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FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 00034

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 166 OF 2012 GIVEN ON 1 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2014 WAIRC 00034
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	:	THURSDAY, 7 NOVEMBER 2013
DELIVERED	:	FRIDAY, 24 JANUARY 2014
FILE NO.	:	FBA 10 OF 2013
BETWEEN	:	MS JOHANNA LANDSHEER Appellant AND MORRIS CORPORATION (WA) PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	:	**Western Australian Industrial Relations Commission**
Coram	:	**Commissioner J L Harrison**
Citation	:	**[2013] WAIRC 00573; (2013) 93 WAIG 1301**
File No.	:	**B 166 of 2012**

CatchWords	:	Industrial law (WA) - claim for contractual benefits - increase in daily hours without an increase in salary - terms of contract considered - whether terms wholly in writing or partly oral considered - terms found to be wholly in writing - terms implied in fact and in law principles considered - wages-work bargain - whether contract entitled employee to be paid for each hour worked - contract provided for an all up rate of pay - no entitlement to payment for additional hours of work
Legislation	:	*Industrial Relations Act 1979* (WA) s 7, s 26(1)(a), s 29(1)(b)(ii), s 49.
Result	:	Appeal dismissed

Representation:

Appellant	:	Mr T J Hammond (of counsel)
Respondent	:	Mr A Cameron, as agent
Solicitors:		
Appellant	:	Fiocco's Lawyers

Case(s) referred to in reasons:

Agricultural and Rural Finance Pty Ltd v Gardiner [2008] HCA 57; (2008) 238 CLR 570

Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (Western Australian Branch) Inc (1999) 79 WAIG 1867

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435

Belo Fisheries v Froggett (1983) 63 WAIG 2394

BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of Shire of Hastings (1977) 180 CLR 266

Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410

Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd (1987) 10 NSWLR 468

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337

Comptoir Commercial Anversois v Power, Son & Co [1920] 1 KB 868

Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd [1986] HCA 14; (1986) 160 CLR 226

County Securities Pty Ltd v Challenger Group Holdings Pty Ltd [2008] NSWCA 193

Deane v The City Bank of Sydney (1904) 2 CLR 198

Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd (1993) 113 ALR 225

Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] HCA 55; (2004) 218 CLR 471

Gruzman Pty Ltd v Percy Marks Pty Ltd (1989) 16 IPR 87

Hampton v BHP Billiton Minerals Pty Ltd (No 2) [2012] WASC 285

Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21; (2001) 181 ALR 263

Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41

Hotcopper Australia Ltd v Saab [2001] WAIRC 03827; (2001) 81 WAIG 2704

Hoyt's Pty Ltd v Spencer [1919] HCA 64; (1919) 27 CLR 133

Hughes v Greenwich London Borough Council [1994] 1 AC 170

Hughes v St Barbara Ltd [2011] WASCA 234

Knight v Alinta Gas Ltd [2002] WAIRC 06243; (2002) 82 WAIG 2392

Major v Bretherton [1928] HCA 11; (1928) 41 CLR 62

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451

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

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

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

Riverwood International Australia Pty Ltd v McCormick [2000] FCA 889; (2000) 177 ALR 193

Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5; (2002) 240 CLR 45

Sterling Engineering Co Ltd v Patchett [1955] AC 534

The Administration of the Territory of Papua and New Guinea v Daera Guba (1973) 130 CLR 353

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

University of Western Australia v Gray [2009] FCAFC 116; (2009) 179 FCR 346

Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd (1990) 20 NSWLR 251

Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15

Ware v Amaral Pastoral Pty Ltd (No 5) [2012] NSWSC 1550

Waroona Contracting v Usher (1984) 64 WAIG 1500

Western Export Services Inc v Jireh International Pty Ltd [2011] HCA 45; (2011) 282 ALR 604

Case(s) also cited:

Bacchus Marsh Concentrated Milk Co Ltd (in Liquidation) v Joseph Nathan & Co Ltd [1919] HCA 18, (1919) 26 CLR 410

Breen v Williams (1996) 186 CLR 71

Bryant v Flight (1839) 5 M & W 114

Flett v Deniliquin Publishing Co Ltd [1964-5] NSWR 383

Hughes v Western Australian Cricket Assn (Inc) (1986) 19 FCR 10; (1986) 69 ALR 660

Landsheer v Morris Corporation (WA) Pty Ltd [2012] WAIRC 00314; (2012) 92 WAIG 605

Powell v Braun [1954] 1 All ER 484

Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592

Woodhouse v ADA Manufacturing Co Ltd [1954] SASR 263

Young & Marten Ltd v McManus Childs Ltd [1969] 1 AC 454

Reasons for Decision

SMITH AP:

The Appeal

1 This appeal is instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision made by the Commission on 1 August 2013 in B 166 of 2012. Application B 166 of 2012 was an industrial matter referred to the Commission by Johanna Landsheer under s 29(1)(b)(ii) of the Act. Ms Landsheer claims that she has been denied unpaid wages for additional hours worked by her from 13 March 2009 by Morris Corporation (WA) Pty Ltd under her contract of employment. After hearing the matter, the Commissioner dismissed Ms Landsheer's application. This appeal is against the decision to dismiss.

The factual background

2 It is common ground that Ms Landsheer entered into a written common law contract of employment. However, Ms Landsheer claims that the written agreement did not contain all the terms and conditions of her employment.

3 Ms Landsheer was employed by Morris Corporation as a kitchen hand. She was a fly-in/fly-out employee and her place of work was the Cloudbreak site in the northwest of Western Australia. Travel to and from the Cloudbreak site was approximately one and a half hours each way by plane and was unpaid. At all material times, she worked a three week cycle of 14 days' work and seven days off.

4 Prior to Ms Landsheer commencing work and signing the written contract of employment, Ms Landsheer was interviewed by a representative of Morris Corporation, Les Seaton, who told Ms Landsheer that 'we would be doing 10-hour days': ts 16. For the first year of her employment, Ms Landsheer worked shifts of 10 and a half hours as she had a half hour unpaid lunchbreak. In March 2009, the project manager employed by Morris Corporation informed Ms Landsheer and other employees on site that they would now be working 12-hour shifts. Ms Landsheer was also told that if she did not accept the increased hours she would no longer have a job. From that time onwards Ms Landsheer worked 12-hour shifts but her pay remained unchanged.

5 After the introduction of the 12-hour shifts, employees asked for pay increases at group meetings but received no response. Ms Landsheer continued to work 12-hour shifts on the same weekly rate of pay she was paid when she commenced employment with Morris Corporation in 2008. At the time she gave evidence before the Commission at first instance, Ms Landsheer was still employed by Morris Corporation. However, at the time the appeal was heard, the Full Bench was informed that Ms Landsheer had resigned from her employment on 13 May 2013.

6 When Ms Landsheer commenced working the 12-hour shifts, she had a half hour paid break and two other breaks of 10 minutes a shift. Consequently, Ms Landsheer's claim is that she is due and owing payment for one and a half hours of additional work that she carried out on each shift from on or about 13 March 2009 until 13 May 2013.

7 At the hearing at first instance, another employee of Morris Corporation, Ms Lynn Mori, gave evidence on behalf of Ms Landsheer. Ms Mori worked for Morris Corporation as a peggy/cleaner at Cloudbreak between 10 June 2008 and May 2012. Before commencing employment at Morris Corporation, Ms Mori also, like Ms Landsheer, attended an interview. She gave evidence that she:

(a) was very surprised to be told at the interview that she would be paid a salary of $75,000 per annum for working 10-hour shifts. She questioned the hours of work because she had previously worked for another employer carrying out similar work in 12-hour shifts for about $55,000 per annum. Consequently, she asked the person who interviewed her on behalf of Morris Corporation several times about the hours of work, and was told several times that 'It's only a 10-hour roster': ts 26; and

(b) worked 10-hour shifts from 10 June 2008 until 12 March 2009. On 11 March 2009, she attended a meeting in which she was told that, 'As from tomorrow FMG want the whole site to be working 12-hour days; we're the only contractors on site doing 10 hours, so as from tomorrow, you will be expected to do a 12-hour shift': ts 27. There was a huge uproar at that announcement and the question was asked whether they were going to be paid extra money for the extra hours, and they were told, 'No, you need to be grateful. You're on the best paid site in WA and if you don't like it, there's a window seat with your name and you can f… o..': ts 27.

8 Both Ms Landsheer and Ms Mori gave evidence that working the additional hours of work interfered with the time that they could spend at the gym and in other leisure activities. Ms Mori also said that she became very fatigued working 12-hour shifts.

9 The parties filed an agreed statement of facts before the hearing at first instance. The statement of agreed facts records that on or about 13 March 2009, Morris Corporation unilaterally increased the number of hours Ms Landsheer was required to work, from 10 to 12 hours per day, and that Ms Landsheer's weekly wage remained the same, and she did not consent to work more

hours for the same rate of pay. It was also common ground and agreed that Ms Landsheer entered into a written contract of employment which was agreed and signed by the parties on or about 28 March 2008.

Material Terms of the Written Contract of Employment

10 The written contract of employment contained comprehensive terms. Clause 1, cl 2 and cl 3 provided:

1. PARTIES TO AGREEMENT

The Australian Workplace Agreement ('AWA') is between MORRIS CORPORATION (WA) PTY LTD (ABN 87 093 760 902) ('the Company') and Johanna Landsheer, an employee employed by the Company ('the Employee') and sets out the provisions agreed by them (collectively referred to as 'the Parties').

2. COMMENCEMENT AND DURATION

The AWA shall come into effect on the 27/03/2008 or on the day after a filing receipt is issued by the Workplace Authority ('the WA') for this AWA, whichever is the earlier date.

The AWA and employment shall continue until the completion or termination of the services contract between the Company and The Pilbara Mining Alliance Pty Ltd ('PMA') or on 27/03/2013 whichever is the earliest date.

It is agreed between the parties that following the expiry of the AWA, its terms and conditions will continue to apply by way of an extension or extensions for a period or periods of up to a maximum of five (5) years from the date of registration with the WA when confirmed in writing by the Company.

If the AWA and employment is extended the AWA and employment shall continue until the completion or termination of the services contract between the Company and TPI or extension date, whichever is the earliest date.

3. COMPLETE AGREEMENT AND EXPRESS EXCLUSION OF PROTECTED AWARD AND OTHER TERMS

For the purposes of this clause, the terms award or awards include a pre-reform federal award, a rationalised and/or simplified federal award, a preserved state agreement and a notional agreement preserving a state award.

The AWA is intended to cover all matters pertaining to the employment relationship. In this regard, the AWA represents a complete statement of the mutual rights and obligations between the Company and the Employee to the exclusion (to the extent permitted by law) of other laws, awards, agreements (whether registered or unregistered), custom and practice and like instruments or arrangements.

Subject to the Fairness Test (Part 8, Division 5A of the *Workplace Relations Act 1996* ('Act')), the AWA regulates all terms and conditions of employment and, subject to this AWA, expressly excludes and displaces the operation of any and all other matters and conditions of employment (including those howsoever described or identified as either a preserved entitlement, preserved notional term, preserved notional entitlement, protected notional condition, preserved award term or protected award condition) in any award or agreement.

Without in any way limiting the operation and intention of this clause, any clause or term or provision of an award dealing with any of the following matters (including incidental matters) are excluded and displaced in whole by the AWA:

a) rest breaks;

b) incentive-based payments and bonuses;

c) annual leave loadings;

d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days or substitute days;

e) monetary allowances for:

i. expenses incurred in the course of employment; or

ii. responsibilities or skills that are not taken into account in rates of pay for employees; or

f) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

g) loadings for working overtime or for shift work;

h) penalty rates;

i) any other matter specified in the Workplace Relations Regulations 2006.

11 The material terms of the contract are cl 7 and cl 9 which were as follows:

7. REMUNERATION

Details of your annualised salary package are set out in the table below.

Base Salary Rate:	$ 1432.69 per week
Superannuation	$ 128.94 per week
Total Salary Rate	$ 1561.63 per week

Subject to clauses **Error! Reference source not found., Error! Reference source not found.** and **Error! Reference source not found.** your salary is paid by the Company to compensate you fully in respect of all entitlements, including payment for work in accordance with Clause 9 – Hours of Work / Rosters, additional hours of work, location, travel and other factors associated with this position. The salary includes payment for approved leave and gazetted public holidays whether worked or not.

The Company will make superannuation contributions on your behalf in accordance with the *Superannuation Guarantee (Administration) Act 1992*.

Your remuneration is directly linked to the position and in the event of you transferring to another position and/or operation, it will be reviewed in line with the new position.

The salary will be paid 1 weekly in arrears. The salary will be paid by direct transfer into your nominated account with a bank, or other recognised financial institution.

In the event of a significant change in working conditions the Company may conduct a review of your remuneration.

9. HOURS OF WORK / ROSTERS AND DUTIES

Subject to clause 13, your ordinary hours or [sic] work are 38 hours per week averaged over a 12-month period, plus all reasonable additional hours necessary to complete your assigned work. You and the Company agree that any hours worked in excess of 38 hours per week averaged over a 12 month period are reasonable based on your personal circumstances and the operational requirements of the business.

Subject to clause 13, your ordinary hours of work will be worked within a daily spread of 12 hours.

Your hours of work will be in accordance with the requirements of your work area, as advised to you by your supervisor, or other authorised Company officer ('Project Working Hours'). The applicable roster will be provided to you.

An indictative [sic] roster cycle will be two weeks (14 days on) one week off (7 days off)

(see table below)

	Mon	Tue	Wed	Thu	Fri	Sat	Sun
Week one	10	10	10	10	10	10	10
Week two	10	10	10	10	10	10	10
Week three	R&R	R&R	R&R	R&R	R&R	R&R	R&R
Week Four	10	10	10	10	10	10	10
Week Five	10	10	10	10	10	10	10
Week Six	R&R	R&R	R&R	R&R	R&R	R&R	R&R

The Company may vary shift rosters and hours of work. The Company may transfer you to or from day work to shift work, and from one shift panel to another, to meet its operational requirements.

In the event of changes to your regularly rostered hours of work, the Company may conduct a review of your remuneration.

Your position is Kitchen Hand with the Company. Your duties are defined in your role description. You may be required to work in any areas or sites and undertake other duties as required commensurate with your skills, competence and training.

You will comply with all reasonable instructions from officials of PMA and Team 45.

You will assist in the training of other employees as required by the Company. You will undertake training courses in relation to enhancing or broadening your work skills as required by the Company.

Position descriptions will be periodically updated to reflect changes to your position, as the nature of your position and the level of responsibility may vary significantly during the term of your employment. Where significant changes to the organisation or performance of your work are proposed, you will be consulted.

12 Although cl 9 makes various references to being subject to cl 13, cl 13 has no application to the claim made by Ms Landsheer. Clause 13 provided for the terms and conditions that applied to the working of shift work. Ms Landsheer's counsel informed the Full Bench that Ms Landsheer was not a shift worker. In my opinion, that concession was properly made. Clause 13 provided that shift work was deemed to be where the majority of the ordinary hours of work are worked outside the spread of ordinary hours defined in cl 9 of the contract of employment. Clause 9 provided the daily spread of hours is 12 hours. It is apparent that the claim made by Ms Landsheer is not for work carried out beyond the spread of 12 hours.

13 Though the written common law contract was described in its terms as an Australian Workplace Agreement, the agreement between the parties was not formally registered as an Australian Workplace Agreement. Thus, the agreement could only have effect as a common law contract of employment.

Commissioner's Reasons for Decision

14 At the hearing at first instance, a submission was made on behalf of Ms Landsheer that in ascertaining the contractual terms and conditions between the parties, the Commission could have regard to the surrounding circumstances to determine the

meaning of the contract and it could be implied in Ms Landsheer's common law contract of employment that she had a right to reasonable remuneration for all hours of work.

15 After outlining the evidence and the submissions put forward by both parties, the Commissioner made the following findings:

(a) For an applicant to be successful in a denial of a contractual benefit claim, a number of elements must be established:

(i) the claim must relate to an industrial matter pursuant to s 7 of the Act;

(ii) the claimant must be an employee;

(iii) the claimed benefit must be a contractual benefit; that being a benefit to which there is an entitlement under the applicant's contract of service;

(iv) the relevant contract must be a contract of service;

(v) the benefit claimed must not arise under an award or order of this Commission; and

(vi) the benefit must have been denied by the employer: ***Hotcopper Australia Ltd v Saab*** [2001] WAIRC 03827; (2001) 81 WAIG 2704; ***Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (Western Australian Branch) Inc*** (1999) 79 WAIG 1867.

(b) The onus is on Ms Landsheer to establish that the claim is a benefit to which she is entitled under her contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under this contract having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case: ***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307.

(c) A contractual agreement between the parties is to be interpreted using the ordinary words of the contract unless there is ambiguity: ***Knight v Alinta Gas Ltd*** [2002] WAIRC 06243; (2002) 82 WAIG 2392.

(d) In ***Ware v Amaral Pastoral Pty Ltd (No 5)*** [2012] NSWSC 1550 the preconditions necessary to imply a term of a contract were outlined in ***BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of Shire of Hastings*** (1977) 180 CLR 266, 283.

(e) At all material times, Ms Landsheer was an employee of Morris Corporation and she was employed under a contract of service. This claim is an industrial matter for the purposes of s 7 of the Act as it relates to wages Ms Landsheer claims are due to her arising out of her employment with Morris Corporation. The benefit that Ms Landsheer is claiming does not arise under an award or order of this Commission. The issue to be determined, therefore, is what were the terms of Ms Landsheer's contract of employment with Morris Corporation and whether it was a term of the contract of employment that Ms Landsheer is entitled to the payment for the additional hours worked by her since March 2009 and superannuation entitlements on the amount claimed.

(f) The written contract constituted Ms Landsheer's terms and conditions of employment with respect to her employment at the Cloudbreak site. The written contract commenced on 27 March 2008. The written contract provided that after 27 March 2013 its terms and conditions could continue to apply for up to another five years without any changes to the contract, including the annual salary: cl 2. The contract also stated that it covers all matters pertaining to the employment relationship to the exclusion of any award or agreement: cl 3.

(g) The terms of the contract relevant to Ms Landsheer's claim are as set out in cl 7, cl 9 and cl 13 of the written contract.

(h) The terms of the written contract allowed Morris Corporation to require Ms Landsheer to work 12-hour shifts without an increase to the salary that she is to be paid as specified in the contract. Therefore, Ms Landsheer's claim that she be paid for the additional hours she worked after 13 March 2009 had not been made out.

(i) It was not in dispute that Ms Landsheer was told at her interview that she would be working 10-hour shifts. The contract had an 'indicative' roster of 10-hour shifts in cl 9 and Ms Landsheer worked 10-hour shifts up to 13 March 2009. However, cl 7 states that Ms Landsheer is to be paid an annualised salary in full compensation for all hours worked in accordance with cl 9. Clause 9 provides that, subject to cl 13, Ms Landsheer is to work 38 hours per week averaged over a 12-month period, plus all reasonable additional hours necessary to complete her assigned work. It also states that her ordinary hours of work were to be worked within a daily spread of 12 hours, which was at that time the current number of hours Morris Corporation required Ms Landsheer to work, and it refers to Ms Landsheer working two weeks on and one week off. Clause 9 also provides that Morris Corporation may vary Ms Landsheer's shift roster and hours of work. Clause 9 states that Ms Landsheer's hours of work will be in accordance with the requirements of her work area, as advised by her supervisor, and a roster will be provided accordingly. Clause 7 refers to the salary paid to Ms Landsheer being in full compensation for the hours worked by Ms Landsheer plus any additional hours of work. Given these terms of the contract, Morris Corporation could require Ms Landsheer to work up to 12 hours on any shift without any adjustment in her annual salary.

(j) Ms Landsheer's argument that Morris Corporation could not increase her hours without reviewing her remuneration and increasing her annual salary in return for working additional hours is rejected. It was not in dispute that when Ms Landsheer's hours changed to a 12-hour shift, Ms Landsheer was not consulted about the impact of this change on her income, nor was there a review of her remuneration. Clause 7 and cl 9 state, however, that Morris Corporation 'may' conduct a review of Ms Landsheer's remuneration in the event of a significant change to her working conditions and if her regularly rostered hours of work changed. The reference

to 'may' in cl 7 and cl 9 refers to any review being discretionary and it was, therefore, not mandatory for Morris Corporation to conduct a review of Ms Landsheer's remuneration when her hours were increased: *Concise Oxford Dictionary* (8th ed, 1990) 'may' is defined as 'expressing possibility'.

(k) Ms Landsheer's argument that it is necessary to imply additional terms into the contract as there is no express term allowing Morris Corporation to unilaterally vary a fundamental term of the contract, that is, increasing the hours to be worked by Ms Landsheer without her being paid additional remuneration, is rejected. The written contract contains terms which allow and contemplate her working up to 12 hours in each shift for the same rate of pay as when she worked a 10-hour shift, without a review of her remuneration being required.

(l) Whilst it may be unfair to require an employee to work additional hours with no increase to an employee's remuneration, that is not the basis for determining whether Ms Landsheer is due the wages she is seeking in this matter. The claim requires an interpretation of the terms of the contract, not whether the terms of the contract were unfair to Ms Landsheer.

(m) As a finding is made that Ms Landsheer is not due the benefit she is claiming she is owed under the contract and when also taking into account s 26(1)(a) of the Act considerations and the duty on the Commission to consider the relief being sought on the basis of equity, good conscience and the substantial merits, the application will be dismissed.

Ms Landsheer's submissions

16 On behalf of Ms Landsheer, counsel put to the Full Bench that at the heart of the appeal is the question whether the term implied by law into almost every contract of service as a matter of course, which is the right to be paid for service performed, was a term that was breached by Morris Corporation. In addressing this issue, the following submissions were made:

(a) The terms and conditions of employment of Ms Landsheer were partly oral and part in writing. To make this finding, regard must be first had to the fact that the written contract of employment was riddled with errors and the wording of the agreement was so ambiguous that to truly ascertain the terms of the contract of employment regard must be had to the surrounding circumstances of the conditions of work of Ms Landsheer. If regard is had to two pieces of evidence a finding should have been made that the contract of employment was quite different to what was set out in the written agreement. The first material evidential matter is that Ms Landsheer was told at her interview unequivocally that she would be required to work 10-hour shifts. The other key piece of evidence is the conduct of the parties for 12 months after her employment commenced. In the first 12 months of her employment she was only required to work 10-hour shifts for which she was paid a weekly salary. When regard is had to these matters, the written contract of employment must be read to the extent that it included the representations made to Ms Landsheer at the time of her interview and be read in light of the conduct of what was expected of her throughout the first 12 months of employment. It is also argued that when regard is had to the ambiguity in the written terms of the contract and these evidential matters, a finding should have been made that it was a fundamental term of the work-wages bargain that Ms Landsheer would work for 10 hours a day to receive the salary set out in cl 7 of the written contract, and to the extent that if she was required to work additional hours of work, she would be remunerated accordingly.

(b) Clause 7 of the written contract ambiguously contains errors and sets out a base salary rate per week but it does not specify the amount of hours that were expected to be worked per week. Apart from the reference of 'subject to clauses Error! Reference source not found.', the clause contains an ambiguous rider that provides, 'In the event of a significant change in working conditions the Company may conduct a review of your remuneration.' The use of the word 'may' imports something more onerous than perhaps an equivocation. It is also argued that cl 9 is ambiguous as it does not state 'your ordinary hours of work will be worked up to 12 hours per shift', but says 'your ordinary hours of work will be worked within a daily spread of 12 hours'.

(c) When regard is had to the context in which the work arrangements were made, it is clear the bargain made between the parties was that Ms Landsheer would be 'paid $1,423.69 per week in exchange for working a 10-hour shift'. To work a 12-hour shift is 'overtime' in the sense that it is one and a half hours' work per day over and above what Ms Landsheer could have reasonably expected to be paid for on the basis of what she was told at her interview and the conduct of the parties in the first 12 months of employment.

(d) There is no doubt that Morris Corporation unilaterally varied the bargain of performance of work and the payment of remuneration by requiring Ms Landsheer to work more hours each shift for the same pay. There was no express term in the contract making such a variation lawful. Neither were there any terms one could properly imply into the contract to suggest Morris Corporation could alter such terms without consultation or agreement with Ms Landsheer.

(e) In the absence of an express or implied term making such a variation permissible, the only finding open to the Commission was that there was a denial of a benefit under the contract, which ought to have resulted in an order being made for damages for what Ms Landsheer ought to otherwise have received if she had been paid in a manner commensurate with the hours worked.

(f) The Commissioner erred in finding Morris Corporation could lawfully decide to unilaterally increase Ms Landsheer's hours per shift without paying her for the additional time worked.

(g) A court can look at the surrounding circumstances to determine the meaning of a contract of employment. In ***Hollis v Vabu Pty Ltd*** [2001] HCA 44; (2001) 207 CLR 21; (2001) 181 ALR 263 [24], the High Court held that the relationship between the parties is to be found not merely from contractual terms. In this matter, the work practices imposed by the employer go to establishing the totality of the relationship between the parties.

(h) The terms of the written contract of employment clearly foreshadowed the ability of the parties to alter the fundamental terms of the contract, but only after a review had been taken: cl 7 and cl 9. Insofar as the written contract provides for a review of remuneration that may be undertaken, the word 'may' in cl 7 and cl 9 should be interpreted as imperative and not discretionary. This interpretation is consistent with the principle in ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355, where the High Court found that in interpreting legislative instruments, purpose, general policy and context must also be taken into account. In particular, an industrial instrument cannot be interpreted in a vacuum divorced from industrial realities.

(i) There is no express term in the contract which provides the parties have agreed Morris Corporation may unilaterally alter the number of hours worked without providing Ms Landsheer with commensurate remuneration, especially after employing her for an entire year on the same terms and conditions. Nor is there any scope for implying into the contract a term that enables a unilateral change in working conditions without commensurate pay.

(j) A purported agreement which leaves the content of the agreement entirely at the discretion of one party is not contractual in nature: ***Riverwood International Australia Pty Ltd v McCormick*** [2000] FCA 889; (2000) 177 ALR 193 [111] (North J). The point which is attempted to be made on behalf of Ms Landsheer in this submission is that a contract of employment which allows one party to alter a fundamental term by adding one and a half hours' work a day to the rostered hours of work without payment is not enforceable because such a provision is unilateral in nature and offends the fundamental principle implied at law of the work-wages bargain.

(k) Whether a term should be implied into a contract is an issue of law to be decided on by the court on the basis of the other terms of the contract and the evidence admissible on the issue: ***Comptoir Commercial Anversois v Power, Son & Co*** [1920] 1 KB 868. For a term to be implied at law, it must be necessary to make the implication, that it, without the term, the contract would be rendered nugatory, worthless, or be seriously undermined: ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd*** [1986] HCA 14; (1986) 160 CLR 226.

(l) It was necessary to imply the right to be paid for service performed by Ms Landsheer into the contract of employment. When examining what is 'necessary' a number of intermediate appellate courts have held the meaning of the word 'indicates something required in accordance with current standards of what ought to be the case, rather than anything more absolute': ***Renard Constructions (ME) Pty Ltd v Minister for Public Works*** (1992) 26 NSWLR 234, 261E approved in ***Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd*** (1993) 113 ALR 225, 240 - 241.

(m) The wages-work bargain can also be implied as a term implied by fact. The onus of proof is on the party asserting the existence of an implied term to prove that the term should be implied into the contract: ***Hughes v Greenwich London Borough Council*** [1994] 1 AC 170, 177. The court can look at the contract as well as the surrounding circumstances in which the contract was made: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337. However, evidence of the parties' actual intention for their negotiations is not admissible for the purpose of implying a term: ***Codelfa Construction***.

(n) Had the Commissioner taken into account all of the relevant evidence in relation to the proper construction of the contract of employment and applied the established principles relevant to implied terms which are set out in ***BP Refinery (Westernport) Pty Ltd***, she would have arrived at a different result.

17 If the Full Bench is persuaded by the arguments put on behalf of Ms Landsheer, it is submitted on her behalf that it is not necessary to remit the matter to the Commission for further hearing as the loss suffered by Ms Landsheer as a result of working the increased hours with no increase in salary entitled her to an order in her favour that she is due $61,907.76 in wages and $5,571.70 in superannuation entitlements.

Principles – Ascertainment of the terms of the contract of employment

18 The first issue to be determined in this appeal is whether the terms of employment were partly oral or wholly in writing. The second issue is whether a term or terms can be implied into the contract as a matter of fact to the effect that Ms Landsheer is entitled to be paid reasonable remuneration for each hour of work in a shift that is in addition to 10 hours of work.

19 The principles discussed in ***Hollis v Vabu Pty Ltd*** do not assist in resolving what were the terms of the contract. The principle enunciated by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in ***Hollis v Vabu Pty Ltd*** when their Honours said that for the purposes of this litigation the relationship between the parties is to be found not merely from the contractual terms [24], their Honours were considering whether the contractual relationship between the parties was one of principal and independent contractor or employer and employee, and whether Vabu Pty Ltd was vicariously liable for the consequences of the courier's negligent performance of his work. The cause of action and the facts of that matter did not require the High Court to consider the principles to be applied when ascertaining whether the terms of the contract of employment were partly oral and partly in writing and the implication of terms into a contract of employment.

20 The starting point in a consideration of the first issue is that the party who alleges that a written agreement does not represent the entire contract must counter a presumption that it does: ***Major v Bretherton*** [1928] HCA 11; (1928) 41 CLR 62, 67 (Isaacs J).

21 A pre-contractual representation can be binding if the promise is promissory and thus a warranty and not representational. In ***Hospital Products Ltd v United States Surgical Corporation*** [1984] HCA 64; (1984) 156 CLR 41 Gibbs CJ explained:

> A representation made in the course of negotiations which result in a binding agreement may be a warranty – i.e., it may have binding contractual force – in one of two ways: it may become a term of the agreement itself, or it may be a separate collateral contract, the consideration for which is the promise to enter into the main agreement. In either case the question

whether the representation creates a binding contractual obligation depends on the intention of the parties. In *J. J. Savage & Sons Pty. Ltd. v.* Blakney ((1970) 119 C.L.R. 435, at p. 442) and *Ross v. Allis-Chalmers Australia Pty. Ltd.* ((1980) 55 A.L.J.R. 8, at pp. 10, 11; 32 A.L.R. 561, at pp. 565, 567), it was said that a statement will constitute a collateral warranty only if it was 'promissory and not merely representational', and it is equally true that a statement which is 'merely representational' – i.e., which is not intended to be a binding promise – will not form part of the main contract. If the parties did not intend that there should be contractual liability in respect of the accuracy of the representation, it will not create contractual obligations (61).

22 If a contract is partly in writing and partly oral, the oral terms cannot contradict the terms of the written agreement: ***Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*** [2004] HCA 55; (2004) 218 CLR 471 [36]. Nor can the terms of a collateral contract impinge upon the terms of the main contract: ***Hoyt's Pty Ltd v Spencer*** [1919] HCA 64; (1919) 27 CLR 133, 147. If earlier agreed oral terms contradict written agreement the terms of the oral agreement can be said to be discharged by the written agreement: ***Equuscorp*** [36].

23 Courts are reluctant to find that the parties' contract is partly in writing and partly oral when the written document appears to be a complete contract. In ***Equuscorp*** the High Court in a joint judgment of five judges made the following points why generally a party having executed a written agreement will be bound by it. These are:

(a) The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions [34].

(b) Oral agreements will sometimes be disputable and resolving such disputes is commonly difficult, time-consuming, expensive and problematic [35].

24 In ***Royal Botanic Gardens and Domain Trust v South Sydney City Council*** [2002] HCA 5; (2002) 240 CLR 45 Kirby J said [98] - [99]:

Written documents and legal rights: The fundamental reason for observing restraint in receiving extrinsic evidence to elaborate, explain and, as some parties would hope, vary a written contract, where parties have put their agreement in writing, was stated by Isaacs J in *Gordon v Macgregor* ((1909) 8 CLR 316 at 323-324. See also *Bacchus Marsh Concentrated Milk Co Ltd (In liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 427):

> 'The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation.'

The practical utility of this rule has been recognised many times, including by this Court (*Petelin v Cullen* (1975) 132 CLR 355 at 359; see also *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384; [1971] 3 All ER 237 at 240). The reason for its persistence as a matter of legal doctrine is based on a desire to uphold the more formal bargains that parties commit to writing; to discourage expensive and time-consuming litigation about peripheral and disputable questions; and to recognise the ample capacity of our law to rectify a written contract where a party can prove that it does not reflect the true agreement of the parties, objectively ascertained (cf Greig and Davis, *The Law of Contract* (1987), p 414).

25 Regard can only be had to surrounding circumstances to interpret a contract where ambiguity arises. In ***Codelfa Construction*** Mason J (with whom Stephen and Wilson JJ agreed) stated:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed (352).

Whilst debate has ensued in a number of decisions of superior courts in Australia whether this rule of construction still applies, in ***Western Export Services Inc v Jireh International Pty Ltd*** [2011] HCA 45; (2011) 282 ALR 604 Gummow, Heydon and Bell JJ held that until the High Court embarks upon a reconsideration of the 'true rule' enunciated by Mason J in ***Codelfa Construction***, intermediate courts are bound to follow that precedent [3].

26 Whether the parties intended the contract to be wholly in writing is a question of fact. In ***Deane v The City Bank of Sydney*** (1904) 2 CLR 198 Griffith CJ said:

> In the present case the first question is, what is the agreement? Is it the writing, or the verbal conversation, or is it to be gathered from the conversation and the letter with all the other circumstances? Possibly it was open to the jury to find that the agreement was contained in the writing, but whether it was or not was a preliminary question of fact for the jury to determine on the evidence (209).

27 Whilst the principle may have been controversial, it is now accepted that a court or tribunal cannot look at subsequent conduct to interpret a written agreement: ***Hughes v St Barbara Ltd*** [2011] WASCA 234 [106] (Pullin JA); ***The Administration of the Territory of Papua and New Guinea v Daera Guba*** (1973) 130 CLR 353, 446 (Gibbs J); ***Agricultural and Rural Finance Pty Ltd v Gardiner*** [2008] HCA 57; (2008) 238 CLR 570 [35] (Gummow, Hayne and Kiefel JJ).

28 However, regard may be had to subsequent conduct of the parties for the purposes of determining what were the entire terms of the contract. In ***County Securities Pty Ltd v Challenger Group Holdings Pty Ltd*** [2008] NSWCA 193 Spigelman CJ said [21] - [27]:

> In my opinion, subsequent conduct, especially how a contract for purchase and sale was settled, is relevant, on an objective basis, to the identification of the subject matter of the contract or the determination of necessary terms, as distinct from deciding the meaning of words.

In *Carmichael v National Power Plc*, supra, the House of Lords had to determine whether a person performed work under a contract of employment, within the meaning of a statute. The House of Lords overruled a Court of Appeal decision that, on the proper interpretation of documents pursuant to which the casual work arrangement had been made, there was such a contract. When rejecting a submission that reliance on post contractual conduct was inconsistent with the objective approach to identifying and interpreting a contract and that the subjective belief of the parties was irrelevant, Lord Hoffmann said at 2050:

> 'This austere rule would be orthodox doctrine in a case in which the terms of the contract had been reduced to writing. But I do not think that it applies to a case like the present. In a case in which the terms of the contract are based upon conduct and conversations as well as letters, most people would find it very hard to understand why the tribunal should have to disregard the fact that Mr Lovatt and Mrs. Carmichael both agreed that the CEGB were under no obligation to provide work and the applicants under no obligation to perform it. It is, I think, pedantic to describe such evidence as mere subjective belief. In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief ... But the terms of the engagement must have been discussed and these conversations must have played a part in forming the views of the parties about what their respective obligations were.
>
> The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583) may be relevant on similar grounds, namely that it shows what the parties thought they had agreed.'

A second matter often referred to is the uncertainty that would be introduced into commercial relationships by reliance on post contractual conduct. (See *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 316; *FAI v Savoy Plaza* supra at 350.) This consideration, in my opinion, is not material when the issue to be determined arises from uncertainty about the subject matter of the contract or the failure to expressly address necessary terms.

All of the cases on which the respondents relied involved contracts in writing. Where, as here, the issue is the identification, as a matter of fact, of the subject matter of the contract, as distinct from the interpretation of the contract, subsequent conduct, especially conduct at the time of settlement is, in my opinion, entitled to significant weight.

As in the case of reference to pre-contractual conversations, the fact that the relevant part of the contract here under consideration was not in writing determines the admissibility of such conduct. (See *Wilson v Maynard Shipbuilding Consultants* [1978] QB 665 at 675; *Mears v Safecar Security Ltd* [1983] QB 54 at 77-8; Lewison op cit at [3.15] p 111, 114; J L R Davis (ed), *Contract: General Principles* (2006) Thomas Law Book Co esp at [7.4.460] at [10] p 384; [7.4.560] p 392; [7.4.610] p 393-394.)

The reasoning of Lord Wilberforce in *Liverpool City Council v Irwin*, set out at [12] above, was expressly applied to reject the applicability of the rule that post contractual conduct cannot be used in *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] EWCA Civ 7; [1976] 1 WLR 1213 per Megaw LJ at 1221, because:

> 'We are here concerned not with construing a contract but with evidence as to what the terms of a contract were.'

Similarly Browne LJ said at 1229:

> 'In the present case, the question is not one of construction of the contract, but of what were the terms of an oral and only partially expressed contract. In my opinion, the court can in such a case take into account what was done later as a basis for inferring what was agreed when the contract was made, or as establishing later additions or variations.'

29 To determine the terms of agreement, consideration must be given not only to what the parties by their words and conduct said and surrounding circumstances, but not their substantive beliefs or understanding: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22].

30 As to the second issue raised on behalf of Ms Landsheer which is whether a term or terms can be implied into the contract, the circumstances which a court or tribunal will imply a term on grounds of fact are well settled. There are five conditions that must be satisfied for a term to be implied on this basis. In ***BP Refinery (Westernport) Pty Ltd*** (283) and ***Codelfa Construction*** (347) the principle was stated that the term must:

(a) be reasonable and equitable;

(b) be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(c) be so obvious that 'it goes without saying';

(d) be capable of clear expression; and

(e) not be contradictory of any express term of the contract.

31 Terms can also be implied as part of the legal relationship of employment. The principles relating to the implication of terms as a matter of law were recently restated by the Full Court of the Federal Court in ***University of Western Australia v Gray*** [2009] FCAFC 116; (2009) 179 FCR 346 where Lindgren, Finn and Bennett JJ said [136]:

> We begin with what is well accepted. (i) Terms implied in law are 'legal incidents of the particular class of contract' to which they respectively relate: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 345. They are to be found in many commonly occurring types of contract — sales, employment, landlord and tenant, doctor-patient, etc. (ii) They are not based upon the intention of the parties, actual or presumed, in a given instance, although the provenance of a particular term may well have been the commonplace use of such a term in earlier times in contracts of that type, so establishing what later would become the default rule: see *Byrne* 185 CLR at 449. (iii) Neither are they founded on the need to give efficacy to a contract: *Codelfa Construction* 149 CLR at 345; although, as has often been recognised, there can be a deal of overlap between terms implied in law and terms implied in fact in particular contractual settings: see eg *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 (*Hughes Aircraft Systems International*) at 193. While implication in law is also said to be based on 'necessity', that necessity, as will be seen, is informed by 'more general considerations than mere business efficacy': *Lister v Romford Ice and Cold Storage Company Pty Ltd* [1957] AC 555 (*Lister*) at 576. (iv) Implication of a term in law yields to the contrary intention of the parties as expressed in their contract or because of inconsistency with the terms that have been agreed: *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468 (*Castlemaine Tooheys*) at 492B-C; *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 (*Shell UK*) at 1196.

32 In ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410 McHugh and Gummow JJ pointed out the question whether the law would imply into the contract of employment a term turns on whether the term is a necessary incident of a definable category of contractual relationship (452). Their Honours said:

> Many of the terms now said to be implied by law in various categories of case reflect the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined (*Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 647-648, 659). Hence, the reference in the decisions to 'necessity'.
>
> For example, it is established that the mere relationship of landlord and tenant implies a covenant for quiet enjoyment. The reason for this appears to be that, originally, the common law courts would not recognise the tenant as having any estate in the demised land and would not reinstate the tenant if ejected by the landlord; the remedy in covenant remedied the position of the tenant who otherwise, if ejected, would have been without recourse (Norton, *Treatise on Deeds*, 2nd ed (1928), p 547, where the authorities are collected).
>
> This notion of 'necessity' has been crucial in the modern cases in which the courts have implied for the first time a new term as a matter of law (450).

33 In ***Renard Constructions (ME) Pty Ltd***, Priestley JA explained what is meant by 'necessity':

> It seems to me that the word necessity, when used in the cases analysed by Hope JA, was not being used in the absolute sense. In regard to classes of contract to which particular implications have been recognised as attaching, it is not possible to say that the implication was always necessary, in the sense that the contracts could not have worked without the implied term. Contracts of sale, contracts of employment, and leases are three classes of contract to which such terms have been attached. In all cases it would have been possible for the main purposes of the contracts to have been attained without the implications the judges have held they include. The rules in regard to each of them have come into existence not because in the particular cases giving rise to recognition of the implication it has been thought that it would be impossible for such contracts to be made and carried out without the implications, but because the Court decided it would be better or more appropriate or more reasonable in accordance with the contemporary thinking of the judges and parties concerned with such contracts that the term should be implied than that it should not. The idea is conveyed I think by Holmes's phrase 'The felt necessities of the time' where necessity has the sense of something required in accordance with current standards of what ought to be the case, rather than anything more absolute (261).

34 Terms implied by law into all contracts of a class, may originate as terms implied in fact which become a part of common practice that courts begin to import them into transactions of that type of contract as a matter of course; and the result is a rule of law: *Halsbury's Laws of England* (4th ed, vol 9); applied in ***Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd*** (1987) 10 NSWLR 468, 487 (Hope JA). It is notable, however, that terms implied by the law are terms which are imported uniformly.

35 Terms implied by law can be varied or excluded by agreement: ***Sterling Engineering Co Ltd v Patchett*** [1955] AC 534, 547 (Lord Reid). Such a term will also be excluded if the term is inconsistent with the terms of the contract: ***Gruzman Pty Ltd v Percy Marks Pty Ltd*** (1989) 16 IPR 87, 89 (McLelland J), applied in ***Devefi Pty Ltd*** (240 - 241) (Northrop, Gummow and Hill JJ); ***University of Western Australia v Gray*** [136].

Conclusion – What were the material terms of the employment contract?

36 When the principles set out above are applied to the facts of this matter, the first question that must be asked is from the words 'we will be working 10-hour days' did the parties intend to be bound by a warranty that the salary rate of $1,561.63 including superannuation for each week was to be paid for work to be performed in 10-hour shifts worked each day for two weeks in a three week cycle? If that proposition is accepted, then can it be inferred that an hourly rate for work performed should be calculated on the basis that for 14 days of work in a three week cycle, 140 hours of work would be performed, which equated to an hourly rate of $30.70 per hour.

37 In my opinion, I cannot make those implications from the evidence. The evidence was that 'we will be working 10-hour days'. There was no discussion about how remuneration for work would be calculated. Nor was it stated that the length of shifts for the total amount of remuneration would be fixed at 10 hours. The fact that for the first 12 months of employment Ms Landsheer worked 10 and a half hour shifts for 14 days in each three-week cycle does not assist the arguments put on behalf of Ms Landsheer. This work pattern is consistent with cl 9 of the written contract which provided for an 'indicative

roster' of 10-hour shifts, as the length of each shift was not set at 10 hours in cl 9. Nor could such a term be inferred from the vague statement made to Ms Landsheer at the interview.

38 Even if it could be inferred it was an oral term of the contract that the length of each shift was fixed at 10 hours for a weekly rate of pay of $1,432.69, such a warranty is inconsistent with the express terms of the written agreement. Thus, once the written agreement was entered into by the parties the oral warranty was discharged by the terms of the written agreement: ***Equuscorp*** [36].

39 I do not agree there is ambiguity in cl 7 or cl 9 of the written agreement. Whilst the words that cl 7 begins with 'Subject to clauses Error! Reference source not found' are meaningless, these words are capable of severance as a mistake in expression: ***Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd*** (1990) 20 NSWLR 251, 264 (Kirby P), 278 (Priestley JA).

40 When the whole of the provisions of the written agreement are considered, it appears that there are no provisions in the written agreement that provide for an exception to the condition created in cl 7 that 'your salary is paid by the Company to compensate you fully in respect of all entitlements, including payment for work in accordance with Clause 9 – Hours of Work / Rosters, additional hours of work, location, travel and other factors associated with this position'.

41 The terms of the written agreement are comprehensive. This is reflected in cl 3. Clause 3 expresses an intention to comprehensively cover all conditions of employment. When cl 7 and cl 9 are read together it is clear that:

(a) Morris Corporation was to pay Ms Landsheer an annual salary, including superannuation calculated at $1,561.63 per week: cl 7;

(b) The annual salary was paid as full compensation in respect of all entitlements, including additional hours worked in accordance with cl 9.

(c) Ordinary hours of work were 38 hours per week averaged over a 12-month period plus all reasonable additional hours: cl 9.

(d) Ordinary hours were to be worked within a daily spread of 12 hours: cl 9.

(e) Hours worked in excess of 38 hours per week averaged over a 12-month period were reasonable: cl 9.

(f) An 'indicative roster' cycle was 14 days on and seven days off of 10-hour shifts: cl 9.

(g) Shift rosters and hours of work could be varied by Morris Corporation.

(h) In the event of a significant change in working conditions or regularly rostered hours of work, it was provided that Morris Corporation 'may' review Ms Landsheer's remuneration: cl 7 and cl 9.

42 Whilst cl 9 used the term 'reasonable additional hours', that term was not undefined. The second sentence of the first paragraph of cl 9 provided that 'You and the Company agree that any hours worked in excess of 38 hours per week averaged over a 12 month period are reasonable based on your personal circumstances and the operational requirements of the business'. By these words, all additional hours were deemed to be reasonable. The number of additional hours is not, however, unrestricted. As ordinary hours were to be worked within a 12-hour spread, hours worked beyond 12 hours could not be considered additional hours of work, worked in accordance with cl 9. Thus, it could not be said the number of hours required to be worked within a 24-hour period was unlimited.

43 It was expressly agreed that Morris Corporation could vary shift rosters and hours of work. In the event that shift rosters and hours of work were varied, Morris Corporation was not required to increase the remuneration paid to Ms Landsheer. The use of the word 'may' in the context of cl 7 and cl 9 was permissive only and not ambiguous. There is no scope to interpret the word 'may' other than a discretion. If circumstances specified when the discretion was to be exercised, thus creating a duty to review Ms Landsheer's remuneration, there would be scope to read the word 'may' as 'shall'. Notwithstanding this interpretation, it may be open to imply by law that in the event that the hours of work were increased and rostered hours were varied, that Morris Corporation was required to act reasonably in reviewing or considering whether a review of remuneration should be conducted. An obligation of good faith and reasonableness in the performance of a contractual obligation or the exercise of a contractual power may be implied as a matter of law in a commercial contract: ***Vodafone Pacific Ltd v Mobile Innovations Ltd*** [2004] NSWCA 15, [125] and [217] (Giles JA) (Sheller and Ipp JJA agreeing); ***Hampton v BHP Billiton Minerals Pty Ltd (No 2)*** [2012] WASC 285, [261] - [264] (Edelman J). However, it is not part of the case put on behalf of Ms Landsheer that Morris Corporation breached an implied term by failing to act reasonably by not considering whether it should review Ms Landsheer's remuneration or not reviewing her remuneration after a decision had been made to increase her hours of work by one and a half hours each shift. This implication if applied, however, would not go so far as to ensure that Ms Landsheer was to receive an increase in remuneration for the additional hours worked.

44 In this matter the 'class' of contract is an employment contract. The terms sought to be implied by law into the contract by Ms Landsheer is a term commonly referred to as the 'wages-work' bargain and a 'right to reasonable remuneration'.

45 I do not agree that the Commissioner's construction of the terms of the written agreement is contrary to the 'wages-work' bargain which is generally accepted as a term implied in employment contracts. The 'wages-work' bargain arises out of service not work: ***Automatic Fire Sprinklers Pty Ltd v Watson*** (1946) 72 CLR 435, 465 - 466 (Dixon J). As the learned authors Sappideen, O'Grady, Riley and Warburton in *Macken's Law of Employment* (7th ed) point out [5.40] Dixon J in ***Watson***:

> [S]ays that it is service which earns wages, not work. Obviously the service usually required will be work, but service is wider than work. It might include refraining from work, say to be ready for an expected rush order, for 'they also serve who only stand and wait' (*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 466). Thus 'a fireman is working for the fire authority even when ... sitting in the recreation room' (*Suffolk County Council v Secretary of State for the Environment* [1984] ICR 882 at 892, citing *Mercer v Associated Electrical Industries Ltd* (1968) 3 ITR 188) and employees waiting for equipment to come online are at work (*Australian Workers Union v BlueScope Steel Ltd* [2007] NSWIRComm 1022 at [58]). Service might also include taking leave, as for example, where an employer exercises a

statutory or award based right to direct an employee to proceed on long service leave or to implement the 'annual close down' so obliging the workforce to take annual leave. It might include being available to work during certain hours, say while the worker is on standby at home (Note, *Tweed District Hospital v Miller* (1948) 90 AR (NSW) 25 at 26 referring, with apparent approval, to the view of Curlewis J in *McPherson v Metropolitan Board of Water Supply and Sewerage* [1922] AR 53 to the effect that the ordinary meaning of the word 'work' includes standing by to be prepared to do duty which the employer may require). Similarly an employee on annual holidays or sick leave is still entitled to wages, even though not actually working; such leave is part of the employee's service (*Australian Workers Union v BlueScope Steel Ltd* [2007] NSWIRComm 1022 at [47]).

46 The principle of 'wages-work' bargain extends only to service, that is, to be ready and willing to work. It does not extend to a right to be paid for every hour of work. If such a right is created it will be created by the express terms of the contract or a term implied on grounds of fact. There was no evidence before the Commissioner at first instance of a 'current standard' upon which a contrary finding could be made. To the contrary, 'all up' rates of pay in employment contracts are not uncommon.

47 Whether a right to be paid for each hour of work in this matter depends upon the construction of the agreed terms of the contract of employment. Ms Landsheer's entitlement to wages arose expressly under the terms of the written agreement. The terms of cl 3, cl 7 and cl 9 when read together provided that the 'wages-work' bargain in the contract was that Ms Landsheer was to be paid an annualised salary calculated as pay for each week (or put another way, an 'all up' rate of pay), for working rostered shifts of hours up to 12 hours each day and that she was to be paid the same rate of pay each week including for the time she was rostered off work.

48 When regard is had to these terms of employment, there is no scope to imply a term on grounds of fact of a right to 'reasonable remuneration for each hour of work'. There is no scope to do so in this matter because the 'wages-work' bargain in the employment agreement of Ms Landsheer expressly provided for an all up rate of pay that included payment for hours worked up to 12 hours a shift. Thus, it cannot be said that no payment had been made to Ms Landsheer for the additional hours of work. Also, such a term cannot be implied at law. To imply such a term in the circumstances of this matter would be inconsistent with the express terms of the contract that provide for an 'all up rate of pay'.

49 Thus, from the time the written agreement became binding on Ms Landsheer and Morris Corporation, Morris Corporation had the right to roster Ms Landsheer to work up to 12 hours a day and Ms Landsheer was required to make herself available for that work in exchange for the right to be paid the salary specified in cl 7 of the written agreement. To imply a term of reasonable remuneration for the additional hours of work would not be open on the grounds of implication of terms on grounds of fact as to do so would be to imply a term of additional remuneration for the additional hours of work. Such a term would be contrary to the express terms of the written agreement. Also such an implication does not arise out of any principle that can be implied at law.

50 For these reasons, I am of the opinion the grounds of appeal have not been made out and the appeal should be dismissed.

SCOTT ASC

51 I have read a draft of the reasons of the Acting President. I agree with those reasons and have nothing to add.

MAYMAN C

52 I have had the benefit of reading a draft of the reasons for decision of Her Honour the Acting President. I respectfully agree with the conclusions that she reached and have nothing further to add.

2014 WAIRC 00035

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS JOHANNA LANDSHEER
	APPELLANT
	-and-
	MORRIS CORPORATION (WA) PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 24 JANUARY 2014
FILE NO/S	FBA 10 OF 2013
CITATION NO.	2014 WAIRC 00035

Result	Appeal dismissed
Appearances	
Appellant	Mr T J Hammond (of counsel)
Respondent	Mr A Cameron, as agent

Order

This appeal having come on for hearing before the Full Bench on 7 November 2013, and having heard Mr T J Hammond (of counsel) on behalf of the appellant and Mr A Cameron, as agent, on behalf of the respondent, and reasons for decision having been delivered on 24 January 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2014 WAIRC 00036

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 50 OF 2013 GIVEN ON 12 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00036
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 16 DECEMBER 2013
DELIVERED	**:**	FRIDAY, 24 JANUARY 2014
FILE NO.	**:**	FBA 11 OF 2013
BETWEEN	**:**	MICHAEL PATRICK O'MEARA Appellant AND JOHN PAUL COLLEGE Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S M Mayman**
Citation	**:**	**[2013] WAIRC 00710; (2013) 93 WAIG 1317**
File No	**:**	**U 50 of 2013**

CatchWords	**:**	Industrial law (WA) - appeal filed out of time - principles for an extension of time considered - not satisfied appeal has any prospects of success - leave not granted to institute an appeal
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 27(1), s 27(1)(hb), s 27(1)(n), s 29(1), s 29(1)(b)(i), s 29(2), s 29(3), s 49, s 49(2), s 49(3), s 49(4)(a) *Industrial Relations Commission Regulations 2005* (WA) reg 4, reg 4(1), reg 4(5), reg 102
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr M Jensen (of counsel)
Solicitors:		
Respondent	**:**	Lavan Legal

Case(s) referred to in reasons:

Chan v The Nurses Board of Western Australia [2007] WASCA 123

Cousins v YMCA of Perth [2001] WASCA 374; (2001) 82 WAIG 5

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196

Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch (1984) 64 WAIG 852

Malik v Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

O'Meara v John Paul College (2013) 93 WAIG 1313

Palata Investments Ltd v Burt & Sinfield Ltd [1985] 1 WLR 942

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

Case(s) also cited:

Anderson v Rogers Seller & Myhill Pty Ltd (2007) 87 WAIG 289

Azzalini v Perth Inflight Catering (2002) 82 WAIG 2992

Brodie-Hanns v MTV Publishing Limited (1995) 67 IR 298

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194

House v The King (1936) 55 CLR 499

Reasons for Decision

SMITH AP:

Introduction

1 Michael Patrick O'Meara seeks to institute an appeal under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision given by the Commission, constituted by a single Commissioner. The decision is a declaration that it would be unfair for the Commission to grant an extension of time under s 29(3) of the Act for Mr O'Meara to file an application on 4 April 2013, under s 29(1)(b)(i) of the Act, claiming that he was harshly, oppressively or unfairly dismissed by John Paul College (the College) on 1 February 2013.

2 Section 29(1) of the Act provides that an industrial matter constituted by a claim that an employee has been harshly, oppressively or unfairly dismissed from his employment may be referred to the Commission by the employee. Section 29(2) and s 29(3) of the Act provide that:

(a) a referral made under s 29(1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated; and

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

3 When the matter came before the Commissioner at first instance, the date of termination of Mr O'Meara's employment was in dispute. Mr O'Meara claimed that his application was filed four days out of time as he was dismissed when he received a letter dated 1 February 2013 addressed to his solicitor from the Principal of the College. How Mr O'Meara could have calculated that the filing of the application was four days out of time is not clear, as he did not refer his application to the Commission until 4 April 2013. If regard is had to the date of the letter, it is apparent that he filed the application 62 days after the date of the letter of 1 February 2013. In any event, the College contended that Mr O'Meara was not terminated, but that he had resigned on 25 September 2012 and ceased to be employed on 18 October 2012.

4 Prior to the Commissioner issuing a decision as to whether she would grant an extension of time to Mr O'Meara to file his application to make a claim that he was harshly, oppressively or unfairly dismissed, the Commissioner convened a conference at which both parties attended. At the conference the Commissioner informed the parties that they should provide written submissions as to whether Mr O'Meara's application should be accepted out of time.

5 After receiving written submissions from the parties, the Commissioner issued the decision on 12 August 2013 refusing Mr O'Meara an extension of time to make a claim.

6 The time prescribed for instituting an appeal against a decision of a single member of the Commission is within 21 days of the date of a decision. Mr O'Meara attempted to file a notice of appeal on 30 August 2013 but the notice was rejected for filing by the registry on that day. A notice of appeal with grounds attached was accepted by the Registrar of the Commission on 5 September 2013. When the notice of appeal was accepted it was more than 21 days after the date of the decision had passed.

7 On 22 October 2013, the College filed an application seeking an order that the appeal be dismissed on grounds that the appeal was lodged outside the 21-day time limit and that the notice of appeal was defective.

8 When the application to strike out the appeal was heard by the Full Bench on 16 December 2013, an issue was raised by the Full Bench as to whether Mr O'Meara had sought to institute an appeal out of time against the decision of the Commission delivered on 12 August 2013.

9 The issues for determination by the Full Bench are whether Mr O'Meara instituted an appeal within the time prescribed by s 49(3) of the Act and, if not, whether leave should be granted to extend time to institute an appeal. In considering whether leave should be granted to institute an appeal, it will be necessary to consider whether the notice of appeal is defective and whether the grounds of appeal have any prospect of success.

The Application for an Extension of Time at First Instance

10 On 21 May 2013, a letter from the associate to Commissioner S M Mayman was sent to the parties which set out the issues the parties were required to address in written submissions. The letter stated as follows:

Please be advised that this application has been allocated to Commissioner S M Mayman.

Mr O'Meara lodged his application that he was harshly, oppressively or unfairly dismissed from his employment in the Western Australian Industrial Relations Commission (the Commission) on 4 April 2013. By s 29(2) of the *Industrial Relations Act 1979* (the Act) his application needed to have been lodged no later than 28 days after the day his employment terminated on 1 February 2013. Accordingly Mr O'Meara's application is 62 days out of time and his application can proceed only if the Commission considers it would be unfair not to accept his application.

The *Industrial Relations Act 1979* contains a provision s 29(3) which allows, in certain circumstances, applications which are out of time to be referred.

> 29. Who may refer industrial matters to Commission
>
> (1) An industrial matter may be referred to the Commission –
>
> …
>
> (b) in the case of a claim by an employee –
>
> (i) that he has been harshly, oppressively or unfairly dismissed from his employment;
>
> (3) The Commission may accept a referral by an employee under subsection (l)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

The Commission, having discussed the issue with the parties, will receive written submissions on the matter **by close of business Friday 21 June 2013**.

In deciding the matter the Commission is likely to consider the decision of the Industrial Appeal Court in *Malik v Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 and the principles contained therein:

1. The length the application is out of time;
2. The reason for the late lodging of the application;
3. The likely merits of the claim of unfair dismissal based upon the grounds set out in the application and in the Notice of Answer;
4. Whether the applicant had actively contested the decision to dismiss before the application was made or whether the respondent had been aware of the intention to challenge the dismissal before the expiry of the 28 day period;
5. The prejudice to the applicant if the application is not accepted;
6. The prejudice to the respondent resulting from the late lodging of the application; and
7. The public interest in disposing of a matter expeditiously.

The Commission will then determine whether the application should be accepted.

11 Mr O'Meara provided his submissions in writing to the Commission in a document dated 19 June 2013. The College provided its written submissions to the Commission in a document dated 20 June 2013.

12 It is clear from the written submission submitted to the Commission at first instance by Mr O'Meara dated 19 June 2013 that he had read the letter from the associate to Commissioner Mayman dated 21 May 2013 as he stated in the submission that he wished to apply for an extension of time to bring a claim and that he would address the criteria in the order set out in the letter. In the written submission, Mr O'Meara:

(a) disputed that he resigned in late September 2012. He said on numerous occasions following his correspondence in late September 2012 the Principal of the College emailed him asking him for his resignation in writing.

(b) stated that his employment concluded on the date that he first received confirmation from the Principal that he was no longer employed and that date was in early February 2013.

(c) stated the duration or reason for the delay in lodging an application under s 29(1)(b)(i) of the Act related to a degree of ignorance on his behalf. He initially made an application to the Fair Work Commission on 20 February 2013 as it seemed an appropriate course of action. When, however, the College objected he immediately logged onto the website of this Commission and completed the wrong form. He then completed the correct form, but was unable to submit it online and so resorted to 'snail' mail. The next delay related to the payment of the required fee.

(d) attached a series of relevant documents. The first was a letter from the Principal and Deputy Principal containing a formal warning relating to a series of matters pertaining to his employment. The letter was dated 13 September 2012. The second document was an email sent on 13 September 2012 from Mr O'Meara in response to the letter from the Principal and Deputy Principal. In the email sent on 13 September 2012 he stated:

(i) the most convenient course of action for the College would be for him to resign. Needless to say this had been a consideration for him also;

(ii) unfortunately resignation would be financial suicide as he would be without any form of income for a period of 14 weeks;

(iii) his attempts to find employment of which he was physically capable had met with no success; and

(iv) he would like to take leave for the remainder of the week (possibly ongoing) to consult with those who may be able to give him advice and some pastoral support.

The third document was an email sent on 13 September 2012, from the Principal to Mr O'Meara stating that his request for leave at short notice would not be granted, but if he did take leave for the remainder of the term that was his decision and that at that date he had 10 days' accrued leave and if he were to exceed this number of days he would be placed on leave without pay.

13 The remainder of Mr O'Meara's written submission was directed to the reasons why he says that his termination of employment was unfair. He also made a submission about the prejudice that he would suffer if the application was not accepted. The effect of the submission was that his reputation as a teacher was in tatters and he had little prospect of teaching again and that it was only fair that he 'get his day in court'. Finally, he made a submission that it was in the public interest that unilateral decisions such as the one made by the Principal be held up to public scrutiny.

14 Attached to the written submissions filed on behalf of the College, at first instance were also attached a number of relevant documents that passed between the parties. These documents were:

(a) An email from Mr O'Meara to the Principal and Deputy Principal sent on 25 September 2012 in which Mr O'Meara stated that it was his intention to leave the College. In the email Mr O'Meara said:

> Thank you for your time yesterday.
>
> As I explained I do not feel comfortable working in this environment, therefore, it is my intention to leave John Paul College.
>
> The exact timeframe needs to be finalised, but I will not leave the College in a situation where there is a staffing difficulty. I will be returning in Term 4.
>
> Once the present Year 12 class graduate I anticipate that I will move on.
>
> I appreciate your offer forgoing the need for me to give the standard 6 weeks' notice of my intention to leave.
>
> Hopefully I will be able to give more specific detail by the end of the forthcoming holiday break.
>
> The events of the last few weeks have cause [sic] a significant degree of confusion.
>
> I will need time make [sic] arrangements and to liaise with the rental agency here in Kalgoorlie.
>
> Also, as I have previously mentioned, there are ongoing financial considerations that will need my attention.

(b) An email sent to Mr O'Meara on 26 September 2012 from the Principal. In the email the Principal asked Mr O'Meara to forward a formal written notification of his intentions to resign from his teaching position from the College. The Principal also made a request that the resignation be provided by Wednesday, 17 October 2012 so the College could put arrangements in place for Mr O'Meara's classes to be covered for the remainder of the year.

(c) A letter from Mr O'Meara to the Principal dated 17 October 2012. In the letter Mr O'Meara did not state an intention to resign. Yet, he did state that his doctor had instructed him to take leave of his work situation and he spoke of his departure from the College.

(d) A letter from Mr O'Meara dated 30 November 2012 to Mr Tim McDonald, the Director of Catholic Education. In the letter Mr O'Meara set out a number of grievances that he had with the way the College was managed, in particular he complained about a culture of bullying. He requested a commissioner be appointed to investigate. In the letter he also stated that he had 'recently left the employ of the College under circumstances that [he] found less than satisfactory'. He also said that he found 'it preferable to be unemployed than put up with the culture of the College' and of having 'little or no prospect of ever teaching again'.

(e) An email from Mr O'Meara sent on 15 December 2012 to the Principal in which Mr O'Meara said:

> Thanks for allowing me to attend the Year 12 last day. I still have a bit of a weep when I read that lovely speech Matthew and Zoe prepared. I don't think I could have asked for a better eulogy to end my teaching career. It means so much more coming from the kids after all that's what a teaching vocation is all about.
>
> I still recall your oft repeated quote: 'What a shame to have your long career end like this'. You can't imagine how true that has become. I have given up even applying to schools. My pay rate plus all the innuendo and 'unknowns' about why I left JPC make me unemployable. It brings to mind your prophetic advice to look for something outside teaching. Sadly the shoulder problem has put paid to bus driving and anything manual. I have been added to the famous 'waiting list for non-essential surgery' that we hear so much about.
>
> The good news is that because I am on sick leave (without pay) CentreLink came to the party half way through November instead on [sic] making me wait 14 weeks.

(f) A letter from Catholic Church Insurance dated 31 January 2013. In the letter Mr O'Meara was informed that his claim for workers' compensation for a stress related condition had been disputed.

(g) A letter dated 30 January 2013 from Mr O'Meara's solicitors to the Principal. In the letter Mr O'Meara's solicitors stated that he had been on sick leave from 19 October 2012 until 31 December 2012 due to sickness. The letter also stated that Mr O'Meara was ready and willing to return to work at the College, but as a result of events that had transpired in the last month he was unsure whether or not he had a job to return to at the College. The letter also asked whether Mr O'Meara's job as a teacher at the College remained open.

(h) A letter dated 1 February 2013 from the Principal to Mr O'Meara's solicitors. In the letter the Principal stated that Mr O'Meara had provided written notification of his intention to resign by email on 25 September 2012 and no payments had been made to Mr O'Meara from the College since his departure on 18 October 2012.

The Commissioner's reasons for decision

15 After considering the written submissions filed by each of the parties, the Commissioner made the following findings:

(a) In considering an application for an extension of time in which to bring an application, the Commission is to have regard to the principles set out in ***Malik v Albert, Director General, Department of Education of Western Australia*** [2004] WASCA 51; (2004) 84 WAIG 683 [74] (Heenan J, with whom Steytler J agreed). Those principles are as follows:

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

(b) The Commission is also required to have regard to the observation of Steytler J in ***Malik*** where his Honour said that the Commissioner is empowered to accept a late referral if it would be unfair not to do so and whilst there is no obligation on the part of an applicant under s 29(3) of the Act to establish any degree of merit, it should be an assessment of the merits in 'a fairly rough and ready way': [25].

(c) In applying these guidelines, the Commission also takes into account that the Act provides a 28-day timeframe to lodge an application and whether the Commission's discretion ought to be exercised in relation to a matter of this nature is confirmed in the negative unless it would be unfair not to do so.

(d) The terms of s 29(3) of the Act make it clear that the decision regarding the extension of time is a discretionary one. Fairness, in this sphere, has a legislative starting point that 28 days is a sufficient period in the public interest for the commencement of such a claim. The longer the delay the more difficult it will be to show unfairness of the dismissal, but even in instances of long delays there may be particular circumstances which reveal that it would be unfair not to accept a late referral.

(e) One of the preliminary considerations for the Commission to make is whether there is any merit in Mr O'Meara's claim. A number of concerns were raised by the College about Mr O'Meara's performance, and it is accepted that there was confusion by Mr O'Meara about these concerns. Furthermore, Mr O'Meara was counselled about the concerns.

(f) In this matter the date of resignation/termination is in dispute.

(g) When regard is had to Mr O'Meara's email to the Principal and Deputy Principal sent on 25 September 2012, a finding can be made that Mr O'Meara intended to resign from his employment in late October 2012, a course he had been considering for a number of weeks. It is noted that at this stage Mr O'Meara seemed somewhat remorseful about his actions whilst he intended to resign from his employment in late October 2012. His resignation correspondence of 25 September 2012 was overtaken by his notification on 17 October 2012 to claim for workers' compensation. Mr O'Meara did not receive any payments for sick leave or wages following 18 October 2012, the date the College cites as Mr O'Meara's date of resignation.

(h) Mr O'Meara was terminated by the College on and from 18 October 2012 without notification to him and without payment in lieu. Whilst there is some merit in Mr O'Meara's claim, that being the failure by the College to notify Mr O'Meara of the termination, it is the view of the Commission that such failure was overcome by:

1. a significant delay by the applicant to lodge his unfair dismissal claim in the Commission (139 days),
2. prejudice to the respondent caused through a number of persons that would have to give evidence surrounding this application;
3. prejudice being greater to the respondent than to the applicant; and
4. the lapse in memory of critical events almost one year later.

(i) The application is out of time by a significant period, some 139 days. In the interim period Mr O'Meara did not actively contest the termination other than to lodge the application.

(j) There are no specific situations which have made Mr O'Meara's situation unfair not to accept his referral out of time.

(k) In all of the circumstances, it would be unfair for the Commission to exercise its discretion to grant an extension of time within which to file the application.

Has an appeal been instituted in the Commission against the decision given at first instance?

16 On 30 August 2013, Mr O'Meara sent by email a form 9 notice of appeal to the Commission. The document was stamped as received by the registry of the Commission at 10.30am. The notice stated on the face of the form that it was an appeal against the decision of the Commission constituted by Commissioner Mayman given on 28 August 2013 in matter No U 50 of 2013 or the following parts of that decision namely, 'I was not afforded the opportunity to attend appeal for late lodgement'.

17 On 2 September 2013, the Registry Services Manager of the Department of the Registrar of the Commission sent an email to Mr O'Meara informing him that the form 9 notice of appeal had not yet been formally filed, as the appeal was deficient. The email also stated:

In this regard, I draw your attention to Regulation 102 - Appeals to Full Bench, of the Industrial Relations Commission Regulations 2005. Relevant excerpts of Regulation 102 state:

> '102. Appeals to Full Bench
>
> (1) An appeal to the Full Bench from a decision of the Commission may be commenced by filing a notice of appeal in the form of Form 9.
>
> (2) The notice of appeal must clearly and concisely set out the grounds of appeal and what alternative decision the appellant seeks.
>
> (3) Without affecting the operation of subregulation (2), it is not sufficient to allege that a decision or part of it is against the evidence or the weight of evidence or that it is wrong in law. The notice must specify the particulars relied on to demonstrate that it is against the evidence and the weight of evidence and the specific reasons why it is alleged to be wrong in law.
>
> (4) In the case of an appeal from a decision that is a finding, the statement setting out the grounds of appeal must, in addition, briefly state the reasons why it is considered that the matter is of such importance that in the public interest an appeal should lie..'.

Although the Form 9 has been received in the Registry, the above issues must be addressed in order for the Form 9 to be accepted for filing.

In addition, it is noted that the Decision of Commissioner Mayman issued on 12 August 2013. However, you have stated (on your Form 9) that the Decision issued on 28 August 2013. This also, is incorrect and must be amended.

Please attend to the issues I have raised above, as a matter of urgency. A copy of the received Form 9 is attached. You may email me directly to provide the required information Mr O'Meara.

18 On 5 September 2013, the registry accepted and filed a copy of the form 9 notice of appeal to the Full Bench, together with a number of attachments, including a typewritten document comprising some six pages which appear to purport to set out the grounds of the appeal. This document, together with attachments, was served upon the College.

19 Regulation 4 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) requires all documents to be filed or lodged under the Act or the Regulations to be filed or lodged as the case requires in the office of the Registrar: reg 4(1). Pursuant to reg 4(5), the Registrar is not to accept any document unless it has been fully and correctly completed in accordance with the Act and the Regulations. Consequently, until a form 9 was filed by Mr O'Meara that complied with reg 102 of the Regulations, the officers of the registry could not accept a document on behalf of the Registrar for filing a notice of appeal against the decision in question. It follows, therefore, until a notice of appeal is accepted for filing by the officers of the Registrar of the Commission an appeal cannot be instituted under s 49(3) of the Act, as pursuant to s 49(2) of the Act an appeal will only lie to the Full Bench in the manner prescribed. Consequently, until the notice of appeal and attached grounds were filed on 5 September 2013, the appeal could not be said to have been attempted to be 'instituted' within the meaning of s 49(3) of the Act. The notice of appeal and attached document which appeared to contain grounds of appeal filed by Mr O'Meara on 5 September 2013 was filed three days out of time. Pursuant to s 49(3) of the Act, an appeal against a decision of the Commission is required to be instituted within 21 days of the date of the decision. The question that now arises is whether this Full Bench should grant leave to Mr O'Meara to allow him to institute and proceed with an appeal.

Should leave be granted to extend time to Mr O'Meara to institute an appeal?

20 The Commission is empowered under s 27(1)(n) of the Act to grant an extension of time to bring an appeal. However, the granting of an extension of time is not automatic and each case turns upon its particular facts. The discretion is conferred for the sole purpose of enabling the Commission to do justice between the parties and it is always necessary to consider the prospects of success of the applicant: ***Cousins v YMCA of Perth*** [2001] WASCA 374; (2001) 82 WAIG 5 [46] (Kennedy J, with whom Scott and Parker JJ agreed).

21 In ***Cousins*** Kennedy J said:

> When the application for an extension of time merely concerns the doing of an act in respect of an appeal already lodged, an even more liberal approach is justified. The Court is then dealing with a pure procedural question, that is to say, should time be extended? The merits of the appeal do not furnish the criterion for granting or refusing such an extension.
>
> Brennan CJ and McHugh J, at 519, cited a passage in the judgment of Lord Denning MR in ***R v Secretary for the Home Department; Ex parte Mehta*** [1975] 1 WLR 1087, a case in which an extension of time was being sought for lodging an appeal. His Lordship said, at 1091:
>
> > 'We often like to know the outline of the case. If it appears to be a case which is strong on the merits and which ought to be heard, in fairness to the parties, we may think it is proper that the case should be allowed to proceed, and we extend the time accordingly. If it appears to be a flimsy case and weak on the merits, we may not extend the time. We never go into much detail on the merits, but we do like to know something about the case before deciding whether or not to extend the time.'
>
> …
>
> In ***Gallo v Dawson*** (1990) 64 ALJR 458, McHugh J said, at 459, in relation to an extension of time for appealing from a single Justice under the *High Court Rules* –
>
> > 'The discretion to extend time is given for the sole purpose of enabling the Court or Justice to do justice between the parties: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time:

> see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194-195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes*, at 263-264; *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has "a vested right to retain the judgment" unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice.'
>
> …
>
> As was emphasised by McHugh J in ***Gallo v Dawson*** *(supra)*, the discretion to extend time is given for the sole purpose of enabling the Court (or, in this case, the Industrial Relations Commission) to do justice between the parties, and the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon him. One of the relevant factors relates to what the consequences will be of the grant or refusal of the application for an extension of time. Another relevant factor for granting an extension of time is that the proposed appeal has some prospects of success, whilst conceding, as Brennan CJ and McHugh J said in ***Jackamarra v Krakouer***, that an appellate court can only assess the merits in a fairly rough and ready way, because otherwise the court would have to conduct a full rehearsal for the appeal ([33] - [39]).

22 When this reasoning is applied to this matter before the Full Bench, it is relevant to consider what the consequences will be of the grant or refusal of the application for an extension of time to institute an appeal to this Full Bench. From the point of view of Mr O'Meara, a refusal of the application to extend time to institute an appeal necessarily means he will be denied an opportunity of putting a case to this Full Bench that the Commissioner at first instance erred in not granting an extension of time to bring an application before this Commission that he was harshly, oppressively or unfairly dismissed by the College.

23 However, if the appeal is allowed to be instituted, the listing of Mr O'Meara's appeal has consequences for the College. Firstly, the College points out that the notice of appeal and the grounds of appeal are defective in that the grounds fail to clearly and concisely set out the grounds of appeal and the particulars provided do not enunciate how the reasons for decision given by the Commissioner against the evidence and the weight of the evidence and the specific reasons why it is alleged that the decision of the Commissioner at first instance was wrong in law. They also point out that it is relevant to consider not only did Mr O'Meara lodge an application under s 29(1)(b)(i) of the Act out of time, but he has also filed his appeal out of time.

24 The College filed written submissions setting out why they say the notice of appeal is deficient. They contend that whilst Mr O'Meara refers to various paragraphs of the reasons for decision given by the Commissioner at first instance, he takes it no further in the notice of appeal other than identifying each of the paragraphs in the reasons for decision and then restating the details contained within that paragraph of the reasons for decision. Thus, it is argued Mr O'Meara does not specify or give any reason how or why the decision is against the evidence or the weight of the evidence. With the exception of [37] of the reasons for decision, each of the paragraphs in the grounds of appeal only refer to the Commissioner's summation of the evidence of the parties as set out in their respective written submissions. The only finding which is challenged in the grounds which is made by the Commissioner relates to the finding in [37] of the Commissioner's reasons for decision where Mr O'Meara seeks to refute the finding that he was 'remorseful' about his actions. However, the observations made about this finding in the 'grounds' of appeal do not give any reason as to why [37] of the reasons for decision is against the evidence or the weight of the evidence. The College also points out in their submissions that Mr O'Meara in his grounds of appeal seeks a rehearing of his application for an extension of time to file his claim. The College points out, however, that the appeal is not a rehearing of the evidence, but a review of the Commissioner's decision to determine whether there was an error of law or if the Commissioner erred in the exercise of her discretion: ***Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch*** (1984) 64 WAIG 852; ***The Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 [73] (Smith AP and Beech CC).

25 When the matter came on for hearing before the Full Bench, Mr O'Meara was asked to identify what were the errors of fact or law in the reasons for decision given by the Commissioner at first instance. In response, Mr O'Meara said there were three errors. These were as follows:

(a) The Commissioner failed to provide him with an oral hearing in which he would be able to give oral evidence.

(b) The Commissioner failed to find or take into account that he did not receive a document from the College stating that his employment had been terminated until he received the copy of the letter which was sent to his solicitors dated 1 February 2013.

(c) The fact that he had been ill for a period of time and had produced medical certificates to the College was ignored.

26 Apart from the general statement on the face of the form 9 notice of appeal which states that Mr O'Meara was not 'afforded the opportunity to attend appeal for late lodgement', none of these issues are raised in the document which is attached to the form 9 which is intended to set out the grounds of the appeal. The document which is attached simply sets out a lengthy summary as to why Mr O'Meara says he was harshly, oppressively or unfairly dismissed by the College.

27 The difficulty with the first proposed ground of appeal is that Mr O'Meara has not identified any error that could arise from not conducting an oral hearing. It is clear from the terms of the letter sent to the parties from the associate to Commissioner Mayman on 21 May 2013 that the issues the parties were required to address were set out clearly and concisely. Pursuant to s 27(1)(hb) of the Act, the Commission may require parties to present evidence and argument in writing. It is apparent from the submissions that Mr O'Meara filed in the Commission on 19 June 2013 that he directed his mind to each one of those points and he provided not only a written submission but a number of documents in support of his submission. In his oral submissions made to the Full Bench at the hearing of this matter, Mr O'Meara did not identify any matters or evidence that he says he would have addressed in an oral hearing in an application for an extension of time to file an application under s 29(1)(b)(i) of the Act other than to say that he expected to attend a hearing at which the facts could be clarified and tested (ts hearing appeal 16-17, 16 December 2013). Consequently, I am not satisfied that this ground has any prospect of success.

28 As to an argument that the Commission failed to give sufficient weight or regard to the fact that Mr O'Meara did not receive a document stating that his employment had been terminated until sometime in February 2013. This ground also has no prospect of success as at [39] of the Commissioner's reasons for decision the Commissioner found that prior to February 2013 the College did not notify Mr O'Meara that his employment had been terminated.

29 As to the third proposed ground of appeal, the difficulty with this ground is that Mr O'Meara did not seek to raise in his submission to the Commission at first instance any issue that from the period 17 October 2012 he had been granted sick leave by the College or that he was unable to dispute the termination of his employment because of his ill health. Thus, this ground is flimsy. The only reference to Mr O'Meara seeking to take leave on grounds of ill health was contained in documents attached to the submissions filed on behalf of the College dated 20 June 2013. In these documents Mr O'Meara also made statements that he had ceased to work as a teacher at the College in late 2012.

30 As it appears Mr O'Meara's proposed grounds of appeal have no prospect of success, I am not satisfied that an extension of time should be given to Mr O'Meara to institute an appeal against the decision of the Commissioner at first instance. The discretion of the Full Bench to extend time is given for the sole purpose of enabling the Commission to do justice between the parties. I am not satisfied that Mr O'Meara has shown that this discretion should be exercised in his favour. In particular, I am not satisfied that he has proved that strict compliance with the rules will work an injustice upon him as it cannot be said with any confidence that an appeal against the decision declaring that it would be unfair for the Commission to grant an extension of time under s 29(3) of the Act for Mr O'Meara to file his application has any prospect of success.

31 For these reasons, I would make orders that leave not be granted to Mr O'Meara to institute an appeal under s 49 of the Act and that the appeal be otherwise dismissed.

BEECH CC

32 I have had the advantage of reading in draft form the reasons for decision of Her Honour the Acting President. I agree with those reasons and have nothing to add.

KENNER C

33 On 12 August 2013 the Commission at first instance published a decision in which it declined to accept an unfair dismissal application out of time, brought by the appellant, Mr O'Meara: *O'Meara v John Paul College* (2013) 93 WAIG 1313. An issue in dispute in those proceedings was whether Mr O'Meara resigned or was dismissed. A further issue in dispute was when this occurred. John Paul College contended that Mr O'Meara resigned effective on 18 October 2012. Mr O'Meara contended that he was dismissed on or about 1 February 2013. The learned Commissioner found at par 39 of her reasons that Mr O'Meara was dismissed without notice on 18 October 2012. Accordingly, his unfair dismissal application was some 139 days out of time.

34 Whilst accepting that there may have been some merit in Mr O'Meara's claim by reason of him not being formally notified of his dismissal, having regard to the principles discussed in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, the learned Commissioner was not persuaded that it would be unfair not to accept the application out of time and the application was dismissed.

35 On 30 August 2013 Mr O'Meara purported to institute an appeal against that decision under s 49 of the Act. As the notice of appeal was defective, as it did not provide any particulars at all as required by reg 102 of the Industrial Relations Commission Regulations 2005, the notice of appeal was not accepted for filing by the Registry. Subsequently, on 5 September 2013, the notice of appeal was accepted by the Registry and the appeal was instituted on that date. As the appeal is outside of the 21 day time limit prescribed by s 49(3) of the Act, the Full Bench needs to accept the appeal out of time. Additionally, Mr O'Meara has not made an application for the time for the filing of his appeal to be extended.

36 The College has made an application under s 27(1) of the Act, that the appeal be dismissed. The application is brought on two bases. The first is that the appeal is out of time and time should not be extended. The second is that in any event, the notice of appeal is so defective that the Full Bench should not entertain the appeal.

37 The relevant principles for the grant of extensions of time in matters of the present kind, are set out in *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196. In this case, Kennedy J at par 198, in referring to *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 1 WLR 942, referred to four factors relevant to whether an extension of time to appeal should be granted, they being the length of the delay; the reasons for the delay; whether the appellant has an arguable case; and whether there is any prejudice to the respondent. These principles were considered and applied by the Court of Appeal of Western Australia in *Chan v The Nurses Board of Western Australia* [2007] WASCA 123. In this case, Buss JA said at pars 12-14:

> **Application for an extension of time: principles**
>
> 12 In *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, Kennedy J said, at 198:
>
> > "In *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 1 WLR 942 at 946; [1985] 2 All ER 517 at 520, the Court of Appeal accepted that, in relation to an application for an extension of time for appealing, there are four major factors to be considered in the exercise of the discretion which is conferred upon the court. They are, first, the length of the delay, secondly, the reasons for the delay, thirdly, whether there is an arguable case and, fourthly, the extent of any prejudice to the respondent. There may in a particular case be additional factors, but I accept that the foregoing are the major factors in the present case."
>
> 13 Where the failure to appeal within time is attributable to the act or default of the applicant's solicitor (and not the applicant), that is a material consideration in the exercise of the Court's discretion. See *Esther Investments* per Kennedy J at 199 and per Rowland J at 204.
>
> 14 In *Gallo v Dawson* (1990) 64 ALJR 458, McHugh J examined the applicable principles in relation to an application to extend time to appeal to the High Court. The relevant provision in the rules of the High Court empowered the Court to extend time upon such terms "as the justice of the case may require". His Honour said, at 459:
>
> > "The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is

> given for the sole purpose of enabling the court or Justice to do justice between the parties: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194–195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes* (at 263–264); *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice. As the Judicial Committee of the Privy Council pointed out in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12; [1964] 3 All ER 933 at 935:
>
> 'The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.'"

Also see *Jackamarra v Krakouer* (1998) 195 CLR 516.

38 Applying these principles to the present matter, leads to the conclusion that leave to institute the appeal out of time should not be granted and that the appeal should be dismissed.

39 Taking first the length of the delay, assuming Mr O'Meara's appeal was properly instituted on 5 September 2013, with the date of the decision of the Commission at first instance being 12 August 2013, then Mr O'Meara's appeal is some three days out of time. This delay is not excessive.

40 As to the reasons for the delay, given that Mr O'Meara's first attempt at filing his appeal on 30 August 2013 was rejected by the Registry, I am prepared to characterise this as non-compliance with the Commission's procedural requirements. This is, of itself, not an unreasonable explanation, in all of the circumstances.

41 However, it is the issue of the merits of the appeal that is the most problematic for Mr O'Meara. The front page to the Form 9 – Notice of appeal to Full Bench, refers to the following: "I was not afforded the opportunity to attend appeal for late lodgement". There follows an attachment, which is a six page statement that outlines Mr O'Meara's employment with the College and contains in essence, among other things, a series of allegations as to why Mr O'Meara considered his dismissal to have been unfair. References are made to the learned Commissioner's decision as a part of this statement. However, the issues mentioned in the statement, do not specifically refer to the Commission's failure to accept Mr O'Meara's unfair dismissal application out of time. No reference is made to any alleged errors by the learned Commissioner in coming to her conclusions, that Mr O'Meara's unfair dismissal claim should not be accepted out of time. There is no reference to how, if at all, the Commission's conclusions were against the evidence, the weight of evidence, or any specific reason alleged as to why the decision was wrong in law, in relation to the extension of time issue.

42 Whilst the appeal notice and the statement attached refer to no opportunity for Mr O'Meara to attend a hearing before the Commission, it is clear that no such hearing was intended. A conference was convened at which the learned Commissioner informed the parties that it was necessary for the Commission to first consider whether Mr O'Meara's unfair dismissal application should be accepted out of time. By letter of 21 May 2013, the Associate to the learned Commissioner wrote to the parties informing them that it was necessary for the Commission to first deal with the issue of the extension of time. Reference was made to *Malik* and the factors to be considered by the Commission. The parties were requested to provide written submissions on the issue of an extension of time and the Commission informed the parties that it "will then determine whether the application should be accepted".

43 On 19 June 2013 Mr O'Meara provided a written submission in accordance with the Commission's direction. A copy of it is annexure KDK2 to the affidavit of Ms Kaur, filed in support of the College's application that the appeal be dismissed. From the first two paragraphs of Mr O'Meara's submission, it is clear he was aware that the Commission was dealing with the extension of time issue and referred to the criteria in the letter from the Associate. Reference is also made to the dispute in relation to the date of the termination of Mr O'Meara's employment. Attached to Mr O'Meara's written submission, are a number of documents. These include correspondence between himself and the College and various statements from students at the College.

44 Whilst Mr O'Meara seems to have been under a misapprehension that there was to be an oral hearing before the Commission, in addition to a consideration of the written submissions, I am not persuaded that Mr O'Meara has suffered any detriment. Nothing has been put to the Full Bench by Mr O'Meara, to lead me to conclude the Commission at first instance was in error in reaching the decision that it did. Further, and specifically, nothing has been put by Mr O'Meara in his submissions, in addition to that contained in his written submissions at first instance, which could reasonably, in my view, have altered the outcome of the matter at first instance. A generalised complaint by Mr O'Meara seemed to be that despite the learned Commissioner's finding that he did not resign, but was dismissed by the College on 18 October 2012 (a finding in Mr O'Meara's favour), the fact that there was no document showing this was in some way the sign of error. That is not so. The Commission's finding as to who terminated the contract of employment and when, did not depend on the existence of a particular document. The conclusion was reached by the Commission from a consideration of the circumstances in existence at the material time. In my view, those conclusions were reasonably open and nothing turns on Mr O'Meara's complaint in this regard.

45 There was also some reference in Mr O'Meara's submissions to the Full Bench, that he was ill at or around the time of his dismissal and he had medical certificates. However, this issue was not specifically raised in Mr O'Meara's written submissions at first instance and is not a matter that can be raised now on appeal for the first time: s 49(4)(a) Act. There is some reference

to a workers' compensation claim (subsequently refused) in the College's written submissions at first instance. This is referred to at par 38 of the learned Commissioner's reasons. However, again, nothing was put by Mr O'Meara as to how any error was made by the Commission at first instance, even if this issue could be raised now on appeal.

46 Therefore, from what is before the Full Bench, I am not persuaded that the appeal has any prospect of success. For these brief reasons, I would dismiss the appeal.

2014 WAIRC 00037

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL PATRICK O'MEARA
	APPELLANT
	-and-
	JOHN PAUL COLLEGE
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 JANUARY 2014
FILE NO/S	FBA 11 OF 2013
CITATION NO.	2014 WAIRC 00037

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr M Jensen (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 16 December 2013, and having heard the appellant and Mr M Jensen (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 24 January 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. Leave not be granted to the appellant to institute an appeal; and
2. The appeal otherwise be and is hereby dismissed.

By the Full Bench

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

FULL BENCH—Procedural Directions and Orders—

2014 WAIRC 00048

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA
	APPLICANT
	-and-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	CECIL O'NEILL
	EDMUND FREDRICK BLACK
	JENNIFER BROZ
	KAYE ROSALIND HOSKING
	LESLIE BRUCE BANYARD
	TREVOR STEPHEN VAUGHAN
	OBJECTORS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 31 JANUARY 2014
FILE NO.	FBM 8 OF 2011
CITATION NO.	2014 WAIRC 00048

Result	Order issued
Appearances	
Applicant	Mr S P Kemp (of counsel)
Respondent	Mr T J Dixon (of counsel)

Order

HAVING heard Mr S P Kemp (of counsel) on behalf of the applicant and Mr T J Dixon (of counsel) on behalf of The State School Teachers' Union of W.A. (Incorporated) (the union objector), the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. The union objector give discovery by 4 pm on Friday, 28 February 2014 in terms of the attached Schedule A subject to the following conditions:
   - (a) Save with the leave of the Full Bench the use of documents in cross-examination shall be limited to a witness who expressly referred to that document in their witness statement. That is:
     - (i) if leave is sought to tender a document it will only be through a witness who expressly refers to that document in their witness statement; and
     - (ii) a document will only be put to a witness in cross-examination who expressly refers to that document in their witness statement.
   - (b) The applicant shall provide a proposed tender bundle a month prior to the hearing with documents clearly identifiable by page number.
   - (c) Save with the leave of the Full Bench the documents in the proposed tender bundle shall only be put (for the purposes of the proposed tender (over objection or otherwise) and cross-examination) to:
     - (i) those witnesses who expressly refer to the relevant document in their witness statement; or
     - (ii) notwithstanding (a)(ii) above, Anne Gisborne or Patricia Byrne.
   - (d) In the event that a document is put to a witness and tendered, the union objector shall have an opportunity (subject to any objection) to put documents to the relevant witness in relation to any matters arising from the cross-examination in reply;
   - (e) The union objector retains the right to object to the tender of any document;
   - (f) Prior to the giving of any discovery, the applicant shall give express undertakings (which necessarily bind inter alios its officers and employees):
     - (i) Except for members of the applicant that no documents discovered will be shown to any person with the Department of Education;
     - (ii) That the discovered documents will not be used for any collateral purpose; and
     - (iii) As contained in the attached Schedule A, items 1 and 5.
   - (g) Discovery will be made by way of a bundle of documents being delivered to the offices of the applicant's legal representatives.
   - (h) If any document in category 12 is redacted to the point it is unreadable, counsel for the applicant may with leave of the Full Bench inspect an unredacted copy of the document.
2. The applicant is to serve on the union objector the materials referred to in Order 1(b) above by 9 May 2014.
3. The applicant is to file and serve its outline of opening submissions by 26 May 2014.
4. The union objector is to file and serve its outline of opening submissions in reply by 2 June 2014.
5. The matter be listed for a hearing of 10 days commencing on 9 June 2014 to 20 June 2014.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

SCHEDULE A

	Description
1	Union survey on the impact of the locality allowance, including all responses. Limited to copy of survey paper and statistics relating to responses received. The applicant undertakes to the Court and the union objector that this document will be treated as sensitive.
2.	The role description for the position of 'School Leader Field Officer' for the current incumbent (Claire Howard).
3.	Emails, faxes, newsletters or letters from the current School Leader Field Officer (Claire Howard) to administrator members informing them of developments with regard to clause 16 of the 2011 Agreement.
4.	Any record of the proceedings or outcome of the forum for school leaders held about upcoming negotiations with the Department pursuant to clause 16 – Administrators of the 2011 Agreement.

	Description
5.	Current membership records of the Union showing the members and financial standing of: (a) all principals; (b) all deputy principals; (c) all other school leaders/administrators. The applicant undertakes to the Court and the union objector that this document will be treated as sensitive.
6.	The Union policy paper regarding independent public schools.
7.	The log of claims 2011 developed by the School Leaders Reference Group.
8.	The aggregate summary of 2011 survey responses by principals referred to in paragraphs 167(a) of Anne Gisborne's statement.
9.	The 2011 'position papers' explaining the log of claims referred to in paragraph 173 of Anne Gisborne's statement.
10.	The Union's 2011 log of claims.
11.	The Union's strategic plans for the Administrators Reference Group.
12.	All documents (notes, letters or emails) created or received by Mary Franklin in relation to the matter referred to in paragraph 41 of her statement. Any details identifying individual members of the union objector, other than the union objector's employees, will be redacted from the documents.
13.	Documents relating to the review of the Reference Group referred to in paragraph 57 of Donald Phillips' statement.
14.	Copy of the ARG and School Leaders Log of Claims for each of the 2007 and 2011 negotiations.
15.	A copy of the rules of the Union as at the date of its incorporation.
16.	All documents containing or recording the literature review undertaken by the SSTUWA and the SSTUWA resolution to commission an enquiry, announced on 29 January 2013, relating to the roles of Principals and Deputy Principals.

2014 WAIRC 00072

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PRINCIPALS' FEDERATION OF WESTERN AUSTRALIA

APPLICANT

-and-

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
CECIL O'NEILL
EDMUND FREDRICK BLACK
JENNIFER BROZ
KAYE ROSALIND HOSKING
LESLIE BRUCE BANYARD
TREVOR STEPHEN VAUGHAN

OBJECTORS

CORAM FULL BENCH
THE HONOURABLE J H SMITH, ACTING PRESIDENT
ACTING SENIOR COMMISSIONER P E SCOTT
COMMISSIONER S M MAYMAN

DATE TUESDAY, 4 FEBRUARY 2014

FILE NO. FBM 8 OF 2011

CITATION NO. 2014 WAIRC 00072

Result Order varied

Order

HAVING heard Mr S P Kemp (of counsel) on behalf of the applicant and Mr T J Dixon (of counsel) on behalf of The State School Teachers' Union of W.A. (Incorporated) (the union objector), by consent it is ordered —

THAT Order [2014] WAIRC 00048 be varied as follows:

5. The matter be listed for a hearing of 10 days commencing on 23 June 2014 to 4 July 2014.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Declarations made under Section 71—

2014 WAIRC 00006

APPLICATION FOR DECLARATION PURSUANT TO S.71 and APPLICATION PURSUANT TO S.62 - ADDITION OF NEW RULE - 14A - COUNTERPART FEDERAL BODY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00006
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 16 DECEMBER 2013
DELIVERED	**:**	MONDAY, 13 JANUARY 2014
FILE NOS.	**:**	FBM 10 OF 2013, FBM 11 OF 2013
BETWEEN	**:**	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS Appellant AND (NOT APPLICABLE) Respondent

CatchWords	**:**	Industrial Law (WA) - Application pursuant to s 71 for a declaration relating to qualifications of persons for membership of a State Branch of a Federal organisation and offices that exist within the Branch - Qualifications for membership rules substantially the same - Not satisfied offices are the same or can be deemed to be the same.
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7(1), s 56, s 56A, s 57, s 62, s 71, s 71(1)(b), s 71(2), s 71(4), s 71(5), s 71(5)(a), s 71(6), s 71(7), s 71A; *Fair Work (Registered Organisations) Act 2009* (Cth)
Result	**:**	FBM 10 of 2013 - Dismissed FBM 11 of 2013 - Adjourned sine die
Representation:		
Applicant	**:**	Mr J Walker, Mr J Welch and Mr A Smith

Case(s) referred to in reasons:

Jones v Civil Service Association Inc. [2003] WASCA 321; (2013) 84 WAIG 4

Re an application by the Civil Service Association (1993) 73 WAIG 2931

Re Bonnie [1986] 2 Qd R 80

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

Reasons for Decision

THE FULL BENCH:

Introduction

1 The Full Bench has before it an application made under the *Industrial Relations Act 1979* (WA) (the Act) in which the applicant (the State organisation) seeks the following:

(a) A declaration pursuant to section 71 of the Industrial Relations Act 1979 (WA) (the Act) that the Community and Public Sector Union, SPSF Group, Western Australian Prison Officers' Union Branch is the counterpart Federal body (the counterpart Federal body) of the Western Australian Prison officers' Union of Workers (the State Organisation).

(b) A declaration pursuant to section 71(2) of the Act the rules of the counterpart Federal body relating to the qualification of persons for membership are the same as or deemed to be the same as the qualifications of persons for membership within the State Organisation; and

(c) A declaration pursuant to section 71(4) of the Act that the officers [sic] within the counterpart Federal body are the same as or deemed to be the same as the offices within the State Organisation.

2 The State organisation recently entered into an arrangement to create a counterpart Federal body by forming a Western Australian Prison Officer Branch of the SPSF Group of the Community and Public Sector Union which is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). The reason the counterpart Federal body has been created is to enable access to the Federal industrial relations system which will enable the counterpart Federal body to represent the interests of current and future members who are national system employees within the prison service in the State of Western Australia.

3 The declarations are sought so that the State organisation can obtain a s 71 certificate to enable offices that exist in its rules to be held by persons holding corresponding offices in its counterpart Federal body. A certificate will also enable it to make an agreement with its Federal organisation relating to the management and control of funds.

4 Section 71 of the Act provides:

(1) In this section —

Branch means the Western Australian Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth);

counterpart Federal body, in relation to a State organisation, means a Branch the rules of which —

(a) relating to the qualifications of persons for membership; and

(b) prescribing the offices which shall exist within the Branch,

are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter; and

State organisation means an organisation that is registered under Division 4 of Part II.

(2) The rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same.

(3) The Full Bench may form the opinion that the rules referred to in subsection (2) are substantially the same notwithstanding that a person who is —

(a) eligible to be a member of the State organisation is, by reason of his being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart Federal body; or

(b) eligible to be a member of the counterpart Federal body is, for the reason referred to in paragraph (a), ineligible to be a member of the State organisation.

(4) The rules of a counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch.

(5) Where, after the coming into operation of this section —

(a) the rules of a State organisation are altered pursuant to section 62 to provide that each office in the State organisation may, from such time as the committee of management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's counterpart Federal body, holds the corresponding office in that body; and

(b) the committee of management of the State organisation decides and, in the prescribed manner notifies the Registrar accordingly, that from a date specified in the notification all offices in the State organisation will be filled in accordance with the rule referred to in paragraph (a),

the Registrar shall issue the State organisation with a certificate which declares —

(c) that the provisions of this Act relating to elections for office within a State organisation do not, from the date referred to in paragraph (b), apply in relation to offices in that State organisation; and

(d) that, from that date, the persons holding office in the State organisation in accordance with the rule referred to in paragraph (a) shall, for all purposes, be the officers of the State organisation,

and the certificate has effect according to its tenor.

(6) A State organisation to which a certificate issued under this section applies may, notwithstanding any provision in its rules to the contrary, make an agreement with the organisation of which the State organisation's counterpart Federal body is the Branch, relating to the management and control of the funds or property, or both, of the State organisation.

(7) Where a memorandum of an agreement referred to in subsection (6) is —

(a) sealed with the respective seals of the State organisation and the other organisation concerned; and

(b) signed on behalf of the State organisation and the other organisation by the persons authorised under their respective rules to execute such an instrument; and

(c) lodged with the Registrar,

the Full Bench may, if it is satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising, approve the agreement.

(8) Where the Full Bench approves an agreement under subsection (7) the Registrar shall —

(a) register the memorandum as an alteration to the rules of the State organisation; and

(b) amend, where necessary, the certificate issued to the State organisation under subsection (5) by declaring that the State organisation is, from the date of registration of the memorandum, exempted from compliance with such provisions of this Act and to such an extent as the Full Bench may, having regard to the terms of the memorandum, direct; and

(c) notify the State organisation in writing of the matters referred to in paragraphs (a) and (b).

(9) After the issue to a State organisation of a certificate or an amended certificate under this section —

(a) the rule referred to in subsection (5)(a) and a memorandum registered under subsection (8)(a) shall not be altered unless the alteration is approved by the Full Bench; and

(b) an alteration to any rule of the State organisation other than the rule referred to in paragraph (a) may be registered by the Registrar if he is satisfied that the rule as so altered is the same as a rule of the State organisation's counterpart Federal body; and

(c) every member of the State organisation's counterpart Federal body who is eligible to be a member of the State organisation shall, for all the purposes of this Act and of any award, industrial agreement or order, be deemed to be a member of the State organisation.

(10) Before granting approval to an alteration of the rule or memorandum referred to in subsection (9)(a), the Full Bench may require compliance by the State organisation with such conditions as the Full Bench considers appropriate.

5 On 4 November 2013, a delegate of the General Manager of the Fair Work Commission approved the creation of the Federal Branch of the Western Australian Prison Officers' Union by amendments to the CPSU Chapter C – SPSF Group Rules which inserted a new Schedule B – SPSF Group Rules for the Western Australian Prison Officers' Union (WAPOU) Branch: O90V-SPSF.

6 The State organisation seeks a declaration pursuant to s 71(2) of the Act to facilitate the orderly and efficient administration and coordination of the State organisation and its counterpart Federal body. A certificate will also enable it to make an agreement with its Federal organisation relating to the management and control of funds.

7 Prior to the issuance of a certificate, the State organisation's rules must be altered and the Full Bench issue a declaration pursuant to s 71 of the Act. An application to alter its rules is the subject of FBM 11 of 2013 which is made pursuant to s 71(5)(a) of the Act which requires the rules of the State organisation to be altered pursuant to s 62 of the Act to provide that each office in the State organisation may, from such time as the committee of management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's counterpart Federal body, holds the corresponding office in that body.

Are the qualifications of persons for membership of the State organisation and its counterpart Federal body substantially the same?

8 The first declaration sought by the State organisation is that its counterpart Federal body is the Community and Public Sector Union, SFSF Group, Western Australian Prison Officers' Union Branch. The second declaration sought is a declaration that the qualifications of membership of the State organisation and its counterpart Federal body are the same or can be deemed to be the same.

9 The qualification for membership rules of a State organisation are deemed to be the same as the qualifications for membership rules of the counterpart Federal body if in the opinion of the Full Bench they are substantially the same: s 71(2). 'Substantial' means what is 'real or of substance as distinct from ephemeral or nominal' or 'considerable' or 'in the main essentially': ***Re an application by the Civil Service Association*** (1993) 73 WAIG 2931; ***Re Bonnie*** [1986] 2 Qd R 80, 82.

10 The State organisation's Federal body is the Community and Public Sector Union. Pursuant to r 2 of Schedule B - WAPOU Branch rules of the CPSU – SPSF Group – Western Australian Prison Officers' Union (WAPOU) Branch, the name of the Branch is the CPSU, the Community and Public Sector Union, SPSF Group, Western Australian Prison Officers' Union Branch (WAPOU Branch). Under r 4.1 of the rules of the WAPOU Branch it is provided that the members of the WAPOU Branch shall be those persons employed in a prison or prison service in the State of Western Australia, who is not a member of, or eligible to be a member of the CPSU/CSA Western Australian Branch and who has been admitted to membership of the CPSU, SPSF Group and who is eligible for membership under r 2 – Constitution and Eligibility for Membership of the CPSU rules.

11 When regard is had to r 5 of the rules of the State organisation and r 4 of the rules of the WAPOU Branch, it is clear that the qualifications of persons for membership are substantially the same. Rule 5 of the rules of the State organisation provides that any person employed in a prison or prison service in the State of Western Australia, who is not a member of, or eligible to be a member of, the Civil Service Association of Western Australia (Incorporated) (the CSA), shall be eligible for admission to the State organisation. The Federal body of the CSA is also the Community and Public Sector Union.

Are the offices that exist in the counterpart Federal body the same as the offices of the applicant?

12 The third declaration sought by the State organisation is a declaration that the offices that exist in the counterpart Federal body are the same as or are deemed to be the same as the offices that exist in the State organisation.

Written submissions filed on behalf of the State organisation

13 Supplementary written submissions were filed on 20 December 2013, addressing the issue of whether the rules of the counterpart Federal body prescribing the offices which exist in the WAPOU Branch can be deemed to be the same as the rules of the State organisation prescribing the offices which exist in the State organisation. On behalf of the State organisation, the following submissions are made:

(a) Section 71(4) sets out the relevant criteria for deeming the offices rules to be 'the same' namely, 'for each office in the State organisation there is a corresponding office in the Branch'. The task is not one merely of seeing whether the names of the offices held in one organisation are the same or substantially the same as the offices in the other organisation. It is necessary for the Full Bench to consider at least the functions and powers of the office based upon a consideration of the similarity or otherwise of the content of the rules: ***Jones v Civil Service Association Inc***. [2003] WASCA 321; (2013) 84 WAIG 4 [35]. In this regard, it is likely to be relevant whether the powers and functions performed and the qualification for election and appointment are similar, but the terms of office and powers to remove officers are not relevant: ***Re The Construction, Forestry, Mining and Energy Union of Workers*** [2011] WAIRC 00422; (2011) 91 WAIG 1034 [20]. The test does not require the functions and powers provided for by the respective rules to be identical. The source of the test stated in ***Jones*** is the reference in the Act to the words 'corresponding office'. Nothing in s 71 requires the rules to be identical or the same in respect to the powers and functions of the offices. The purpose to which s 71 is directed is to ensure that if the requirement to hold elections is dispensed with, members are not deprived of the democratic right to elect those who will exercise the powers of management and influence in the Union. The Full Bench must be satisfied that the offices of the counterpart Federal body have sufficient equality of power and function with the State organisation's offices so as not to pervert the democratic and representative operation of the Union. Accordingly, the fact that offices exist within the rules and have the same titles will not be sufficient to satisfy the requirement that the offices are 'corresponding'.

(b) The word 'correspond' is defined in the Macquarie dictionary to mean 'to be similar or analogous; be equivalent in function, position, amount, etc'. The rules of the respective entities may differ in respect to the precise descriptions of the functions and powers of offices. For example, the rules of a Federal branch may provide for particular record keeping functions of an office so as to comply with specific requirements of Federal laws which may not apply to the State organisation. The fact that the State organisation's rules are silent or specify no requirement of the office to keep such records will not take that office outside the scope of what is 'corresponding'. In ***Re CFMEU***, the Full Bench articulated a test which required the powers and functions of each office to be 'the same or substantially the same' [37] and later a test of 'sufficient similarity' [44] – [48]. The former formulation goes further, and is a narrower test, than what ***Jones*** requires, namely similarity of functions and powers in the context of the rules. The practical application of the test in ***Re CFMEU*** suggests the test is more accurately described by reference to similarity of functions and powers rather than 'sameness'. For example, in ***Re CFMEU***, the Full Bench observed at [25] that the rules of the State organisation did not prescribe the duties of the management committee except in general terms, whereas the management committee of the counterpart Federal body had specific duties under the rules expressed in addition to the general obligation to manage and control the Union. This did not derogate from the finding at [36] that the offices of the State organisation and the Branch were respectively the management committee of the State organisation and the Branch. Further, the fact that particular offices had functions in addition to those which were common, or there were minor procedural differences in the exercise of powers and functions, did not detract from them being sufficiently similar and therefore corresponding offices: [44] – [48].

(c) The definition of 'office' under s 7(1) of the Act does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation. However, the Act does not define what a 'committee of management' is. A committee of management ordinarily refers to the body which manages an association, having collective control over the property of an organisation and charge of its destiny. The management committee has the same nature as a board of directors of a company. The officers of an association are generally a broader group than the committee of management. For example, officers may include paid executive or senior management staff, or members of the committee: Fletcher KL, *Non-Profit Associations*, Chapter 17 Management.

(d) The State organisation has a State Council and a State Executive Committee with their respective roles and functions set out in r 14. The State Council has 'the general control and conduct of the business of the Union and shall act on its behalf in all matters'. The State Executive 'shall have the control and conduct of the business of the Union and shall act on its behalf in all matters' between meetings of State Council and subject to the direction of State Council. Members of both the State Council and the State Executive Committee are elected: r 14(2) and r 14(3)(a)(ii). The State Executive comprises the President, Vice-President, Secretary, Assistant Secretary, Treasurer and three members. Each of these offices are 'offices' for the purposes of s 71 by virtue of definition (b) of 'office' in s 7(1) of the Act. The members of the State Executive Committee are also members of the State Council. While the Council has general control over the business of the Union and has power to direct the Executive, the Executive manages the business of the Union between Council meetings. The structure of the rules therefore suggests that the Executive is the committee of management in which case, all positions on the Executive are 'offices' for the purpose of s 71 by virtue of definition (a) of 'office' in s 7(1) of the Act.

(e) The WAPOU Branch has a Branch Council and Branch Executive with their respective roles and functions set out in r 13 and r 17 respectively. The Branch Council 'manages the affairs of the Branch' with power to 'control and manage the business and affairs of the Group'. The Branch Executive is expressly described as the committee of management of the Branch. Branch officers are the Branch President, the Branch Vice-President, the Branch Secretary, the Branch Assistant Secretary, the Branch Treasurer and Executive Councillors if the Branch rules so provide. Each of these offices is 'offices' for the purpose of s 71 by virtue of definition (b) of 'office' in s 7(1) of the Act. As the Branch Executive is the committee of management, all positions on the Branch Executive are 'offices' for the purpose of s 71 by virtue of definition (a) of 'office' in s 7(1) of the Act.

(f) The State Executive and the Branch Executive have substantially the same powers and functions. Both are the committee of management of each organisation. The State Executive has particular express functions:

(i) To appoint a returning officer: r 27;

(ii) Give notice of general meetings: r 29;

(iii) Receive written notices of objection to rule alterations: r 34(4);

(iv) Make press statements: r 34;

(v) Visit branches: r 44;

(vi) Grant emergency legal assistances subject to conveying the grant to State Council: r 40;

(vii) Determine the salary of the Secretary: r 42.

The Branch Executive powers are expressed in general terms only. The general powers conferred would ordinarily encompass the matters which are express functions of the State Council, except that the Branch Council powers are more extensively listed in the Federal rules. Two of the functions exercisable by the State Executive are reserved to the Branch Council: appointing a returning officer: r 13(ii)(vii) [sic] and fixing salaries: r 13(ii)(ix) [sic]. These differences do not alter the nature of the functions and powers of the State Executive and Branch Executive sufficiently to mean the offices which comprise the management committee are not equivalent and corresponding. The State Executive and Branch Executive function equivalently as management committees.

(g) In assessing whether the rules prescribing offices are 'the same', it is relevant to consider the content of the rules as a whole and in particular, the structure of the governance of the relevant entity. The case where particular functions are conferred on an office in one entity, but there is no express conferral of those functions on any office of the other entity, is different to the case where the specific functions are provided for but are conferred on a different office. In the former case, the nature of the office may well be sufficiently similar and the overall governance structure aligned and equal. In the latter case, the offices take on a different nature as does the governance. The rules of the State organisation and the WAPOU Branch fall into the former category. The number and title of offices are entirely aligned. There is no case where duties or functions of one office are performed by a different office in the other entity. This is a strong indicator of meeting the requirements for the rules to be deemed to be the same for the purposes of s 71(1)(b) and s 71(4) of the Act.

The functions and powers of the President/Branch President

(h) Both the State President and the Branch President have in common obligations to preside over all meetings of Council, Executive and membership; maintain and enforce rules; and ensure officers of the Union abide by the rules. Under the rules of the State organisation, the President must additionally ensure that expenditure is authorised by the members in meeting and must certify such authorisation. This is a minor difference in procedure rather than a substantive difference in powers or functions. Insofar as the rules of the WAPOU Branch require that the Branch President enforce Branch policies and ensure the rules of the WAPOU Branch are enforced, this function encompasses a responsibility for ensuring authorisation of expenditure as may be required by the rules and policies (including r 13(ii)iv) [sic] of the rules of the WAPOU Branch which empowers the Branch Council to authorise the disbursement of moneys). The only substantive difference is that the rules of the State organisation require the President to certify that such expenditure is duly authorised. The President has no additional power to authorise expenditure him or herself. Under the WAPOU Branch rules, the Branch President determines the dates of meetings of the Branch Council and Branch Executive in consultation with the Branch Secretary. Under the rules of the State organisation, this function is conferred upon the State Council. This is a minor procedural difference which does not alter the nature of the functions and powers on the office of President. The President of the State organisation has a casting vote. The President of the WAPOU Branch may exercise a deliberative vote at meetings of Branch Council and Branch Executive. Having a deliberative vote anticipates that the President may not exercise his or her ordinary vote at a meeting unless and until the remaining members have voted and if that vote was required to determine an issue. A casting vote is exercised only after the ordinary vote has been exercised and only if voting is then equal. A casting vote therefore cannot be exercised to determine a special resolution, and can only influence the passing of a resolution which would otherwise lapse for want of a simple majority. This represents a difference in respective voting rights and meeting procedure. It does not alter the scope of the President's functions or powers in the sense contemplated by Pullin J in ***Jones***. The casting vote is a procedural mechanism for breaking a tie in votes: Renton NE, *Guide for Meetings and Organisations*, (4th ed, 1985, para 813. It is a procedural provision. Even if the capacity to cast a vote is viewed as a 'power', which is not admitted, then the difference is minor. The fact that the State rules provide for the President to exercise a deliberative vote and the Federal rules provide the Branch President a casting vote was not an obstacle to finding the offices were corresponding in ***Re CFMEU***: CFMEU State r 25(1)(c) [22] and Federal r 43 [26]. It can also be said that the difference is analogous to the position of the State President in ***Re CFMEU*** having a power to decide upon a course of action in circumstances of urgency. That is, the State President had an

additional power not conferred on the Branch President with limited scope of operation so that it did not sufficiently alter the nature of the office so that the offices were not corresponding.

The functions and powers of the Vice-President/ Branch Vice-President

(i) Both the Vice-President and the Branch Vice-President are required to assist their respective President and Branch President in relation to the conduct of meetings only. The Vice-President takes the chair in the President's absence. The Branch Vice-President on the other hand is expressly required to assist the President in the performance of 'duties of Branch President' and perform the duties of Branch President or Branch Treasurer when those respective officers are absent or whenever requested by the President (in the case of the President's duties) or whenever instructed by the Branch Council or the Branch Executive. The Branch President's duties are set out in r 16.1 of the rules of the WAPOU Branch and include presiding at meetings but also extend to enforcing the rules and other matters. Whilst this represents a difference in the rules that are relevant to the office of Vice-President, the difference does not detract from the corresponding nature of the office of the Vice-President and the office of Branch Vice-President. This is because when the Branch Vice-President is performing duties in accordance with r 16.2(b) or 16.2(c) of the rules of the WAPOU Branch he or she is performing the duties and exercising the functions of the Branch President, the Branch Treasurer, the Branch Council or the Executive Branch depending on the duties that were requested or instructed to be performed. In practical terms, this means that the Vice-President can be called upon to perform an unlimited scope of duties. That does not mean that the role of Vice-President should be characterised as an office having unlimited duties or duties encompassing all those of the Branch President, Branch Treasurer, Branch Council and Branch Executive. The fundamental nature of the office of Vice-President is that his or her purpose is to assist the Branch President. In ***Re CFMEU***, the CFMEU Branch rules provided for the Divisional Branch Vice-President to carry out 'such duties as may be required by resolution of the Divisional Branch Council or the Divisional Branch Management Committee': r 44(i) [27]. This was not a requirement of the State rules. This did not however appear to have been a bar to the finding that the offices were 'corresponding'. The Full Bench said in ***Re CFMEU*** [44]:

> Whilst the Divisional Branch Vice-President of the Branch has duties which are in addition to the functions in common with the Vice-President of the State organisation, it is apparent that there is sufficient similarity in the shared central function of the offices which is to act in the place of President and the Divisional Branch Vice-President respectively.

The function and powers of the Secretary/Branch Secretary

(j) Rules 10, 21, 23 and 31 of the rules of the State organisation and r 16.4 of the rules of the WAPOU Branch provide for common duties and functions. These include the issuing of notices of meetings; attending general meetings, executive and council meetings; keeping minutes of meetings; receiving and attending to correspondence; receiving fees and contributions; maintaining books and records, and maintaining proper accounts; maintaining the register of members; discharging other duties as are assigned or allocated; and lodging such information as is necessary for the compliance with the Act. In addition, under the rules of the State organisation, the Secretary is expressly the custodian of movable property and is required to maintain a register of member attendances at meetings. The Branch Secretary is to be 'the executive officer' of the Branch and be responsible for administration and management of the Branch and its employees, be an ex-officio member of committees and fulfil various financial functions. Despite the different expressions of the scope of duties, the offices are sufficiently similar and are clearly of the same nature, having regard to the functions and powers so as to be 'corresponding' offices.

The functions and powers of the Treasurer/Branch Treasurer

(k) The Treasurer of the State organisation and the Branch Treasurer have in common the duty to present accounting reports and reports on the financial position to Council. The State rules express the duty of reporting to Council in more general terms of 'relevant reports', whereas the Branch rules refer to specific statements showing financial position and reports supplied by auditors. These are minor differences only. The State Treasurer has the obligation to 'keep a general oversight of the financial position of the Union'. This obligation is implicit in the requirement for the Branch Treasurer to report on the financial position of the Branch and is therefore not a substantive difference. The State Treasurer has an obligation to 'exercise proper control over the management of [the Union's] funds and ensure accounting records are kept in accordance with proper accounting principles and truly record and explain the financial transaction and financial position of the Union.' Again, while these duties are not expressed in r 16.3 of the rules of the WAPOU Branch, it is implicit that the requirement to 'furnish' statements showing the financial position that the Branch Treasurer will do these things. The Branch Treasurer cannot provide reports on the financial position of the Branch without keeping proper accounts from which those reports can be prepared. The Branch Treasurer cannot practically provide reports showing the financial position without recording and explaining the financial transactions that comprise those reports. The State organisation rules additionally require the Treasurer to present accounts at the annual general meeting and act with the President and two other members of the Executive in matters of urgency. These further functions do not significantly alter the nature of the office so as to detract from its similarity with the Branch Treasurer. The Branch Treasurer has an additional duty to perform the duties of the Branch President in the absence of both the Branch President and Branch Vice-President, and to perform particular duties when requested or instructed by the President, Council or Executive. This is not a difference in the office which detracts from its correspondence with the State Treasurer for the same reasons that are put forward in relation to the offices of Vice-President and Branch Vice-President.

The functions and powers of the Assistant Secretary/Branch Assistant Secretary

(l) Rule 21A of the rules of the State organisation and r 16.5 of the rules of the WAPOU Branch provide in each case that the Assistant Secretary and the Branch Assistant Secretary are to assist and act on behalf of their respective Secretaries when he or she is absent.

Finding – Is there a corresponding office in the WAPOU Branch for each office in the State organisation

14 Pursuant to s 71(4) of the Act, the rules of the counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch. An 'office' in relation to an organisation is defined in s 7(1) of the Act to mean:

(a) the office of a member of the committee of management of the organisation; and

(b) the office of president, Vice-President, secretary, assistant secretary, or other executive office by whatever name called of the organisation; and

(c) the office of a person holding, whether as trustee or otherwise, property of the organisation, or property in which the organisation has any beneficial interest; and

(d) an office within the organisation for the filling of which an election is conducted within the organisation; and

(e) any other office, all or any of the functions of which are declared by the Full Bench pursuant to section 68 to be those of an office in the organisation,

but does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation;

15 At the hearing of this matter on 16 December 2013, Mr Walker on behalf of the State organisation made a submission that the State Council and the Branch Council are the management committee of each of the organisations. A contrary submission is however put on behalf of the State organisation in its supplementary submissions filed on 20 December 2013. In our opinion, the submission put on behalf of the State organisation in its supplementary submissions is correct. We have some difficulty with the contention that the State Council and the Branch Council are management committees of the organisations within the meaning of 'office' in s 7(1) and s 71 of the Act. Such a construction in respect of the WAPOU Branch is contrary to the express provision in r 7.1 of the rules of the WAPOU Branch which provides that between meetings of Branch Council the management of the WAPOU Branch shall be vested in the Branch Executive which shall be the committee of management of the Branch and pending the first meeting of Branch Council shall have all such powers except the power to make, amend or rescind rules or any power expressly reserved to itself by decision of Branch Council.

16 Rule 14(1) of the rules of the State organisation provides:

> Subject to the Rules and decisions of a General or Special General Meeting, the State Council shall have the general control and conduct of the business of the Union and shall act on its behalf in all matters. Between meetings of the State Council and subject to the control of the State Council, the State Executive shall have the control and conduct of the business of the Union and shall act on its behalf in all matters. It shall have the daily management of the business of the Union. Without in any way limiting the generality of the foregoing, the State Executive shall have power to hear and determine all disputes between any two or more members relating to matters concerning the Union. It shall interpret the rules and shall determine all matters where the rules are silent and shall provide delegates to affiliated organisations in pursuance of all the objects of the Union.

17 Pursuant to r 14(2) of the rules of the State organisation, the State Executive consists of the President, Vice-President, Secretary, Assistant Secretary, Treasurer and three members. It also provides that members of the State Executive shall be elected four yearly. Under r 14(3)(a) of the rules of the State organisation, the State Council consists of the State Executive and delegates elected by each Branch on the basis of one delegate for each hundred members or part thereof.

18 Under r 7.3 of the rules of the WAPOU Branch, the Branch Executive consists of the Branch President, the Branch Vice-President, the Branch Secretary, the Branch Assistant Secretary, the Branch Treasurer and three Executive Members. Like the State Council, the Branch Council also consists of the Branch Executive Officers and Delegates to the Branch Council elected by each Sub-Branch on the basis of one delegate for each hundred financial members or part thereof: r 6.2 of the rules of the WAPOU Branch. The Branch Council is required to meet every two months or at such other times as Branch Council or Branch Executive shall deem necessary and shall be convened by notice signed by the Branch Secretary: r 6.3 of the rules of the WAPOU Branch. The State Council is also required to meet at least every second month: r 14(5)(a) of the rules of the State organisation. Under r 14(5)(b), a State Executive can determine when it meets. However, under r 7.2 of the rules of the WAPOU Branch, the Branch Executive is required to meet at least every two months between meetings of Branch Council and whenever required by the Branch President after consultation with the Branch Secretary.

19 Whilst the State Council has the overall general control and conduct of business of the union, which is subject only to the rules and decisions of General and Special General Meetings, it does not follow as a matter of construction of r 14 of the rules of the State organisation that the State Council is the management committee of the organisation. In our opinion, the proper construction of r 14(1) is that the Council is the supreme governing body of the organisation that has the power to direct and control the State Executive. As the State Executive is required to have the daily management of the business of the union it is the management committee of the union within the meaning of the definition of 'office' in s 7(1) and s 71 of the Act. Consequently, in our opinion, the only offices that need to be examined by the Full Bench in considering whether the offices that exist in the WAPOU Branch are the same as the offices of the State organisation are those of the offices in the State Executive and the Branch Executive.

20 We now turn to the powers and functions of each of the offices in the State Executive and the Branch Executive, which are as follows:

State Organisation	WAPOU Branch
President	Branch President
Vice-President	Branch Vice-President
Secretary	Branch Secretary
Assistant Secretary	Branch Assistant Secretary
Treasurer	Branch Treasurer
Three Executive members	Three Executive members

21 It is apparent from the scheme of the provisions of s 71 when read with the definition of 'office' in s 7(1) of the Act together with the provisions in the Act that deal with the subject matter of elections of office holders of an organisation (s 56, s 56A, s 57) and the provisions of s 71A which authorises a State organisation to adopt the rules of its counterpart Federal body, that it is intended that once a declaration is made by a Full Bench and a certificate is issued by the Registrar of the Commission under s 71(5) of the Act, a State organisation and its counterpart Federal body can effectively operate as one organisation. If they wish to do so they can jointly manage the property and funds of both organisations by entering into a memorandum of agreement with the counterpart Federal body under s 71(6) and s 71(7) of the Act relating to the management and control of the funds or property, or both, of the State organisation. It is also clear that by authorising persons holding office in a counterpart Federal body to hold office in a State organisation is that effectively the two organisations can be operated for many purposes as if the organisations were as one.

22 Where there is no difference between the functions and powers of the offices of both organisations, clearly the offices can be deemed to be the same. However, if the powers and functions of the offices of the State organisation and its counterpart Federal body are not sufficiently similar, a decision or decisions of the management committees of the organisations could in some circumstances be challenged as invalid. If, for example, a State management committee and its counterpart Federal body committee of management sit at the same time with the same officers holding office in each committee and make decisions that collectively affect the members and/or property or funds of both organisations, the question is likely to arise if the issue is to be dealt with differently or by different persons holding offices under the rules, which rules do they have to comply with in making decisions that affect members of both organisations, if it is not possible to comply with the rules of both organisations.

23 Whilst Pullin J in ***Jones*** at [35] found that when determining whether the offices that exist in a counterpart Federal body are the same as the offices in the State organisation it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules, his Honour did not analyse how this task is to be conducted. Nor did his Honour formulate any principles upon which similarity of powers and functions of offices should be assessed. Section 71(4) of the Act deems offices of the State organisation to be the same as offices in the counterpart Federal body if there is a corresponding office for each State office in the counterpart Federal body. For an office to 'correspond', its functions and powers must be similar. To determine whether there is similarity, the functions and powers must have a degree of similarity that is sufficient to enable a finding to be made that offices can be deemed to be the same and thus correspond within the meaning of s 71(4) of the Act.

24 In ***Re CFMEU*** after comparing each office of the State organisation and its counterpart Federal body, the Full Bench was unable to be satisfied that there was sufficient similarity in the functions and powers of the some offices to be sufficiently similar, or the same or substantially the same [37]. In respect of other offices the Full Bench found there was sufficient similarity in the function and powers of offices to form the requisite opinion [44], [45], [46], [47] and [48].

25 In assessing similarity, it is also necessary to assess whether a conflict arises between the functions and powers of the duties of each office of the State organisation and each office that is not a 'corresponding' office in the counterpart Federal body but corresponds to another office. This issue arose in ***Re CFMEU***. One of the reasons why the Full Bench in that matter found that the offices of the President of the State organisation and the Divisional Branch President could not be deemed to be the same is that the Divisional Branch President had some of the powers and functions of a treasurer which were in part similar to the powers of the Treasurer of the State organisation [38]. In these circumstances, a clear conflict arose as the functions and powers of one office could be performed by the holder of another office.

26 Where an office of a State organisation is said to correspond with an office of its counterpart Federal body, no conflict will usually arise if each office has the same or substantially similar functions and power. Nor will any conflict usually arise if any of the offices of the counterpart Federal body have additional functions and powers that are not comparable to the powers and functions of any office in the State organisation. In such a case, no conflict arises if those other functions and powers are simply 'additional'. For example, some differing additional obligations arise out of the fact that the Act and the *Fair Work (Registered Organisations) Act* impose different regulatory obligations on the organisations.

27 When these principles are applied the following findings can be made in respect of each of the offices in the State organisation and the WAPOU Branch.

President and Branch President

28 Pursuant to r 19 of the rules of the State organisation, the President is required to preside at all meetings of the union to maintain order and administer the rules impartially, and to the best of his/her ability see that the officers of the union attend strictly to their respective duties and see that all expenditure is first authorised at regular meetings of the members and duly certified by him. The President has an ordinary vote (deliberative) and where the voting is equal has a casting vote. Thus, the President has two votes when there is a tie. The Branch President however only has one vote and that is deliberative.

29 The duties of the Branch President are set out in r 16.1 of the rules of the WAPOU Branch. Rule 16 provides as follows:

> The Branch President shall:
>
> (a) preside at all meetings of Branch Council, Branch Executive and any meetings in the WAPOU Branch that they attend, and sign the minutes thereof;

(b) enforce the rules, Union and WAPOU Branch policies and standing orders, and have control of meetings at which he or she presides, and shall use all necessary power to secure and enforce order and expedition in the conduct of the business and good order of the members thereat;

(c) in consultation with the Branch Secretary determine the date, time and place of meetings of Branch Council and Branch Executive whenever such date, time and place has not been determined by Branch Council or Branch Executive;

(d) exercise a deliberative vote if he or she so desires at meetings of Branch Council and Branch Executive;

(e) ensure, as far as possible, that the rules of the WAPOU Branch are performed and observed by officers and members of the WAPOU Branch;

(f) request and receive an explanation from any officer or member of the WAPOU Branch in any case where the Branch President believes that the rules of the WAPOU Branch have not been performed or observed and report thereon to Branch Executive and Branch Council;

(g) generally act to safeguard the reputation, unity, autonomy and property of the WAPOU Branch;

(h) be an ex-officio member of all committees of the WAPOU Branch;

(i) act in conjunction with the Branch-Secretary and at least two other members of the Branch Executive in all matters of urgency.

30 An irregularity could arise if the Executive and the Branch Executive convene a joint meeting to consider and determine matters that are common to the members of both organisations as the Branch President has under the WAPOU Branch rules a deliberative vote and as President pursuant to the rules of State organisation rules, he or she has an ordinary vote and a casting vote. Thus, under the rules of the WAPOU Branch the holder of the office would have one vote and under the rules of the State organisation they would have two votes if there is a tie. If there is a meeting of both executives at the same time, and six members of the Executive are present including the President, and a vote is taken and the vote is split 3/3, under the rules of the State organisation the person who holds the office of Branch President and President could act under the State rules to exercise a casting vote to resolve the matter at 3/4 or 4/3. However, such a course of action would not be open under the rules of the WAPOU Branch, the vote would remain tied at 3/3.

31 The voting rights and duties of President and Branch President in this matter are different to the voting rights of the offices of President and Divisional Branch President in ***Re CFMEU***. In that matter, the Divisional Branch President did not have a 'casting' vote as well as a deliberative vote, the holder of that office had a 'casting vote only' ([26] r 43(d)), whereas the President of the State organisation of the CFMEU had a deliberative vote. Whilst the right to vote was different both offices only had one vote.

32 Whilst a conflict could also be said to arise under r 16.1 of the rules of the WAPOU Branch, which requires the Branch President safeguard the property of the WAPOU Branch. The President of the State organisation has no such role. In fact, the Secretary of the State organisation under r 21 of the rules of the State organisation is the custodian of all movable property of the union. As r 16.1 only applies to the property of the WAPOU Branch no conflict with the requirements of the rules of the State organisation is likely to arise

33 There are functions that the Branch President has that the President of the State organisation does not have. These arise under r 16.1(c) of the rules of the WAPOU Branch. They are, determining the date, time and place of meetings of the Branch Council and Branch Executive, being an ex officio member of all committees of the WAPOU Branch and acting in conjunction with the Branch Secretary and at least two other members of the Branch Executive in all matters of urgency. Also, under r 16.1(f) of the rules of the WAPOU Branch, the Branch President is empowered to request and receive an explanation from any officer or member of the WAPOU Branch in any case where the Branch President believes that the rules of the WAPOU Branch have not been performed or observed and report thereon to the Branch Executive and Branch Council. The President of the State organisation has no such role. Under r 11(3) of the rules of the State organisation, a member who wishes to make a complaint against another member for alleged conduct in breach of the rules must lodge the complaint in writing at the registered office, addressed to the Secretary. None of these powers and functions are material as they can all be characterised as additional duties of the Branch President that do not conflict with the powers and functions of the President or any other office of the State organisation.

34 Whilst there are some functions and powers of the President and the Branch President that are similar or the same, such as presiding at meetings, maintaining and enforcing rules and ensuring officers of the organisations abide by the rules, the voting rights of the Branch President conflict with the requirements of the rules of the State organisation. Thus, we are of the opinion that the offices of President and Branch President cannot be deemed to be the same.

Vice-President and Branch Vice-President

35 In the rules of the State organisation, the Vice-President is required to assist the President to conduct all meetings, and during his/her absence take the chair. However, the Branch Vice-President has some additional powers, functions than that of the Vice-President. Rule 16.2 of the rules of the Branch provides:

The Branch Vice-President shall:

(a) assist the Branch President in the performance of the duties of the Branch President;

(b) in the absence of the Branch President, or whenever the Branch President requests, or Branch Council or Branch Executive instructs, perform the duties of the Branch President or such of those duties as may be specified in each request or instruction;

(c) in the absence of the Branch Treasurer, or whenever Branch Council or Branch Executive instructs, perform the duties of the Branch Treasurer or such of those duties as may be specified in each request or instruction; and

(d) attend all meetings of the Branch Council and Branch Executive.

36 It is apparent from the powers and functions contained in r 16.2 that the Branch Vice-President, unlike the State Vice-President, can carry out and perform the functions of the Branch President. He or she can also carry out the functions of the Branch Treasurer. This function cannot in our opinion be characterised as an additional function that does not conflict with the functions and powers of the offices of President and Vice-President.

37 Thus, if at a meeting of the Branch Executive and the Executive the Branch Vice-President performs some of the functions of the Branch President as the Branch President is absent or performs the functions of the Branch Treasurer because the Branch Treasurer is absent, and decisions are made which relate to the property of the State organisation an argument could arise that the Branch Vice-President was not authorised by the rules of the State organisation to carry out those functions despite the fact if a s 71 declaration had been made would enable the Branch Vice-President to also carry out the roles and functions of the Vice-President. However, the functions and powers of the Vice-President do not enable the Vice-President to carry out all of the functions and powers of the President or the Treasurer. The Vice-President has a very limited role under the rules of the State organisation. In the absence of the President he or she is only authorised to take the chair at all meetings.

38 For these reasons, we are not satisfied that the office of Vice-President and Branch Vice-President can be said to be the same or deemed to be the same.

Secretary and Branch Secretary

39 The powers, functions and duties of the Secretary of the State organisation are to be found in r 21 and r 23 of the rules of the State organisation as the Secretary is also a finance officer of the State organisation. Rule 21 provides:

> The Secretary's duty is to issue notice of all meetings of the Union, to attend same and ensure fullest minutes of the proceedings are recorded, receive and attend to all correspondence to receive all fees and contributions payable by members. He/she shall keep all documents and books, save those documents and books necessarily retained and maintained by the Treasurer, and shall be custodian of all movable property of the Union. The Secretary shall forward to the Registrar each year the returns required by 'The Act'. He/she shall keep the register of all members attendance, which shall be signed by each member before taking his seat. The Secretary shall further discharge such other duties as may be allotted to him/her from time to time and generally pay the strictest attention to the interests of the Union. The Secretary shall be permitted to operate imprest accounts.

Rule 23 provides:

> (1) The Finance Officials of the Union are the persons who:
>
> (a) Are entitled to participate directly in the financial management of the Union, or
>
> (b) Are elected to the Office of Treasurer and are entitled to participate directly in the financial management of the Union.
>
> (2) Each Financial Official is to ensure the Union keeps and maintains accounting records as required by Rule 22 : Treasurer and the Act.

40 The rules of the Branch Secretary are set out in r 16.4 of the rules of the WAPOU Branch. Rule 16.4 provides:

> The Branch Secretary shall:
>
> (a) be the executive officer of the WAPOU Branch and, subject to Rule 6, be responsible for the administration of the WAPOU Branch, the management of the Branch Office and the direction of the employees of the WAPOU Branch;
>
> (b) attend all General Meetings and meetings of the Branch Council or Branch Executive;
>
> (c) attend to and keep a copy of all correspondence;
>
> (d) keep minutes of all meetings and record business transacted by the WAPOU Branch, circulate such minutes in draft where required and present a true copy of minutes at a subsequent meeting of the same body;
>
> (e) convene all General Meetings and summon members of the Branch Council and Branch Executive to all meetings;
>
> (f) keep a register of all members of the WAPOU Branch and the Sub-Branch to which members are assigned;
>
> (g) conform to all the requirements of legislation required to be observed by the WAPOU Branch and where necessary and appropriate submit industrial disputes to conciliation and arbitration in accordance with the practices and procedures set out in the legislation;
>
> (h) keep proper books of account of the WAPOU Branch and see to the preparation of an annual balance sheet and statement of receipts and payments and income and expenditure disclosing the true financial position of the WAPOU Branch and submit same together with all books and vouchers or records required for audit to the WAPOU Branch and in particular:
>
> (i) be accountable for all monies received by the WAPOU Branch;
>
> (ii) ensure prompt payment of WAPOU Branch monies into the appropriate bank account of the WAPOU Branch;
>
> (iii) be accountable for all monies expended p-om Branch funds;
>
> (iv) ensure cheques drawn upon the Branch fund in payment of accounts are correct to be paid and that all cheques are countersigned;
>
> (v) not make any disbursement directly out of monies received before being banked;
>
> (vi) produce any books and records for inspection at all reasonable times when demanded by the Branch Council;
>
> (vii) produce any financial records for inspection when demanded by the Auditor or Branch Treasurer;
>
> (i) discharge all such other duties and services as may be assigned by the Branch Council or Branch Executive;

(j) not pay, lend or otherwise appropriate any of the funds of the Branch for any cause or purpose whatsoever unless so authorised by the Branch Council;

(k) not make any disbursement directly out of monies received before being paid into the bank.

(1) be an ex-officio member of all committees of the WAPOU Branch; and

(m) act in conjunction with the Branch President and at least two other members of the Branch Executive in all matters of urgency.

41 Rule 23 of the rules of the State organisation provides that the Secretary as Financial Official is to ensure the union keeps and maintains accounting records as required by r 22 – Treasurer. It is apparent when one reads r 22 together with r 16.4 of the rules of the WAPOU Branch, that it could be said that the functions, powers and duties of the Secretary and the Branch Secretary are in this respect substantially similar.

42 However, there are three other matters which arise in relation to comparison of the functions and powers of the Secretary which require consideration. Firstly, under r 16.4 of the rules of the WAPOU Branch, the Branch Secretary is an ex officio member of all committees of the WAPOU Branch. There is no equivalent power under the rules of the State organisation. However, that is not, in our view, material as this function could be said to be an additional function that does not conflict with the powers and functions of the office of Secretary or any other office. The second matter is that the Branch Secretary under r 16.4(m) of the rules of the WAPOU Branch is empowered to act in conjunction with the Branch President and at least two other members of the Branch Executive in all matters of urgency. This provision is also not material as the quorum for a meeting of State Executive under r 14(4) of the rules of the State organisation is four, so that it can be contemplated that the State Executive at a joint meeting with the Branch Executive could make decisions when it is comprised solely of the President, the Secretary and two other members of the Executive.

43 The third issue is that r 14(7) and r 25(c) of the rules of the State organisation contemplate that persons holding office as Secretary and Assistant Secretary may not be members of the State organisation. Pursuant to r 25(c), a person is prohibited from holding office, except if they hold the office of Secretary and Assistant Secretary, unless they are members of the union and r 14(7) provides that all members of the State Council and State Executive, with the exception of the Secretary, shall be members of the union. Pursuant to r 23.3 of the rules of the WAPOU Branch, the Branch Secretary and the Branch Assistant Secretary can be held by a member of the WAPOU Branch or a person who is not a member. Rule 23.3 contemplates that if a person from outside the WAPOU Branch is elected to either position they will be subsequently deemed to possess all the rights and privileges of a member of the WAPOU Branch. Consequently, r 23.3 contemplates that a person who as a member of the WAPOU Branch could be elected as Branch Secretary or Branch Assistant Secretary and where such a person is a member if the application for a s 71 declaration is successful this would enable someone who is a member of the Branch to hold the office of Branch Secretary or Branch Assistant Secretary and also hold the office as Secretary or Assistant Secretary of the State organisation. However, as the person holding the office of Branch Secretary would only be a member of the WAPOU Branch and not a member of the State organisation, no conflict would arise.

44 For these reasons, we are satisfied that the offices of the Secretary and the Branch Secretary can be deemed to be the same.

Assistant Secretary and Branch Assistant Secretary

45 The role of the Assistant Secretary is set out in r 21A of the rules of the State organisation and r 16.5 of the rules of the WAPOU Branch. It is clear that both of those rules provide the same powers, functions and duties for each of those offices. The duties of the Assistant Secretary and Branch Assistant Secretary are to in each case assist the Secretary and the Branch Secretary with the discharge of their duties and to act on their behalf when he or she is absent. Thus, it is clear that the functions and powers of the Assistant Secretary and the Branch Assistant Secretary can be deemed to be the same.

Treasurer and Branch Treasurer

46 Rule 22 of the rules of the State organisation provides that the powers, duties and functions of the Treasurer are as follows:

(1) The Treasurer shall:

(a) Keep a general oversight of the financial position of the Union and exercise proper control over the management of its funds and ensure accounting records are kept in accordance with proper accounting principles and truly record and explain the financial transactions and financial position of the Union.

(b) Present to State Council appropriate accounting reports including the status of funds and financial position of the Union or other relevant reports as required by State Council.

(c) At each Annual General Meeting, the Treasurer shall give a full account of the year's operations, providing a balance sheet signed by the Auditors.

(d) The Treasurer shall produce all books, vouchers and other papers of his/her office as required by the Auditors or the State Council.

(e) Be entitled to call for a full audit at any given time.

47 Under r 16.3 of the rules of the WAPOU Branch, the powers, duties and functions of the Branch Treasurer are as follows:

The Branch Treasurer shall:

(a) furnish to the Branch Council at each ordinary meeting a statement showing the financial position of the WAPOU Branch;

(b) present to the Branch Council such reports as may have been supplied by the Auditors;

(c) in the absence of the Branch President and the Branch Vice- President, or whenever the Branch President requests, or Branch Council or Branch Executive instructs, shall perform the duties of the Branch President or such of those duties as may be specified in each request or instruction; and

(d) attend all meetings of the Branch Council and Branch Executive.

48 With the exception of the duties and functions conferred by r 16.3(c) of the rules of the WAPOU Branch, the duties of the Branch Treasurer are substantially similar to the duties, powers and functions of the Treasurer. However, under r 16.3(c) the Branch Treasurer is empowered in the absence of the Branch President and the Branch Vice- President, or whenever the Branch President requests, or Branch Council or Branch Executive instructs, to perform the duties of the Branch President. Such a power is not conferred on the Treasurer of the State organisation. In our opinion, this function conflicts with the powers and functions of the State Treasurer who is not empowered to act as the President.

49 For these reasons, we are of the opinion that the office of Treasurer and Branch Treasurer cannot be deemed to be the same.

Executive Members and Branch Executive Members

50 The rules of the State organisation do not prescribe any powers, duties or functions of the Executive Members. However, as the Executive Members are members of the Executive it follows therefore that the Executive Members are required to participate in meetings of the State Executive and vote on decisions involving the control and conduct of the business of the union and matters involving the daily management and business of the union.

51 Rule 16.6 and r 16.7 of the rules of the WAPOU Branch set out the duties of the Branch Executive Members. Rule 16.6 and r 16.7 provide as follows:

> The Branch Executive Members shall attend all meetings of the Branch Council and Branch Executive.
>
> With the exception of the Branch Secretary, where a Branch Officer is unable to perform a duty of office, the Branch Executive may authorise one of the Executive Members or member of Branch Council to perform that duty.

52 As r 16.7 contemplates that a Branch Executive Member can perform a duty of office of any of the Branch offices, with the exception of the Branch Secretary, for the reasons set out in [37] and [48] in respect of the offices of Vice-President and Branch Vice-President; and Treasurer and Branch Treasurer, we are of the opinion that the office of Executive Members are not the same, nor can they be deemed to be the same as the offices of the Branch Executive Members.

Conclusion

53 For these reasons, we are of the opinion that FBM 10 of 2013 should be dismissed.

54 Whilst application FBM 11 of 2013 came on for hearing before the Full Bench on 16 December 2013, we are of the opinion that FBM 11 of 2013 should be adjourned sine die. The rules of an organisation should not be altered to enable the holders of an office in a counterpart Federal body to hold an office in a State organisation until declarations are made under s 71 of the Act.

2014 WAIRC 00007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS **APPLICANT** **-and-** (NOT APPLICABLE) **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DATE	MONDAY, 13 JANUARY 2014
FILE NO.	FBM 10 OF 2013
CITATION NO.	2014 WAIRC 00007

Result	Dismissed
Appearances	
Applicant	Mr J Walker, Mr J Welch and Mr A Smith

Order

This matter having come on for hearing before the Full Bench on 16 December 2013, and having heard Mr J Walker, Mr J Welch and Mr A Smith on behalf of the applicant and reasons for decision having been delivered on 13 January 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the application be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2014 WAIRC 00009

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	MONDAY, 13 JANUARY 2014
FILE NO.	FBM 11 OF 2013
CITATION NO.	2014 WAIRC 00009

Result	Adjourned sine die
Appearances	
Applicant	Mr J Walker, Mr J Welch and Mr A Smith

Order

This matter having come on for hearing before the Full Bench on 16 December 2013, and having heard Mr J Walker, Mr J Welch and Mr A Smith on behalf of the applicant and reasons for decision having been delivered on 13 January 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the application be adjourned sine die.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Matters dealt with—

2014 WAIRC 00052

A STAY OF OPERATION OF THE ORDER IN MATTER NO. U 45 OF 2013 WHICH IS THE SUBJECT OF FBA 17 OF 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00052
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	TUESDAY, 28 JANUARY 2014
DELIVERED	**:**	FRIDAY, 31 JANUARY 2014
FILE NO.	**:**	PRES 4 OF 2013
BETWEEN	**:**	MARCUS JOHN GRIFFITHS AND ANGELINE GRIFFITHS TRADING AS MIDWEST TOP NOTCH TREE SERVICES
		Applicants
		AND
		JEREMY FREEMAN
		Respondent

CatchWords	**:**	Industrial law (WA) - application to stay operation of an order - special circumstances considered - decision stayed in part
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 49, s 49(11)
Result	**:**	Order made
Representation:		
Applicants	**:**	Mr M J Griffiths
Respondent	**:**	Ms A Tapsell, as agent

Case(s) referred to in reasons:

John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers (2005) 85 WAIG 3918

Seacode Nominees Pty Ltd as trustee for the Stonehouse Family Trust v Penfold [2005] WAIRC 03015; (2005) 85 WAIG 3926

Reasons for Decision

1 This is an application made under s 49(11) of the *Industrial Relations Act 1979* (the Act). The applicants seek an order that the operation of order 4 of a decision made by the Commission on 17 October 2013, in application U 45 of 2013 be stayed, pending the hearing and determination of appeal FBA 17 of 2013 against that decision.

2 The decision of the Commission made in U 45 of 2013 on 17 October 2013 contained orders and a declaration: [2013] WAIRC 00871. These were as follows:

> 1. ORDERS THAT the name of the respondent be deleted and that Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services be substituted in lieu thereof.
> 2. ORDERS THAT application U 45 of 2013 be and is hereby accepted out of time.
> 3. DECLARES THAT the dismissal of Jeremy Freeman by the respondent was unfair and that reinstatement or re-employment is impracticable.
> 4. ORDERS THAT the respondent pay Jeremy Freeman compensation in the sum of $3,240 gross within 14 days of the date of this order.

3 Attached to the application for a stay of the decision is a statutory declaration made by one of the applicants, Ms Angeline Griffiths. The statutory declaration was made on 7 November 2013. In the statutory declaration Ms Griffiths states that the respondent's claim is untrue and the Commissioner erred in law by failing to be unbiased and did not act in a manner equitable to both parties. Ms Griffiths also states that the respondent failed to provide any proof to substantiate his claim. The matters set out in the statutory declaration do not address any reasons why the stay should be made, but simply reiterates a summary of the grounds of appeal which are set out in a notice of appeal filed on 7 November 2013.

4 After the application for a stay was filed, programming directions were made which were served on the respondent to the application. One of the directions given was that any evidence in support of or in opposition to the application for a stay of the decision was to be by way of an affidavit filed and served by the relevant party by 3 pm on Friday, 22 November 2013. The directions also notified the parties that the application for a stay would be set down for hearing by video or telephone link on Monday, 2 December 2013.

5 On 19 November 2013, Ms Tapsell, the agent for the respondent, filed a notice of answer and counter-proposal to the application for a stay. In the notice of answer, it is pleaded that the respondent opposes an application for a stay of the order on grounds that there was sufficient evidence to establish that the respondent was unfairly dismissed and that the grounds of appeal have no merit.

6 On 29 November 2013, the application for a stay was adjourned by consent as the respondent and his agent had recently relocated from Geraldton in Western Australia to Brisbane in Queensland and they required time to prepare for the hearing of the application of a stay. The application for a stay was then relisted for hearing on 28 January 2014.

7 At the hearing of the application for a stay, Mr Griffiths appeared on behalf of the applicants. Mr Griffiths made a submission that the grounds of appeal raise a strong case that the decision of the Commission at first instance should be set aside. He also made a submission that there are special circumstances which exist to justify an order that order 4 of the decision be stayed. The circumstances are that:

> (a) The respondent is not an Australian resident. He a citizen of New Zealand;
> (b) If the appeal is successful and no stay is granted there is no guarantee that the respondent will repay the sum of money required to be paid in accordance with order 4;
> (c) The respondent can leave Australia whenever he chooses and if so the applicants would not be able to recoup the funds paid to him rendering the appeal nugatory;
> (d) In any event it would be difficult to recoup funds from the respondent even if he does not leave Australia as he resides in Brisbane.

8 In response to the applicants' submission, Ms Tapsell stated that the respondent is a resident of Australia for tax purposes. She also made a submission that the appeal has no merit.

Consideration - Should an order be made staying the decision?

9 The principles that apply in deciding whether or not to order a stay of a decision are well established. The discretionary grounds upon which a stay will be granted pending the determination of an appeal required the demonstration of special circumstances as there must be justification for departure from the ordinary rule that a successful litigant is entitled to the fruits of the judgment. Therefore, something special or unusual is required before a stay will be granted. The relevant principles were summarised by Ritter AP in ***John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers*** (2005) 85 WAIG 3918.

> 34 In *Federal Commissioner of Taxation v Myer Emporium Limited (No 1)* [1986] 160 CLR 220, Dawson J at 222 said that the discretion to "*order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal…. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory…. Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think,*

exist where for whatever reason, there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed".

35 These observations were cited with approval by Pullin J in *Commonwealth Bank v Bouwman* [2003] WASC 205 and by Anderson J, with whom Pidgeon J agreed, in *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at pages 89-90. In the latter case, Anderson J said:-

> "*… unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the High Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal would be futile.*"

36 The reasons of Anderson J were cited with approval by Sharkey P in *G & M Partacini t/as Bayswater Powder Coaters v SDAE* (2005) 85 WAIG 51. In that decision, Sharkey P emphasised that the jurisdiction to grant a stay should also be exercised having regard to the requirements of s26 of *the Act* and the "*need to prevent there being any more uncertainty than is necessary, in industrial matters*".

37 In *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, the court (Murray and Parker JJ) at 311 distilled generally applicable principles in relation to applications for stays of orders. These principles were set out as follows:-

> "*• The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.*
>
> *• It is for the applicant for a stay to move the court to a favourable exercise of its discretion.*
>
> *• It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.*
>
> *• The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.*
>
> *• If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.*
>
> *• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.*"

38 Accordingly, in my opinion, the primary focus is upon the consequences of a stay being granted or not granted. Where, for example, the absence of a stay would render the appeal nugatory or futile, special circumstances warranting the grant of a stay may exist. It will also be necessary to consider matters such as the arguability of the appeal and the balance of convenience. The parties, in their submissions, emphasised that the Commission should consider whether there is a serious question to be tried and where the balance of convenience would lie. In considering the latter consideration, the circumstances of the respondent or any other affected party, such as Mr Kavanagh, can be important.

10 In ***Seacode Nominees Pty Ltd as trustee for the Stonehouse Family Trust v Penfold*** [2005] WAIRC 03015; (2005) 85 WAIG 3926, Ritter AP considered an application for a stay of a decision of the Commission on grounds that the applicant could face liquidation because it did not have the financial capacity to satisfy the orders made by the Commission at first instance. After considering this submission Ritter AP found it was necessary to consider not only the applicant's financial circumstances but also other matters, including the arguability of the appeal and the interests of the respondent.

11 In this matter, it is not the financial circumstances of the applicants that are in question, but the circumstances of the respondent. The applicants say that as the respondent is not an Australian citizen and resides in Queensland, it is likely that if the order for compensation made by the Commission is not stayed and the appeal is successful, the applicants may not be able to recover payment of the amount paid in accordance with the order.

12 The first requirement of s 49(11) of the Act is that an appeal must be instituted to the Full Bench under s 49. I am satisfied that this has occurred. Secondly, the stay application must be filed by a person or persons who have a sufficient interest to make the application. Again, I am satisfied that as the applicants are the parties against whom the order to pay was made, they have sufficient interest to make the application for a stay.

13 It is not appropriate for me to reach any conclusion about the strength of the appellant's case on appeal, I am only required to be satisfied there is some issue of substance to be raised.

14 The grounds of the appeal have not been clearly drafted in the notice of appeal. However, having said that, the grounds which appear to be addressed in the document titled "Grounds for Appeal", which is set out largely in the form of a narrative, appear to be as follows:

(a) The procedure adopted by the Commission was biased;

(b) The Commission failed to have regard to the evidence given on behalf of the appellant and accepted evidence given on behalf of the respondent that was unsupported by any other evidence;

(c) The Commission failed to provide a fair hearing.

15 Having read the reasons for decision given by the Commission on 15 October 2013 ([2013] WAIG 00864), it is my view that, without hearing argument, the grounds do not appear to be reasonably arguable.

16 Notwithstanding my opinion in respect of the grounds of appeal, I am satisfied that special circumstances exist for the granting of a stay of order 4 of the decision. As the respondent now resides in Queensland there is a risk that it would not be possible to restore the applicants substantially to their former position if the appeal is successful and a stay is not granted. However, if the respondent still resided in Geraldton, I would not have been persuaded that an order for a stay should be granted.

2014 WAIRC 00071

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARCUS JOHN GRIFFITHS AND ANGELINE GRIFFITHS TRADING AS MIDWEST TOP NOTCH TREE SERVICES
	APPLICANTS
	-and-
	JEREMY FREEMAN
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 4 FEBRUARY 2014
FILE NO.	PRES 4 OF 2013
CITATION NO.	2014 WAIRC 00071

Result	Order made
Appearances	
Applicants	Mr M J Griffiths
Respondent	Ms A Tapsell, as agent

Order

This matter having come on for hearing before me on 28 January 2014, and having heard Mr M J Griffiths on behalf of the applicants and Ms A Tapsell, as agent on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

Order 4 of the decision made by the Commission on 17 October 2011 in application U 45 of 2013 [2013] WAIRC 00871 is stayed pending the hearing and determination of appeal FBA 17 of 2013 or until further order.

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

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2014 WAIRC 00062

APPLICATION TO VARY ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION OF WA (INC) AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 64 OF 2013
CITATION NO.	2014 WAIRC 00062

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	No appearance

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and by way of consent by letter dated 13 December 2013 there will be no appearance for National Electrical & Communications Association of WA (Inc) and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Electrical Contracting Industry Award R 22 of 1978* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 12. - Overtime: Delete paragraph (e) of subclause (2) and insert in lieu thereof the following:

(e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid $13.20 for such meal and for a second or subsequent meal if so required.

(ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.

(iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, $13.20.

2. Clause 18. - Special Rates and Provisions: Delete subclauses (1), (2), (3), (4) and (5) and insert in lieu thereof the following:

(1) Height Money: An employee shall be paid an allowance of $2.65 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.

(2) Dirt Money: An employee shall be paid an allowance of 54 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 91 cents per hour.

(4) Confined Space: An employee shall be paid an allowance of 64 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(5) Diesel Engine Ships: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 91 cents per hour whilst so engaged.

3. Clause 18. - Special Rates and Provisions: Delete subclause (7) and insert in lieu thereof the following:

(7) Hot Work: An employee shall be paid an allowance of 54 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

4. Clause 18. - Special Rates and Provisions: Delete subclauses (9), (10), (11) and (12) and insert in lieu thereof the following:

(9) Percussion Tools: An employee shall be paid an allowance of 34 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(10) Chemical, Artificial Manure and Cement Works: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of $13.50 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(11) Abattoirs: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $18.10 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(12) Phosphate Ships: An employee shall be paid an allowance of 81 cents for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

5. Clause 18. - Special Rates and Provisions: Delete subclause (19) and insert in lieu thereof the following:

(19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.70 per week in addition to their ordinary rate.

6. Clause 18. - Special Rates and Provisions: Delete subclause (21) and insert in lieu thereof the following:

(21) Nominee: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of $67.00 per week.

7. Clause 19. – Car Allowance: Delete this Clause and insert in lieu thereof the following:

19. – CAR ALLOWANCE

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of 79.4 cents per kilometre travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

8. Clause 20. – Allowance for Travelling and Employment in Construction Work: Delete paragraph (a) of subclause (2) and insert in lieu thereof the following:

(a) On jobs measured by radius from the General Post Office, Perth situated within the area of:

		Per Day
		$
(i)	Up to and including 50 kilometre radius	17.15
	OR	
(ii)	Over 50 kilometres up to and including 60 kilometre radius	21.70
	OR	
(iii)	Over 60 kilometres up to and including 75 kilometre radius	33.35
	OR	
(iv)	Over 75 kilometres up to and including 90 kilometre radius	47.20
	OR	
(v)	Over 90 kilometres up to and including 105 kilometre radius	61.25

9. Clause 21. – Distant Work: Delete subclause (6) and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of $33.50 for any weekend that they returns to their home from the job but only if –

(a) The employee advises the employer or their agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required to work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

10. Clause 21. – Distant Work: Delete subclause (9) and insert in lieu thereof the following:

(9) Where an employee, supplied with the board and lodging by their employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $14.80 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

11. Clause 27. - Grievance Procedure and Special Allowance: Delete subclause (3) of this Clause and insert in lieu thereof the following:

(3) (a) Subject to paragraph (e) of this subclause, a special allowance of $33.20 per week shall be paid as a flat amount each week except where direct action takes place.

(b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as non-adherence to the disputes procedure Clause or affect the payment of this allowance.

(c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and $33.20 shall be paid.

(d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.

(e) An apprentice shall be paid a percentage of $33.20 being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

12. Clause 30. - Special Provisions - Western Power: Delete subclause (2), (3), (4) (5) and (6) and insert in lieu thereof the following:

(2) In addition to the wage otherwise payable to an employee pursuant to the provisions of this award an employee (other than an apprentice) shall be paid:

(a) $2.14 per hour for each hour worked if employed at Muja;

(b) $1.27 per hour for each hour worked if employed at Kwinana;

(3) (a) An employee to whom Clause 20. - Allowance for Travelling and Employment in Construction Work applies and who is engaged on construction work at Muja shall be paid:

(i) An allowance of $17.15 per day if the employee resides within a radius of 50 kilometres from the Muja Power Station;

(ii) An allowance of $46.30 per day if the employee resides outside that radius;

in lieu of the allowance prescribed in the said Clause.

(b) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

(4) In addition to the allowance payable pursuant to subclause (6) of Clause 21. - Distant Work of this award an employee to whom that Clause applies shall be paid $29.20 on each occasion upon which the employee returns home at the weekend but only if -

(a) The employee has completed three months' continuous service with the employer;

(b) The employee is not required for work during the weekend;

(c) The employee returns to the job on the first working day following the weekend;

(d) The employer does not provide or offer to provide suitable transport;

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

(5) An employee to whom Clause 21. - Distant Work of this award applied and who proceeds to construction work at Muja from their home where located within a radius of 50 kilometres from the General Post Office, Perth -

(a) Shall be paid an amount of $77.65 and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said Clause; and

(b) In lieu of the provisions of subclause (4) of the said Clause, shall be paid $77.65 and for three hours at ordinary rates when their services terminate if the employee has completed three months continuous service;

and the provisions of subclause (3) and subclause (4) of Clause 21. - Distant Work shall not apply to such an employee.

(6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this Award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of $438.30 per week to meet the expenses reasonably incurred by the employee for board and lodging.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain their original residence.

(iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.

(v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this Award shall not apply.

13. Clause 36: - Superannuation: Delete subparagraph (i) of paragraph (b) of subclause (2) and insert in lieu thereof the following:

(i) For Apprentices not engaged on construction work, a weekly contribution calculated as 9.25% of the rate of pay prescribed in the First Schedule - Wages of this Award as follows:

Four Year Term		**Three and a Half Year Term**		**Three Year Term**	
1st Year	$28.60	Six Months	$28.60		
2nd Year	$37.40	Next Year	$37.40	1st Year	$37.40
3rd Year	$49.13	Next Year	$49.13	2nd Year	$49.13
4th Year	$57.93	Final Year	$57.93	3rd Year	$57.93

14. First Schedule - Wages: Delete subclause (3) of this Clause and insert in lieu thereof the following:

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$27.90
(b)	If placed in charge of more than ten and not more than twenty other employees	$42.90
(c)	If placed in charge of more than twenty other employees	$55.30

15. First Schedule - Wages: Delete subclauses (5) and (6) of this Clause and insert in lieu thereof the following:

(5) Tool Allowance:

(a) In accordance with the provisions of subclause (20) of Clause 18. – Special Rates and Provisions of this award the tool allowance to be paid is:

(i) $16.10 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $16.10 being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(6) Construction Allowance:

(a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid:

(i) $49.80 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $44.80 per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $26.50 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

16. First Schedule - Wages: Delete subclauses (9) and (10) of this Clause and insert in lieu thereof:

(9) Licence Allowance:

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid $23.70 per week.

(10) Commissioning Allowances:

An "Electrician Commissioning" as defined shall be paid at the rate of $36.20 per week in addition to rates prescribed in this schedule.

2014 WAIRC 00063

APPLICATION TO VARY ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	CHUBB ELECTRONIC SECURITY AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 65 OF 2013
CITATION NO.	2014 WAIRC 00063

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	No appearance

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and no appearance for Chubb Electronic Security and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Electrical Trades (Security Alarms Industry) Award, 1980* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 11. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $12.60 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $8.65 for each meal so required.

2. Clause 15. - Special Rates and Provisions: Delete subclauses (1) to (4) inclusive and insert in lieu thereof the following:

(1) Height Money: An employee shall be paid an allowance of $2.80 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) Dirt Money: An employee shall be paid an allowance of 57 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) Confined Space: An employee shall be paid an allowance of 72 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) Hot Work: An employee shall be paid an allowance of 57 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees celsius.

3. Delete subclause (6) and insert in lieu thereof the following:

(6) Percussion Tools:

An employee shall be paid an allowance of 36 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

3. Clause 15. - Special Rates and Provisions: Delete subclauses (13) and (14) and insert in lieu thereof the following:

(13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $11.70 per week in addition to their ordinary rate.

(14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $23.70 per week.

4. Clause 16. – Car Allowance: Delete subclause (3) and insert in lieu thereof the following:

(3) A year for the purpose of this Clause shall commence on the 1 July and end on the 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Rate per Kilometre (cents)			
Metropolitan Area	83.0	74.2	64.5
South West Land Division	85.0	76.0	66.1
North of 23.5 ^{o} South Latitude	93.8	83.8	72.9
Rest of the State	87.4	78.7	68.2
Motor Cycle (In All Areas)	28.4 Cents per Kilometre		

5. Clause 18. – Distant Work: Delete subclauses (4) and (5) and insert in lieu thereof the following:

(4) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of $34.80 for any weekend that they return to their home from the job but only if -

(a) The employee advises the employer or the employer's agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.50 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 28. - Wages: Delete subclauses (3) - (5) and insert in lieu thereof the following:

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of $16.30 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson shall replace or pay for any tools supplied by the employer if lost through their negligence.

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) $52.90 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $47.80 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $27.60 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) Leading Hand: In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$30.00
(b)	If placed in charge of more than ten and not more than twenty other employees	$45.80
(c)	If placed in charge of more than twenty other employees	$59.00

2014 WAIRC 00064

APPLICATION TO VARY ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	ACTION ELECTRONICS PTY. LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 66 OF 2013
CITATION NO.	2014 WAIRC 00064

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	No appearance

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and no appearance for Action Electronics Pty. Ltd and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Electronics Industry Award No. A 22 of 1985* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 9. – Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $7.90 for each meal so required.

2. Clause 13. - Car Allowance: Delete subclause (3) of this Clause and insert in lieu thereof:

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE

ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
Rate per kilometre (cents)	**Over 2600cc**	**1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	82.0	73.2	63.6
South West Land Division	83.7	74.9	65.4
North of 23.5o South Latitude	92.0	82.7	72.1
Rest of the State	86.3	77.5	67.2
MOTOR CYCLE (IN ALL AREAS)	27.9 cents per kilometre		

3. Clause 15. - Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu thereof:

(4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $34.70 for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employer's agent of the employee's intention no later than Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.10 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20

minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 20. - Special Provisions: Delete subclauses (1) - (4), (6) - (8) and (14) and insert in lieu thereof the following:

(1) Dirt Money: An employee shall be paid an allowance of 57 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) Confined Space: An employee shall be paid an allowance of 71 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) Hot Work: An employee shall be paid an allowance of 57 cents per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) Height Money: An employee shall be paid an allowance of $2.70 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

(6) Diesel Engine Ships: The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 96 cents per hour whilst so engaged.

(7) Percussion Tools: An employee shall be paid an allowance of 36 cents per hour when working pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

(8) Chemical, Artificial Manure and Cement Works: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $14.50 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $11.30 per week in addition to their ordinary rate.

5. Clause 33. - Wages: Delete subclauses (2) and (5) and insert in lieu thereof the following:

(2) Leading Hands:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$29.70
(b)	If placed in charge of more than ten but not more than twenty other employees	$44.80
(c)	If placed in charge of more than twenty other employees	$58.30

(5) Tool Allowance

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -

(i) $16.30 per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of $16.30 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of technicians, service people, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II - CONSTRUCTION

6. Clause 5. - Special Rates and Provisions: Delete subclause (2) and insert in lieu thereof the following:

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of an employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of $341.90.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

7. Clause 6. - Allowance for Travelling and Employment in Construction Work: Delete paragraphs (a), (b) and (c) of subclause (1) of this Clause and insert in lieu thereof:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $16.55 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 84 cents per kilometre.

(c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 84 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

8. Clause 7. - Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $33.80 for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $14.85 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

9. Clause 10. - Wages: Delete subclauses (5), (6) and (7) of this clause and insert in lieu thereof the following:

(5) Construction Allowances:

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -

(i) $52.20 per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) $47.20 per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $27.60 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) Leading Hand:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$29.70
(b)	If placed in charge of more than ten but not more than twenty other employees	$44.80
(c)	If placed in charge of more than twenty other employees	$58.30

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -

(i) $16.30 per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of $16.30 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2014 WAIRC 00061

APPLICATION TO VARY ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	THE MINISTER FOR WORKS AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 67 OF 2013
CITATION NO.	2014 WAIRC 00061

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	Ms J Bourke and with her Ms C Holmes

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and Ms Bourke for the Minister for Works and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 14. - Overtime: Delete paragraphs (e) of subclause (3) of this clause and inset in lieu thereof the following:

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid $12.35 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, they shall be supplied with each such meal by the employer or be paid $8.70 for each meal so required.

2. Clause 14. - Overtime: Delete paragraphs (h) of subclause (3) of this clause and inset in lieu thereof the following:

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid $5.75 for breakfast.

3. Clause 17. - Special Rates and Provisions: Delete subclauses (1) - (5) and insert in lieu thereof the following:

(1) **Height Money**: An employee shall be paid an allowance of $2.65 for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.

(2) **Dirt Money**: Dirt Money of 55 cents per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto

unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 61 cents per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled of damaged by the nature of the work done.

(3) **Confined Space:**

70 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid 35 cents per hour extra whilst so engaged.

(5) **Hot Work**: An employee shall be paid an allowance of 55 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

4. Clause 17. - Special Rates and Provisions: Delete subclauses (8) - (16) and insert in lieu thereof the following:

(8) Any employee working in water over their boots or, if gumboots are supplied, over the gumboots, shall be paid and allowance of $1.65 per day.

(9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 55 cents.

(10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of $3.35 for such examination and $1.20 per hour extra thereafter for fixing, renewing or repairing such work.

(11) Ship Repair Work: Any employee engaged in repair work on board ships shall be paid an additional $6.00 per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of $2.31 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 20 cents per hour, with a minimum payment of $1.45 per day.

(14) Abattoirs -

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $18.80 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to $17.50 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 58 cents per hour, with a minimum payment for four hours.

(16) Morgues -

An employee required to work in a morgue shall be paid 58 cents per hour or part thereof, in addition to the rates prescribed in this clause.

5. Clause 17. - Special Rates and Provisions: Delete subclause (19) and insert in lieu thereof the following:

(19) An employee required to repair or maintain incinerates shall be paid $3.55 per unit.

6. Clause 17. - Special Rates and Provisions: Delete subclauses (21) - (24) and insert in lieu thereof the following:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 41 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean:

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:

(aa) Non-ferrous die casting (including gravity and pressure):

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $22.90 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e.: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 74 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) **Towing Allowance**: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of $5.20 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

7. Clause 17. - Special Rates and Provisions: Delete subclauses (26) - (29) and insert in lieu thereof the following:

(26) **First Aid Allowance**: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $11.30 per week in addition to their ordinary rate.

(27) **Polychlorinated Biphenyls**

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of $2.31 per hour whilst so engaged.

(28) **Nominee Allowance**:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of $20.00 per week.

(29) **Hospital Environment Allowance:**

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

(a) (i) $16.10 per week for work performed in a hospital environment; and

(ii) $5.40 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital
King Edward Memorial Hospital
Sir Charles Gairdner Hospital
Royal Perth Hospital
Fremantle Hospital

(b) $11.70 per week for work performed in a hospital environment at -

Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt. Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

(c) $7.70 per week for work performed in a hospital environment at -

Bentley Hospital	Derby Hospital
Narrogin Hospital	Port Hedland Hospital
Rockingham Hospital	Sunset Hospital
Armadale Hospital	Broome Hospital

Busselton Hospital	Carnarvon Hospital
Collie Hospital	Esperance Hospital
Katanning Hospital	Merredin Hospital
Murray Hospital	Warren Hospital
Wyndham Hospital	

8. Clause 19. – Fares and Travelling Allowances: Delete paragraphs (a), (b) and (c) of subclause (1) and insert in lieu thereof the following:

(a) On places within a radius of fifty kilometres from the General Post Office, Perth - $17.50 per day;

(b) For each additional kilometre to a radius of sixty kilometres from the General Post Office, Perth – 92 cents per kilometre;

(c) Subject to the provisions of paragraph (d) work performed at places beyond a sixty kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employee with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause in which case an additional allowance of 92 cents per kilometre shall be paid for each kilometre in excess of the sixty kilometre radius.

9. Clause 20. – Distant Work – Construction: Delete subclauses (6) and (7) of this Clause and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $36.00 and for any weekend that he/she return to his home from the job but only if -

(a) The employer or his/her agent is advised of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) He/she is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

(7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, they shall be provided with suitable transport to and from that job or be paid an allowance of $15.75 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

10. Clause 21. – District Allowances: Delete subclause (6) and insert in lieu thereof the following:

(6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ Per Week	Town Or Place	$ Per Week
6	88.70	Nil	Nil
5	72.50	Fitroy Crossing	97.70
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	91.20
		Marble Bar	
		Wittenoom	
		Karratha	85.80
		Port Hedland	79.40
4	36.80	Warburton Mission	98.40
		Carnarvon	34.30
3	23.10	Meekatharra	36.80
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	16.50	Kalgoorlie	5.50
		Boulder	
		Ravensthorpe	21.80
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

11. First Schedule - Wages: Delete subclause (5) and insert in lieu thereof the following:

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all-purpose industry allowance of $18.10.

(b) This allowance shall be paid in two instalments, as follows:

(i) $9.10 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $9.00 - totalling $18.10 - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

12. First Schedule - Wages: Delete subclause (8) and insert in lieu thereof the following:

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:

	$
If placed in charge of not less than three and not more than 10 other employees	29.10
If placed in charge of more than 10 and not more than 20 other employees	44.30
If placed in charge of more than 20 other employees	56.90

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than 10 other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	71.00
Harvey, Dwellingup, Mundaring, Yanchep	35.30
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	17.90
Jarrahdale	17.90

13. First Schedule - Wages: Delete subclauses (10) – (12) inclusive and insert in lieu thereof the following:

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) $50.80 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) $45.80 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A “multi-storeyed building” is a building which, when completed will consist of at least five storeys.

(iii) $27.00 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) Tool Allowance

(a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(i) $16.10 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in this Schedule,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.

(c) An employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through the negligence of such employee.

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional $2.66 per hour whilst so engaged.

14. Fifth Schedule – Building Management Authority Wages and Conditions: Delete paragraphs (c), (d) and (e) of subclause (5) of this Schedule and insert in lieu thereof the following:

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of $30.40 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of $40.90 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule – Wages of this Award.

15. Fifth Schedule – Building Management Authority Wages and Conditions: Delete subclause (7) of this clause and insert in lieu thereof the following:

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quanitites of materials in respect of work performed by others, shall be paid $4.30 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2014 WAIRC 00065

APPLICATION TO VARY GATE, FENCE AND FRAMES MANUFACTURING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	CAI FENCES AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 68 OF 2013
CITATION NO.	2014 WAIRC 00065

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	No appearance

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and no appearance for CAI Fences and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Gate, Fence and Frames Manufacturing Award* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 7. - Overtime: Delete paragraph (f) of subclause (3) and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (h) of this subclause, an employee required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $11.60 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $8.00 for each meal so required.

2. Clause 14. - Special Rates and Provisions: Delete subclauses (1), (2) and (4) of this clause and insert in lieu thereof the following:

(1) Dirt Money: An employee shall be paid an allowance of 56 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) Confined Space: An employee shall be paid an allowance of 70 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association appointed by the employer to perform first aid duties, shall be paid $11.50 per week in addition to the ordinary rate.

3. Clause 19. - Fares & Travelling Time: Delete paragraphs (a) of subclause (2) and insert in lieu thereof the following:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $17.00 per day.

4. Clause 20. – Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $32.90 for any week-end the employee returns to the employee's home from the job, but only if -

(a) The employee advises the employer or the employer's agent of the employee's intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

(b) The employee is not required for work during that week-end;

(c) The employee returns to the job on the first working day following the week-end; and

(d) The employer does not provide, or offer to provide, suitable transport

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $14.45 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

5. First Schedule - Wages: Delete subclauses (2) and (6) of this clause and insert in lieu thereof the following:

(2) Leading Hand: In addition to the appropriate rate prescribed in subclause (1) of this clause, a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	30.20
(b)	If placed in charge of more than 10 and not more than 20 other employees	46.40
(c)	If placed in charge of more than 20 other employees	59.80

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(i) $16.80 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $16.80 being the percentage which appears against the year of apprenticeship in subclause (a) of subclause (3) of this Schedule.

For the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through their negligence.

2014 WAIRC 00066

APPLICATION TO VARY LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	KONE ELEVATORS PTY LIMITED AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 69 OF 2013
CITATION NO.	2014 WAIRC 00066

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	No appearance

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and no appearance for Kone Elevators Pty Limited and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Lift Industry (Electrical and Metal Trades) Award 1973* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 12. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $12.60 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid $8.65 for each meal so required.

2. Clause 16. - Special Rates and Provisions: Delete subclauses (5) and (6) and insert in lieu thereof the following:

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $23.30 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $11.60 per week in addition to his/her ordinary rate.

3. Clause 17. – Car Allowance: Delete subclause (3) and insert in lieu thereof the following:

(3) A year for the purpose of this Clause shall commence on the 1st day of July and end on the 30th day of June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE

ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (In Cubic Centimetres)**		
Rate per Kilometre (Cents)	**Over 2600cc**	**Over 1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	82.9	74.1	64.4
South West Land Division	84.7	75.8	65.9
North of 23.5' South Latitude	92.9	83.5	72.7
Rest of the State	87.4	78.3	68.3
Motor Cycle (In All Areas)	28.5 cents per kilometre		

4. Clause 18. – Fares & Travelling Allowance: Delete subclause (2) and insert in lieu thereof the following:

(2) An employee to whom subclause (1) of this Clause does not apply and who is engaged on construction work or regular repair service and/or maintenance work shall be paid an allowance in accordance with the provisions of this subclause to compensate for excess fares and travelling time from the employee's home to his/her place of work and return:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $17.15 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 94 cents per kilometre.

(c) Subject to the provision of paragraph (d), work performed at places beyond a 60 kilometres radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this Clause, in which case an additional allowance of 94 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres radius.

(d) In respect to work carried out from an employer's depot situated more than 60 kilometres from the G.P.O., Perth, the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.

(e) Where transport to and from the job is provided by the employer from and to his/her depot or such other place more convenient to the employee as is mutually agreed upon between the employer and employee, half the above rates shall be paid; provided that the conveyance used for such transport is provided with suitable seating and weatherproof covering.

5. Clause 19. – Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:

(6) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $34.80 for any week-end they return home from the job, but only if -

(a) The employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

(b) The employee is not required for work during that week-end;

(c) The employee returns to the job on the first working day following the week-end; and

(d) The employer does not provide, or offer to provide, suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.55 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

6. Clause 28. - Lift Industry Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $109.60 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

7. First Schedule - Wages: Delete subclauses (3) and (6) and insert in lieu thereof the following:

(3) Leading Hands:

In addition to the appropriate total wage prescribed in this Clause, a leading hand shall be paid -

		$
(a)	If placed in charge of not less than three and not more than ten other employees	29.50
(b)	If placed in charge of more than ten and not more than twenty other employees	44.90
(c)	If placed in charge of more than twenty other employees	58.00

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-

(i) $16.30 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $16.30 being the percentage which appears against their years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant of paragraph (a) of this Clause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

(c) An employer shall provide for the use of tradesperson or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

2014 WAIRC 00067

APPLICATION TO VARY METAL TRADES (GENERAL) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	ANODISERS WA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 70 OF 2013
CITATION NO.	2014 WAIRC 00067

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	No appearance

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and no appearance for Anodisers WA and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Metal Trades (General) Award* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 3.2 – Overtime: Delete 3.2.3(6) and insert in lieu thereof the following:

(6) Subject to the provisions of 3.2.3(7) of this subclause, an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid $12.65 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid $8.60 for each meal so required.

2. Clause 4.8 – Wages and Supplementary Payments: Delete 4.8.2(1) and insert in lieu thereof the following:

4.8.2 (1) Leading Hand:

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week -

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	29.80
(b)	If placed in charge of more than 10 and not more than 20 other employees	45.50
(c)	If placed in charge of more than 20 other employees	58.80

3. Clause 4.8 – Wages and Supplementary Payments: Delete 4.8.6(1) and insert in lieu thereof the following:

(1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of -

(a) $16.30 per week to such tradesperson, or

(b) In the case of an apprentice a percentage of $16.30 being the percentage which appears against the year of apprenticeship in 4.8.3,

for the purposes of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

4. Clause 4.8 – Wages and Supplementary Payments: Delete 4.8.7 and insert in lieu thereof the following:

4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of $26.30 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities but an employee so employed for no more than three days in a week shall be paid on a pro rata basis.

This subclause shall not apply to employees employed by Cockburn Cement Limited.

5. Clause 5.2 – Special Rates and Facilities: Delete this clause and insert in lieu thereof the following:

5.2.1 Height Money: An employee shall be paid an allowance of $2.70 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to lines people nor to riggers and splicers on ships and buildings.

5.2.2 Dirt Money: An employee shall be paid an allowance of 58 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

5.2.3 Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this Award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 98 cents per hour.

5.2.4 Confined Space: An employee shall be paid an allowance of 70 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.

5.2.5 Diesel Engine Ships: The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 98 cents per hour whilst so engaged.

5.2.6 Boiler Work: An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which the employee may be entitled under 5.2.2 and 5.2.4.

5.2.7 Hot Work: An employee shall be paid an allowance of 58 cents per hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1º and 54.4º Celsius.

5.2.8 (1) Where, in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may –

(a) Fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(b) Fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(c) Prescribed such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Board sees fit.

(2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.

(3) An allowance fixed pursuant to 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.

5.2.9 Tarring Pipes: The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of 95 cents per day whilst so engaged.

5.2.10 Percussion Tools: An employee shall be paid an allowance of 34 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

5.2.11 Chemical, Artificial Manure and Cement Works: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $14.50 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

5.2.12 Abattoirs and Tallow Rendering Works: An employee, employed in and about an abattoir or in a rendering section of tallow works, shall be paid an allowance calculated at the rate of $18.90 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this Clause.

5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in5.2.1 - Height Money.

5.2.14 Phosphate Ships: An employee shall be paid an allowance of 83 cents for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than they would be entitled to receive pursuant to the award which would apply if such employee was employed in the gold mine concerned.

5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.

5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.

5.2.18 Special Rates Not Cumulative: Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely – the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.

5.2.19 Protective Equipment:

(1) An employer shall have available a sufficient supply of protective equipment (as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.

(2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.

(3) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if the employee does both employees shall be deemed guilty of wilful misconduct.

(4) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(5) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.

5.2.20 (1) Subject to the provisions of this Clause, an employee whilst employed on foundry work shall be paid a disability allowance of 41 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.

(2) The foundry allowance herein prescribed shall also apply to apprentices and un-apprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.

(3) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this Clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(4) For the purpose of this subclause 'foundry work' shall mean -

(a) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(b) Where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -

(i) Non-ferrous die casting (including gravity and pressure);

(ii) Casting of billets and/or ingots in metal moulds;

(iii) Continuous casting of metal into billets;

(iv) Melting of metal for use in printing;

(v) Refining of metal.

5.2.21 An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $11.40 per week in addition to the employee's ordinary rate.

5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant Regulation in force on the 28th day of February, 1978 under the *Electricity Act 1945*, shall be paid an allowance of $23.60 per week.

6. Clause 5.3 – Car Allowance: Delete 5.3.3 and insert in lieu thereof the following:

5.3.3 A year for the purpose of this Clause shall commence on the 1st day of July and end on the 30th day of June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S
OWN VEHICLE ON EMPLOYER'S BUSINESS
MOTOR CAR

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
	RATE PER KILOMETRE (CENTS)		
Distance Travelled Each Year on Employer's Business	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Metropolitan Area	82.5	74.0	64.3
South West Land Division	84.4	75.8	66.0
North of 23.5° South Latitude	92.9	83.6	72.6
Rest of the State	87.3	78.1	68.0
Motor Cycle (in all areas)	28.4 cents per kilometre		

7. Clause 5.5 – Distant Work: Delete 5.5.4 and 5.5.5 and insert in lieu thereof the following:

5.5.4 An employee, to whom the provisions of 5.5.1apply, shall be paid an allowance of $35.00 for any weekend that the employee returns home from the job, but only if -

(1) The employee advises the employer or the employer's agent of such intention not later than Tuesday immediately preceding the weekend in which the employee so returns;

(2) The employee is not required for work during that weekend;

(3) The employee returns to the job on the first working day following the weekend; and

(4) The employer does not provide, or offer to provide, suitable transport.

5.5.5 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.45 per day, provided that where the time actually spent in travelling either to or from the job exceeds twenty (20) minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

PART 2 – CONSTRUCTION WORK

8. Clause 13. – Wages: Delete 13.4, 13.5 and 13.6 and insert in lieu thereof the following:

13.4 Construction Allowances

(1) In addition to the appropriate rates of pay prescribed in this clause, an employee shall be paid -

(a) $52.60 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(b) $47.30 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(c) $27.80 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.

(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a Leading Hand shall be paid –

		$
(1)	If placed in charge of not less than three (3) and not more than ten (10) other employees	29.80
(2)	If placed in charge of more than ten (10) and not more than twenty (20) other employees	45.50
(3)	If placed in charge of more than twenty (20) other employees	58.80

13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(a) $16.30 per week to such tradesperson; or

(b) In the case of an apprentice a percentage of $16.30 being the percentage which appears against their year of apprenticeship in 4.8.3 of Clause 4.8 - Wages and Supplementary Payments of PART 1 - GENERAL (subject to Clause 12.2 - Apprentices of PART 2) of this Award,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.

(2) Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(4) A tradesperson or an apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

9. Clause 15.1 – Special Allowances and Provisions: Delete 15.1.2(2) and insert in lieu thereof the following:

(2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of $892.80.

10. Clause 15.1 – Special Allowances and Provisions: Delete 15.1.4 and insert in lieu thereof the following:

15.1.4 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of $23.60 per week. **11. Clause 15.2 – Allowance for Travelling and Employment in Construction Work: Delete 15.2.1(1), 15.2.1(2) and 15.2.1(3) and insert in lieu thereof the following:**

15.2.1 (1) On places within a radius of 50 kilometres from the General Post Office, Perth - $17.10 per day.

(2) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 91 cents per kilometre.

(3) Subject to the provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 91 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

12. Clause 15.3 – Distant Work: Delete 15.3.6 and 15.3.7 and insert in lieu thereof the following:

15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of $35.00 for any weekend that the employee returns home from the job, but only if -

(1) The employee advises their employer or the employer's agent of their intention not later than the Tuesday immediately preceding the weekend in which they so return;

(2) The employee is not required for work during that weekend;

(3) The employee returns to the job on the first working day following the weekend; and

(4) The employer does not provide, or offer to provide, suitable transport.

15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of $15.45 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

13. Clause 15.4 – Special Provision – Western Power: Delete 15.4.2 and insert in lieu thereof the following:

15.4.2 In addition to the wage otherwise payable to an employee pursuant to the provisions of PART 2 - CONSTRUCTION WORK of this Award, an employee (other than an apprentice) shall be paid -

(1) $2.35 per hour for each hour worked if employed at Muja;

(2) $1.37 per hour for each hour worked if employed at Kwinana;

(3) A safety footwear allowance of twelve (12) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee. Failure to wear approved safety footwear or to maintain it in sound condition as determined by the employer shall render the employee liable to dismissal.

14. Clause 15.4 - Special Provision – Western Power: Delete 15.4.3, 15.4.4 and 15.4.5 and insert in lieu thereof the following:

15.4.3 (1) An employee, to whom Clause15.2 - Allowance for Travelling and Employment in Construction Work of this PART applies and who is engaged on construction work at Muja, shall be paid -

(a) An allowance of $17.10 per day if the employee resides within a radius of 50 kilometres from the Muja power station;

(b) An allowance of $45.15 per day if the employee resides outside that radius.

in lieu of the allowance prescribed in the said clause.

(2) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

15.4.4 In addition to the allowance payable pursuant to 15.3.6 of Clause 15.3 – Distant Work of this PART, an employee to whom that clause applies shall be paid $33.65 on each occasion upon which the employee returns home at the weekend, but only if -

(1) The employee has completed three months' continuous service with the employer;

(2) The employee is not required for work during the weekend;

(3) The employee returns to the job on the first working day following the weekend;

(4) The employer does not provide, or offer to provide, suitable transport;

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

15.4.5 An employee to whom Clause 15.3 - Distant Work of this PART applies and who proceeds to construction work at Muja from home where located within a radius of 50 kilometres from the General Post Office, Perth -

(a) Shall be paid an amount of $79.15 and for three hours at ordinary rates in lieu of expenses and payment prescribed in 15.3.3 of the said clause; and

(b) In lieu of the provisions of 15.3.4 of the said clause, shall be paid $79.15 and for three (3) hours at ordinary rates when the employee's services terminate, if the employee has completed three (3) months' continuous service;

and the provisions of 15.3.3 and 15.3.4 of Clause 15.3 - Distant Work of this PART shall not apply to such employee.

2014 WAIRC 00068

APPLLICATION TO VARY RADIO AND TELEVISION EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	HILLS INDUSTRIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 71 OF 2013
CITATION NO.	2014 WAIRC 00068

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	No appearance

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and no appearance for Hills Industries Ltd and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Radio and Television Employees Award No. 3 of 1980* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 9. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $12.60 or a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $8.55 for each meal so required.

2. Clause 13. – Car Allowances: Delete subclause (3) of this Clause and insert in lieu thereof the following:

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE
ON EMPLOYER'S BUSINESS
MOTOR CAR

Area and Details	**Engine Displacement (in Cubic Centimetres)**		
Rate per Kilometre (Cents)	**Over 2600cc**	**Over 1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	82.8	74.0	64.4
South West Land Division	84.7	75.8	65.9
North of 23.5° South Latitude	93.0	83.4	72.8
Rest of the State	87.4	78.3	68.3
Motor Cycle (In All Areas)	28.3 cents per kilometre		

3. Clause 14. – Distant Work: Delete subclause (4) of this Clause and insert in lieu thereof the following:

(4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $15.50 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 29. - Wages: Delete subclauses (2) and (5) of this Clause and insert in lieu thereof:

(2) **Leading Hands:**

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	29.70
(b)	If placed in charge of more than ten and not more than twenty other employees	45.10
(c)	If placed in charge of more than twenty other employees	58.30

(5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-

(i) $16.20 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $16.20 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause,

for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through their negligence.

2014 WAIRC 00059

WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ELECTRICAL TRADES UNION WA

APPLICANT

-v-

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES, PEEL HEALTH SERVICES BOARD AND WA COUNTRY HEALTH SERVICES AND OTHERS

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 3 FEBRUARY 2014

FILE NO/S APPL 63 OF 2013

CITATION NO. 2014 WAIRC 00059

Result	Change of Respondent's name
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	Ms R Sinton and with her Ms C Holmes

Order

WHEREAS this application was lodged in the Commission pursuant to s 41 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS at the hearing held on 3 February 2014 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 the Registry Officer, Department of Health, Health Industrial Relations Service and others be deleted and the Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the Hospitals formerly comprised in the Metropolitan Health Services Board, Peel Health Services Board and WA Country Health Services and Others be inserted in lieu thereof.

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

2014 WAIRC 00060

APPLICATION TO VARY WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA **APPLICANT** **-v-** THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD, PEEL HEALTH SERVICES BOARD AND WA COUNTRY HEALTH SERVICES AND OTHERS **RESPONDENTS**
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 FEBRUARY 2014
FILE NO/S	APPL 63 OF 2013
CITATION NO.	2014 WAIRC 00060

Result	Award varied
Representation	
Applicant	Ms N Ireland and with her Ms B Ward
Respondent	Ms R Sinton and with her Ms C Holmes

Order

HAVING heard Ms Ireland for Electrical Trades Union WA, as applicant and Ms Sinton as agent for Minister for Health in his incorporated capacity under s 7 of the Hospital and Health Services Act 1927 as the Hospitals formerly comprised in the Metropolitan Health Services Board, Peel Health Services Board and WA Country Health Services and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *WA Government Health Services Engineering and Building Services Award 2004* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 3rd day of February 2014.

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

SCHEDULE

1. Clause 19. – Leading Hand Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid –

(a) Not less than 3 and not more than 10 other employees - $43.60 per week;

(b) More than 10 and not more than 20 other employees - $58.50 per week;

(c) More than 20 other employees - $73.10 per week.

2. Clause 23. – Special Rates and Provisions: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Disability Allowances

(a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. – Title, as at the date of registration of this Award.

(b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of $2.20 for each hour or part thereof whilst so engaged.

(c) Asbestos:

(i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.

(ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, i.e. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of $0.73 per hour for each hour or part thereof whilst so engaged.

(d) Furnace Work

Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid $1.60 per hour or part thereof whilst so engaged.

(e) Construction Allowance

(i) In additional to the appropriate rate of pay prescribed in Appendix A. – Salaries of this Award, an employee shall be paid –

(aa) $48.20 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(bb) $43.50 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storey building" is a building which, when completed, shall consist of at least five stories.

(cc) $25.60 per week if engaged otherwise on Construction Work.

(ii) The rates specified in paragraph (1)(e)(i) shall be discounted by $19.90 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.

(f) Asbestos Eradication

(i) This subclause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.

(ii) For the purposes of this clause "asbestos eradication" means work on or about buildings, involving the removal of any other method of neutralisation of any materials which consist of, or contain asbestos.

(iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.

Without limited the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.

(iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of $1.59 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23. – Special Rates and Provisions.

(v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (i.e. 1716 "Specification of Respiratory Protective Devices") shall be worn by all personnel during work involving eradication of asbestos.

(g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

3. Clause 23. – Special Rates and Provisions: Delete paragraphs (b), (d), (e) and (f) of subclause (3) of this clause and insert the following in lieu thereof:

(b) Permit Work

Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $18.80 for that week in addition to the rates otherwise prescribed.

(d) Scaffolding Certificate Allowance

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid $0.59 per hour or part thereof, in addition to the rates otherwise prescribed in this Award.

(e) Nominee Allowance

A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of $18.80 per week.

(f) Setter Out

A setter out (other than a leading hand) in a joiner's shop shall be paid $5.70 per day in addition to the rates otherwise prescribed.

4. Clause 25. – Overtime: Delete paragraph (a) of subclause (7) of this clause and insert the following in lieu thereof:

(a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of $13.45 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to an employee notified on the previous day of the previous day of the requirement to work such overtime.

5. Clause 50. – District Allowances: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) The annual rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I District	COLUMN II Standard Rate $ Per Annum	COLUMN III Exceptions To Standard Rate Town Or Place	COLUMN IV Rate $ Per Annum
6	4,437	Nil	Nil
5	3,469	Fitzroy Crossing	4,888
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	4,544
		Marble Bar	
		Wittenoom	
		Karratha	4,273
		Port Hedland	3,976
4	1,829	Warburton Mission	4,912
		Carnarvon	1,723
3	1,152	Meekatharra	1,829
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	827	Kalgoorlie	275
		Boulder	
		Ravensthorpe	1,091
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause, employees with dependants shall be entitled to double the rate of district allowance shown.

6. Appendix A. – Salaries: Delete subclause (1) of this Appendix and insert the following in lieu thereof:

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
	Building Tradesperson Level 08	120	438.20	62.40	326.50	827.10	14.86	105.40	12.00	50,046
	Building Tradesperson Level 09	125	456.50	65.00	327.20	848.70	15.50	105.70	12.00	51,222
Other Building employees not elsewhere classified	Building Employee Entrant Level	78	284.86	40.56	320.54	645.96	9.68	68.90	14.00	38,527
	Building Employee Level 1	82	299.46	42.64	321.10	663.20	10.20	69.10	14.00	39,464
	Building Employee Level 2	87	319.18	45.45	321.88	686.51	10.87	69.30	14.00	40,725
	Building Employee Level 3	92	337.44	48.05	322.58	708.07	11.51	69.60	14.00	41,899
	Building Employee Level 4	100	365.20	52.00	325.70	742.90	12.40	70.00	14.00	43,783
Mechanical Fitter, Motor Mechanic, Refrigeration Fitter & other engineering trades employees not elsewhere classified	Engineering Employee Level 14	78	284.86	40.56	320.54	645.96	14.68	67.80	14.00	38,730
	Engineering Employee Level 13	82	299.46	42.64	321.10	663.20	15.40	68.00	14.00	39,677
	Engineering Employee Level 12	87.4	319.18	45.45	321.88	686.51	16.47	68.20	14.00	40,960
	Engineering Employee Level 11	92.4	337.44	48.05	322.58	708.07	17.41	68.50	14.00	42,149
	Engineering Tradesperson Level 10	100	365.20	52.00	325.70	742.90	18.80	84.60	12.00	44,774
	Engineering Tradesperson Level 09	105	383.50	54.60	326.40	764.50	19.70	84.90	12.00	45,963
	Engineering Tradesperson Level 08	110	401.70	57.20	327.10	786.00	20.70	85.10	12.00	47,148
	Engineering Tradesperson Level 07	115	420.00	59.80	325.80	805.60	21.60	85.40	12.00	48,233
	Engineering Tradesperson Level 06	125	456.50	65.00	329.30	850.80	23.50	68.60	12.00	49,813
	Engineering Tradesperson Level 05	130	474.80	67.60	327.90	870.30	24.40	68.80	10.00	50,784
Electrical Fitter/ Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	325.70	742.90	18.80	107.00	12.00	45,943
	Engineering Tradesperson Level 09	105	383.50	54.60	326.40	764.50	19.70	107.30	12.00	47,132
	Engineering Tradesperson Level 08	110	401.70	57.20	327.10	786.00	20.70	107.70	12.00	48,327
	Engineering Tradesperson Level 07	115	420.00	59.80	325.80	805.60	21.60	107.90	12.00	49,406
	Engineering Tradesperson Level 06	125	456.50	65.00	327.20	848.70	23.50	90.90	12.00	50,867
	Engineering Tradesperson Level 05	130	474.80	67.60	327.90	870.30	24.40	91.20	10.00	51,952

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
	Building Tradesperson Level 08	120	438.20	62.40	326.50	827.10	14.86	105.40	12.00	50,046
	Building Tradesperson Level 09	125	456.50	65.00	327.20	848.70	15.50	105.70	12.00	51,222
Other Building employees not elsewhere classified	Building Employee Entrant Level	78	284.86	40.56	320.54	645.96	9.68	68.90	14.00	38,527
	Building Employee Level 1	82	299.46	42.64	321.10	663.20	10.20	69.10	14.00	39,464
	Building Employee Level 2	87	319.18	45.45	321.88	686.51	10.87	69.30	14.00	40,725
	Building Employee Level 3	92	337.44	48.05	322.58	708.07	11.51	69.60	14.00	41,899
	Building Employee Level 4	100	365.20	52.00	325.70	742.90	12.40	70.00	14.00	43,783
Mechanical Fitter, Motor Mechanic, Refrigeration Fitter & other engineering trades employees not elsewhere classified	Engineering Employee Level 14	78	284.86	40.56	320.54	645.96	14.68	67.80	14.00	38,730
	Engineering Employee Level 13	82	299.46	42.64	321.10	663.20	15.40	68.00	14.00	39,677
	Engineering Employee Level 12	87.4	319.18	45.45	321.88	686.51	16.47	68.20	14.00	40,960
	Engineering Employee Level 11	92.4	337.44	48.05	322.58	708.07	17.41	68.50	14.00	42,149
	Engineering Tradesperson Level 10	100	365.20	52.00	325.70	742.90	18.80	84.60	12.00	44,774
	Engineering Tradesperson Level 09	105	383.50	54.60	326.40	764.50	19.70	84.90	12.00	45,963
	Engineering Tradesperson Level 08	110	401.70	57.20	327.10	786.00	20.70	85.10	12.00	47,148
	Engineering Tradesperson Level 07	115	420.00	59.80	325.80	805.60	21.60	85.40	12.00	48,233
	Engineering Tradesperson Level 06	125	456.50	65.00	329.30	850.80	23.50	68.60	12.00	49,813
	Engineering Tradesperson Level 05	130	474.80	67.60	327.90	870.30	24.40	68.80	10.00	50,784
Electrical Fitter/ Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	325.70	742.90	18.80	107.00	12.00	45,943
	Engineering Tradesperson Level 09	105	383.50	54.60	326.40	764.50	19.70	107.30	12.00	47,132
	Engineering Tradesperson Level 08	110	401.70	57.20	327.10	786.00	20.70	107.70	12.00	48,327
	Engineering Tradesperson Level 07	115	420.00	59.80	325.80	805.60	21.60	107.90	12.00	49,406
	Engineering Tradesperson Level 06	125	456.50	65.00	327.20	848.70	23.50	90.90	12.00	50,867
	Engineering Tradesperson Level 05	130	474.80	67.60	327.90	870.30	24.40	91.20	10.00	51,952

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2014 WAIRC 00010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANNEE DARRELL BOBICH
	APPLICANT
	-v-
	TRITON TRANSPORT SERVICES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 14 JANUARY 2014
FILE NO/S	U 191 OF 2013
CITATION NO.	2014 WAIRC 00010

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 8 January 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAYMOND BURCH
	APPLICANT
	-v-
	KEP MANAGEMENT SERVICES PTY LTD ACN 074 110 393
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 21 JANUARY 2014
FILE NO/S	B 167 OF 2013
CITATION NO.	2014 WAIRC 00025

Result	Discontinued
Representation	
Applicant	Mr B Jackson of counsel
Respondent	Mr M Cox 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.

2014 WAIRC 00027

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	OWEN CRAWLEY
	APPLICANT
	-v-
	CENTREL PTY LIMITED, TRADING AS RELIANCE PETROLEUM
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 JANUARY 2014
FILE NO/S	B 177 OF 2013
CITATION NO.	2014 WAIRC 00027

Result	Application discontinued
Representation	
Applicant	Mr O Crawley
Respondent	Ms J Kelly (of counsel)

Order

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

AND WHEREAS on 16 December 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS on 13 January 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00407

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY LINETTA FERGUSON
	APPLICANT
	-v-
	TNT AUSTRALIA PTY LTD (41 000 495 269)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 5 JULY 2013
FILE NO.	B 66 OF 2013
CITATION NO.	2013 WAIRC 00407

Result	Direction issued
Representation	
Applicant	Mr S Ferguson of counsel
Respondent	Mr M Brennan of counsel

Direction

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

(1) THAT the applicant file and serve on the respondent an outline of submissions together with any affidavit evidence no later than 4 days prior to the date of hearing.

(2) THAT the respondent file and serve on the applicant an outline of submissions together with any affidavit evidence no later than 2 days prior to the date of hearing.

(3) THAT the matter be listed for hearing for one day on a date to be fixed.

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

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

2013 WAIRC 00435

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY LINETTA FERGUSON
	APPLICANT
	-v-
	TNT AUSTRALIA PTY LTD (41 000 495 269)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 24 JULY 2013
FILE NO/S	B 66 OF 2013
CITATION NO.	2013 WAIRC 00435

Result	Order issued
Representation	
Applicant	Mr S Ferguson of counsel
Respondent	Mr M Brennan of counsel

Order

HAVING heard Mr S Ferguson of counsel on behalf of the applicant and Mr M Brennan 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 respondent be granted leave to appear by video link from a venue approved by the Commission.

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

2014 WAIRC 00020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00020
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 24 SEPTEMBER 2013
DELIVERED	**:**	MONDAY, 20 JANUARY 2014
FILE NO.	**:**	B 66 OF 2013
BETWEEN	**:**	AMY LINETTA FERGUSON Applicant AND TNT AUSTRALIA PTY LTD (41 000 495 269) Respondent

Catchwords	**:**	Industrial law – Contractual benefits claim – Commission and Bonus Scheme – Claim for commission payments – Letter of offer and checklist of attachments – Express incorporation and the words "abide by" – Entire agreement clause – Exclusion clause – Implied terms – Mutual trust and confidence – Duty of cooperation – Variation to the contract – Notice – Consideration – Managerial discretion – Principles applied – Circumstances, context and intention – Construction of the Scheme – Scheme did not have contractual effect – Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 7, 29(1)(b)(ii)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr S Ferguson of counsel
Respondent	**:**	Mr N Furland of counsel

Case(s) referred to in reasons:

Australian Broadcasting Commission v Australasian Performing Right Association Limited (1973) 129 CLR 99

Balfour v Travelstrength Limited (1980) 60 WAIG 1015

Barker v Commonwealth Bank of Australia (2012) 296 ALR 706

BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266

Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales (1982) 149 CLR 337

Commonwealth Bank of Australia v Barker (2013) 214 FCR 450

Con-Stan Industries of Australia Proprietary Limited v Norwich Winterthur Insurance (Australia) Limited (1986) 160 CLR 226

F.A. Tamplin Steamship Company, Limited v Anglo-Mexican Petroleum Products Company, Limited [1916] 2 AC 397

GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd (2003) 128 FCR 1

Goldman Sachs JBWere Services Pty Limited v Nikolich [2007] FCAFC 120

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

MacDonald v Shinko Australia Pty Ltd [1999] 2 Qd R 152

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451

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

Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193

Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165

Wigan v Edwards (1973) 47 ALJR 586

Yousif v Commonwealth Bank of Australia (2010) 193 IR 212

Case(s) also cited:

Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (Western Australian Branch) Inc [2000] WASCA 80

Ajax Cooke Pty Ltd v Nugent (1993) 5 VIR 551

Akmeemana v Murray (2009) 190 IR 66

Al-Safin v Circuit City Stores Inc. (2005) 394 F 3d 1254

Anderson v Douglas & Lomason Company (1995) 540 NW 2d 277

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

Barry Bainbridge v Circuit Foil UK Ltd [1997] EWCA Civ 1016

Bauman v Hulton Press Ltd [1952] 2 All ER 1121

Bekker NO v Total South Africa (Pty) Ltd [1990] 3 SA 159

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Bostik (Australia) Pty Ltd v Gorgevski (No 1) (1992) 36 FCR 20

Buckland v Bournemouth University Higher Education Corporation [2011] QB 323

Byrne v Australian Airlines Ltd (1995) 185 CLR 410

Cadoux v Central Regional Council [1986] IRLR 131

Clark v Nomura International Plc [2000] IRLR 766

Cohen v Clean Image Cleaning Services WA [2012] WAIRC 00713

Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) 201 CLR 520

Concut Pty Ltd v Worrell (2000) 176 ALR 693

Construction, Forestry, Mining and Energy Union v HWE Mining Pty Ltd [2011] FWA 8288

Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd [2005] NSWSC 1005

Criniti v Scott Turner - Vip Publishers and Adconnect Local Marketing [2011] WAIRC 937

Davis v Blaxland Pty Ltd (2002) 82 WAIG 475

Derksen v Wasa Insurance Co (1994) 4 BCLR 3d 73

Dietrich v Dare (1980) 30 ALR 407

Eley v Potato Marketing Corporation of Western Australia (2013) 93 WAIG 213

Eshuys v St Barbara Ltd [2011] VSC 125

EzishopNet Ltd (in liq) v Veremu Pty Ltd [2003] NSWSC 156

French v Barclays Bank Plc [1998] IRLR 646

Hall v Busst (1960) 104 CLR 206
Hanson v Royden (1867) LR 3 CP 47
Hart v Macdonald (1910) 10 CLR 417
Hartley v Cummings (1847) 5 Comb 247
Hartley v Ponsonby (1857) 119 ER 1471
Hawkins v Clayton (1988) 164 CLR 535
Hilton v Shiner Builders Merchants [2001] IRLR 727
Horkulak v Cantor Fitzgerald International [2005] ICR 402
Horwood v Millar's Timber & Trading Co Ltd [1917] 1 KB 305
Jackson v Iustini Holdings Trading As Doors Plus (2001) 81 WAIG 1215
Johnson v Unisys Ltd [2003] 1 AC 518
Knight v Alinta Gas Ltd (2002) 82 WAIG 2392
Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd [2008] NSWCA 5
La Rosa v Nudrill Pty Ltd [2013] WASCA 18
Larkin v Boral Construction Materials Group Ltd (2003) 83 WAIG 929
Life Insurance Co of Australia Ltd v Phillips (1925) 36 CLR 60
Lloyd's Bank Ltd v Cooke [1907] 1 KB 794
Maier v E & B Exploration Ltd [1986] 4 WWR 275
Malik v Bank of Credit and Commerce International SA [1998] AC 20
Manufacturers' Mutual Insurance Ltd v Withers (1988) 5 ANZ Ins Cas 60
Matthews v Cool Or Cosy Pty Ltd (2004) 84 WAIG 2125
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457
McDonald v Parnell Laboratories (Aust) Pty Ltd [2007] FCA 1903
McRae v Commonwealth Disposals Commission (1951) 84 CLR 377
Miles v Brendon Penn Nominees Pty Ltd [2006] WAIRC 05752
Moschi v Lep Air Services Ltd [1973] AC 331
Mouritz v Hegedus [1999] WASCA 1061
Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197
Onuoha v PEP Community Services Inc [2011] WAIRC 00402
Pemberton v Civil Service Insurance (2009) 89 WAIG 538
Ramsey v Annesley College [2013] SASC 72
Rankin v Scott Fell & Co (1904) 2 CLR 164
Re London Celluloid Co (1888) 39 Ch D 190
Reynolds v Southcorp Wines Pty Ltd (2002) 122 FCR 301
Rose v TJ & LK Cattle (2012) 92 WAIG 1797
Salomon v Brownfield (1896) 12 TLR 239
Scally v Southern Health & Social Services Board [1992] 1 AC 294
Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357
Sterling Commerce (Australia) Pty Ltd v Iliff [2008] FCA 702
Stilk v Myrick (1809) 2 Camp 317
Stylianou v Country Realty Pty Ltd As Trustee for the Marcelli Family Trust (2010) 91 WAIG 2028
Sullivan v Janvay Pty Ltd trading as Harvey World Travel, Fremantle (1998) 78 WAIG 3583
Sydney City Council v West (1965) 114 CLR 481
Taylor v Laird (1856) 1 H & N 266
The Australian Rail Tram and Bus Industry Union of Employees West Australian Branch v Public Transport Authority (2005) 85 WAIG 1604
Trimboli v Cusma Corporation Pty Ltd t/as Cusma Property Consultants [2003] WAIRC 8020
Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
Wandsworth London Borough Council v D'Silva [1998] IRLR 193

Waroona Contracting v Usher (1984) 64 WAIG 1500

Western Export Services Inc v Jireh International Pty Ltd [2011] HCA 45

Whitwood Chemical Co v Hardman [1891] 2 Ch 416

Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522

Williams v Roffey Brothers & Nicholls (Contractors) Ltd [1991] 1 QB 1

World Best Holdings Ltd v Sarker [2010] NSWCA 24

Young v Canadian Northern Railway Company [1931] AC 83

Reasons for Decision

1 Ms Ferguson was employed by TNT Australia Pty Ltd in May 2010 as a Field Sales Executive. TNT is a national company engaged in the business of freight and transport services. Ms Ferguson was based in the Perth office of TNT. In her position, she was responsible for the sales of TNT services to existing and new clients. Ms Ferguson was employed under a written contract of employment. In addition to her base remuneration, Ms Ferguson participated in a Commission and Bonus Scheme. It is this Scheme which is controversial in these proceedings.

2 Ms Ferguson resigned from her employment on 1 March 2013, by the giving of four weeks' notice in accordance with her contract of employment. Ms Ferguson sought clarification of her entitlements under the Scheme, for commission payments for January, February and March 2013, following the tendering of her resignation. Ms Ferguson was informed by TNT management that she had no entitlement under the Scheme to payments of commission, because her employment was terminating at the end of March 2013. Ms Ferguson disputed this. She claims under the Scheme she is owed some $5,000, despite her resignation. TNT disagrees. It says it does not owe Ms Ferguson any commission payments under the Scheme, because its terms provide that no commission is payable when a person ceases employment with the company.

3 Ms Ferguson has now brought the present claim, alleging that TNT has denied her, as a contractual benefit, payments under the Scheme. Two principal issues need to be determined in this matter. They are:

(a) Did the Scheme have contractual effect, either on the basis of express incorporation of its terms or were its terms implied into Ms Ferguson's contract?

(b) If the Scheme did have contractual effect, on a proper construction of its terms, did the Scheme give rise to an entitlement on the facts?

4 There were a number of subsidiary arguments put by Ms Ferguson and TNT. These issues will be separately identified and dealt with.

Factual setting

5 Affidavits were filed by Ms Ferguson and Mr Godbier, TNT's General Manager Sales. Ms Ferguson testified that her offer of employment was contained in a letter from TNT dated 13 May 2010. The offer letter was detailed and ran to some seven pages. It had annexed to it a document entitled "Check list of Attachments", setting out various policies and procedures of the company. A second attachment to the letter of offer was a job description for Ms Ferguson's position.

6 Formal parts omitted, relevant parts of the letter were as follows. At the commencement, the first two paragraphs provided:

> I am pleased to formally offer you the position of Field Sales Executive with TNT Australia Pty Limited (**Company**), commencing on 17 May 2010.
>
> Should you accept this offer, the terms and conditions of your employment will be as follows:

7 Under the heading "Duties", the final paragraph was in the following terms:

> The terms set out in this letter will continue to govern your employment with the Company despite any changes from time to time to your position, duties and responsibilities, remuneration, working hours or employment location unless otherwise agreed in writing.

8 For present purposes, the most controversial part of the letter appears under a heading "Policies and Procedures". The two paragraphs under this heading read as follows:

> You agree to abide by all policies and procedures of the Company as replaced, amended or varied from time to time, including but not limited to the policies and procedures attached to this letter. However, the policies and procedures of the Company referred to in this clause and elsewhere in this letter are not incorporated into this letter.
>
> You must familiarise yourself with these policies and procedures, including the policies and procedures attached and verify acknowledgement by signing the attached checklist confirming you have read and understood the policies and procedures.

9 At the end of the letter was a heading "Previous understandings and agreements" and the paragraph under it said as follows:

> This letter, which includes the **attached** position description:
>
> (a) constitutes the whole of the terms and conditions of your contract of employment with the Company; and
>
> (b) supersedes all previous agreements, arrangements, understandings or representations in relation to your employment with the Company.

10 In the acceptance section of the letter, appeared the words:

> I have read and accept employment with TNT Australia Pty Limited on the terms and conditions set out in this letter.

11 There follows the name and signature of Ms Ferguson (by her maiden name) which is dated 17 May 2010.

12 It was common ground that the Scheme was not one of the policies and procedures listed on the checklist of attachments attached to Ms Ferguson's letter of appointment. Ms Ferguson sought to make something of this in her submissions, and I will return to this issue later in these reasons. Ms Ferguson testified that she was given a copy of the documents referred to in the list with the letter of offer and she said she read them. She also acknowledged this by her signature accepting the offer of employment.

13 Once employed, Ms Ferguson testified that she earned commissions, payable monthly, under the Scheme. There was a three month time lag between a claim being made under the Scheme for a commission payment, and a payment being made. The Scheme was reviewed and updated regularly. Attached to Ms Ferguson's affidavit, were versions of the Scheme in place in 2010, 2011 and the most recent version as at the time she resigned from her employment, for 2013. Ms Ferguson testified that the commission payments she received under the Scheme, for both new business and existing customer sales, formed a substantial portion of her total income.

14 At the beginning of each year, Ms Ferguson said she received a letter from Mr Godbier, setting out her sales targets for that year. A letter of 1 February 2011 also referred to the updated version of the Scheme, which was available on the TNT intranet. Mr Godbier testified that a full copy of the Scheme was available for all employees to view on the TNT intranet, and which was easily accessed by staff. He also referred to the requirement for all employees to remain familiar with the Scheme and its various updates.

15 As noted, on 1 March 2013, Ms Ferguson resigned from the company. She testified that she was not clear as to her entitlements under the Scheme on her resignation. Relevantly, cl 8 of the Scheme, under the heading "General Rules for Participants", in the 2013 version provided as follows:

> **8.0 GENERAL RULES FOR PARTICIPANTS**
>
> To be eligible for payment of commission/bonus, a member of the scheme must:
>
> 8.0.1 Be fully employed by one of the following companies (each referred to as a 'Member Company'):
>
> TNT Australia Pty Limited
>
> Riteway Transport Pty Limited
>
> TNT Express Worldwide (NZ) Pty Limited
>
> TNT Express Worldwide Pty Limited
>
> for the duration of the period of the claim.
>
> 8.0.2 Have been in full time employment with a 'Member Company' referred to in clause 8.0.1 for four weeks prior to the first date of any claim and be assigned to a territory.
>
> 8.0.3 No consideration will be given to any request for consequential claims by members of the scheme. The liability of each 'Member Company' referred to in clause 8.0.1 to its respective members is restricted to the period during which a member of the scheme was fully employed by such 'Member Company', with no consideration as to future value after the final date of employment. *For the avoidance of doubt and notwithstanding any other provision in this document, no payments of any type under this Scheme will be paid to a member of the scheme after the termination of the member's employment.* (My emphasis)
>
> 8.0.4 Have met the criteria for payment as defined in the rules of New Business Bonus and Commission scheme.
>
> 8.0.5 New business eligibility is conditional upon the first trade as specified in Section 3. This means that if a sales person leaves/is redeployed and an account has been signed but not traded, then there is no eligibility for commission for that customer.
>
> 8.0.6 If a sales person is redeployed within the Sales Department in a selling role, then entitlement to New Business Commission will run its course until the expiration of the 12 month eligibility period. This includes moving to Time Critical and Failsafe in a selling role.
>
> 8.0.7 If a Manager receiving commission based on their Team's performance moves to a selling role, any New Business Ongoing Commission is forfeited.
>
> 8.0.8 If a sales person is redeployed within TNT, but to a different department or country, New Business commission ceases to be an entitlement.
>
> 8.0.9 New Business Commission will be paid up until the last week of employment for eligible Sales personnel who have resigned from TNT. Such payments will be paid with normal monthly payroll subject to clause 8.0.3 above and not as a lump sum on the last day of employment with TNT.
>
> 8.0.10 In the case of Maternity and Paternity Leave, New Business Commission is payable up until the last day at work. If the person on Maternity/Paternity Leave starts work again within the 12 month New Business commission payment period, then commission is payable from the date that the person recommences work (not retrospectively) up until the 12 month commission eligibility period expires.
>
> 8.0.11 All monetary amounts in this document are in the local currency (ie AU$,NZ$ or FJ$) relevant to the country in which scheme participant receiving the payment resides.

16 Ms Ferguson said she spoke to her manager about the matter, and in turn, the TNT head office. On 17 March 2013, the TNT Director Sales and Marketing, confirmed that under cls 3.6.7, 8.0.3 and 8.0.9 of the Scheme, no payments were made to employees following the termination of their employment. Mr Godbier in his testimony confirmed that this had been the

longstanding practice of the company. He said that an employee must be actually employed to receive a "New Business Commission" under the Scheme. Mr Godbier said that claims by employees for payment of commission after their employment had ended, are not paid. This includes claims based on revenue received by TNT, at a time when the person was still employed.

17 In relation to cl 8 of the Scheme, Mr Godbier testified that following a claim by an employee for commission payments after their employment had ended cl 8.0.3 was changed to reflect the current provision. He said that this was done so it would be completely clear to employees, that no payment under the Scheme of any type, are payable after termination of employment.

18 Further, Ms Ferguson suggested that neither she nor those in the Perth office of the company were aware of the changes to cl 8 made in 2011, and Ms Ferguson submitted, this was deliberate. This was denied by TNT. Mr Godbier said amendments to the Scheme were noted in the "Amendment Detail" table at the back of the Scheme document. This contained a summary note of the change, which was often expressed in a generic format.

19 Ms Ferguson maintained that at all times she considered that she should be paid for commission payments for January, February and March 2013, based on the work she had performed. She said that she was never told these amounts would be effectively forfeited, on her resignation.

Relevant legal principles

Contractual benefits claim

20 On a claim made by an employee or a former employee under s 29(1)(b)(ii) of the Act, the onus is on the applicant to establish that the benefit claimed, was one arising under their contract of employment. To establish such a claim, the claim must relate to an "industrial matter", as set out in s 7 of the Act; the claim must be made by an "employee" as defined in s 7 of the Act; the benefit claimed must be a contractual benefit, as an entitlement under the contract of service; the subject contract must be a contract of service; the benefit must not arise under an award or order of the Commission; and the benefit must also have been denied: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704. To be "entitled", to such a benefit, the employee or former employee must establish that the relevant benefit claimed arises under, by virtue of or pursuant to their contract of employment: *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307. Furthermore, the meaning of "benefit" has been defined broadly, to include any "advantage, entitlement, right, superiority, favour, good or perquisite by the action of the employer in contravention of a provision of the contract of service": *Balfour v Travelstrength Limited* (1980) 60 WAIG 1015.

Interpretation of contracts

21 The contemporary approach to contractual interpretation is to have regard to the meaning of a contractual provision that a reasonable person in the position of the parties at the time the contract was made, would have, in the context of the surrounding circumstances and the purpose and object of the transaction: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165. This involves an objective assessment. The subjective intention of the parties is not relevant: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451.

22 The focus is on the text of the contract, which is to be given its ordinary and natural meaning. There is no reason to depart from the ordinary and natural meaning unless the terms in question are unclear or ambiguous, or would lead to an absurdity or inconsistency: *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99. Furthermore, it is not generally permissible to look to extrinsic material, unless there is some ambiguity in the terms of the relevant contract: *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352 per Mason J.

23 In cases where a contract contains an "entire agreement" clause, this generally prevents the conclusion that the contract may contain further express provisions or the existence of a collateral contract: *MacDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152 per Davies JA at 156. However, this does not preclude the implication of a term for example, of good faith and fair dealing: *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1.

Was the Scheme a contractual entitlement?

Express incorporation

24 In very detailed written submissions, Ms Ferguson contended that the Scheme was incorporated into her contract of employment by reason of the language used in the letter of appointment. In particular, Ms Ferguson focussed on the words "abide by" in the letter of appointment, in the policies and procedures clause. It was contended, that when regard is had to other cases, such as *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193, the use of such a phrase reflects an intention by the parties to offer and accept mutual obligations in accordance with the terms of the Scheme (per North J at par 107). Further, Ms Ferguson submitted that by reason of the level of detail in the Scheme and the fact that it creates substantial rights, this reinforces the view that objectively, the parties intended the secondary document to have contractual effect.

25 Ms Ferguson also pointed to the bureaucratic process she said she had to use to participate in the Scheme. Forms had to be completed. She had to "register" under the Scheme, before she could participate in it. In support of the contractual nature of the Scheme, Ms Ferguson also made reference to letters she received each year from TNT, suggesting she would be rewarded under the Scheme.

26 Taking all of these matters into account, Ms Ferguson contended that a reasonable person in the position of the parties would assume that the terms of the Scheme conferred, as a matter of contract, the benefit of participation in it and the rewards that flowed from its terms. This was so, on Ms Ferguson's submissions, despite the second sentence in the policy clause, to the effect that policies and procedures of the company were "not incorporated into this letter". Whilst Ms Ferguson accepted that this part of the clause was a "hurdle", it was not insurmountable, given the other factors to which I have referred.

27 It was also contended that in this case, there appears no exclusion clause in the Scheme itself. This is in contrast to cases such as *Yousif v Commonwealth Bank of Australia* (2010) 193 IR 212 and *Barker v Commonwealth Bank of Australia* (2012) 296 ALR 706. Ms Ferguson emphasised the importance of context, despite the existence of the exclusion clause in the policies in these cases. A further contention put by Ms Ferguson, was to the effect that as the Scheme was not on the "check list" attached to the letter of offer, it was removed from any operation of the exclusion clause in any event.

28 Taking this last proposition first, I do not accept that it can be concluded that because the Scheme is not mentioned in the list on the attachment to the letter of offer, it means no reference can be made to the Scheme when considering the exclusion clause. The first sentence of the policies clause clearly refers to "all policies and procedures of the Company". Further, in the same sentence, the words "including but not limited to the policies and procedures attached to this letter", appear. The combined effect of these words in the clause is to make it plain that the policies and procedures list attached to the letter of offer is not in any sense exhaustive. There is no doubt in my view, that the Scheme was a policy and procedure for the purposes of the clause at the material time.

29 Whether an employer is to be taken to commit itself contractually to a particular policy in the workplace, is to be concluded from all of the circumstances and the context of each case. I reject the proposition that an employer can only require an employee to observe a particular policy, as an obligation on the employee, with the consequence of disciplinary action if not complied with, only if, as a corollary, the employer must bind itself contractually to such a policy. To so conclude, would be to completely disregard, and render almost nugatory, an employer's right, as an incident of an employment contract, to require an employee to comply with lawful and reasonable directions, given by an employer, from time to time.

30 In this case, the obligation on Ms Ferguson to familiarise herself with and "abide by" the policies and procedures of TNT, was an obligation the company was able to lawfully and reasonably impose on an employee. If Ms Ferguson failed to do so, she may have been subject to disciplinary action. Absent other indications in the letter of offer, or the Scheme document itself, it may also, consistent with cases such as *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120, and depending on the entire context, be open to conclude that the policies and procedures concerned created enforceable contractual obligations.

31 However, in this case, unlike in *Nikolich*, and as in *Yousif* and *Barker*, there were clear indications in the contract documents that such policies and procedures did not have contractual effect. The statement in the policies and procedures clause of the letter of offer, referred to above, is clear and unambiguous. In my view, a reasonable person in the position of the parties could be in no doubt as to the meaning and intention to be gleaned from the policies and procedures clause in the letter of appointment. Ms Ferguson's evidence was she carefully read and understood the letter of offer and policies and procedures as outlined in the checklist of attachments. This policies and procedures clause in the offer of employment is a fundamental barrier to Ms Ferguson's claim for the recovery of a denied contractual benefit.

32 However and furthermore, the policies and procedures clause in Ms Ferguson's letter of appointment should not be read in isolation. When considered in the context of other provisions of the letter of offer, the issue is put beyond doubt in my view. The entire agreement clause, set out above at par 9, is of significance. It is clear from its terms, that it is only the letter of offer and the attached position description that constituted the contract of employment between Ms Ferguson and TNT. In my opinion, there is no reason, despite Ms Ferguson's submissions to the contrary, to not give plain effect to this entire agreement clause. It reinforces the express terms of the policies and procedures clause, to the effect that while Ms Ferguson was required to comply with the company's policies and procedures, they were not incorporated into the contract of employment.

33 Additionally, the terms of the letter of appointment specifying that it will continue to govern Ms Ferguson's employment with TNT, regardless of identified changes, "unless otherwise agreed in writing", is a further indicator of the contract of employment being limited to the express terms of the letter of appointment, including Ms Ferguson's job description.

34 When regard is had to these provisions of Ms Ferguson's letter of appointment, expressed as they are in clear and unambiguous language, from the four corners of the letter of appointment, the conclusion is compelling that a reasonable person in the position of the parties at the time the contract was entered into, could only conclude that the terms and conditions of Ms Ferguson's contract of employment, were limited to those set out in the letter of offer. To conclude otherwise, would be to disregard the plain language of the written contract of employment itself.

35 As to the issue of the Scheme as an implied term, I turn to those contentions now.

Implied term

36 A number of arguments were advanced by Ms Ferguson in support of the proposition that the Scheme formed an implied term of the contract of employment between her and TNT. The first basis contended by Ms Ferguson was applying the "business efficacy" principle. This principle was espoused by the Privy Council in *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266. In this case, Lord Simon of Glaisdale observed at 283:

> In their [Lordships] view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it "goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

37 The principle in *BP Refinery* has been considered and adopted by the High Court. In *Codelfa*, Mason J said at 346:

> The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it – it is not a term that they have actually agreed upon. Thus, in the case

> of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention.

38 Thus, Mason J was commenting on the failure by the parties to the contract to direct their minds to the subject matter of the terms sought to be implied.

39 The immediate problem confronting Ms Ferguson in relation to this issue is, for the reasons I have set out in some detail above, the parties in this case have turned their minds to the issue of the status of the company's policies and procedures and other documents, standing outside of the detailed letter of offer. As I have found, it was an express term of the contract that TNT policies and procedures are not to be taken to be incorporated into the contract of employment. This conclusion is not just based on the policies and procedures clause itself, but also, as I have set out earlier in these reasons, from a reading of the letter of offer as a whole, in its ordinary and natural grammatical sense. If, as Ms Ferguson contended, the Scheme is to be implied as a term of the contract, it would deprive the policies and procedures clause, and the others to which I have referred, of any real meaning.

40 This issue was explained in *F.A. Tamplin Steamship Company, Limited v Anglo-Mexican Petroleum Products Company, Limited* [1916] 2 AC 397 where Lord Parker of Waddington said at 422-423:

> It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency.

41 I am therefore not persuaded by Ms Ferguson's submission that the Scheme can be said to satisfy the tests in *BP Refinery* to stand as an implied term of the contract.

42 A further proposition advanced by Ms Ferguson was to the effect that the Scheme is to be implied into her contract based on custom and usage. It is the case that a term may be implied into a contract based on an established custom and usage. The principle was explained in the decision of the High Court, *Con-Stan Industries of Australia Proprietary Limited v Norwich Winterthur Insurance (Australia) Limited* (1986) 160 CLR 226. In this case, the Court (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ) held at 236-238 that (1) the existence of an implied term based on custom and usage is a question of fact; (2) the term relied on must be so well known as to be notorious to all those in the trade or industry concerned; (3) it must not contradict an express term of the contract; and (4) knowledge of the term is not necessary before it will be implied.

43 As with the implication of the Scheme as a term based on the business efficacy test, the custom and usage principle founders as, in this case, to imply it, would fly in the face of the express terms of the contract in relation to the status of the policies and procedures of TNT. Furthermore, and equally problematic for Ms Ferguson, is the fact that there is no evidence before the Commission of the Scheme's existence as a "notorious fact" such that anyone entering into a contract of employment with TNT would know of the Scheme's existence and operation and that it would be an assumed part of any contract of employment entered into. As to the proposition of a prior course of dealing between the parties, consistent with the submissions of TNT on this issue, the evidence before the Commission, through Mr Godbier, was to the effect that it has been the past practice that commissions under the Scheme are not paid after termination of employment. This evidence was at odds with the case advanced by Ms Ferguson on this issue.

44 The next basis contended by Ms Ferguson for the implication of the Scheme as a term of the contract, was in reliance on the proposition of mutual trust and confidence, said to be implied into the contract. This term is said to be implied, following the decision of the Full Court of the Federal Court in *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450. The existence of such a term in Australia is controversial and the decision of the Full Court in *Barker* is presently on appeal before the High Court. However, even if such an implied term exists, a breach of it would give Ms Ferguson a right to claim damages at common law. That right, as a cause of action, is not of itself in my view, a contractual benefit capable of being the subject of an order of the Commission in proceedings of this kind. It must be borne in mind that Ms Ferguson has sought the recovery of a specific contractual benefit, in the form of commission and bonus payments, not any other form of benefit.

45 Equally problematic for Ms Ferguson, even if such a term could be implied and a breach led to an order for a denied contractual benefit, any such breach would need to be sufficiently serious to give rise to a remedy. In this case, the evidence points to no other conclusion than that TNT has consistently applied the Scheme based upon its view of its operation and effect. For a breach of an alleged implied term of trust and confidence to be established, it would need to be found that the company has conducted itself without reasonable or proper cause, inconsistently with its policies and procedures, and such conduct was likely to destroy or seriously damage the relationship of trust and confidence between the parties. There is no evidence to support such a proposition.

46 The same conclusions may be reached in relation to Ms Ferguson's submissions that the implied duty of cooperation, if breached, supports a finding of a denied contractual benefit. I am therefore not persuaded that Ms Ferguson had a contractual benefit to the terms of the Scheme, based on the implication of such a term into her contract of employment.

Variation to contract

47 There were further submissions made by Ms Ferguson to the effect that despite the entire agreement clause in the letter of offer, the Scheme could be regarded as going beyond the terms of the original offer of employment, amounting to a subsequent variation to her contract of employment. In response to TNT's answer that Ms Ferguson provided no fresh consideration for this variation, Ms Ferguson submitted that her requirement to "over achieve"; to "exceed targets" and to "exceed certain criteria" all pointed to her performing other than an existing legal obligation. For the following reasons, I do not consider this to be so.

48 It is trite that the existence of consideration, in the form a benefit moving from the promisee to the promisor, being the agreed price for the promissor's promise, is essential in the formation of a contract (see generally Lindgren KE, 'Consideration' in Lindgren KE et al *Contract Law in Australia* (1986) 75-130). Consideration needs to have some value in the eyes of the law, but its adequacy is not relevant. In the case of employment contracts, the consideration for the employer's promise to pay an employee's salary is the employee's performance of work, encapsulated in the "wages for work" bargain (see generally Sappideen C, O'Grady P and Warburton G, *Macken's Law of Employment* (6th ed, 2008) 118).

49 In this case, Ms Ferguson was obliged by her contract of employment to work to the best of her capacity as an employee of TNT. Participation in the Scheme did not require employees to do what they had otherwise promised to do, that being to perform their duties, to the best of their ability, in accordance with their contracts of employment. In Ms Ferguson's case, that involved selling TNT's products and achieving her sales targets given to her each year. This was an existing legal obligation under her then contract of employment and could not constitute fresh consideration: *Wigan v Edwards* (1973) 47 ALJR 586.

50 However, if I am incorrect in relation to contentions advanced by Ms Ferguson in her submissions, and the terms of the Scheme were a benefit under her contract of employment, I will now turn to consider the terms of the Scheme itself.

Terms of the Scheme – did Ms Ferguson meet them?

51 Ms Ferguson gave evidence as to the operation of the Scheme. She described payments under it as being made monthly, with a three month time lag. She was paid the commissions along with her usual salary. The criteria for the payment of commissions were referred to by Ms Ferguson. These criteria are all set out in the copy of the 2013 version of the Scheme, on which Ms Ferguson's present claim is based. Ms Ferguson referred to the Scheme being regularly reviewed and her receiving a letter at the start of each year, setting out the company's direction for that coming year. Attached to her affidavit, at ALF 7, ALF 8 and ALF 9 were copies of letters from Mr Godbier, to this effect.

52 In particular, the letter of 1 February 2011 from Mr Godbier, referred to by Ms Ferguson, included a copy of the updated Scheme's terms and conditions for that year. It was this update, which included the revised terms of cl 8.0.3. Ms Ferguson also acknowledged that sales staff had been referred to the TNT intranet, where the latest versions of the Scheme could be accessed by staff. I interpose to observe, that by her contract of employment, Ms Ferguson, along with other sales employees, was required to maintain a current knowledge of the company's policies and procedures, all of which were available on the company's intranet.

53 From the terms of the Scheme, it provides an incentive and reward for sales staff to achieve and exceed their sales objectives: cl 1.0. There are two broad types of commission payments available under the Scheme: New Business and Cross Sell commissions: cl 3.0. From its terms, there appears to be quite strict rules regarding the application of the Scheme. For example, all sales staff have to be registered to participate: cl 2.0. Eligibility for commissions and bonuses is dependent on sales transactions taking place within a 13 week "Eligible Period". All claims for commissions must be submitted within 14 days of a second "trade": cl 3.4.1 - 3.4.2. Subject to what is described as a "genuine special circumstance", any claims submitted outside of this 14 day period are considered "late claims" and are not processed: cl 3.6.5 - 3.6.6.

54 As noted earlier in these reasons, all approved claims are paid within a 3 month time lag from the date of approval: cl 3.6.7. This is subject to the proviso in the general rules for Scheme participants, in cl 8.0.3, set out above. There are also other exclusions and exceptions in the Scheme. For example, managers of TNT who participate in a team performance bonus and who move into a sales position, forfeit their commissions: cl 8.0.7. Similarly, if a salesperson moves to a non-selling position, they cease to be entitled to commissions: cl 8.0.8. Those on maternity and paternity leave, cease to have any entitlements to commissions under the Scheme, beyond the last day prior to proceeding on leave: cl 8.0.10.

55 When these provisions of the Scheme are read with the terms of cl 8.01 - 8.03 of the general rules, it seems that the Scheme is intended to reward staff whilst they are employed by TNT and related companies, are at work and are performing their duties in a sales position.

56 Turning then to the controversial provision in cl 8.0.3. Ms Ferguson in her submissions sought to draw a distinction between "past value" commission payments and "future value" commission payments. The former were said to be those earned prior to the termination of Ms Ferguson's employment on 29 March 2013. The latter payments were said to be those for value generated after the termination of her employment. However, the scheme itself draws no such clear distinction. No doubt Ms Ferguson sought to draw this distinction from the terms of cl 8.0.3, which refer to "consequential claims" and "future value". These phrases are less than clear. However, as with all cases of interpretation, the meaning of particular words in a contract, or in this case, a policy, is to be gleaned from the context in which the words appear. From the first two sentences of cl 8.0.1, it seems the reference to "consequential" claims by members, is referring to the rule in the second sentence, that no entitlements will survive the termination of a member's employment.

57 The third sentence of cl 8.0.3 puts the issue beyond doubt in my view. It was the case that this sentence was included in cl 8.0.3 from February 2011, on Mr Godbier's testimony. Regardless of the correctness of the view that there is no distinction under the terms of the Scheme between "past value" commissions and "future value" commissions, it is difficult to imagine a clearer statement of entitlement, under the Scheme, than the third sentence of cl 8.0.3. The sentence refers to payments of "any type" under the Scheme. When read with the remainder of cl 8.0, in the context of the operative parts of the Scheme as a whole, it is clear in my view, that for Ms Ferguson to be entitled to commission payments for January, February and March 2013, she would need to be employed by TNT in April, May and June 2013 respectively. She was not so employed. Ms Ferguson has not established an entitlement under the Scheme, even if the Scheme was to be considered a contractual benefit.

58 There were two further submissions made by Ms Ferguson. These related to whether, if TNT's interpretation of cl 8.0.3 of the Scheme was correct, Ms Ferguson had sufficient notice of the change to it in February 2011. The second argument put was whether, in the circumstances, any discretion that TNT may have had under the Scheme to pay a commission or bonus, was lawfully exercised. I will deal with each of these contentions in turn.

Notice of the variation to the Scheme

59 The nub of Ms Ferguson's submission on this issue was that the change to cl 8.0.3 in February 2011 was substantial and should have been brought to her attention specifically. In reliance on cases such as *Riverwood*, it was submitted that courts are reluctant to uphold an employer's power to vary a contract unilaterally, the absence of clear words to the contrary. It was also submitted that whether the variation is to the benefit of the employer or employee is also relevant. If it is the former, then adequate notice becomes more important. The contention was also put that cl 8.0.3 operated as an exclusion clause, and, accordingly, should be construed consistent with the principles applicable to them in contracts. In particular in relation to putting a party to the contract clearly on notice as to its terms.

60 The first point to note in relation to these submissions is that, as I have found above, the terms of the Scheme in this case did not have contractual effect and were not incorporated into Ms Ferguson's contract of employment. Thus any changes to the Scheme, or other policies and procedures for that matter, would not, from the perspective of a reasonable bystander, be seen to contractually bind the parties. The cases referred to and relied on by Ms Ferguson, dealt with situations where changes to external documents, such as manuals, had contractual effect. In those circumstances, one can perhaps appreciate the need for some specific notification, in particular, in cases where the changes made may disadvantage an employee. Similar observations can be made about exclusion clauses. I have doubts however, as to whether the exclusion clause analogy applies in this case. Such clauses usually seek to limit liability for breach of a contract. No issue of breach of contract, in this sense, arises in this case.

61 Secondly, it is relevant to note, as submitted by TNT, that Ms Ferguson was on notice of the updated version of the Scheme from Mr Godbier's letter of 1 February 2011. A copy of the 2011 Scheme, annexed as ALF 5 to Ms Ferguson's affidavit, was provided to her at the time. The general rules for Scheme participants were then cl 9 and not cl 8. Ms Ferguson had been employed since May 2010 and had been a Scheme participant for some time by then. It is reasonable to assume that she would have been broadly familiar with its operation by that time. She certainly was quite familiar with the operation of the Scheme in her testimony.

62 In any event, Ms Ferguson gave evidence that the Scheme was regularly updated and was aware of her obligation to remain familiar with its terms. The terms of the general rules section of the Scheme are not overly complicated and a cursory reading of the then cl 9.0.3, would have put Ms Ferguson on notice that no payments under the Scheme would be made to an employee after termination of their employment. Whilst with the benefit of hindsight, it may have been better for TNT to have noted the specific change then made, it is not open to conclude in my view, that Ms Ferguson did not have adequate notice of the change at the time. Nor in my view, based on the evidence in this matter, is it open to draw an inference that there was any deliberate attempt to conceal the change made. Whilst on Mr Godbier's evidence the change made in February 2011 was described in the "Document Amendment Record" in generic terms that was also the case with many other changes to the Scheme referred to in the list. No adverse inference can be drawn from this in my view. I also note Mr Godbier's evidence that from time to time queries are raised with him by sales staff about the Scheme's operation. He testified that he has never discouraged staff from doing so and has answered such queries to the best of his ability.

63 It is also relevant to observe, as pointed out in TNT's submissions, that Ms Ferguson had been working under the Scheme as amended for over two years and taken the benefits of it, before she resigned and commenced these proceedings.

Unlawful exercise of discretion

64 The final submission made by Ms Ferguson was that the company has exercised its discretion under the Scheme in an unlawful manner. It was contended that the operation of the three month time lag meant that Ms Ferguson had no entitlement under the Scheme for the last three months of commissions and this was inherently unfair. The submission was that TNT did have discretion under the Scheme to make a payment to Ms Ferguson and the company should have exercised it in this case.

65 It is not clear how, under the Scheme, such discretion could have been exercised in this case. Whilst Ms Ferguson referred to cl 1.0, by partial reference to "payment rulings outside of the stated rules", a full reading of this clause makes it clear the intention of the Scheme rules is to avoid the need for any such rulings.

66 There is no doubt that where discretion is conferred on a person, in this case, an employer, such discretion should not be exercised capriciously or in an arbitrary manner. A remedy may be available if this obligation is breached. However, in this case, based on the construction of the Scheme's terms that I prefer, Ms Ferguson has not established an entitlement to a commission and no issue of discretion arises in this case. The terms of cl 8.0.3 are very clear and as mentioned earlier in these reasons, other provisions of the Scheme point to quite stringent requirements being imposed for eligibility and other matters. These requirements are spelt out in the Scheme in plain terms and a participant could be under no reasonable misapprehension about them in my view.

Conclusion

67 Accordingly, despite the valiant attempt by Ms Ferguson to persuade the Commission to the contrary, the application must be dismissed.

2014 WAIRC 00021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMY LINETTA FERGUSON
	APPLICANT
	-v-
	TNT AUSTRALIA PTY LTD (41 000 495 269)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 14 JANUARY 2014
FILE NO/S	B 66 OF 2013
CITATION NO.	2014 WAIRC 00021

Result	Application dismissed
Representation	
Applicant	Mr S Ferguson of counsel
Respondent	Mr N Furland of counsel and with him Mr M Brennan

Order

HAVING heard Mr Ferguson of counsel on behalf of the applicant and Mr Furland of counsel and with him Mr M Brennan on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2013 WAIRC 01083

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 01083
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 26 AUGUST 2013, TUESDAY, 27 AUGUST 2013, WEDNESDAY, 28 AUGUST 2013, WEDNESDAY, 9 OCTOBER 2013
DELIVERED	**:**	FRIDAY, 20 DECEMBER 2013
FILE NO.	**:**	B 40 OF 2013
BETWEEN	**:**	NATALIE LEANNE GARTSIDE
		Applicant
		AND
		MR DAVID GLOSTER, HEAD OF AIRPORTS - WESTERN AUSTRALIA QANTAS AIRWAYS
		Respondent
FILE NO.	**:**	B 41 OF 2013
BETWEEN	**:**	HELEN MARIE JOYCE
		Applicant
		AND
		MR DAVID GLOSTER, HEAD OF AIRPORTS - WESTERN AUSTRALIA QANTAS AIRWAYS
		Respondent

Catchwords	**:**	Contractual benefit claim - Entitlement under contract of employment - Claim for applicants to be maintained in job share arrangement - Applicants' claims made out - Order issued
Legislation	**:**	*Industrial Relations Act 1979* s 7, s 27(1) and s 29(1)(b)(ii)
Result	**:**	Order issued
Representation:		
Applicant	**:**	Mr G Upham (as agent) and Ms E McCarthy
Respondent	**:**	Mr R Hooker, Ms D McConnell and Ms S Francis (all of counsel)

Case(s) referred to in reasons:

Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Belo Fisheries v Froggett (1983) 63 WAIG 2394

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

Byrne & Frew v Australian Airlines Ltd (1995) 185 CLR 410

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337

Con-Stan Industries of Australia Pty Ltd v Norwich Winterhur Insurance (Australia) Ltd (1986) 160 CLR 226

Hotcopper Australia Ltd v David Saab (2001) 81 WAIG 2704

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

Rai v Dogrin Pty Ltd [2000] 80 WAIG 1375

The State School Teachers' Union of W.A. (Incorporated) v Ken Davis (2012) 92 WAIG 1870

Ware v Amaral Pastoral Pty Ltd (No 5) (2012) NSWSC 1550

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 On 18 March 2013 Natalie Leanne Gartside and Helen Marie Joyce (the applicants) lodged applications in the Commission claiming that they had been denied a benefit due to them under their contracts of employment. Their employer, Mr David Gloster, Head of Airports – Western Australia Qantas Airways (the respondent) (Qantas), disputes that the applicants are due the benefit they are seeking.

2 Following is the order, as amended during the hearing, being sought by both applicants:

> Whereas the Commission has made a finding of fact that the applicant's contract of employment is one of job share, the Commission orders that the respondent maintain the applicant in a job share position in accordance with the contract of employment.

3 As these applications deal with the same facts the applications were heard together.

Name of the respondent

4 During the proceedings it became apparent 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 Mr David Gloster, Head of Airports – Western Australia Qantas Airways be deleted as the named respondent in these applications and be substituted with Qantas Airways Limited (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).

Background

5 The following is not in dispute:

(1) On 22 August 2007 the applicants and eight other employees submitted requests to the respondent seeking job share arrangements.

(2) On 12 September 2007 the respondent invited expressions of interest (EOI) within Perth Airport for the position of Customer Service Agent (Job Share) Level 3 within the Customer Services Division.

(3) On or about 16 September 2007 each applicant submitted an EOI in response to the September EOI notice.

(4) On 27 September 2007 the applicants submitted a written proposal for a job sharing arrangement.

(5) On 22 October 2007 the respondent approved additional job share roles.

(6) From November 2007 the respondent and the Australian Services Union (ASU) discussed the terms of a local job share agreement for customer service employees at Perth Airport. The ASU position was that all job share positions at Perth Airport were to be permanent ongoing positions. The applicants were involved in these negotiations.

(7) The respondent's position was that job share arrangements at Perth Airport would only be fixed-term secondments from the employee's substantive role.

(8) In or around January 2008 the ASU rejected the respondent's proposed local job share agreement of five-year fixed term job share secondments.

(9) In January 2008 the respondent issued an internal vacancy notice inviting applications from customer service employees at Perth Airport for the position of Customer Service Agent (Job Share) Level 3 within the Customer Services Division.

(10) On 1 February 2008 the respondent had discussions with each of the applicants about the proposed job share arrangements.

(11) On 7 February 2008 the respondent advised the ASU in writing that:

(a) if the six-month trial was successful, the applicants would be offered a job share role at Perth Airport for a further 4 1/2 years; and

(b) the terms of the job sharing arrangements were those contained in a document called 'The Job Share Proposal Perth Airport (Version 14)' which would be applied as a matter of policy pending any subsequent agreement that may be reached with the ASU.

(12) On 8 February 2008 the ASU advised the respondent that its members would commence to act in job share positions from 13 February 2013 (sic) for a six-month trial.

(13) The applicants commenced working their job share arrangement in the week commencing 20 February 2008.

(14) On 20 May 2008 the respondent set out the terms and conditions of the trial job share arrangement in a document provided to each applicant titled 'Confirmation of Secondment to a Temporary Job Share Position'. Neither applicant signed this letter.

(15) On 30 June 2008 the ASU emailed the respondent disagreeing with the respondent's position that the job share positions be for a fixed term.

(16) On 23 April 2009 the respondent advised the ASU in writing that:

(a) as the respondent could not agree to the ASU's demand that the job share positions are to be filled on a permanent basis, there was no agreement to a local job share agreement with the ASU at Perth Airport; and

(b) the terms and conditions of the job sharing arrangements for employees who participated in the trial would continue to be those contained in 'The Job Share Proposal Perth Airport (Version 14)' which would then be applied as a matter of policy as the 'Job Share Arrangement'.

(17) On 24 April 2009 the ASU sought further discussions with the respondent before implementation of 'The Job Share Proposal Perth Airport (Version 14)'.

(18) On 5 June 2009 the respondent sent letters to each of the applicants confirming the end date of the applicants' job share as being 19 February 2013. This arrangement provided that in recognition of the particular circumstances the job share term was fixed at five years or a lesser period if agreed by the employee.

(19) On 18 June 2009 Ms Pat Branson of the ASU wrote to the respondent on behalf of the applicants refuting the respondent's position and suggesting further revision of 'The Job Share Proposal Perth Airport (Version 14)'.

(20) On 3 December 2012 the respondent invited each applicant to re-apply for a job share secondment before 31 December 2012, as their existing job share secondment was due to expire on 19 February 2013.

(21) On 14 December 2012 and 20 December 2012 the applicants reiterated that they considered they held ongoing job share positions.

(22) On 4 February 2013 each applicant provided the respondent with their updated personal circumstances in support of being employed in an ongoing job share arrangement. The applicants maintained their position that they were in a permanent job share arrangement.

(23) By letter dated 12 February 2013 the respondent informed each applicant that their existing job share secondment would be extended to 30 April 2013 to allow the respondent to undertake a review of job share arrangements at Perth Airport.

(24) On 12 February 2013 the ASU wrote to formally dispute the removal of employees from job share.

(25) The respondent subsequently granted a further short-term extension of each applicant's secondment to 28 May 2013.

(26) On 27 May 2013 the respondent advised each applicant that the respondent could not offer the applicants a further job share secondment after the expiry of their current secondment, but that the respondent was offering a three-month transition period to allow each applicant to transition back to their substantive position and roster.

(27) The respondent extended each of the applicants' job share secondment until 1 October 2013.

6 In support of the applicants' claim that the job share arrangements are permanent the applicants rely on a Heads of Agreement dated 19 August 1996 (HOA), which was agreed between the ASU and the respondent. This agreement related to job share positions with the respondent at Airports across Australia (Exhibit 1.4). The applicants argue that this forms the framework of local area job share arrangements which apply at airports throughout Australia. The applicants also rely on the terms and conditions of a job share arrangement in place at Perth Airport as at August 1998 for Ms Lesley Emmans. This memorandum headed 'Confirmation of Transfer to Job Share with Ms Sue Duncan', dated 12 August 1998, relates to Ms Emmans' transfer from working fixed hours part time to a full time job share arrangement (Exhibit 1.3).

7 The general principles related to job share arrangements contained in the HOA and the memorandum dated 12 August 1998 are as follows:

> It is recognised that in some instances current serving staff will, due to changed circumstances, find their full time hours impossible to meet. In those circumstances the staff member may elect to share a full time job with another job sharer. This job share arrangement will be facilitated by Qantas in instances where efficiency/cost is not compromised.
>
> It should be noted that job share is not a substitute for part time employment but has been created to provide more flexible employment arrangements where an existing staff member's circumstances have changed.

> Each job sharer will be on an individual contract sharing a full time position. Should the job sharer's partner leave or permanently change their hours the Company will assist the job sharer to find a new partner.
>
> If the vacant job share position cannot be filled, then the position will revert back to a full time position and the job share person will be required to work full time hours.
>
> (Exhibits 1.3 and 1.4)

8 The following witnesses gave evidence on behalf of the applicants.

9 Ms Joyce commenced employment with the respondent on 15 December 2004 as a Customer Service Agent on a part time basis. She commenced in her current position of a Customer Service Agent (Job Share) Level 3 on 20 February 2008.

10 Ms Gartside commenced employment with the respondent on 22 September 2003 as a Customer Service Agent on a permanent part time basis. In February 2008 she commenced in a job share position of Customer Service Agent (Job Share) Level 3.

11 Ms Linda White is currently the Assistant National Secretary of the Australian Municipal, Administrative, Clerical and Services Union. She has been in this role since 1995.

12 Ms Patricia Branson is currently the Assistant Branch Secretary of the Australian Municipal, Administrative, Clerical and Services Union Western Australian Branch. Ms Branson has had direct involvement with Qantas on behalf of the ASU since August 2007.

13 Ms Norelle Quayle has been employed by the respondent since 1 September 2003 as a permanent part time Customer Service Agent. On 25 February 2009 Ms Quayle returned from 11 months maternity leave and commenced a job share position.

14 Ms Fay Finnigan commenced employment with the respondent as a part time Customer Service Agent Level 3 on 19 March 2003. On 12 March 2008 she commenced a job share position.

15 The respondent did not call any witnesses.

Applicants' evidence

16 Ms Joyce gave evidence that the job share trial document she received from the respondent dated 20 May 2008 contained different terms and conditions to those which she had been working under for the previous three months and she continued to work under her existing conditions and not the conditions specified in the job share trial document. Even though this document referred to her returning to her substantive role after the trial period had finished should an agreement not be reached with the ASU on a local agreement she remained in her job share position with no agreement being reached between the ASU and the respondent. When Ms Joyce received a letter from the respondent on 5 June 2009 referring to her job share arrangement expiring after five years she responded by letter stating that she understood that her job share arrangement was a permanent arrangement. Ms Joyce stated that when she applied and completed an EOI for her job share arrangement on 12 September 2007 she understood this role was ongoing and not time limited.

17 Ms Gartside gave evidence that the job advertisement for Customer Service Agent Job Share Level 3 on or about 12 September 2007 was an ongoing position because it did not state otherwise. Ms Gartside completed a staff vacancy form for this position. Ms Gartside understands that the only positions which are short term in Qantas are those which relate to a secondment. Ms Gartside did not agree at any stage to undertake her job share role on a time limited basis and when the respondent advised her on 3 December 2012 that her job share arrangement was to cease on 19 February 2013 she responded stating that her position was not fixed term nor had she agreed to any job share arrangement which was due to expire.

18 Ms White testified that the HOA agreed with Qantas in 1996 contains the general principles governing job share arrangements throughout Australia and its terms forms the basis of negotiation of local agreements for job sharing at Qantas. During negotiations for a local area job share agreement at Perth Airport the ASU's position was that all positions would be ongoing, which was the situation which applied in late 2007 at Perth Airport. Ms White said that at this time approximately 170 Qantas employees were engaged in job share positions around Australia and they were all ongoing, permanent arrangements. Ms White is unaware of any job share positions at Qantas throughout Australia which were not ongoing. Ms White stated that the ASU reached agreement with the respondent that employees at Perth Airport who worked the additional job share positions in 2008 would complete a trial of job share positions and she understood that these positions would then become permanent. Ms White stated that many local area agreements included enhanced conditions over and above the conditions included in the HOA. No further agreement was reached between the ASU and the respondent, however employees continued to work in the job share arrangements after the six month trial period and remain in these positions to date.

19 During Ms Branson's negotiations about job share arrangements at Perth Airport no agreement was reached between the parties about the job share roles being for a fixed term. Ms Branson maintained that job share arrangements entered into by the applicants on 20 February 2008 at Perth Airport were all ongoing and permanent based on the terms of the HOA and on the basis that existing job share arrangements at the time were permanent. There was no agreement between the ASU and the respondent to change or amend the principles contained in the HOA.

20 Ms Quayle commenced maternity leave in March 2008. She started her job share position on 25 February 2009 and her conditions of employment were those applying to other permanent job sharers at Perth Airport and were different to when she worked as a part time employee. Ms Quayle works 19 hours per week, she does not have to cover sick leave or days in lieu for her job share partner and she is paid overtime after working 19 hours per week at the rate of double time. Ms Quayle stated that she was not given a contract for her job share position when she commenced nor was she advised that it was on a temporary or trial basis. Ms Quayle understood her job share arrangement would be ongoing as she was aware other employees who job shared at Perth Airport prior to 2008 expected to remain in their job share positions on an ongoing basis. Ms Quayle would not have undertaken a job share role if it was going to be time limited. Ms Quayle understood that the trial period for job share positions in 2008 was to see if partners were compatible and working well together.

21 Ms Finnigan commenced in a job share position on 12 March 2008. When Ms Finnigan applied for a Customer Service Agent Job Share Level 3 in September 2007 she understood it was an ongoing, permanent position because there was no reference to this position being time limited or was a secondment for a specified period. When she applied for this position she did so in the same way as she had applied for other ongoing positions within Qantas. Ms Finnigan gave evidence that when she had applied for secondments previously with the respondent she did not fill out the staff vacancy form that she had filled out when she applied for the job share arrangement in 2007. Ms Finnigan has been on secondments when she has been job sharing and after each secondment she returned to her job share position. Ms Finnigan never agreed to undertake her job share role for a fixed term and she never signed or agreed to change what she understood to be an ongoing, permanent job share role.

Submissions

Applicants

22 The applicants maintain that the terms and conditions contained in Ms Emmans' contract applies to the contracts of employment of the applicants and the respondent has effectively endorsed these terms and conditions by allowing the applicants to work under the terms of this contract. On 20 May 2008 the respondent regarded the applicants as being on trial in their new positions but the applicants were not returned to their substantive positions at the end of this trial as contemplated by the respondent at the time. Furthermore the terms and conditions the respondent tried to have the applicants work under from 5 June 2009 as confirmed in Exhibit A34 were never worked by the applicants. The respondent cannot after the event seek to change the applicants' terms and conditions to a fixed term contract position.

23 When the job share EOI was advertised it was not advertised as a secondment or fixed term position. It was therefore an ongoing position. Each applicant applied for and was successful in obtaining a permanent job share position. When the applicants changed from their original contracts in 2004 to job share arrangements in 2008 there were changes to their terms and conditions of employment including the hours they worked, overtime arrangements and rostering. Their contracted hours changed from 20 hours per week to 19 hours, overtime is paid for any hours worked in excess of the contracted hours, in this case 19 hours, whereas when they worked part time overtime was paid for any hours worked in excess of 7.6 hours per day to a maximum of 30 hours per week.

24 Ms White's evidence shows that in 2007 and 2008 throughout Australia all job share positions at Qantas were ongoing.

25 The applicants' conditions of employment are identical to those worked by other long standing employees working on an ongoing basis under job share arrangements prior to 2008. Whilst there were numerous discussions between the respondent, the applicants and the ASU about the respondent wanting to change the job share arrangements at Perth Airport the applicants maintain that no agreement was reached by them or the ASU to change the nature of the job share contracts. The respondent sent a draft job share arrangement to the applicants dated 20 May 2008 and a proposed job share agreement dated 5 June 2009 however the applicants have never worked the conditions outlined in these proposed contracts, the respondent did not require them to work these conditions nor did they agree to these conditions. The applicants maintain that they have worked throughout the past five years in accordance with the job share contracts applying at Perth Airport at the time they commenced in their job share positions, which are permanent job share positions. Since 2008 this has been the common law contract for the applicants' job sharing positions.

26 The applicants reject the respondent's claim that much of the evidence given by its witnesses is inadmissible. The applicants argue that their evidence should be given full weight as it was tested under cross-examination and none of the evidence put by the applicants was disputed by the respondent during cross-examination. In the absence of any contrary evidence the Commission should accept the evidence given by the applicants' witnesses.

27 The applicants argue that the test in ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1982) 149 CLR 337 (***Codelfa***) applies when determining the applicants' terms and conditions of employment. The five criteria which must be satisfied before a term will be implied are: it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that 'it goes without saying'; it must be capable of clear expression; and it must not contradict any express term of the contract. The applicants maintain that these criteria have been established in this case.

28 The applicants argue that the terms sought to be implied are reasonable and equitable as they are the long standing terms of the job share contract in the Perth Airport. It is necessary for business efficacy for the contract of employment to have a provision that sets out whether it is either ongoing or fixed term and the applicants argue that the job share contract existing in Perth Airport in its entirety is implied to be the job share contract that applies to them. The ongoing nature of the contract is obvious and it goes without saying as this is stated in the job share contracts existing at Perth Airport. The permanent nature of the job share arrangement is clearly expressed in the contracts existing in the Perth Airport and the issue of conflict with any express term of the contract does not arise in this case. The applicants therefore maintain that the terms of the job share contracts existing in the Perth Airport are implied into the applicants' job share contract, and that the term providing for permanent (ongoing) job share is necessarily implied into the contract of employment.

29 The Commission should find that the applicants are working to contracts of employment which include an ongoing job share role. If the respondent removed this term from their job share arrangement they would be denying them a contractual entitlement.

Respondent

30 The respondent maintains that much of the evidence given by the applicants and other witnesses on their behalf is inadmissible as their evidence was in the main irrelevant, subjective, based on assumptions and beliefs and was hearsay. Given the importance of a claim under s 29(1)(b)(ii) of the Act being heard and determined in accordance with common law principles the respondent maintains that any inadmissible material led by the applicants ought not be admitted and any subjective beliefs or understandings are irrelevant and therefore inadmissible. The respondent particularised all of the paragraphs in each witness statement of the witnesses who gave evidence on behalf of the applicants and the nature of their objection to that evidence.

31 If a term of a contract is to be implied on the basis of custom and usage it must be in accordance with established principles and the applicants' claims do not appear to relate to any of these assumptions (see ***Byrne & Frew v Australian Airlines Ltd*** (1995) 185 CLR 410; ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterhur Insurance (Australia) Ltd*** (1986) 160 CLR 226).

32 The respondent maintains that the applicants cannot imply a term into their contracts that their contracts were ongoing using the criteria set out in ***Codelfa***. The respondent also maintains that it is inequitable for only one party to be able bring a contract to an end. The respondent argues that there is no evidence that the terms of Ms Emmans' written job share contract constitutes the terms of the job share contract agreement at Perth Airport and there were no agreed general job share conditions that apply at the Perth Airport as evidenced by different terms and conditions of each individual's employment contract and the ASU's unsuccessful attempts to negotiate a local job share agreement containing uniform terms and conditions (see Exhibits 1.3 and R1). The respondent had no intention of offering a job share arrangement to the applicants on other than a fixed term basis and this was expressly communicated to the applicants on numerous occasions prior to February 2008.

33 The respondent agrees that the HOA forms a framework for job share agreements to be negotiated at local airports to apply at the local level and argues that it is a set of propositions and a starting point for these discussions. The respondent maintains that the terms of the HOA do not guarantee that job share arrangements are ongoing and it argues that it did not seek to change the job share positions to a fixed term position after the applicants commenced their job share positions as these positions have always been fixed term. The respondent claims that the terms of the applicants' contracts of employment are based on their written contracts of employment when they first commenced employment with the respondent. Other terms and conditions have been implied into their contracts of employment arising out of correspondence between the applicants, the ASU and the respondent pre and post the applicants' commencement of their job share arrangements. Under these terms it is open to both the respondent and the applicants to terminate their current arrangement at any time.

34 Even though some of the applicants' working conditions are consistent with conditions worked by other job share employees this does not establish that these contractual terms ought be implied into the applicants' contracts of employment. It also does not follow that even though some of the applicants' working conditions may not have been consistent with the terms of the respondent's job share arrangement policy nothing in the respondent's policy was capable of applying to the applicants. Furthermore, the applicants' actual working conditions have little relevance to the current claims.

35 The respondent rejects the applicants' argument that they have a right to ongoing job share positions irrespective of the conditions offered by the respondent and the EOI cannot be taken as an offer of ongoing employment under a job share arrangement. The respondent did no more than invite Customer Service Agents to express their interest in a job share arrangement. The applicants also knew at least four months before they commenced working their job share positions that the respondent was only offering these positions on a fixed term basis.

36 The respondent argues that the applicants have not demonstrated the presence of any contractual benefit capable of being enforced and the proposed relief therefore does not arise for consideration. If the applicants are entitled to a remedy in the terms being sought there are difficulties with the proposed order. The respondent argues that the order being sought is ambiguous and does not reflect what in reality is being sought by the applicants. In any event the applicants have not established that they have a contractual entitlement to ongoing job share positions.

Consideration

37 The claims before the Commission are for alleged denials of contractual benefits. The law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to an industrial matter pursuant to s 7 of the Act and the claimant must be an employee, the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service, the relevant contract must be a contract of service, the benefit claimed must not arise under an award or order of this Commission and the benefit must have been denied by the employer: ***Hotcopper Australia Ltd v David Saab*** (2001) 81 WAIG 2704; ***Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)*** (1999) 79 WAIG 1867. The meaning of 'benefit' has been interpreted widely in this jurisdiction: ***Balfour v Travel Strength Ltd*** (1980) 60 WAIG 1015; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307.

38 In determining whether a contractual entitlement is due to the applicants the onus is on the applicants to establish that the claim is a benefit to which they are entitled under their contracts of employment. The Commission must determine the terms of the contracts of employment and decide whether the claim constitutes a benefit which has been denied under these contracts having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts***).

39 In ***Ware v Amaral Pastoral Pty Ltd (No 5)*** (2012) NSWSC 1550 the preconditions necessary to imply a term of a contract were outlined:

> The five preconditions necessary to found an implied term of a contract were stated by the Privy Council in ***BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*** (1977) 180 CLR 266 at 283, being that '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'. In the case of written contracts that are complete on their face, these requirements have been endorsed by the High Court many times (e.g. ***Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*** [1979] HCA 51; 144 CLR 596 at 605-6; ***Codelfa*** at 347 and 404) [165].

40 The Full Bench stated the following in ***The State School Teachers' Union of W.A. (Incorporated) v Ken Davis*** (2012) 92 WAIG 1870 (***Davis***) about implying a term into a contract based on custom and usage:

A term can also be implied into a contract on the basis of custom and usage. The circumstances where a term can be implied from custom and usage is also well established. These principles were set out in ***Con-Stan Industries of Australia Pty Ltd*** as follows (236 - 237):

(a) The existence of a custom or usage that will justify the implication of a term into a contract is a question of fact.

(b) There must be evidence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract.

(c) A term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement.

(d) A person may be bound by a custom, notwithstanding the fact that he had no knowledge of it.

Whilst these requirements are not entirely different to the five conditions of the business efficacy test, there is no requirement that the term is necessary to make the agreement work. However, it must be shown that the custom relied on is so well known and acquiesced in that everyone making a contract in the circumstances in question can reasonably be presumed to have imported that term into the contract: ***Con-Stan Industries of Australia Pty Ltd*** (241); ***Byrne*** (440) (McHugh and Gummow JJ)[36]-[37].

41 I find that the applicants are employed by the respondent under contracts of service. I find that these claims constitute an industrial matter for the purposes of s 7 of the Act as they relate to the status of the applicants' current employment. I also find that the benefit the applicants are claiming does not arise under an award or order of this Commission. The issue to be determined therefore is what are the terms of the applicants' contracts of employment and whether it was a term of these contracts that the applicants are entitled to an ongoing job share position with the respondent. In particular, whether the applicants' contracts of employment contain a term that their job share roles are for a fixed term or ongoing.

42 Paragraph 5 sets out the history of how the applicants commenced in their job share roles and the negotiations between the respondent and the ASU on their behalf since 2007 about the applicants' terms and conditions of employment in the job share positions.

43 When the applicants commenced employment with the respondent as permanent part time employees their conditions of employment were contained in written contracts which at the time were to be read in conjunction with the Airline Officers (Qantas Airways Ltd) Award 2000. This award appears to have been replaced by a series of enterprise agreements negotiated between the ASU and the respondent which were referred to by the parties at the hearing. The enterprise agreements do not include specific terms and conditions for the respondent's employees who work a job share arrangement however, each agreement contains a clause stating that local job share agreements in place as of the date of lodgement of each enterprise agreement will continue to apply to existing and new job sharers in the workplace concerned for the life of the agreement.

44 The HOA was agreed between the ASU and the respondent in 1996. Its terms apply to the respondent's employees who work in job share positions throughout Australia, including the applicants, and the provisions contained in the HOA form the basis of any negotiations for a local agreement. I find that the HOA provides that job share positions of employees working at airports throughout Australia are ongoing and not time limited unless agreed otherwise by an employee and the respondent or a different term is included in a local agreement negotiated between the ASU and the respondent. I also find that it is a term of the applicants' contracts of employment that their job share positions are ongoing on the basis that this term is implied into the applicants' contracts of employment based on custom and usage (see ***Davis***).

45 I find that the terms of the HOA contemplate that the applicants' job share positions are ongoing and are not time limited for a number of reasons. The HOA states that the respondent will facilitate job sharing where there is mutual agreement to a job share arrangement when a job share role is available to employees, which is the case in this instance with respect to the applicants. This requirement is only fettered by efficiency and cost considerations which have not been raised by the respondent as issues or impediments to an ongoing job share arrangement. The HOA provides that if one job sharer leaves, the respondent will assist the job sharer to find a new partner so that these positions will continue to be ongoing and the only reference in the HOA to job share positions being time limited applies when a job share employee undertakes this position to cover for maternity leave. Job share employees who commenced in this role at Perth Airport before 2008 and whose terms and conditions of employment were subject to the terms of the HOA have ongoing and not time limited written contracts of employment (see contracts of Ms Duncan and Ms Toula Meakins Exhibits 1.3 and R1). Ms White also gave evidence that when the terms of the HOA have been applied to the contracts of job share employees at other Airports throughout Australia, these employees have not worked in that role for a fixed term. In my view this adds weight to my finding that the HOA provides that job share positions at airports throughout Australia are ongoing.

46 I find that the term in the HOA that job share positions are ongoing is implied into the applicants' contracts of employment by custom and usage as this term is not contrary to any express term of an agreement between the applicants and the respondent and the terms of the HOA were relied upon and well known to job share employees and the respondent prior to 2008.

47 I find that the applicants' job share contracts of employment were never varied to include a term that their positions were time limited. The respondent claims that the applicants were only offered fixed term job share positions and the terms of their contracts of employment contain this provision. The respondent also argues that it made it clear to the applicants prior to and after they commenced their job share positions that these positions are time limited. When the respondent decided to expand the number of job share positions at Perth Airport in 2007 and did so on or about February 2008, the ASU on behalf of its members, which included the applicants, did not finalise a local agreement with the respondent about whether the job share positions, including those of the applicants, would be time limited and no local agreement was or has been reached between the ASU and the respondent to vary the terms of the HOA for job share employees working at Perth Airport. Written contracts containing a term that the applicants' job share positions were time limited were given to them by the respondent for signing and acceptance after the applicants had been working in their job share positions for over 10 months. This proposed variation

to their existing contracts of employment, which I have already found were governed by the terms of the HOA at the time they commenced in their job share positions, was not accepted by the applicants and they did not sign or agree to this offer. As the terms of the HOA were not varied by agreement between the respondent and the applicants, which is a requirement to vary terms of an existing contract of employment, the applicants remained in their existing ongoing job share positions. Furthermore, the respondent did not prevent the applicants from continuing in their job share roles after they did not agree to their positions being time limited and did not sign a contract to this effect.

48 The applicants are seeking orders that the respondent maintain each applicant in a job share position in accordance with their contracts of employment. Given my finding that the terms of the applicants' job share contracts of employment include a term that these positions are ongoing it is necessary to specify this as a term of each applicant's contract of employment to properly dispose of these applications. The following declarations and orders will therefore issue with respect to these applications:

B 40 of 2013

Declares that Natalie Leanne Gartside is employed in her job share position on an ongoing basis.

Orders that the respondent continue to employ Ms Gartside in her job share position on this basis in accordance with her current contract of employment.

B 41 of 2013

Declares that Helen Marie Joyce is employed in her job share position on an ongoing basis.

Orders that the respondent continue to employ Ms Joyce in her job share position on this basis in accordance with her current contract of employment.

49 The respondent argued that some of the evidence given by the applicants' witnesses should be disregarded as it was hearsay, not based on fact and constituted beliefs. It is unnecessary to deal with this submission as the decision made with respect to these applications has been based on agreed documents tendered into the evidence and evidence which was essentially not in dispute.

50 A minute of proposed order will now issue with respect to each application.

2014 WAIRC 00086

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE LEANNE GARTSIDE
	APPLICANT
	-v-
	QANTAS AIRWAYS LIMITED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 10 FEBRUARY 2014
FILE NO/S	B 40 OF 2013
CITATION NO.	2014 WAIRC 00086

Result	Order issued
Representation	
Applicant	Mr G Upham (as agent) and Ms E McCarthy
Respondent	Mr R Hooker, Ms D McConnell and Ms S Francis (all of counsel)

Order

On 20 December 2013 the Commission issued Reasons for Decision and a Minute of Proposed Order (the Minute).

At a speaking to the Minute held on 7 February 2014 the respondent sought to vary the Minute on the basis that order 3 may create ambiguity with respect to the terms of the applicant's current contract of employment. The respondent sought to replace declaration 2 and order 3 with the following:

2. DECLARES that it is a term of the current contract of employment of Natalie Leanne Gartside that she is employed in her job share position on an ongoing basis.

3. ORDERS that the respondent continue to employ Ms Gartside in her job share position on that basis.

The applicant does not consent to the proposed changes. The applicant argues that the Minute reflects the Commission's Reasons for Decision.

The Commission is of the view that the alternative wording proposed by the respondent has the same effect as the wording in the Minute. However, as the respondent claims its changes will assist in allaying concerns about any ambiguity with respect to the terms of the applicant's current contract of employment and as the applicant did not raise any concerns about the terms of the respondent's proposed changes I will change the Minute to include the respondent's proposed changes.

NOW HAVING HEARD Mr G Upham (as agent) and Ms E McCarthy on behalf of the applicant and Mr R Hooker, Ms D McConnell and Ms S Francis (all of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS that the name of the respondent be deleted and that Qantas Airways Limited be substituted in lieu thereof.
2. DECLARES that it is a term of the current contract of employment of Natalie Leanne Gartside that she is employed in her job share position on an ongoing basis.
3. ORDERS that the respondent continue to employ Ms Gartside in her job share position on this basis.

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

2014 WAIRC 00087

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HELEN MARIE JOYCE
	APPLICANT
	-v-
	QANTAS AIRWAYS LIMITED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 10 FEBRUARY 2014
FILE NO/S	B 41 OF 2013
CITATION NO.	2014 WAIRC 00087

Result	Order issued
Representation	
Applicant	Mr G Upham (as agent) and Ms E McCarthy
Respondent	Mr R Hooker, Ms D McConnell and Ms S Francis (all of counsel)

Order

On 20 December 2013 the Commission issued Reasons for Decision and a Minute of Proposed Order (the Minute).

At a speaking to the Minute held on 7 February 2014 the respondent sought to vary the Minute on the basis that order 3 may create ambiguity with respect to the terms of the applicant's current contract of employment. The respondent sought to replace declaration 2 and order 3 with the following:

2. DECLARES that it is a term of the current contract of employment of Helen Marie Joyce that she is employed in her job share position on an ongoing basis.
3. ORDERS that the respondent continue to employ Ms Joyce in her job share position on that basis.

The applicant does not consent to the proposed changes. The applicant argues that the Minute reflects the Commission's Reasons for Decision.

The Commission is of the view that the alternative wording proposed by the respondent has the same effect as the wording in the Minute. However, as the respondent claims its changes will assist in allaying concerns about any ambiguity with respect to the terms of the applicant's current contract of employment and as the applicant did not raise any concerns about the terms of the respondent's proposed changes I will change the Minute to include the respondent's proposed changes.

HAVING HEARD Mr G Upham (as agent) and Ms E McCarthy on behalf of the applicant and Mr R Hooker, Ms D McConnell and Ms S Francis (all of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS that the name of the respondent be deleted and that Qantas Airways Limited be substituted in lieu thereof.
2. DECLARES that it is a term of the current contract of employment of Helen Marie Joyce that she is employed in her job share position on an ongoing basis.
3. ORDERS that the respondent continue to employ Ms Joyce in her job share position on this basis.

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

2014 WAIRC 00032

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONNALEE KEMENADE
	APPLICANT
	-v-
	PORT HEDLAND TOWN COUNCIL
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 24 JANUARY 2014
FILE NO/S	U 240 OF 2012
CITATION NO.	2014 WAIRC 00032

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

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979.*

On 20 March 2013 the Commission convened a conference for the purpose of conciliating between the parties however no agreement was reached.

The matter was to be set down for hearing and on 19 April 2013 the Commission was advised that the parties had agreed to settle the matter.

On 6 May 2013 the Commission wrote to the applicant requesting a Notice of Withdrawal or Discontinuance form be lodged once the settlement had been finalised.

The applicant filed a Notice of Withdrawal or Discontinuance form on 13 June 2013 in respect of the application and the respondent consents to the matter being discontinued.

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,
[L.S.] Commissioner.

2014 WAIRC 00018

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANDRA MIERS
	APPLICANT
	-v-
	PUNTUKURNU ABORIGINAL MEDICAL SERVICE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 16 JANUARY 2014
FILE NO/S	U 73 OF 2013, B 73 OF 2013
CITATION NO.	2014 WAIRC 00018

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.*

On 5 June 2013 the Commission was advised that the applicant did not wish to proceed with her applications.

The applicant filed Notices of Withdrawal or Discontinuance forms on 11 June 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,
[L.S.] Commissioner.

2014 WAIRC 00080

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MS SUSAN DIANE PRINCE (AKA ZENA PRINCE)

APPLICANT

-v-

MR MARK JOHN BENNETT, PROPRIETOR
BENSON'S CHAINSAW CENTRE

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE WEDNESDAY, 5 FEBRUARY 2014
FILE NO/S U 249 OF 2012
CITATION NO. 2014 WAIRC 00080

Result Application discontinued
Representation
Applicant Ms S D Prince
Respondent Ms I Sim (of counsel)

Order

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

AND WHEREAS on 6 February 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference no agreement was reached between the parties;

AND WHEREAS on 31 January 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00047

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JULIE ANNE RODDEN

APPLICANT

-v-

SHANE CONNOLLY

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
DATE THURSDAY, 30 JANUARY 2014
FILE NO/S U 226 OF 2012
CITATION NO. 2014 WAIRC 00047

Result	Dismissed for want of prosecution

Order

WHEREAS this matter was listed for mention and at the hearing on 21 January 2014 there was no appearance for or by the applicant;

AND WHEREAS the Commission gave reasons for decision at the hearing why the application is to be dismissed for want of prosecution;

NOW THEREFORE, I the undersigned, 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.

2014 WAIRC 00008

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREGORY WILLIAM ROWSON
	APPLICANT
	-v-
	WADE ANDERSON AT WESTSIDE SCAFFOLDING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 13 JANUARY 2014
FILE NO/S	U 150 OF 2013
CITATION NO.	2014 WAIRC 00008

Result	Order issued
Representation	
Applicant	Ms A Kay of counsel
Respondent	Mr A Davidson 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.

2014 WAIRC 00081

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	POPPY CYNTHIA HELENA STUBBS
	APPLICANT
	-v-
	BEACHLIFE SURF SHOP MARGARET RIVER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 5 FEBRUARY 2014
FILE NO/S	U 183 OF 2013
CITATION NO.	2014 WAIRC 00081

Result	Application discontinued
Representation	
Applicant	Ms P C H Stubbs
Respondent	Ms H Thompson

Order

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

AND WHEREAS on 16 January 2014 a conference between the parties was convened;

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

AND WHEREAS on 4 February 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER JAMES TAYLOR
	APPLICANT
	-v-
	JOHN KNUDSON OF STARCAP LOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 19 NOVEMBER 2013
FILE NO/S	B 82 OF 2012
CITATION NO.	2013 WAIRC 00988

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr K Morrison as agent

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr K Morrison as agent 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 on the notice of application be amended by deleting the name "John Knudson of Starcap Logistics" and inserting in lieu thereof the name "Julie Drage trading as Starcap Logistics."

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

2014 WAIRC 00026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00026
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 11 NOVEMBER 2013, TUESDAY, 19 NOVEMBER 2013
DELIVERED	**:**	TUESDAY, 21 JANUARY 2014
FILE NO.	**:**	B 82 OF 2012
BETWEEN	**:**	CHRISTOPHER JAMES TAYLOR
		Applicant
		AND
		JULIE DRAGE TRADING AS STARCAP LOGISTICS
		Respondent

Catchwords	**:**	Industrial law (WA) - Contractual benefits claim - Application to adjourn the hearing - Claim in excess of the Transport Workers (General) Award 1961 - Applicant's claim for unpaid wages and allowances is enforceable under s 29(1)(b)(ii) of the *Industrial Relations Act 1979 (WA)* - Factual dispute regarding the hours of work and a compromise payment - Order issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	**:**	Application upheld. Order issued
Representation:		
Counsel:		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	:	Mr K Morrison as agent

Case(s) referred to in reasons:

Mason v Bastow (1990) 70 WAIG 19

Roberts v Groome (1984) 64 WAIG 774

Steele v Tardiani (1946) 72 CLR 386

Reasons for Decision

1 Mr Taylor was employed by Starcap Logistics as a truck driver HC Class from 19 March 2012 to 4 April 2012. As a driver, Mr Taylor was engaged to drive trucks with oversized loads throughout Western Australia and the Northern Territory. These proceedings relate to a contractual benefits claim brought by Mr Taylor, by which he alleges that Starcap has underpaid him, by an amendment to his claim, in the amount of $4,168 for wages and allowances.

2 Prior to the hearing of the substantive claim, Starcap made an application to adjourn the hearing. The grounds advanced by Starcap, through Mr Knudson, one of the principals of the business, was that he did not have representation and that given the Transport Workers Union were representing Mr Taylor, Starcap would be at a disadvantage. The Commission listed the application to hear the application to adjourn. The Commission was not minded to adjourn the substantive hearing. Starcap had been aware for some months that the Union was acting on behalf of Mr Taylor. It had taken no steps to obtain representation, if it wanted to. Accordingly, the substantive claim proceeded to be heard by the Commission.

3 Mr Taylor testified that he agreed with Mr Knudson to work for Starcap on the basis that he would be paid $350 per day for road trips and $28 per hour for work done in Starcap's yard and around town in Perth. Additionally, Mr Taylor said that it was also agreed that whilst on road trips, he would be paid an extra $70 per night to cover expenses, when required to travel away from Perth. It was common ground that Mr Taylor's employment was governed by the Transport Workers (General) Award 1961. However, Mr Taylor was paid substantially above the minimum award rate of pay. Therefore, the Commission has jurisdiction to deal with Mr Taylor's contractual benefits claim under s 29(1)(b)(ii) of the Industrial Relations Act 1979, as the recovery of a single contractual debt for the entire sum: *Steele v Tardiani* (1946) 72 CLR 386; *Roberts v Groome* (1984) 64 WAIG 774; *Mason v Bastow* (1990) 70 WAIG 19.

4 Mr Taylor gave evidence that he duly worked for Starcap however, over the period of his employment, from 19 March to 4 April 2012, he was only paid the sum of $500. Mr Taylor said he eventually left the employment, because he was not getting paid. The basis for Mr Taylor's claim was set out in a schedule tendered by him, in effect standing as amended particulars of claim.

5 It was not in contest that Mr Taylor worked over the period of 19 March to approximately 4 April 2012, although there was some factual dispute as to a few days worked over this period. However, the basis of Starcap's defence to Mr Taylor's claim in the main was that Mr Taylor was paid what was owed to him, by way of a cash payment, of $1,800, in August 2012. Mr Knudson testified that Mr Taylor informed him at about this time, that if Starcap paid this sum in cash, that the matter would be resolved. This was strongly denied by Mr Taylor. He said he had never requested nor been paid cash by Starcap. The only evidence of any payment being received by Mr Taylor was for the sum of $500, paid by direct bank transfer to his bank account on 3 April 2012, as set out in exhibit A2.

6 The disputed issues is in relation to the hours worked by Mr Taylor related to work done by him at the Kings (OneSteel) yard at an induction on 30 March 2012 and for time worked at that location from 2 to 4 April 2012. Mr Taylor testified that he kept a diary in his truck of his hours of work. He also agreed that he signed timesheets and handed them to his supervisor each day. A copy of the relevant timesheets was exhibit R2.

7 Mr Taylor accepted in his testimony that there was some discrepancy between his amended particulars of claim and the hours recorded on his timesheets. Given that the timesheets were completed and signed at the time of the performance of the work, Mr Taylor accepted that for the purposes of his claim, they should be regarded as an accurate record. I find accordingly. For 26 March 2012, the hours should be 10 not 11. For 28 March they should be 9 rather than 13. For 29 March the hours recorded were 12 not 10. For 30 March and 2 April they should be 10 hours and 9.5 hours respectively. At the agreed hourly rate of $28 per hour, the total for the hours worked is 102 hours in the sum of $2,856. In addition, to be taken into account is the sum of $1,680 for a trip to the North West from 20 March to 23 March 2012 inclusive, at the agreed rate of $350 per day, including payment of $70 per overnight stay for expenses. Thus, the total adjusted sum is $4,536, less the payment of $500 made, resulting in an amount said to be owed of $4,036.

8 As noted, there was a factual dispute on the timesheets in relation to hours of work. For 30 March 2012, Mr Taylor said he was required to attend an induction at the Kings yard in Spearwood. He said this was paid time and he had never done inductions in his own time previously. Mr Taylor said that the induction was a large and complex one. He returned to the Starcap yard after the induction to "do some bits and pieces" and then went home. Ten hours are recorded on the timesheet for this. However, on Mr Knudson's evidence, he said that the induction was in Mr Taylor's own time and that he noted this on the timesheet. Mr Knudson also testified that the induction was only for about three and a half hours, as he had done it himself.

9 I am not prepared to accept that Mr Taylor should not have been paid for the induction. There is an obligation on an employer to ensure that all employees attend inductions as part of occupational health and safety requirements. However, I am prepared to accept that the hours of work claimed should not be for the full day and I would make an allowance of 5 hours for work performed on 30 March 2012. This reduces the hours worked by 5 hours, in the sum of $140. In relation to work done on 4 April 2012 at the Kings yard, Starcap asserted that no work was done at all on this day. This is contrary to the evidence contained in the timesheets and the testimony of Mr Taylor. In the absence of any evidence being led to the contrary by Starcap, I accept the evidence of Mr Taylor on this issue.

10 The major factual contest in this case, relates to the issue of the alleged "cash payment" made to Mr Taylor by Mr Knudson on or about 14 August 2012. Mr Taylor testified that he never received any cash payments from Starcap. Mr Knudson said that after Mr Taylor left Starcap, and commenced this claim, he received a telephone call from Mr Taylor. Mr Knudson agreed that Starcap owed Mr Taylor about $1,795. However, he could not find any paperwork to support the balance of Mr Taylor's wages claim. Mr Knudson said that Mr Taylor telephoned again sometime after, on about 14 August 2012, and said that if Starcap paid him $1,795 he would not pursue the claim any further.

11 Based on this, Mr Knudson said he withdrew $2,000 in cash from the Starcap bank account and gave $1,800 in cash to Mr Taylor. He said he met Mr Taylor at the front of the Starcap premises on 14 August and gave him the money. A copy of a bank statement, exhibit R1, refers to a "miscellaneous debit" of $2,000 on 14 August 2012. An undated handwritten note appears alongside the withdrawal which said "wages Chris Taylor". No other written record reflects this payment. There was no evidence that this notation was made at the time of the withdrawal of the funds.

12 Mr Taylor emphatically denied he made a request or received any such payment from Mr Knudson or anyone else from Starcap. The only payment he said he received from the business was $500 by the direct bank transfer to him on 3 April 2012, to which I have already referred.

13 Resolution of this issue turns on determining the conflict on the evidence between Mr Taylor and Mr Knudson. Exhibit A3 was a PAYG summary for Mr Taylor. He said he received this in early August 2012. It was for the 2012 financial year ending on 30 June 2012. It records payments to Mr Taylor by Julie Drage, the proprietor of Starcap, in the total amount of $2,660. This comprised a sum $2,380 in wages and $280 in travel allowances. The period during which payments were said to be made was 12 March 2012 to 25 March 2012. I pause to observe that this was not the period of employment of Mr Taylor. There is a signature box at the bottom of the document. The signature is obscured on the copy tendered in evidence. However, the name "Julie Drage" appears as the payer. It is dated 8 July 2012. It is reasonable to infer that the signature would be that of Julie Drage. The declaration made is to the effect that "the information given on this form is complete and correct". It clearly is not. The period of employment of Mr Taylor is incorrect. Additionally, there is no evidence that the payments referred to in the summary were made to Mr Taylor. It is common ground, as I have noted, that in his period of employment, Mr Taylor was only paid the amount of $500 by Starcap, and not until 3 April 2012. Mr Knudson said he had no knowledge of exhibit A3 as he does not get involved in this side of the business.

14 By the time of the alleged contact by Mr Taylor with Mr Knudson in August 2012, Starcap was aware of Mr Taylor's claim and that he was in dispute with it in relation to underpayments of wages and allowances. It is therefore very surprising, to say the least, that a payment of a sum of approximately $1,800 would be made in cash to a former employee, months after the termination of their employment, without any written record at all of such a payment. This is particularly in light of the existence of such a dispute. It would not have been difficult at all for even the briefest note, acknowledging the payment, to have been made.

15 The terms of exhibit R1 also do not provide adequate support for the assertion of the payment of $1,800 to Mr Taylor. Firstly, it is not for the amount of $1,800, which was said to have been the payment made to Mr Taylor. Secondly, there is nothing to suggest that the monies withdrawn were not withdrawn for some other purpose. Thirdly, there is nothing to suggest that the handwritten note on the copy of the bank statement was made at or about the time the money was said to have been paid to Mr Taylor. Finally, taken in the context of the evidence as a whole, the terms of exhibit A3 are troubling. It records payments allegedly made to Mr Taylor by Starcap, when no such payments were made. All of these issues go to the credibility of Starcap's evidence in relation to whether such a compromise payment was made. There is also the overriding evidence that

although Mr Taylor commenced employment with Starcap on 19 March 2012, he had not, despite requests, received any wages or allowance payments at all until 3 April 2012, and then only in the sum of $500.

16 There was also an assertion made by Starcap that Mr Taylor has caused some damage to the truck and had lost some items of property whilst on a trip. No evidence was led by Starcap about this and Mr Taylor said this was never raised with him. In the absence of any evidence from Starcap on this issue, the Commission cannot deal with the matter any further. In any event, even if such findings could be made, these matters are separate to and cannot offset any contractual entitlement of Mr Taylor, unless the contract of employment provided for it.

17 For all of these reasons, I prefer the testimony of Mr Taylor to that of Mr Knudson on the disputed payments issue. I therefore find that Starcap is indebted to Mr Taylor in the sum of $3,896. I also accept that the overnight accommodation rate was agreed at $70, as this is noted on the first page of exhibit R2, the timesheet dated 19 March 2012. A handwritten note of calculations, presumably made by Starcap after the timesheet was submitted by Mr Taylor, refers to payments for 20 March and 21 March at $350 and with the following addition "+ 140 allowance", which must mean $70 was the agreed daily allowance rate, for 2 nights away.

18 Therefore, the Commission will order Starcap to pay Mr Taylor the sum of $3,896 gross within 14 days as a denied contractual benefit.

2014 WAIRC 00033

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER JAMES TAYLOR
	APPLICANT
	-v-
	JULIE DRAGE TRADING AS STARCAP LOGISTICS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 JANUARY 2014
FILE NO/S	B 82 OF 2012
CITATION NO.	2014 WAIRC 00033

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr K Morrison as agent

Order

HAVING heard Mr Dzieciol of counsel on behalf of the applicant and Mr Morrison as agent 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 $3,896 gross within 14 days less any amount payable to the Commissioner of Taxation under the Income Tax Assessment Act 1997 (Cth) and actually paid.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Catherine Cahill	Access Global Resources	B 2/2014	Chief Commissioner A R Beech	Discontinued
Dannica Hickey	Subi Hairdressing	U 144/2013	Chief Commissioner A R Beech	Discontinued
Deborah Lee Sontag	Kira Incorporated	U 126/2013	Chief Commissioner A R Beech	Discontinued
Elvio Ruggiero	Alara Resources Ltd	B 184/2013	Chief Commissioner A R Beech	Discontinued
Gail Valerie McDonnell	Mrs Anna Latto and Mr Alan Latto	U 151/2013	Chief Commissioner A R Beech	Discontinued
Hugh Sutherland Rogers	J-Corp Pty Ltd	B 165/2013	Chief Commissioner A R Beech	Discontinued
Jeffrey Holt	Groundforce Rentals WA Pty Ltd	B 153/2013	Chief Commissioner A R Beech	Discontinued

Parties		Number	Commissioner	Result
Michael William Schembri	RCR Tomlinson	B 182/2013	Chief Commissioner A R Beech	Discontinued
Mr Kevin Keane	Advance Formwork Pty Ltd	B 100/2013	Chief Commissioner A R Beech	Discontinued
Parmal Patel	Metro Gates & Balustrades Pty Ltd	B 157/2013	Chief Commissioner A R Beech	Discontinued
Ronald Kenyon	Gold Corporation (The Perth Mint) ABN 98838298431	U 210/2013	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2014 WAIRC 00024

DISPUTE RE LONG SERVICE LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES RAYMOND BURCH

APPLICANT

-v-

KEP MANAGEMENT SERVICES PTY LTD ACN 074 110 393

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 21 JANUARY 2014
FILE NO/S C 229 OF 2013
CITATION NO. 2014 WAIRC 00024

Result Discontinued
Representation
Applicant Mr B Jackson of counsel
Respondent Mr M Cox 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 01068

DISPUTE RE IMPLEMENTATION GUIDELINES FOR REGISTERED AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 18 DECEMBER 2013
FILE NO/S C 220 OF 2013
CITATION NO. 2013 WAIRC 01068

Result	Order issued
Representation	
Applicant	Ms A Hamlin
Respondent	Mr M Hammond

Order

HAVING heard Ms A Hamlin on behalf of the applicant and Mr M Hammond on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

CONFERENCES—Matters referred—

2013 WAIRC 01057

DISPUTE RE ALLEGED UNAUTHORISED DEDUCTIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 6 DECEMBER 2013
FILE NO/S	CR 4 OF 2013
CITATION NO.	2013 WAIRC 01057

Result	Order issued
Representation	
Applicant	Mr K Singh
Respondent	Mr D Matthews of counsel

Order

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

THAT the application be and is hereby discontinued.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Minister for Health	Scott A/SC	PSAC 36/2013	N/A	Dispute re employment contract and hours	Discontinued
Health Services Union of Western Australia (Union of Workers)	Minister for Health	Scott A/SC	PSAC 18/2013	31/05/2013 25/06/2013	Dispute re voluntary redundancy	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 11/2013	22/04/2013	Dispute re investigation process	Discontinued
United Voice WA	The Director General, Department of Education and Training	Scott A/SC	C 232/2013	25/11/2013	Dispute re funding changes	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00083

WA HEALTH - AUSTRALIAN NURSING FEDERATION - REGISTERED NURSES, MIDWIVES, ENROLLED (MENTAL HEALTH) AND ENROLLED (MOTHERCRAFT) NURSES - INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES 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, THE PEEL HEALTH SERVICES BOARD, WA COUNTRY HEALTH SERVICE AND THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY

APPLICANT

-v-

AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE WEDNESDAY, 5 FEBRUARY 2014

FILE NO/S AG 19 OF 2013

CITATION NO. 2014 WAIRC 00083

Result Order issued

Representation

Applicant Mr D Matthews (of counsel) and Mr N Fergus

Respondent Ms V Loveridge and Ms E Hadrys

Order

This is an application for the registration of the *WA Health - Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses - Industrial Agreement 2013.*

The matter has been listed for hearing under s 42G of the *Industrial Relations Act 1979* (the Act) as the parties agreed to the Commission arbitrating a number of clauses which are in dispute between the parties.

The applicant seeks leave under s 31(4) of the Act to have a legal practitioner conduct all of its case at the s 42G hearing. The respondent objects to this.

Submissions

Applicant

- Section 31(4) of the Act provides that if a matter of law is to be argued and a legal practitioner is granted leave to appear, this person can appear and conduct the applicant's case for the entire proceedings.
- Section 6(c) of the Act is not the most important part of s 6, the objects of the Act, when determining whether legal representation should be allowed.

- Section 26(1)(c) applies with respect to the Commission exercising its discretion in this instance. As the respondent's claims have a potentially significant impact on the State's finances and therefore the State's population this is a relevant consideration and should be taken into account. There is also a significant public interest in the outcome of these proceedings given the cost of the respondent's claims.
- Legal representatives can assist with the expeditious and efficient conduct of a case before the Commission.
- The applicant has agreed that the new agreement should not include any loss of conditions. A number of matters of law therefore arise with respect to the applicant responding to the respondent's additional claims.
- The applicant argues that legal issues arise with respect to its claim that the agreement reached between the applicant and the respondent on 24 February 2013 was based on illegitimate pressure and these legal and equitable arguments impact on whether the additional claims being sought by the respondent should be granted.
- A number of significant legal matters are raised or are likely to be raised with respect to many of the proposed clauses being sought by the respondent. These clauses relate to accrued days off, claims for pay increases based on service, payment for personal leave, requests for purchased leave, access to the deferred salary scheme, access to redundancy and workers compensation payments, provision of parking and regulation of parking charges and the establishment of three consultative committees.

Respondent

- The arbitration of the clauses being sought by the respondent does not raise nor is it likely to raise any legal questions of substance.
- There is no disadvantage to the applicant if it is not represented by a legal practitioner as the applicant's industrial relations section is well resourced and experienced.
- The proceedings could be extended by lengthy legal argument if a legal practitioner appears.
- If any legal issues arise with respect to this application this could be dealt with by written submissions or a brief appearance by a legal practitioner.
- It is inappropriate for the applicant to argue that illegitimate pressure was applied by the respondent and its members to reach the agreement between the applicant and the respondent on 24 February 2013 as the applicant has agreed to arbitrate outstanding matters via this application.

Consideration

Beech SC made the following observations concerning the granting of leave for a legal practitioner to appear in proceedings in ***Civil Service Association of Western Australia Incorporated v Director General, Department of Justice*** (2003) 83 WAIG 503. With respect, I adopt his views:

> It may be able to be said that most, if not all, proceedings before the Commission may involve some question of law. This is because the Commission is a creature of a statute which operates in accordance with that statute and arguments may arise regarding the interpretation of the statute. Further, matters of employment law are frequently central to the issues which are brought to the Commission. The point to be made is that s.31 of the *Industrial Relations Act 1979* does not give a right to parties to be represented by counsel merely because a question of law is raised or argued or likely to be raised or argued. Therefore, the fact that a question of law may be raised of itself may not be sufficient justification for the Commission to exercise its discretion to permit counsel to appear. In other words, merely because the declaration and orders sought "relate or touch upon questions of law" (to quote from the respondent's letter of 21 February 2003) does not mean that counsel is to be given leave to appear.
>
> Rather, the question of law raised or argued, or likely to be raised or argued, should be a question of substance and not mere technicality. I say this because the Act provides means for settling disputes with the maximum of expedition and the minimum of legal form and technicality. The prospect of there being raised unnecessary legal form and technicality, particularly, but not solely, where it inhibits the settling of industrial disputes may well not be the sort of consideration which would justify the exercise of discretion in favour of a legal practitioner appearing in a matter (*Western Mining Corporation v. AWU*, op.cit) [36] - [37].

Section 31(4) of the Act provides as follows:

> (4) Where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard.

Section 31(4) provides that the Commission may allow a legal practitioner to appear in a matter when a question of law is raised or argued or in the opinion of the Commission is likely to be raised or argued in the proceedings. Section 31(4) gives the Commission discretion to determine if a legal practitioner can appear if legal issues are to be argued and on what matters that legal practitioner can be heard. As this section gives the Commission the power to grant leave to a legal practitioner to appear to be heard as it deems appropriate, I find that the terms of s 34(1) do not mandate that a legal practitioner given leave to appear must be heard with respect to all matters in the proceedings.

Section 6(c) of the Act provides that when exercising its discretion the Commission is required to settle disputes within the context of a minimum of legal form and technicality and I take this object into account when determining whether leave to appear in these proceedings should be granted to a legal practitioner and the manner in which this person is granted leave to appear.

On the information currently before me it is my view that legal issues of some substance are to be raised or are likely to be raised in these proceedings. In the circumstances I will grant leave to counsel for the applicant to appear to be heard on the legal issues relevant to this application.

In my view the applicant will not be disadvantaged by not having a legal practitioner appear on its behalf to conduct all of its case as it is my view that the applicant is sufficiently resourced and its employees appropriately experienced to be able to adequately conduct the remainder of its case.

On 31 January 2014 the Commission issued a Minute of Proposed Order and the applicant requested a Speaking to the Minutes.

At the Speaking to the Minutes held on 4 February 2014 the applicant sought clarification about the operation of the proposed order.

Given that the applicant was seeking clarification of the proposed order the Commission was of the view that no issue had been raised about the Minute of Proposed Order not reflecting the decision and the parties were advised that the order would issue in the terms of the Minute.

NOW HAVING HEARD Mr D Matthew (of counsel) and Mr N Fergus on behalf of the applicant and Ms V Loveridge and Ms E Hadrys on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT leave is granted for the applicant to be represented by a legal practitioner to make submissions with respect to legal issues relevant to and arising out of this application.

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

2014 WAIRC 00082

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TROY DOUGLAS SEMMENS
	APPLICANT
	-v-
	TORAK PTY LTD TRADING AS PRESTIGE PRODUCTS)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 5 FEBRUARY 2014
FILE NO/S	B 8 OF 2014
CITATION NO.	2014 WAIRC 00082

Result	Change of respondent's name
Representation	
Applicant	Mr T D Semmens
Respondent	Mr S Edwards (as agent)

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 at the conference held on 4 February 2014 the respondent advised the Commission 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 Prestige Products (John Poleykett – Owner) be deleted and Torak Pty Ltd trading as Prestige Products be inserted in lieu thereof.

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

2014 WAIRC 00092

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD SIMPSON
	APPLICANT
	-v-
	MURRAY TAYLOR
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 12 FEBRUARY 2014
FILE NO/S	B 152 OF 2013
CITATION NO.	2014 WAIRC 00092

Result	Name of respondent amended

Order

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

WHEREAS at the hearing on the 11th day of February 2014 the applicant sought to amend the name of the respondent to "Uduc Brook Farms Pty Ltd"; and

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

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

THAT the name of the respondent in the application be amended to "Uduc Brook Farms Pty Ltd".

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

2014 WAIRC 00016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYRILLOS SAWERES
	APPLICANT
	-v-
	SALVATORE SCAFFIDI - MUTA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 14 JANUARY 2014
FILE NO/S	B 190 OF 2013
CITATION NO.	2014 WAIRC 00016

Result	Change of respondent's name
Representation	
Applicant	Mr K Saweres
Respondent	Ms J Swift (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 the matter was listed for conference on 13 January 2014;

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

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

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

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

THAT the name Dijana Badrov, Pharmacist Manager, United Discount Chemists Darch ABN: 76 196 485 028 Scaffidi-Muta, Salvatore be deleted and Salvatore Scaffidi – Muta inserted in lieu thereof.

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

2013 WAIRC 00790

DISPUTE RE ENTERPRISE BARGAINING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 SEPTEMBER 2013
FILE NO.	C 219 OF 2013
CITATION NO.	2013 WAIRC 00790

Result	Recommendation issued
Representation:	
Applicant	Mr T Kucera of counsel and with him Mr K Singh, Mr P Robinson, Mr L Page, Mr R Debenham, Mr C Fogliani and Mr C Dearth
Respondent	Mr R Farrell and with him Ms J Allen-Rana, Mr E Gearon and Ms T Kerr

Recommendation

WHEREAS on 27 August 2013 the Union made an application for a conference under s 44 of the Industrial Relations Act 1979 in relation to enterprise bargaining negotiations between it and the Authority;

AND WHEREAS on 3 September 2013 the Commission convened a compulsory conference under s 44 of the Act. At the conference, the Union referred to the negotiations between it and the Authority for a new industrial agreement which have been on foot for approximately eight months;

The Union referred to recent correspondence between it and the Authority in relation to ongoing delays in the Authority making a formal offer for a replacement industrial agreement. It referred to the Authority's response, most recently on 27 August 2013, to the effect that it was hopeful of receiving approval from the Government to make a formal offer by about mid-September 2013;

AND WHEREAS at the conference the Authority indicated that it had been advised that it would be in a position to make a formal offer to the Union on Friday 13 September 2013 and proposed a meeting with the Union for that purpose;

AND WHEREAS in the course of the conference, the parties canvassed various means by which the terms of the formal offer may be communicated to employees and the timeframe over which that process could take place;

AND WHEREAS the Union requested that the Commission make orders in relation to the matters raised by the Authority which orders were opposed by the Authority. The Commission indicated, following consideration, that it would not make the orders sought but would consider making recommendations in relation to the future conduct of bargaining between the parties;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under ss 42B and 44 of the Industrial Relations Act, 1979 hereby recommends –

(1) THAT the Authority provide to the Union a formal bargaining offer by 12 noon Friday, 13 September 2013.

(2) THAT the parties confer in relation to the most appropriate means by which the terms of the formal offer may be communicated to employees and the timeframe over which such communication process will take place, including the formal response of the Union to the Authority's offer.

(3) THAT the parties report back to the Commission as to the progress of these matters by Friday 20 September 2013.

(4) THAT the compulsory conference be adjourned to a date and time to be fixed by the Commission.

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

2014 WAIRC 00043

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00043
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT- CHAIRMAN DR N ROTHNIE - BOARD MEMBER MR B DODDS - BOARD MEMBER
HEARD	**:**	TUESDAY, 21 JANUARY 2014
DELIVERED	**:**	THURSDAY, 30 JANUARY 2014
FILE NO.	**:**	PSAB 17 OF 2013
BETWEEN	**:**	DR JONATHAN THABANO Appellant AND THE CEO, CHEMCENTRE RESOURCES AND CHEMISTRY PRECINCT Respondent

CatchWords	**:**	Public Service Appeal Board – Application for discovery – Whether the documents sought relate to the preliminary issue – Fixed term contract
Legislation	**:**	*Industrial Relations Act 1979* s 80I(1)(c), s 80I(1)(e)
Result	**:**	Application for discovery granted in part
Representation:		
Appellant	**:**	Dr J Thabano on his own behalf
Respondent	**:**	Mr D Matthews of counsel

Reasons for Decision

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

2 The appellant says that the respondent has dismissed him unfairly and he appeals against the decision to dismiss. The respondent says that it did not dismiss the appellant but that he was employed on a fixed term contract which lapsed. The respondent says that the Board has no jurisdiction as there was no dismissal.

3 The issue of the Board's jurisdiction, that is, whether Dr Thabano was dismissed from his employment, is to be dealt with as a preliminary issue. That requires determination of whether the contract of employment was genuinely for a fixed term or that the purported fixed term contract was a sham. For the purposes of the hearing of the preliminary issue, the appellant has sought discovery of the following documents as set out in his request to the respondent of 22 November 2013, being:

> 1. List of candidates interviewed with Dr Thabano and their shortlist in 2010.
>
> 2. Any evidence (i.e minutes of meetings) of other persons employed with Dr Thabano in 2010 within the Forensic Science Laboratory (FSL).
>
> 3. Any supporting evidence when Richard Donovan was employed in ChemCentre and the circumstances of his employment.
>
> 4. Documents of decisions for persons made permanent from 2010 to 2013 in FSL and criteria used.
>
> 5. Circumstances of Richard Donovan's conversion to permanent employment (decision and employment letters)
>
> 6. Records of Dr Thabano's training file
>
> 7. Full access to Dr Thabano's e-mail records. Time to be appointed by ChemCentre and advice[sic] Dr Thabano accordingly.
>
> 8. Records of decisions leading to the short term employment
>
> 9. Any records of deliberations to terminate Dr Thabano's employment.
>
> 10. Records of documents for the FSL restructure, between management of ChemCentre and that between management and employees.
>
> 11. Records of people employed during and after the FSL restructure.
>
> 12. Records of surveys at ChemCentre concerning workplace discrimination/diversity and their outcomes.

4 The respondent says that the only documents which are relevant at this stage of proceedings are those which relate to the preliminary point. The respondent has accepted that the documents in item 9 on the appellant's list, being '[a]ny records of deliberations to terminate Dr Thabano's employment', are relevant although it disputes that his employment was terminated, and has provided those documents. The remainder of the documents, the respondent says, are not relevant to that preliminary issue and in any event the requirement to provide discovery of some of them would be oppressive.

Consideration

5 The jurisdiction of the Public Service Appeal Board in respect of this appeal is set out in the *Industrial Relations Act 1979* (the Act) s 80I(1)(c) or (e), being an appeal by a government officer from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed. Therefore, it is necessary for the Board to decide whether there was a decision to dismiss by the employer, or whether the appellant was on a fixed term contract which expired and was not renewed.

6 In the process of discovery, a party may be required to discover to the other party 'all documents in his possession or under his control relating to any matters in question in the action' (*Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 550). In this case, the question is whether the documents sought relate to any matter in question in relation to the preliminary issue, not in relation to whether the dismissal, if there was such a dismissal, was unfair.

7 The appellant appears to complain that he was put on a fixed term contract and that others were not; that his contract was not renewed yet there was still work to be done and that there was a decision not to offer him a new contract. He also asserts that he was given undertakings that he would be provided with ongoing employment and, in those circumstances, the question arises as to whether there was a fixed term contract or the fixed term contract was a sham.

8 In that context, the documents sought by the applicant need to be examined.

The first six items

9 The list of documents is set out above. Based on submissions made by the appellant during the course of the hearing, it would appear that items 1 to 6 in the list relate to the circumstances surrounding the applicant's initial appointment and the selection, interview and appointment process. He says there was a plot to replace him with another person who was also shortlisted for appointment. He suggests that appointing him to a fixed term contract made him vulnerable from the very beginning.

10 Richard Donovan, identified in item 3, is the person whom the respondent continued to employ rather than himself, and the appellant says that issues of how Mr Donovan came to be appointed are significant.

11 In respect of item 4 in particular, he says that his manager told him that he would be employed permanently at the end of two years.

12 It seems all of these documents relate to the assertion by the appellant that there was a plot to replace him with another person and that he was, in fact, appointed on a fixed term contract. Whilst those documents may relate to the question of the appellant's appointment, they appear to relate to the rationale behind a fixed term appointment, rather than the fact of the contract which eventuated and any decision to dismiss, if there was one.

13 In all of the circumstances, we are of the view that the first six documents relate to the appellant's complaints which appear to be that he was put on a fixed term contract when others were not, or that his contract was not renewed when it ought to have been, when there was still work to be done, and the decision not to offer a new contract. In those circumstances, those documents do not relate to the issue of whether or not there was a fixed term contract or a sham fixed term contract.

14 As to item 7, Dr Thabano's email records, we are of the view that those emails may contain information relevant to the issues in dispute between the parties and that a period of time for the appellant to examine the email records at the employer's premises is appropriate, and we would order accordingly. Given that the appellant is no longer an employee of the respondent, the presence of a person authorised by the respondent may be appropriate during the inspection, however, that is a matter for the respondent.

15 Item 8, records of decisions leading to the short term employment, has been clarified as relating to the appellant's own employment contract and the issue of jurisdiction. In that context, discovery is appropriate.

16 As to item 10, any documents between management and employees of the respondent as to the FSL restructure, may be relevant insofar as the appellant says that there were guarantees of people not losing their jobs as a result of this restructure. This may relate to whether the appellant's contract was fixed term or ongoing and, accordingly, relate to the matter in question and ought to be discovered.

17 Item 11, records of people employed during and after the restructure, are not strictly a matter of discovery in respect of the existing matter. However, we are of the view that it would be of assistance and not onerous for the respondent to provide to the appellant a list of employees employed immediately prior to and immediately after the FSL restructure, and including the section in which the employee was initially employed and subsequently, following the restructure.

18 Item 12, regarding surveys relating to workplace discrimination/diversity and their outcomes do not appear to relate to the issue before the Board but may relate to other complaints that the appellant has.

19 In the circumstances, we intend to issue an Order that the respondent:

1. Provide the appellant with access to his email records during the course of his employment, at a time mutually convenient, within 14 days of the date of this Order.
2. Discover to the appellant records of management decisions regarding Dr Thabano's employment being short term or permanent.
3. Discover to the appellant documents between management and employees regarding the FSL restructure in 2013.
4. Provide to the appellant a list of employees employed prior to and immediately after the FSL restructure, including the section in which each employee was employed.

2014 WAIRC 00044

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR JONATHAN THABANO
	APPELLANT
	-v-
	THE CEO, CHEMCENTRE RESOURCES AND CHEMISTRY PRECINCT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	DR N ROTHNIE - BOARD MEMBER
	MR B DODDS - BOARD MEMBER
DATE	THURSDAY, 30 JANUARY 2014
FILE NO	PSAB 17 OF 2013
CITATION NO.	2014 WAIRC 00044

Result	Order for discovery issued

Order

HAVING heard Dr J Thabano on his own behalf and Mr D Matthews 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:

1. THAT the respondent provide the appellant with access to his email records during the course of his employment, at a time mutually convenient, within 14 days of the date of this Order.
2. THAT the respondent discover to the appellant records of management decisions regarding Dr Thabano's employment being short term or permanent.
3. THAT the respondent discover to the appellant documents between management and employees regarding the FSL restructure in 2013.
4. THAT the respondent provide to the appellant a list of employees employed prior to and immediately after the FSL restructure, including the section in which each employee was employed.

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

2013 WAIRC 00939

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KELLY MARIE MCDONALD
	APPLICANT
	-v-
	ALISON KAY MCFARLAND TRADING AS CASSIA HAIR AND BEAUTY SHOP
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 1 NOVEMBER 2013
FILE NO/S	U 161 OF 2013
CITATION NO.	2013 WAIRC 00939

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

WHEREAS on 7 October 2013 the applicant made application to the Commission under s 29(1)(b)(i) of the Industrial Relations Act 1979 alleging that on or about 12 September 2013 the applicant was harshly, oppressively and unfairly dismissed from her employment by the respondent;

AND WHEREAS by notice of application filed on 23 October 2013 the respondent filed an application under reg 36 of the Industrial Relations Commission Regulations 2005 seeking an order that the time for the respondent to file a notice of answer in the application be extended;

AND WHEREAS having considered the grounds in support of the application for an extension of time for filing an answer the Commission is satisfied that an extension of time should be granted;

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

THAT the time within which a notice of answer is to be filed is extended to 8 November 2013.

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

2014 WAIRC 00015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYRILLOS SAWERES
	APPLICANT
	-v-
	SALVATORE SCAFFIDI - MUTA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 14 JANUARY 2014
FILE NO/S	U 190 OF 2013
CITATION NO.	2014 WAIRC 00015

Result	Change of respondent's name
Representation	
Applicant	Mr K Saweres
Respondent	Ms J Swift (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 the matter was listed for conference on 13 January 2014;

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

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

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

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

THAT the name Dijana Badrov, Pharmacist Manager United Discount Chemists Darch ABN: 76 196 485 028 Scaffidi-Muta, Salvatore be deleted and Salvatore Scaffidi – Muta inserted in lieu thereof.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Anglican Schools Commission Enterprise Agreement 2012 AG 22/2013	31/01/2014	The Independent Education Union of Western Australia, Union of Employees, The Anglican Schools Commission	(Not applicable)	Commissioner S M Mayman	Agreement registered
Combined Metal Industries Industrial Agreement 2013, The AG 1/2014	13/02/2014	Combined Metal Industries, Automotive Food Metals Engineering Printing & Kindred Industries Union of Workers	Minister for Commerce, Chamber of Commerce & Industry of WA, Australian Mines & Metal Association	Chief Commissioner A R Beech	Agreement Registered
Corruption and Crime Commission Industrial Agreement 2013 PSAAG 1/2013	14/01/2014	Corruption and Crime Commission of Western Australia and The Civil Service Association of Western Australia (Incorporated)	(Not applicable)	Commissioner S M Mayman	Agreement registered
Dental Officers Industrial Agreement 2013 PSAAG 2/2013	15/01/2014	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 Anoth	The Civil Service Association of Western Australia Incorporated	Commissioner J L Harrison	Agreement registered
Identitywa and United Voice Disability Support Workers Agreement 2013 AG 21/2013	14/01/2014	The Roman Catholic Church Archdiocese of Perth trading as Identitywa	United Voice WA	Commissioner S M Mayman	Agreement registered
Registered Nurses - Australian Nursing Federation - Disability Services Industrial Agreement 2010 AG 22/2011	2/09/2011	The Director General of the Disability Services Commission	The State Secretary of the Australian Nursing Federation, Industrial Union of Workers	Commissioner J L Harrison	Agreement registered
Telethon Speech & Hearing Centre (Enterprise Bargaining) Agreement 2013 - The AG 2/2014	13/02/2014	The Independent Education Union of Western Australia, Union of Employees, The Telethon Speech & Hearing Centre, United Voice WA , Health Services Union of Western Australia Industrial Union of Workers	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Western Australian Fire Service Enterprise Bargaining Agreement 2011 AG 23/2011	13/09/2011	Fire and Emergency Services Authority of Western Australia and United Firefighters Union of Australia West Australian Branch	(Not applicable)	Commissioner J L Harrison	Agreement registered
Western Australian Police Agency Specific Agreement 2013 PSAAG 1/2014	30/01/2014	Commissioner of Police	Civil Service Association of Western Australia	Commissioner S J Kenner	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 01056

APPEAL AGAINST THE DECISION TO SUSPEND THE APPELLANT'S EMPLOYMENT ON FULL PAY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RUSSELL CLEMENS
	APPELLANT
	-v-
	MR BRIAN BRADLEY, DIRECTOR GENERAL, DEPARTMENT OF COMMERCE, GOVERNMENT OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MS S RANDALL - BOARD MEMBER
DATE	FRIDAY, 6 DECEMBER 2013
FILE NO	PSAB 21 OF 2013
CITATION NO.	2013 WAIRC 01056

Result	Order issued
Representation	
Appellant	Ms M McCormack of counsel
Respondent	Mr R Bathurst of counsel

Order

WHEREAS the appellant 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 00838

NOTICE OF APPEAL AGAINST THE DECISION GIVEN ON 13 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BHARATHAN KANGATHERAN
	APPELLANT
	-v-
	DEPARTMENT OF THE REGISTRAR/SUE BASTIAN
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G BROWN - BOARD MEMBER
	MR K CHINNERY - BOARD MEMBER
DATE	THURSDAY, 3 OCTOBER 2013
FILE NO	PSAB 16 OF 2013
CITATION NO.	2013 WAIRC 00838

Result	Direction issued
Representation	
Appellant	In person
Respondent	Ms R Hartley of counsel and with her Ms S Hutchinson

Direction

HAVING heard the appellant in person and Ms R Hartley of counsel and with her Ms S Hutchinson on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant file and serve an amended notice of appeal, setting out the grounds of appeal, by 24 October 2013.

(2) THAT the respondent file and serve a notice of answer within 14 days of service of the appellant's amended notice of appeal.

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

(Sgd.) S J KENNER,
Commissioner.

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

2013 WAIRC 01088

NOTICE OF APPEAL AGAINST THE DECISION GIVEN ON 13 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 01088
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER - CHAIRMAN MR G BROWN - BOARD MEMBER MR K CHINNERY - BOARD MEMBER
HEARD	**:**	THURSDAY, 3 OCTOBER 2013, FRIDAY, 29 NOVEMBER 2013
DELIVERED	**:**	TUESDAY, 24 DECEMBER 2013
FILE NO.	**:**	PSAB 16 OF 2013
BETWEEN	**:**	BHARATHAN KANGATHERAN Appellant AND CHIEF EXECUTIVE OFFICER, DEPARTMENT OF THE REGISTRAR Respondent

Catchwords	**:**	Industrial law – Appeal under s 78(1)(b) of the *Public Sector Management Act 1994* (WA) – Allegations of substandard performance – Investigation – Reduction in classification under s 79(3) of the *Public Sector Management Act 1994* (WA) – Date of the decision to impose the penalty in issue – Appeal out of time – Principles applied – Length of the delay – Reason for the delay – Arguable case – Prejudice – Appeal dismissed
Legislation	**:**	*Public Sector Management Act 1994* (WA) ss 78(1)(b), 78(1)(b)(i), 79(3), 79(5), Pt 5 Div 2 *Industrial Relations Commission Regulations 2005* (WA) Reg 107(2)
Result	**:**	Appeal dismissed
Representation:		
Appellant	In person	
Respondent	Ms R Hartley of counsel and with her Ms S Bastian	

Case(s) referred to in reasons:

Nicholas v Department of Education and Training (2008) 89 WAIG 817

Reasons for Decision

1 The appellant was employed by the respondent as a Level 4 Systems Administrator. The respondent is a government department established under the Public Sector Management Act 1994, and provides administrative support to the Industrial Relations Commission.

2 As a result of allegations of substandard performance of the appellant made in November 2012, the respondent commenced an investigation under Part 5 Div 2 of the PSM Act. The investigation concluded that the appellant had failed to set up a video conference to New Zealand and failed to document and follow operating procedures in respect of the matter. Additionally, he was absent from work without prior approval on the morning of Tuesday, 20 November 2012. Also, by letter of 12 April 2012, the respondent had previously counselled the appellant in relation to previous instances of his failure to properly attend to video conferencing arrangements interstate. As a result of the substandard performance finding, and the previous performance issues, the respondent resolved to impose a penalty under s 79(3) of the PSM Act of a reduction in classification from Level 4.3 to Level 3.3. Such a reduction in classification as a penalty was to take effect on 22 May 2013.

3 The appellant now appeals under s 78(1)(b) of the PSM Act against the respondent's decision to impose this penalty. The appellant contends in the notice of appeal, that the respondent's decision to impose the penalty was given on 13 August 2013. The respondent, however, says that its decision to impose the penalty was communicated to the appellant at the latest, on 21 May 2013. Given that the appeal was not filed until 28 August 2013, the respondent contended that the appeal is over 11 weeks out of time, well beyond the 21 day time limit prescribed by Reg 107(2) of the Industrial Relations Commission Regulations 2005. This is disputed by the appellant. It is therefore necessary for the Appeal Board to determine, as a threshold issue, the date of the decision for the purposes of s 78(1)(b)(i) of the PSM Act.

When was the decision made?

4 The respondent implemented the substandard performance process under the PSM Act through the Acting Chief Executive Officer and Registrar, Ms Bastian. Ms Bastian referred to a letter of 19 April 2013 tendered as exhibit R1. The letter refers to earlier correspondence from the respondent to the appellant dated 28 November 2012, informing him of two separate incidents where he had failed to sustain a standard of performance acceptable to the respondent. By letter of 7 December 2012, from the Community and Public Sector Union on the appellant's behalf, the allegations were denied. As a consequence, an investigation was undertaken by an investigator under s 79(5) of the PSM Act. The investigation concluded that the appellant had engaged in the conduct complained of. Ms Bastian formed the view that the appellant's performance was less than that expected of an officer in his level of classification. Reference was also made to the prior incidents to which we have referred above.

5 Ms Bastian then informed the appellant that she was considering taking disciplinary action under the PSM Act, by way of a reduction in the appellant's classification from Level 4.3 to Level 3.3. An opportunity was provided to the appellant to respond. The Union did so by letter of 29 April 2013. On 1 May 2013, the respondent wrote again to the appellant, a copy of which was tendered as exhibit R2. In the letter, Ms Bastian referred to the response from the Union on the appellant's behalf. This response was taken into account however, having regard to the nature of the underperformance and the appellant's prior work history, the penalty of a reduction in classification would be implemented.

6 On 7 May 2013, Ms Bastian testified that a meeting took place between herself, Mr Smith, the respondent's Chief Information Officer, the appellant and the Union. At the meeting, the appellant was informed that the respondent's decision to reduce his classification from Level 4.3 to Level 3.3 remained and would take effect on 22 May 2013. Additionally, by this time, there was another issue that had arisen, in relation to a security breach involving the appellant's use of the respondent's information technology system.

7 Later, on 20 May 2013, Ms Bastian attempted to send an email to the appellant confirming the issues discussed at the meeting on 7 May 2013. However, as the appellant's external email account had been suspended, due to the security breach, Ms Bastian sent it to Mr Smith, who in turn forwarded it to the appellant. In the email, reference was made to the respondent's decision to reduce the appellant's classification, effective 22 May 2013. A copy of the email was tendered as exhibit R3.

8 On 21 May 2013, a further meeting took place between Ms Bastian, Ms Hulm, the respondent's Human Resources Manager, and the appellant. The meeting was arranged for the purposes of the appellant responding to the respondent in relation to the alleged IT security breach. At the meeting, Ms Bastian also communicated again, her decision in relation to the reduction in classification to take effect on 22 May, and, effective from that time, the appellant would relocate to the Registry. Ms Bastian testified that during the course of this meeting, she asked the appellant whether he needed any clarification as to the effect of the reduction in classification. She said the appellant advised that he did not require clarification. However, the appellant handed to Ms Bastian a letter dated 21 May 2013, requesting that he take long service leave with immediate effect. This issue had been previously discussed, whereby the appellant could access his accrued long service leave, pending the finalisation of the security breach matter, to consider his future.

9 In the circumstances, the respondent had agreed that the appellant take long service leave at his then current Level 4.3 classification rate, as at 21 May, the day prior to when the reduction in classification would otherwise take effect. The effect of this decision was that the appellant would have the benefit of taking long service leave at his higher classification rate. The appellant's letter of 21 May 2013, referred to his agreement to proceed on long service leave at his current substantive rate at Level 4.3 with the lower rate taking effect on his return from long service leave. Ms Bastian made a file note of the meeting and it and a copy of the appellant's letter of 21 May were tendered as exhibit R4. Whilst the appellant was due to return to work on 8 August 2013, he did not actually return until 12 August.

10 Given that the appellant's email account had been suspended, the respondent also took steps to communicate to the appellant the terms of exhibit R3, that being Ms Bastian's email of 20 May 2013, by SMS message. Mr Smith testified that as contact by email with the appellant from the respondent's email system was not possible, he copied and pasted the entire contents of

Ms Bastian's email of 20 May 2013 into an SMS message and sent it to the appellant at 3.36 pm on the afternoon of 20 May. Mr Smith testified that additionally, he forwarded Ms Bastian's email to his private email address and then reforwarded it to the appellant's external email address. This email was forwarded on 20 May at 4.36 pm.

11 Mr Smith testified that at approximately 10.55 pm on 20 May, he received an SMS message from the appellant in response to his earlier lengthy message, which said words to the effect "Received – can I have tentatively 15 to 3rd June off as annual leave please ..: need to know tomorrow am …". Mr Smith responded to those communications and then a further SMS message was received from the appellant at 10.50 am on 21 May 2013 with the question, "Would my long service leave be at level 4.3?" A copy of the SMS messages taken as "screenshots", were tendered as exhibit R6.

12 The testimony of Ms Bastian and Mr Smith was not seriously challenged by the appellant in cross-examination. The appellant did not seek to give evidence in rebuttal to that led by the respondent.

13 Having considered all of the evidence, there is no doubt in our view, that on a construction of events most favourable to the appellant, the latest time the respondent's decision to reduce the appellant's classification was communicated to him was 21 May 2013. So much so is abundantly clear from evidence comprising the various letters and emails to which we have referred and the lengthy text message from Mr Smith to the appellant, to which the appellant responded on 20 and 21 May 2013. It is also clear from the appellant's own note to the respondent of 21 May 2013, in relation to the rate of pay for his long service leave that an inference can, and should be drawn, that the appellant was aware of the reduction in his classification. The same observation can be made in relation to the appellant's query in relation to his long service leave in his SMS message of 21 May 2013, in reply to the SMS message sent by Mr Smith.

14 Accordingly, from all of the evidence, we are well satisfied and find that while from the respondent's letter of 1 May 2013 (exhibit R2) it is open to conclude that the decision to reduce the appellant's classification was made and communicated to him prior to 21 May 2013, certainly by that date, the appellant was aware of it. The fact that the appellant sought, and was granted, a period of long service leave the day prior to the effective date of the reduction in classification, at his higher rate of pay, does not alter such a finding. On the basis of this finding, the appellant's appeal is some 11 weeks and one day out of time. It is necessary, therefore, for the Appeal Board to consider whether the appeal should be accepted out of time.

Principles to apply

15 In *Nicholas v Department of Education and Training* (2008) 89 WAIG 817, the Appeal Board referred to the relevant legal principles as to the grant of an extension of time to bring appeals. At pars 8-14, the Appeal Board said:

> 8. By s 80J of the Act and reg 107(2) of the Regulations, an appeal of the present kind is to be commenced within 21 days of the decision appealed against. Taking the date of 18 August 2008 for present purposes as the material notification of termination of the appellant's employment, and allowing for delivery of the letter in the ordinary course of the post, that being by 19 August 2008, the notice of appeal is some three working days out of time.
>
> 9. By s 80L of the Act the provisions of Part II Division 2 of the Act apply to the Appeal Board's jurisdiction, in particular, for present purposes, s 27. By s 27(1)(n) of the Act, a power exists to extend any prescribed time, which reg 107(2) of the Regulations plainly is. By the terms of s 27(1)(n) of the Act, the Commission, and by necessary modification (s 80 L(1) of the Act) the Appeal Board plainly has the power to extend the time for lodging an appeal under s 80I: *Re Coldham v Ors; Ex parte BLF* 64 ALR 215; *Arpad Security Agency Pty Ltd v FMWU* (1989) 69 WAIG 1287; *Maureen Dehnel v Dr Neil Fong Director General Department Health and Ors* (2006) 86 WAIG 3310.
>
> **Relevant Principles**
>
> 10. The jurisdiction and power to grant an extension of time for the institution of an appeal is a discretionary decision. In extensions of time applications generally, courts and tribunals are to consider the justice of the particular case in terms of the relative prejudice to the parties. The onus is on the appellant to establish that the discretion should be exercised in his or her favour. Generally, some consideration of the merits of the appeal is to be undertaken.
>
> 11. Whilst the representatives of the appellant and respondent made some reference to relevant principles for extensions of time in unfair dismissal proceedings before the Commission pursuant to s 29(3) of the Act, as considered in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, it is important to observe that that case turned substantially upon the particular statutory framework prescribed under s 29 of the Act and in particular s 29(3), which provides that *"The Commission may except a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so"*.
>
> 12. Whilst the principles in *Malik* may be of some assistance in the present context, a more apposite approach in our view, given the range of different decisions from which persons may commence appeal proceedings under s 80I of the Act, and where the exercise of the statutory power to extend any prescribed time by s 27(1)(n) of the Act is under consideration, is that applicable to extensions of time to appeal and institute proceedings generally.
>
> 13. In *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, the Full Court of the Supreme Court of Western Australia considered general principles applicable to extensions of time for the institution appeals against primary decisions. In that case, Kennedy J at 198, considered that four relevant factors to take into account include the length of the delay, reasons for the delay, whether the appellant has an arguable case and any prejudice to the respondent.
>
> 14. In *Chan v The Nurses Board of Western Australia* [2007] WASCCA 123, the Court of Appeal (WA) considered and applied the principles discussed in *Esther Investments.* In particular, in relation to consideration of the relevant principles, Buss JA observed at pars 12-14 as follows:

"**Application for an extension of time: principles**

[12] *In Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196, Kennedy J said, at 198:*

In Palata Investments Ltd v Burt & Sinfield Ltd [1985] 1 WLR 942 at 946; [1985] 2 All ER 517 at 520, the Court of Appeal accepted that, in relation to an application for an extension of time for appealing, there are four major factors to be considered in the exercise of the discretion which is conferred upon the court. They are, first, the length of the delay, secondly, the reasons for the delay, thirdly, whether there is an arguable case and, fourthly, the extent of any prejudice to the respondent. There may in a particular case be additional factors, but I accept that the foregoing are the major factors in the present case.

[13] *Where the failure to appeal within time is attributable to the act or default of the applicant's solicitor (and not the applicant), that is a material consideration in the exercise of the Court's discretion. See Esther Investments per Kennedy J at 199 and per Rowland J at 204.*

[14] *In Gallo v Dawson (1990) 64 ALJR 458, McHugh J examined the applicable principles in relation to an application to extend time to appeal to the High Court. The relevant provision in the rules of the High Court empowered the Court to extend time upon such terms "as the justice of the case may require". His Honour said, at 459:*

The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the court or Justice to do justice between the parties: see Hughes v National Trustees Executors & Agency Co of Australasia Ltd [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see Avery v No 2 Public Service Appeal Board [1973] 2 NZLR 86 at 92; Jess v Scott (1986) 12 FCR 187 at 194–195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see Burns v Grigg [1967] VR 871 at 872; Hughes (at 263–264); Mitchelson v Mitchelson (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has 'a vested right to retain the judgment' unless the application is granted: Vilenius v Heinegar (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice. As the Judicial Committee of the Privy Council pointed out in Ratnam v Cumarasamy [1965] 1 WLR 8 at 12 ; [1964] 3 All ER 933 at 935:

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.

Also see Jackamarra v Krakouer (1998) 195 CLR 516."

16 We adopt and apply those principles for the purposes of this appeal.

Consideration

Length of delay

17 A delay of over two and a half months in bringing the appeal is substantial and is a factor that we place some weight on for present purposes.

Reason for the delay

18 The appellant suggested in his submissions that he was overwhelmed by the amount of correspondence he was receiving from the respondent. He also submitted that he considered that the decision to reduce his classification did not take effect until mid-August 2013, when he returned from long service leave, for the reasons that we have referred to earlier. As we have already found however, we conclude that the appellant was aware of the decision to reduce his classification by, at the latest, 21 May 2013. It is also of note that the appellant had the benefit of assistance and representation by the Union for some of this time. The appellant acknowledged in his submissions that this included some advice as to his rights, including any possible challenge to the respondent's decision arising out of the substandard performance process. The appellant also accepted that he had some knowledge that there would be time limits for any challenge.

19 Therefore, we are not persuaded that any good reason has been demonstrated by the appellant, for the substantial delay in filing the appeal.

Arguable case

20 The notice of appeal originally filed contains very scant grounds indeed. The notice simply says, "Too harsh Not fair consideration of evidence Incorrect decision". Because of this lack of specificity, the Appeal Board made directions on 3 October 2013 requiring the appellant to file an amended appeal, setting out his grounds, by 24 October 2013. By an amended notice of appeal filed on 24 October, the appellant raised amended grounds. However, unfortunately, these amended grounds take the issues little further than in the original notice of appeal. The amended grounds of appeal are in the following terms: "The process failed to fairly and impartially consider the evidence before it, resulting in lack of procedural fairness. Due consideration was not made of the evidence from investigation. Decision to demote was too harsh."

21 In his submissions, the appellant asserted that as the investigator was appointed by the respondent, this amounted to bias. This cannot be so. It is the respondent who is the appellant's employing authority for the purposes of the PSM Act and is the only person who can do so. The appellant also complained as to a lack of resources available to him in bringing the appeal. The appellant is in no different a position to many other self-represented parties in this respect. As to the alleged failure by the investigator to properly consider evidence, the appellant asserted that the investigation "failed to take into account a number of shortfalls in the helpdesk system; government processes and procedures, and IT procedures". When it was put to him whether he was aware of the video conference booking that he failed to set up for, the appellant said he was aware of this but there were problems in the "helpdesk" arrangement. It was not entirely clear to us what this meant.

22 In reply, the respondent contended that from the lack of particularity in the appeal and amended notice of appeal, the respondent still did not appreciate the case it had to meet. It was submitted by the respondent that it appointed an independent investigator under the PSM Act, who prepared a detailed and compelling report. The appellant was given the opportunity to respond to the matters raised throughout the course of the substandard performance procedure. The appellant also had the benefit of advice and assistance from the Union.

23 The respondent submitted that its complaints in relation to substandard performance were not in any sense complex. Also, the respondent did not impose the harshest penalty of termination of employment, arguably open, in this case. Furthermore, the respondent submitted that the appellant was given the ability to take long service leave immediately prior to the effective date of the decision to reduce his classification, at his then higher rate of pay. This was said to be a more than fair and equitable decision and to the appellant's advantage. As to the appellant's performance, the respondent contended that the appellant has a history of performance issues, such that the conduct complained of, leading to the formal investigation, could not be seen as isolated incidents. Accordingly, the respondent contended that the appellant does not have an arguable case.

24 On what is before us in these proceedings, we cannot be satisfied, when reviewing the matter at this stage in a "rough and ready way", that the appellant has been able to demonstrate to us that he has an arguable case, based on the notice of appeal, the amended notice of appeal, the submissions and the evidence.

Prejudice

25 Apart from having to contend with the appeal, no other material prejudice has been demonstrated by the respondent.

Conclusion

26 We are not persuaded that the appellant has established, on balance, that the time for bringing his appeal should be extended. Accordingly, the appeal is dismissed.

2013 WAIRC 01087

NOTICE OF APPEAL AGAINST THE DECISION GIVEN ON 13 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BHARATHAN KANGATHERAN
	APPELLANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF THE REGISTRAR
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G BROWN - BOARD MEMBER
	MR K CHINNERY - BOARD MEMBER
DATE	TUESDAY, 24 DECEMBER 2013
FILE NO	PSAB 16 OF 2013
CITATION NO.	2013 WAIRC 01087

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Ms R Hartley of counsel and with her Ms S Bastian

Order

HAVING heard the appellant in person and Ms R Hartley of counsel and with her Ms S Bastian on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the name of the respondent on the notice of appeal and the amended notice of appeal be amended by deleting the name "Department of the Registrar/Susan Bastian" and inserting in lieu thereof the name "Chief Executive Officer, Department of the Registrar."

(2) THAT the appeal be and is hereby dismissed.

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

RECLASSIFICATION APPEALS—

2014 WAIRC 00019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRIONA SMITH
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 JANUARY 2014
FILE NO	PSA 31 OF 2013
CITATION NO.	2014 WAIRC 00019

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 12th day of December 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this application be, and is hereby dismissed.

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

SCHOOL TEACHERS—Matters dealt with—

2014 WAIRC 00090

APPEAL AGAINST DECISION OF EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00090
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 17 DECEMBER 2013
DELIVERED	**:**	MONDAY, 10 FEBRUARY 2014
FILE NO.	**:**	APPL 52 OF 2013
BETWEEN	**:**	STEVEN LOCKWOOD
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		Respondent

Catchwords	**:**	Industrial law - Breaches of discipline - Appeal against findings and penalties imposed on a Principal - Claim that decision harsh, oppressive or unfair - Preliminary issues - Whether appeal should be heard as a hearing de novo - If hearing de novo, whether harsher sanction may be applied - Application to be heard as hearing de novo - Commission has power to apply different penalty
Legislation	**:**	*Industrial Relations Act 1979* s 26(1)(c) and s 29(1)(b)
		Public Sector Management Act 1994 s 78(2) and s 80
Result	**:**	Declaration issued
Representation:		
Counsel:		
Applicant	**:**	Mr S Kemp
Respondent	**:**	Mr D Matthews
Solicitors:		
Applicant	**:**	Jackson McDonald
Respondent	**:**	State Solicitor's Office

Case(s) referred to in reasons:

Anca Flynn v Paul Albert, Director General Department of Education and Training (2005) 85 WAIG 770

Geoffrey Johnston v Mr Ron Mance, Acting Director General Department of Education (2002) 83 WAIG 1553

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

Sangwin v Imogen Pty Ltd (1996) IRCA 100

Reasons for Decision

1 This application has been lodged by Steven Lockwood (the applicant). The Director General, Department of Education (the respondent) found the applicant guilty of committing four breaches of discipline under s 80 of the *Public Sector Management Act 1994* (PSM Act) in August 2013. The respondent disciplined the applicant by transferring him to another primary school, he was reprimanded and fined four days' pay and he was required to be performance managed and undertake training. He is aggrieved by the respondent's sanctions and he appeals this decision pursuant to s 78(2) of the PSM Act and s 29(1)(b) of the *Industrial Relations Act 1979* (the Act).

2 Two preliminary issues were raised by the respondent with respect to how this application is to be dealt with. These issues are whether this application should be heard as an appeal de novo and if this is to occur whether the Commission can impose a harsher sanction than that imposed by the respondent.

Submissions

Respondent

3 The respondent concedes that an applicant aggrieved by a decision referred to the Commission under s 78(2) of the PSM Act can have his or her application dealt with as a hearing de novo. However, there are exceptions to this and this case falls within

such an exception (see ***Minister for Health v Denise Drake-Brockman*** (2012) 92 WAIG 203). In the alternative if a hearing de novo is held there is no need to consider any challenge to the procedure followed by the respondent.

4 The respondent argues that a hearing de novo should not be held because the respondent had reasonable grounds to believe on the information available to it at the time that the applicant was guilty of the misconduct alleged (see ***Minister for Health v Denise Drake-Brockman***; ***Sangwin v Imogen Pty Ltd*** (1996) IRCA 100). If the respondent had a belief and reasonable grounds for deciding that the applicant had gone too far in the use of force on students on the information available to it at the time, this is sufficient for the respondent to take action with respect to the applicant's conduct. The use of force on a school child is the kind of case where it is sufficient that a belief of misconduct is reasonably held by the respondent to take action and it is therefore not appropriate for the Commission to conduct a hearing de novo and decide for itself at a much later time and on fresh evidence whether the applicant's misconduct occurred.

5 The respondent relies on s 26(1)(c) of the Act which requires the Commission to have regard to the interests of the persons immediately concerned as well as the community when deciding how to deal with this application. The respondent argues that it is not in the interests of children to be involved in a hearing de novo and that child witnesses should not be required to give evidence a long time after the event has occurred. The respondent claims that the applicant's interests are sufficiently met by the respondent having held an inquiry and the applicant being involved in that inquiry and as the applicant can challenge the procedure the respondent used to form the view that he misconducted himself this can be the appropriate process to review the respondent's decision and this does not involve children having to give evidence. In the alternative, if the Commission does not accept the respondent's submission that as a matter of general principle these kinds of cases should not be held as hearings de novo then the respondent submits that the Commission should exercise its discretion not to hold a hearing de novo in this particular case as the applicant has not been dismissed and he remains at the same classification level.

6 If a hearing de novo is held the Commission will hear all of the evidence and form its own assessment about the applicant's conduct. The respondent therefore argues that if a hearing de novo is held the only issues that should be dealt with are those relating to merit because any alleged procedural flaws will be cured on a hearing of all of the evidence. The respondent submits that if the Commission is going to hear the evidence afresh and stand in the shoes of the employer it is not consistent with the objects and role of the Commission to spend time hearing and determining whether the respondent's procedure was a sufficiently good one in this case.

7 As the Commission will stand in the shoes of the employer there is no reason why it should not be in a position to determine an appropriate penalty which could be a more serious penalty than that already imposed on the applicant (see ***Anca Flynn v Paul Albert, Director General Department of Education and Training*** (2005) 85 WAIG 770).

Applicant

8 The Commission can rehear an application afresh and review the employer's decision de novo (see ***Geoffrey Johnston v Mr Ron Mance, Acting Director General Department of Education*** (2002) 83 WAIG 1553 where Kenner C determined that the Commission is not limited to determining the reasonableness of the employer's decision).

9 The nature of the challenge to the decision in this matter relates not only to the procedure but whether the applicant misconducted himself, as well as the harshness of the sanction applied. Given this the applicant seeks that the matter be heard de novo with evidence to be led by the parties and a decision given on the evidence presented at the hearing and if the Commission does not hear all of the evidence relevant to the allegations made against the applicant it will be unable to determine whether the respondent acted upon a correct factual basis.

10 The Commission does not have the power to impose a harsher sanction than that imposed on the applicant by the respondent. The possibility of harsher sanctions could only arise if the respondent imposed a lenient sanction in the first instance and the investigation report was flawed and omitted evidence that was available that would justify a harsher sanction or new allegations are raised at the hearing. The applicant submits that none of these matters have been proposed in the respondent's Notice of Answer and Counter Proposal and any new allegations relating to the applicant should be dealt with under the processes contained in the PSM Act. The Commission should therefore find that it does not have the power to impose a harsher sanction.

Consideration

11 When taking into account the nature of the matters and issues raised in the appeal, I find that it is appropriate in this instance to hear this application as a hearing de novo. It is not in contest that the Commission has the power to hear this application as a hearing de novo and I am not persuaded that in this instance it is inappropriate for this to occur. In my view the Commission should review the facts relevant to this matter to determine if the applicant misconducted himself with respect to the conduct which was alleged to have occurred. All but one of the allegations against the applicant relate to his alleged behaviour towards children which are very serious matters, the conclusions about which may have significant consequences for the applicant, the respondent and the children. In the circumstances I find that the applicant should not be denied the opportunity to have the facts relevant to the allegations made against him reviewed by the Commission notwithstanding that the respondent had a genuine belief on the information before it that the applicant had committed the misconduct alleged against him and the applicant remains employed by the respondent. Even though children may be required to give evidence if a hearing de novo is held, in my view this issue can be dealt with in an appropriate manner.

12 As the Commission can substitute its own decision to that of an employer when a hearing de novo takes place I find that the Commission has the power to determine the nature of any penalty which may apply arising out of the conclusions reached by the Commission. It follows that the Commission may reach a different penalty than that determined by the respondent in the first instance.

13 I declare accordingly.

2014 WAIRC 00097

APPEAL AGAINST DECISION OF EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN LOCKWOOD
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 13 FEBRUARY 2014
FILE NO.	APPL 52 OF 2013
CITATION NO.	2014 WAIRC 00097

Result	Declaration issued
Representation	
Applicant	Mr S Kemp (of counsel)
Respondent	Mr D Matthews (of counsel)

Declaration

HAVING HEARD Mr S Kemp 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 declares –

1. THAT it is appropriate to hear this application as a hearing de novo.
2. THAT when the hearing de novo takes place the Commission can determine any penalty which may be appropriate to apply to the applicant.

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

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2014 WAIRC 00022

DISPUTE RE DUTIES AND EMPLOYMENT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ROBERT KIETH FRASER
	APPLICANT
	-v-
	PATRICK PROJECTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 JANUARY 2014
FILE NO/S	OSHT 3 OF 2013
CITATION NO.	2014 WAIRC 00022

Result	Application discontinued
Representation	
Applicant	Ms L Morich and Mr R K Fraser
Respondent	Ms L Cordone (of counsel) and Ms M Storey

Order

WHEREAS this is an application pursuant to the *Occupational Safety and Health Act 1984*;

AND WHEREAS this matter was listed for hearing on 30 October 2013;

AND WHEREAS on 14 January 2014 the applicant file a Notice of Discontinuance;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby, discontinued.

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

2014 WAIRC 00070

REFERRAL OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MARGARET MORRISON
	APPLICANT
	-v-
	PATHWEST - KING EDWARD MEMORIAL HOSPITAL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 4 FEBRUARY 2014
FILE NO/S	OSHT 4 OF 2013
CITATION NO.	2014 WAIRC 00070

Result	Application discontinued
Representation	
Applicant	Ms M Morrison
Respondent	Mr D Leigh (of counsel)

Order

WHEREAS this is an application pursuant to the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 11 and 28 November 2013 conferences between the parties were convened;

AND WHEREAS at the conclusion of the conference held on 28 November 2013 no agreement was reached between the parties;

AND WHEREAS on 29 January 2014 the applicant filed a Notice of Discontinuance;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby, discontinued.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2014 WAIRC 00103

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	DAMIEN COLE PTY LTD
	APPLICANT
	-v-
	SHACAM TRANSPORT PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 FEBRUARY 2014
FILE NO/S	RFT 3 OF 2013
CITATION NO.	2014 WAIRC 00103

Result	Application dismissed

Order

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

THAT this application be and is hereby dismissed.

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

2014 WAIRC 00039

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	T & G ELDER TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 28 JANUARY 2014
FILE NO/S	RFT 5 OF 2013
CITATION NO.	2014 WAIRC 00039

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol
Respondent	Ms C Ebell

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.