Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 3 WEDNESDAY 26 MARCH, 2014 Vol. 94—Part 1

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

94 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 00076

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. PSAC 41/2013 GIVEN ON 4 DECEMBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00076
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 22 JANUARY 2014
DELIVERED	**:**	TUESDAY, 4 FEBRUARY 2014
FILE NO.	**:**	FBA 21 OF 2013
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Appellant AND DIRECTOR GENERAL, DEPARTMENT OF HOUSING Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Public Service Arbitrator**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**[2013] WAIRC 01049**
File No.	**:**	**PSAC 41 of 2013**

CatchWords	**:**	Industrial law (WA) - appeal against decision of the Commission - application for interim order pursuant to s 44 of the *Industrial Relations Act 1979* (WA) - public interest - compulsory conference - discretion to intervene in an investigation under s 81 of the *Public Sector Management Act 1994* (WA) considered - preconditions for exercise of power to make interim order not met - leave to appeal not granted

Legislation	:	*Industrial Relations Act 1979* (WA) s 7(1), s 26, s 26(1)(a), s 26(2), s 26(3), s 44, s 44(6), s 44(6)(ba), s 44(6)(ba)(i), s 44(6)(ba)(ii), s 44(6)(ba)(iii), s 44(12)(a), s 44(12a), s 49(2a)
		Public Sector Management Act 1994 (WA) Part 5, s 80, s 80A, s 81, s 81(1), s 81(1)(a), s 82A(3), s 82A(3)(b), s 82(1)(a)
		Residential Tenancies Act 1987 (WA) s 5(2)(d), s 12, s 12A, s 12A(1), s 15, s 15(1), s 15(2), s 15(2)(a), s 15(2)(b), s 15(2)(c), s 15(2)(d), s 15(2)(e), s 15(4), s 27A, s 32, s 59C, s 71, s 71(2)(a), s 71(2)(b), s 82
		Government Employees' Housing Act 1964 (WA)
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	Mr M E Shipman and with him Mr K Rukunga
Respondent	:	Mr S Thackrah and with him Ms M Elderfield

Case(s) referred to in reasons:

Burswood Resort (Management) Ltd v ALHMWU [2003] WAIRC 09550; (2003) 83 WAIG 3314

Civil Service Association of Western Australia v Director General of the Department for Community Development [2002] WASCA 241

Commissioner for Fair Trading v Voulon [2006] WASC 261

Deng v Managh (2013) WADC 58

Director General, Department of Education v State School Teachers' Union of WA Inc [2011] WAIRC 58; (2011) 91 WAIG 2307

Director General, Department of Education v United Voice WA [2013] WASCA 287

Grassby v R (1989) 168 CLR 1

House v The King (1936) 55 CLR 499

Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch [2005] WAIRC 03358; (2005) 86 WAIG 247

Re Burton; Ex Parte Rowell [2006] WASC 277

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

Williams v Spautz (1992) 174 CLR 509

Case(s) also cited:

Aboriginal Legal Service of Western Australia Incorporated v Lawrence [2007] WAIRC 00435

Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch [2000] WASCA 386

Civil Service Association of Western Australia Inc v Shean, Chief Executive Officer, Disabilities Services Commission [2005] WAIRC 02043

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

Confederation of Western Australian Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1990) 70 WAIG 1281

GlaxoSmithKline Australia Pty Ltd v Makin [2010] FWAFB 5343

H A Warner Pty Ltd v Williams (1946) 73 CLR 421

Martin v State Housing Commission (Unreported, WASC, Library No. 980122, 18 March 1998

MRTA of WA Inc v Tsakisiris (2007) 87 WAIG 2795

Norbis v Norbis (1986) 161 CLR 513

S v Director-General, Department of Racing, Gaming and Liquor [2012] WAIRC 00700

Schaefer v Housing Authority [2011] WASC 222

The Department of Education and Training v Weygers [2009[WAIRC 00041

The Registrar v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 1904

Reasons for Decision

SMITH AP:

Background

1 The Civil Service Association of Western Australia Incorporated (the CSA) seeks the leave of the Full Bench to appeal against a decision made by the Public Service Arbitrator (the Arbitrator) on 4 December 2013 dismissing an application for an interim order ([2013] WAIRC 01049). The decision was made following the convening of a compulsory conference pursuant to s 44 of the *Industrial Relations Act 1979* (WA) (the Act) on 26 November 2013 consequent upon the filing of a notice of application by the CSA on 5 November 2013.

2 The application for a s 44 conference was made because Ms Emma Hazelton who is a member of the CSA, and a public service officer employed by the Director General, Department of Housing (the employer), had been served with a notice under s 80 of the *Public Sector Management Act 1994* (WA) (the PSM Act) which alleged that she had committed a number of acts which may constitute a breach of discipline. Attached to the application was a copy of a notice dated 7 October 2013 in which the following allegations were made:

1) You sublet your Government Regional Officers' Housing (GROH) residence at 6 Finch Street, Karratha to Ms Louisa Belotti between August 2012 and April 2013.

2) You breached the provisions of your Tenancy Agreement, the *Residential Tenancies Act 1987* and the GROH Subletting Policy by soliciting payments from Ms Belotti for rent and other considerations.

3) You profited from subletting your GROH tenancy by receiving rent and other payments from Ms Belotti which were in excess of the sum total that you were required to pay the Department under your employee subsidised tenancy arrangements.

4) You concealed this arrangement from the Department by falsely advising that you had not received financial payments from Ms Belotti in respect of her occupancy at 6 Finch Street, Karratha, when this was raised with you by your supervisor in May 2013.

3 The notice also stated that if substantiated these actions may be in contravention of:

- Section 80(c) of the Act, by committing an act of misconduct when you acted contrary to the public interest by:
  - corruptly taking advantage of your employment and employer subsidised GROH tenancy to seek a benefit for yourself, namely by subletting your GROH residence in breach of your Tenancy Agreement.
  - corruptly taking advantage of your employment and employer subsidised GROH tenancy to seek a benefit for yourself, namely by accepting financial payments for 'other considerations' as defined by the GROH Subletting Policy.
  - fraudulently taking advantage of your employment by profiteering from your employer subsidised GROH tenancy, namely by charging rent in excess of the sum total that you were required to pay to the Department.
  - breaching the trust placed in you as a public service officer by misusing Departmental resources for personal gain and profiteer from an illegitimate financial arrangement.
  - dishonestly concealing this arrangement by providing false information to the Department.
- Section 80(b)(i) of the Act, by failing to observe section 9(b) of the Act. Specifically, it is considered that by misleading the Department, soliciting personal gain and profiteering from your employee subsidised GROH tenancy, you have contravened an obligation to '*act with integrity..... and be scrupulous in the use of official information, equipment and facilities*'.
- Section 80(b)(i) of the Act, by contravening any provision of the Act applicable to an employee, namely section 9(a)(iii) of the Act which requires an employee to comply with the Department's *Code of Conduct*. Specifically, it is considered that your actions contravened a requirement to:
  - act ethically and with integrity in the public interest and not for personal gain; and
  - use the resources of the State in a responsible and accountable manner.
- Section 80(b)(ii) of the Act, by failing to comply with the Western Australian Public Sector *Code of Ethics* requirement to exercise personal integrity and accountability in performing your functions as a public officer.

4 The notice informed Ms Hazelton that should it be found that she had committed a breach of discipline under s 82A(3)(b) of the PSM Act, the Department may take disciplinary action which may result in one or more penalties being imposed, and/or improvement action being required or no further action.

5 The notice also advised Ms Hazelton that pursuant to s 82(1)(a) of the PSM Act, she was suspended from duty on full pay until further notice.

6 By letter dated 29 October 2013, the CSA wrote to the employer on behalf of Ms Hazelton, challenging the alleged factual circumstances set out in the notice and challenging the employer's power to treat the matter as a breach of discipline. In the letter the CSA stated that the allegations were based on three fallacies:

1. A misreading of the provisions of the Public Sector Management Act 1994[PSM Act], sections 80, and 9(b) in particular, and a concomitant misreading of the definition of misconduct in the Corruption and Crime Commission Act 2003 [CCC Act], section 4;
2. Creating a nexus between allegations of a breach of tenancy obligations, which is the sole preserve of the Residential Tenancies Act 1987, with misconduct as defined by the PSM Act and the CCC Act [This nexus is not legally possible]; and
3. A consideration of malicious misinformation emanating from Karratha persons. There was no sublease.

7 In relation to point 3, the CSA stated in the letter the allegation related to a family friend who stayed with Ms Hazelton from August 2012 until April 2013 and did not pay rent.

Matters pleaded in the application for a s 44 conference

8 In the application the CSA made submissions that:

(a) the Arbitrator has power to intervene in disputes over the application of disciplinary proceedings in the PSM Act if the allegations are baseless;

(b) as the allegations touch upon the rights of landlord and tenant, any dispute is within the exclusive jurisdiction of the Magistrates Court. Pursuant to s 12A of the *Residential Tenancies Act 1987* (RT Act) there is no other avenue to deal with the dispute.

9 The CSA sought the following orders:

(a) an interim order that the investigation ceases pending resolution by conciliation and arbitration; and

(b) a final order that the allegations are baseless.

10 Attached to the application, was a copy of the lease agreement which is made between Ms Hazelton and the Department of Housing.

The Public Service Arbitrator's reasons for decision

11 At the compulsory conference each party stated contentions of 'fact' upon which they relied and made a number of submissions. These were recorded in the Arbitrator's reasons for decision given on 4 December 2013 as follows ([2013] WAIRC 01048):

> At the compulsory conference, the Association asserted that the allegations made by the Department against Ms Hazelton were baseless. It was contended that Ms Hazelton permitted a close friend of long standing, to reside with her between December 2012 and April 2013, to assist her friend at a time of difficulty. The Association contended that Ms Hazelton's friend was never a tenant and there was no subletting of her property. Whilst it was acknowledged that Ms Hazelton received some monies from her friend, Ms Hazelton denied it was in the nature of rent, rather reflected some money for household expenses and some other monies in respect of a private loan. Moreover, the Association contended that the fact that Ms Hazelton had her friend staying with her over the relevant period was well known at the Departmental office in Karratha.
>
> In particular, the Association contended that as Ms Hazelton was a tenant of the Department under a written tenancy agreement, then any allegation as to subletting of the premises was a matter properly dealt with under the residential tenancies legislation. It was acknowledged that by cl 17 of the tenancy agreement, Ms Hazelton is not permitted to sublet the premises or assign her interests under the agreement. In short, the Association contended that the allegation of Ms Hazelton subletting her premises, had nothing to do with the employment relationship and is exclusively a residential tenancies matter. Accordingly, the Association contended that the Department had no capacity to undertake an investigation or proceed with a disciplinary matter against Ms Hazelton on the facts.
>
> The Department contended that the allegations against Ms Hazelton can properly form the basis of misconduct allegations under s 80(c) of the PSM Act. It was submitted by the Department that there is no prohibition on it proceeding to deal with the matter as it could pursue the matter as either a residential tenancy issue or an employment issue. It has elected to proceed under the PSM Act. The present stage of the matter involves an investigation to determine the facts. The Department contended it is only once the investigation process has been completed, that there can be some further consideration by the Department as to the factual basis for the allegations. Until that time, the Department submitted that it would be inappropriate to take any steps to cease the disciplinary process ([4] - [6]).

12 After the Arbitrator found that he had wide powers to make interim orders as will, in his opinion, satisfy the requirements of s 44(6)(ba) of the Act, he found:

(a) The CSA effectively seeks the cessation of the disciplinary action on the footing that the matter involves the exclusive jurisdiction of the Magistrates Court in relation to a dispute solely dependent on a landlord and tenant relationship.

(b) Whether or not the relationships of employer and employee on the one hand, and landlord and tenant on the other, are exclusive and independent, as contended by the CSA, may well be a matter which requires to be determined. On the other hand, the allegations themselves, without reaching any concluded view on the issue, may well be said to be capable of supporting allegations of misconduct under s 80 of the PSM Act.

(c) It is not necessary at this point to reach a concluded view on any of these issues. At this stage of the proceedings, interim relief is sought by the CSA, to effectively terminate the disciplinary process. If such an order is made, it will not be, in effect, an interim order as contended by the CSA. It will, in effect, be a final order, terminating the disciplinary process in its entirety. Such an order would not be made pending further conciliation or arbitration between the parties. Nor could such an order enable conciliation or arbitration to resolve the matter in question, or lead to an encouragement of the parties to exchange or divulge attitudes or information which would assist in the resolution of the matter in question. In that sense, an interim order as sought would not, and indeed could not, satisfy the requirements of s 44(6)(ba) of the Act.

(d) It would be open for Ms Hazelton and the CSA to agitate the issues raised in the application for interim relief, at the conclusion of the disciplinary process, and subject to its outcome, having regard to s 80A and s 82A(3) of the PSM Act.

Grounds of appeal

13 Ground 1 of the appeal contends that the Arbitrator made an error of law when he dismissed the application because the application sought final but unspecified orders. The particulars are set out in the CSA's submissions as to why it says the Arbitrator erred.

14 Ground 2 of the appeal contends that the Arbitrator erred in law in finding that the interim relief sought by the CSA was to effectively terminate the disciplinary proceedings.

CSA's submissions

15 The CSA accepts that the Arbitrator cannot issue final orders out of a compulsory conference. This appeal focusses on the power of the Arbitrator to issue interim orders out of a compulsory conference and the power to correct claims for relief under s 26 of the Act. The CSA submits the Arbitrator misconstrued the nature of the CSA's claim for interim relief in order to achieve a particular outcome. An interim order to suspend the investigation pending conciliation and arbitration was a legitimate outcome. If there was an issue with the wording of the interim order sought by the CSA, it could have been reformulated by virtue of s 26(1)(a) of the Act.

16 The CSA contends when the allegations made against Ms Hazelton are analysed it can be seen that these allegations are predicted on the existence of a sublease, and its existence, along with related issues which are within the exclusive jurisdiction of the Magistrates Court pursuant to s 12A of the RT Act.

17 The CSA sought an interim order to cease the investigation as a temporary measure pending the resolution of the substantive matter after the jurisdiction of the RT Act was resolved. Such an order was within the power of the Arbitrator. The CSA sought the interim order to suspend the investigation whilst the question of whether the employer had the ability to proceed with a disciplinary inquiry under s 80 of the PSM Act was referred for hearing and determination under s 44(12)(a) of the Act. The basis of the claim to be referred is a determination whether the CSA's contention that the provisions of the RT Act prohibit the employer from proceeding with the investigation, as matters covered by the RT Act cannot be part of disciplinary proceedings brought by an employer under the PSM Act (the substantive matter), is correct. Part of the substantive matter is whether a lease arrangement between an employer and employee can be the subject matter of a disciplinary inquiry brought under s 80 of the PSM Act. Another part of the substantive matter is the contention the employer's action is ultra vires because of the operation of s 12A of the RT Act.

18 The CSA concedes that an order that the allegations are baseless would be a final order. Such an order could only be made if the Arbitrator determined after a hearing that the jurisdiction of the employer was ousted by the exclusive jurisdiction created under the RT Act.

19 At no stage did the CSA seek to terminate the disciplinary proceedings. It was put to the Arbitrator that the application for a final order was in the alternative.

20 Whilst the CSA says that the giving of directions or orders under s 44(6) and s 26(2) of the Act involves the exercise of discretion, under s 26(3) of the Act, there is an obligation imposed upon the Arbitrator to afford the parties an opportunity of being heard.

21 If there was any doubt about the CSA's position, the Arbitrator should have exercised his power under s 26(2) or s 26(3) of the Act. There were two choices:

(a) to sever the application for an interim order from the final order which could be done under s 26(1)(a) on the basis that the Arbitrator was not restricted to the specific claim; or

(b) to seek clarification from the CSA as to whether it was seeking to terminate the disciplinary process in its entirety.

22 The essence of the second ground of appeal is that the Arbitrator, by finding that the interim relief sought was to effectively terminate the disciplinary proceedings, did not characterise the application correctly. There was a claim for an interim order that the investigation ceases pending resolution of the substantive matter by conciliation and arbitration. The CSA wanted the matter as to whether the RT Act ousted the jurisdiction of the employer to pursue disciplinary action under the PSM Act to be referred for hearing and determination. Until that issue was heard and determined, the CSA sought an interim order to suspend the investigation pending resolution by conciliation and arbitration.

23 The CSA says the preconditions for the making of an interim order under s 44(6)(ba)(i) and s 44(6)(ba)(ii) were met. In particular, the order sought would have prevented a deterioration of industrial relations in respect of the matter in question until conciliation and arbitration had resolved that matter. Also an interim order to suspend the investigation would have encouraged the parties to exchange or divulge attitudes or information which would assist in the resolution of the matter in question. The reason why the CSA says these preconditions were met was because there was an injustice being visited on the CSA's member, Ms Hazelton, and there was a jurisdictional bar upon the disciplinary matter which the CSA sought to have arbitrated.

24 The facts relevant to determining the substantive issue are:

(a) All of the allegations are predicated on the existence of a sublease or otherwise and that Ms Hazelton profited from the sublease. These allegations arise from an alleged breach of a lease which is within the exclusive jurisdiction of the Magistrates Court under the RT Act.

(i) Section 12A of the RT Act provides as follows:

(1) The Magistrates Court has exclusive jurisdiction to hear and determine a prescribed dispute and such disputes are not justiciable by any other court or tribunal.

(2) A prescribed dispute is a minor case for the purposes of Part 4 of the *Magistrates Court (Civil Proceedings) Act 2004* and the jurisdiction conferred by subsection (1) is to be exercised accordingly.

(ii) '[P]rescribed dispute' is defined in s 12 of the RT Act to mean:

> any matter that may be the subject of an application under this Act, other than an application made under this Act that is, or involves, a claim for an amount over the prescribed amount, but includes an application made under clause 8 of Schedule 1, irrespective of the amount claimed.

(b) Ms Hazelton has a discrete lease with the employer. There is no evidence of a written sublease between Ms Hazelton and Ms Belotti.

(c) The protocol of the employer is that they follow a prescribed form of lease and if a sublease exists it would be a document in the form of a sublease. If there is a dispute about the existence or non-existence of a sublease, the RT Act is the jurisdiction under which one would resolve that dispute. All of the employer's allegations are premised on the existence of a sublease. These allegations are exaggerated and involve an attempt to extend the operation of the PSM Act beyond its scope as contemplated by Parliament. They are ultra vires.

(d) Pursuant to s 27A of the RT Act, all tenancies are to be recorded in writing. Section 5(2)(d) of the RT Act excludes from the operation of the RT Act circumstances where the tenant is a boarder of a lodger. A lodger is someone who does not have exclusive possession of premises: ***Commissioner for Fair Trading v Voulon*** [2006] WASC 261.

(e) The allegations of profiteering come within the scope of s 32 of the RT Act. The RT Act is a complete code for regulating any matter relating to a landlord and tenant relationship. If the RT Act is a code, then it follows that the PSM Act cannot be used to deal with disputes relating to government housing leases. Further, the employer has no authority to regulate government lease conditions by the use of policy. The terms and conditions must be set out in the lease. Any other changes may only be effected by regulation, not policy: see ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287. The policy offends the prohibition on contracting out under the provisions of s 82 of the RT Act. Section 82 of the RT Act provides as follows:

> (1) Except as provided under this Act —
>
> (a) any agreement or arrangement that is inconsistent with a provision of this Act or purports to exclude, modify or restrict the operation of this Act is to that extent void and of no effect; and
>
> (b) any purported waiver of a right conferred by or under this Act is void and of no effect.
>
> (2) A person must not enter into any agreement or arrangement with intent either directly or indirectly to defeat, evade or prevent the operation of this Act.
>
> Penalty: a fine of $10 000.

(f) The employer's position in effect is that Ms Hazelton has a service occupancy, rather than a leasehold. Thus, the employer can initiate a breach of discipline. This reasoning is wrong in fact and in law. The tenancy agreement and the employment contract are discrete documents. Clearly on the facts, Ms Hazelton had two relationships distinct from each other. The lease was not granted to her for the more effectual performance of her work. The lease was granted for recompense of her services. She had independent occupation of the premises. There is in effect a statutory barrier placed on the exclusive jurisdiction of the Magistrates Court to determine tenancy disputes. The barrier prevents any disciplinary inquiry under s 80 of the PSM Act. The most an investigator can do is identify a document that takes the form of a lease but the investigator cannot establish whether a sublease exists or not. In these circumstances, the employer does not have reasonable grounds to initiate a breach of discipline.

(g) The jurisdictional bar prohibits an investigator from determining whether a sublease was in existence between Ms Hazelton and Ms Belotti. All the investigator can do is determine whether there is a document in existence which takes the form of a sublease.

25 On 29 January 2014, the CSA filed a submission in writing addressing why it contends that the matters set out in the notice to Ms Hazelton constitute a 'prescribed dispute' within the meaning of the RT Act. In its written submission it makes the following submissions:

(a) A prescribed dispute means any matter that may be the subject of an application under the RT Act. By application of s 12A the Magistrates Court has exclusive jurisdiction to hear and determine that matter, if that matter may be the subject of an application under the Act: ***Re Burton; Ex Parte Rowell*** [2006] WASC 277.

(b) In ***Deng v Managh*** (2013) WADC 58, Derrick J stated that matters that could be subject of an application under the RTA were prescribed disputes as defined by s 12 of the RT Act. It follows that the dispute between the CSA and the employer, subject to the dispute between the parties being a matter that 'could be the subject of an application' would therefore meet the test of a 'prescribed dispute' within the meaning of the RT Act.

(c) Further by application of s 15(1) and s 15(4) of the RT Act, a breach of a residential tenancy is a matter that can be the subject of an application and thus meets the test of a prescribed dispute being a matter which can be the subject of an application under the RT Act.

(d) If the dispute regarding the lease could be the subject of an application under the RT Act by satisfying the test in s 12 of the RT Act, the Magistrates Court has exclusive jurisdiction to hear and determine such a matter. Section

12A of the RT Act further mandates a prescribed dispute is not justiciable or should not be heard by any other court or tribunal other than the Magistrates Court.

(e) It is settled the Magistrates Court as constituted in this jurisdiction has been found to be a competent court for the purposes of hearing a prescribed dispute.

(f) The employer has conceded there was a breach of the residential tenancy agreement, arising from an alleged breach of a term of a periodic tenancy which prohibits a sublease without written consent of the owner. The CSA disputes the existence of a sublease. The CSA contends such a dispute falls within the ambit of either or any of s 15(1) and s 15(4) of the RT Act which allows for breaches of a residential tenancy agreement and s 59C of the RT Act which allows for the recognition of certain persons as tenants.

(g) Section 15(1) of the RT Act allows for both lessor and tenant to make an application. Section 15(4) of the RT Act does not distinguish or define the applicant, thus allowing for any party to a tenancy agreement to make such an application. Section 59C of the RT Act provides for a person other than the owner or lessor of the property to make an application to determine the existence of a tenancy relationship and by extension the existence of a lease of sublease. It follows that a party other than the employer could make a valid application under these sections and by so doing satisfy the test of a prescribed dispute under s 12 of the RT Act. If that is so, it follows such a matter is within the exclusive jurisdiction of the Magistrates Court by application of s 12A of the RT Act.

(h) The CSA submits that the breach of discipline alleged by the employer hinges on the existence of a sublease. The employer alleges a breach of a sublease, which is in breach of the residential tenancy agreement. A person other than the employer could have made an application both under s 15(1) and s 15(4) and s 59C of the RT Act to determine a dispute arising from a lease, making such an application a prescribed dispute under s 12 of the RT Act and thus enlivening s 12A of the RT Act.

(i) When the facts of this matter are applied to the tests as defined in the RT Act, it follows the only logical conclusion that can be drawn is the dispute falls within the exclusive jurisdiction of the Magistrates Court.

26 At the hearing of the appeal, counsel on behalf of the CSA informed the Full Bench that the investigation by the employer had been completed. However, the disciplinary proceedings have not been concluded. In these circumstances, the CSA seeks an order that the appeal be upheld and the decision varied to suspend the disciplinary proceedings until conciliation has determined the issue whether the provisions of the RT Act render the investigation baseless and/or ultra vires. Alternatively, it seeks an order that the operation of the decision be suspended and the case be remitted to the Arbitrator for further hearing and determination.

The employer's submissions

27 The employer submits that the subject of the appeal is not of such importance that in the public interest an appeal should lie. The central issue in this appeal is whether the Arbitrator erred in law in dismissing the application for an interim order. In the alternative, it says the decision of the Arbitrator contains no errors of law. If both of these submissions fail the employer contends that the decision can be upheld for different reasons than stated by the Arbitrator.

28 The employer points out that the CSA bears the onus of establishing that the subject of the appeal is of such importance that, in the public interest, an appeal should lie pursuant to s 49(2a) of the Act. The employer submits that the CSA has not discharged this onus.

29 The employer says the Arbitrator misstated the issue that would have been considered if this matter had proceeded to conciliation or arbitration. The question is not, as the Arbitrator put, whether or not the relationships of employer and employee and landlord and tenant are exclusive and independent as it is common ground between the parties that the relationships operate in different spheres, have different legal consequences, and that disputes arising out of the relationships may only be ventilated in forums with the appropriate jurisdiction.

30 The question that would have been considered if the matter had proceeded to conciliation and arbitration, being the issue that the employer says is in dispute between the parties, is as follows: In circumstances where an employee's employer is also their landlord, is a breach of lease capable of constituting an act of misconduct for the purposes of s 80 of the PSM Act? (the question)

31 The employer concedes that the question is one on which reasonable minds might differ. Accordingly, it would have been the subject of an argument at arbitration. However, argument on this question would not have been centred on jurisdiction as the exclusive jurisdiction granted to the Magistrates Court by s 12A of the RT Act is not expressed in terms of determining whether breaches of the residential tenancy agreement have occurred. Thus, there is no inconsistency or, to use the CSA's words, 'statutory barrier', or ultra vires in the interrelationship between the PSM Act and the RT Act. The determination of the issue would have centred on a straightforward determination of a preliminary question. Moreover, the answer to the question very much depends on the factual circumstances. For example, the employee's actual or constructive knowledge of the terms of the lease is relevant. In the case of Ms Hazelton, the employer was guided by the factual substratum that she worked for the very agency that administers housing under the *Government Employees' Housing Act 1964* (WA) (the GEH Act), and therefore ought to have known that subleasing her premises constituted a breach of lease.

32 Furthermore, the question is only one question before the investigator that is potentially capable of determination by arbitration. The allegations go beyond a mere breach of lease to encompass 'corruptly taking advantage of employment', 'fraudulently taking advantage of employment', 'breaching trust placed in you as a public service officer by misusing Departmental resources for personal gain' and 'dishonestly concealing the arrangement by providing false information', not all of which are premised on the finding of a breach of lease.

33 As properly framed, the question involves no questions of law that have a broader relevance necessary to satisfy the public interest test.

34 The second submission made on behalf of the employer is that the Arbitrator did not make any errors of law.

35 The Arbitrator in his reasons described the orders sought by the CSA as being in the alternative. The employer concedes that it would have been more accurate to describe the orders sought as operating conjunctively. However, any unfortunate characterisation does not lead to the consequence that the Arbitrator fell into error in his findings.

36 The Arbitrator essentially found a conceptual error in the nature of the orders sought. He found that the difficulty with the orders sought by the CSA at this stage of the proceedings is that if such an order is made, it would, in effect, be a final order, terminating the disciplinary process in its entirety.

37 It is well established that orders made under s 44(6)(ba) of the Act must be interim or interlocutory and not finally dispose of a matter in question: ***Director General, Department of Education v State School Teachers' Union of WA Inc*** [2011] WAIRC 58; (2011) 91 WAIG 2307 [60] (Smith AP)***; Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1989) 69 WAIG 1873, 1882 - 1883; ***Burswood Resort (Management) Ltd v ALHMWU*** [2003] WAIRC 09550; (2003) 83 WAIG 3314 [44].

38 The interim orders sought by the CSA to cease the investigation pending resolution by conciliation and arbitration at first blush might seem to be capable of being characterised as an interim order. Despite the unfortunate use of the word 'cease' as opposed to, for example, 'suspend', it is clear that what was being sought by the CSA was a temporary cessation of the disciplinary proceedings to enable the Arbitrator to make findings on, for example, the question the employer says should have been determined by conciliation and arbitration.

39 The Arbitrator applied the correct test, did take into account relevant material, did not mistake the facts and took account of all material considerations, and therefore cannot be said to have made an error in the sense of ***House v The King*** (1936) 55 CLR 499.

40 The Arbitrator turned his mind to the correct test being the criteria for the making of an interim order in s 44(6)(ba)(i) - (iii). He properly found that the proposed order to cease the disciplinary proceedings:

(a) Would not be made pending further conciliation or arbitration between the parties, clearly considering and applying s 44(6)(ba)(i).

(b) Could not enable conciliation or arbitration to resolve the matter in question, clearly considering and applying s 44(6)(ba)(ii).

(c) Would not lead to an encouragement of the parties to exchange or divulge attitudes or information which would assist in the resolution of the matter of the question, clearly considering and applying s 44(6)(ba)(iii) of the Act.

41 If the Full Bench is not persuaded by the employer's submissions that the public interest is not satisfied and that the Arbitrator did not make any errors of law, the employer submits in the alternative that the Full Bench ought to uphold the order dismissing the application for interim orders for different reasons than that stated by the Arbitrator.

42 There were two distinct legal relationships between the employer and Ms Hazelton, being, a relationship of employer/employee; and a relationship of lessor/lessee. The former relationship is governed by the PSM Act and the Act; the latter relationship is governed by the RT Act.

43 The employer has only ever based its right to commence disciplinary proceedings against Ms Hazelton under Part 5 of the PSM Act, as it is legally obliged to do. During oral submissions counsel for the employer informed the Full Bench that it was the view of the employer that it could have taken action to serve a notice of termination of the lease under the RT Act but it has not done so; it has taken no action under that Act.

44 The employer is not denying the reality of the lessor/lessee relationship. However, it says that the employer/employee and lessor/lessee relationships are linked in the case of Ms Hazelton in two ways:

(a) Firstly, employment in certain public service positions in certain geographical regions of Western Australia comes with an entitlement to subsidised housing under the GEH Act. The entitlement is advertised with the job, but is not necessarily incorporated as a term of the employment contract or award.

(b) Secondly, the tenant is in breach of their residential tenancy agreement if they 'cease to be an employee in a Department (as defined in the GEH Act)' and the Department may terminate the residential tenancy agreement on grounds of that breach (see cl 18(1) of Ms Hazelton's residential tenancy agreement).

45 The commencement of employment disciplinary proceedings, even if a key element is whether a tenancy agreement was breached, is not a prescribed dispute under s 12A(1) of the RT Act. In essence, the CSA's contention is that if an investigator conducting a disciplinary inquiry under the PSM Act is required in the course of the inquiry to make a finding as to whether the employee was in breach of a residential tenancy agreement; such a finding would impermissibly interfere with the jurisdiction of the Magistrates Court. However, the exclusive jurisdiction granted to the Magistrates Court by s 12A of the RT Act is not expressed in terms of determining whether breaches of a residential tenancy agreement have occurred. Rather the exclusive jurisdiction is to 'hear and determine a prescribed dispute'.

46 A lessor may make an application under s 71 of the RT Act for an order terminating a residential tenancy agreement and for possession of the premises. While determining whether a breach of a residential tenancy agreement occurred is one step in considering an application under s 71, the Magistrates Court also needs to be satisfied of a range of other conditions before making orders for termination: for example, the correct provision of notice (s 71(2)(a)) and whether the breach justifies termination of the agreement (s 71(2)(b)).

47 In the same way that the Magistrates Court might consider the breach of a tenancy agreement in the course of dealing with a prescribed dispute, an investigator under Part 5 of the PSM Act might consider the breach of a tenancy agreement in the course of investigating whether misconduct has occurred. The former may lead to the termination of a tenancy agreement; the latter may lead to a finding of breach of discipline.

48 The employer says that it is clear that determining whether a breach of Ms Hazelton's tenancy agreement had occurred was only one of many preliminary steps the investigator had to take in conducting his inquiry into the allegations. For example, the investigator might have found a technical breach of the 'no sublease' term but found that in the circumstances, Ms Hazelton in doing so did not 'corruptly take advantage of her employment' or 'fraudulently take advantage of her employment'. In any case, the allegations were cast wider than a mere breach of lease. The allegations extend to 'dishonestly concealing the arrangement by providing false information to the Department'.

49 The existence or otherwise of a sublease between Ms Hazelton and Ms Belotti is a key finding of fact on which the investigator might base a conclusion that Ms Hazelton was in breach of cl 17 of her residential tenancy agreement. The CSA is simply wrong in its submission that s 27A of the RT Act 'requires all tenancies to be recorded in writing'. The existence or otherwise of a sublease is a matter solely for the investigator to determine. It is open to the CSA to make such submissions to the investigator on behalf of its member, however it is not a matter that is appropriate for the Arbitrator to make findings on following conciliation and arbitration.

50 When regard is had to the observations made by Anderson J in ***Civil Service Association of Western Australia v Director General of the Department for Community Development*** [2002] WASCA 241 [20]-[21] it would have been inappropriate for the Arbitrator at a conciliation and arbitration hearing, to effectively step into the shoes of an investigator who has only partly completed his investigation, take over the investigation, receive and consider evidence in an adversarial setting, and make findings on whether, for example, there was a sublease and consequently a breach of the residential tenancy agreement. The employer asserts that the inappropriateness of such a course of action directly falls out of the observations made by Anderson J that baselessness must be a conclusion founded on the nature of the allegations, not the testing of the evidence. To that extent, the employer concedes that the CSA's jurisdictional point might have been capable of being determined at a hearing before the Arbitrator, but solely on the basis of the construction of the allegations; it would not have been appropriate for the CSA to lead evidence as to the existence or otherwise of the sublease.

51 The employer filed further submissions on 31 January 2014, which addresses why it says the effect of s 12 and s 12A of the RT Act does not render beyond power any decision by an investigator that touches on matters falling within a prescribed dispute. In these submissions they put the following arguments:

(a) It is not necessary for the Full Bench, in disposing of this appeal, to consider the substantive jurisdictional issue raised by the CSA.

(b) The CSA correctly states that s 15(1) of the RT Act provides for either party to a residential tenancy agreement to claim that the other party has breached the agreement or that a dispute has arisen under the agreement. The CSA is also correct in stating that one of the parties, having claimed a breach or the existence of a dispute, 'may apply for relief to a competent court'.

(c) Having made such an application for relief to the court, it therefore follows that the matter before the court is a prescribed dispute for the purposes of s 12A, and that therefore no other court or tribunal than the Magistrates Court may hear the application or hear and determine the prescribed dispute for the purposes of s 12A.

(d) To succeed in an argument that an investigator is effectively usurping the jurisdiction of the Magistrates Court under s 12A when deciding on whether a lease has been breached, the CSA would need to establish that the Investigator is de facto hearing and determining a prescribed dispute. However the content of the prescribed dispute cannot be divorced from the relief sought in the competent court.

(e) The Magistrates Court, being a court of inferior record is restricted to those powers granted to it by legislation. It has 'a limited jurisdiction which does not involve any generally responsibility for the administration of justice beyond the confines of its constitution': ***Grassby v R*** (1989) 168 CLR 1 [21] (Dawson J). Under s 15(2) of the RT Act, the only relief that may be granted to a party making an application are the orders set out in s 15(2)(a) to (e).

(f) A lessor cannot simply apply to the court asking the court to find that the tenant has breached the residential tenancy agreement. It is not within the powers of the Magistrates Court under s 15(2) of the RT Act to make declaratory orders that a residential tenancy agreement has been breached.

(g) There cannot be a prescribed dispute unless one of the parties to the dispute is seeking relief that could possibly be granted under the RT Act. If a 'prescribed dispute means any matter that may be the subject of an application under this Act', it is clear that it is not possible to make an application that seeks no relief other than bare declaratory orders.

(h) If the CSA's arguments are taken to their logical conclusion, the parties are left with absurdity and unworkability in the following way.

(i) The logical consequence of the CSA's argument for the employer is that when it 'is made aware, or becomes aware that [an] employee may have committed a breach of discipline' for the purposes of s 81 of the PSM Act, and that the breach of discipline is constituted by a breach of lease, the employer should not comply with its statutory obligation under s 81(1)(a) to, if it so decides, 'deal with the matter as a disciplinary matter under this Division in accordance with the Commissioner's instructions', but that it should rather test the preliminary issue of whether there was a breach of lease by making an application to the Magistrates Court. The problems with such a course of action are manifold.

(j) For a start, the RT Act imposes an adversarial process that is quite inappropriate in the context of a process under Part 5 of the PSM Act that Parliament intended to be objective, impartial and at arm's length from the employing authority.

(k) Where the role of the employing authority under Part 5 of the PSM Act is to consider the nature of the allegations and to refer them to the investigator to make findings, the CSA would have the employing authority positively asserting a breach of lease. The threshold of the employing authority being made aware that the employee 'may have committed a breach of discipline' is much lower than such a positive assertion.

(l) The employing authority, and any legal practitioners representing it, could not in good conscience (and consistent with the latter's obligations to the court) pursue a claim in the Magistrates Court that might meet the threshold test in s 81(1) of the PSM Act, but nevertheless not have a reasonable prospect of success. At the stage of commencing the disciplinary inquiry, it will not be known by the employing authority whether there is a live dispute on whether there was a breach. Without sending the allegations to the employee and commencing a disciplinary inquiry process (the very purpose of which is to dispense natural justice to the employee) the employing authority might very well be in a situation where it is ventilating an issue in the Magistrates Court that is simply not contested between the parties. To do so would be a waste of the court's time and resources.

(m) In addition, such a course of action would be contrary to the requirement under s 81(1)(a) of the PSM Act to deal with disciplinary matters in accordance with the Commissioner's instructions. Instruction 1.2 of 'Commissioner's Instruction No. 3 Discipline - general' states that once a decision to deal with the matter as a disciplinary matter is made, the employing authority is to ensure the process undertaken to determine if a breach of discipline occurred is completed as soon as practicable.

(n) Finally, it is arguable that the employing authority, in pursuing an action in the Magistrates Court under, for example, s 15 of the RT Act, not for the purpose of exercising or pursuing its rights under the residential tenancy agreement, but rather for the collateral purpose of assembling a factual foundation to a disciplinary inquiry under the PSM Act, would be seen by the Magistrates Court as perpetrating an abuse of process: ***Williams v Spautz*** (1992) 174 CLR 509.

Leave to appeal

52 The order made by the Arbitrator was a 'finding' as defined in s 7(1) of the Act. This is because the order was interlocutory and did not finally dispose of the matter before the Commission at first instance. Section 49(2a) of the Act provides that an appeal does not lie from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie. In ***Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*** [2005] WAIRC 03358; (2005) 86 WAIG 247, Ritter AP set out the meaning of the public interest requirement in s 49(2a) of the Act as follows ([12] - [13]):

> This subsection provides that an appeal does not lie from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie. The subsection focuses the attention of the Full Bench upon '*the matter*'. It seems that a determination is to be made as to whether the matter, as opposed to individual appeal grounds, is of such importance that, in the public interest, an appeal should lie. Accordingly, it seems that the Full Bench may not form the opinion that an appeal should lie on only some of the grounds.
>
> In *RRIA v AMWSU and Others* (1989) 69 WAIG 1873, the Full Bench at 1879 said that the words '*public interest*' in s49(2a) of *the Act* should not be narrowed to mean '*special or extraordinary circumstances*'. As stated by the Full Bench, an application may involve circumstances which are neither special nor extraordinary but which are, because of their very generality, of great importance in the public interest. The Full Bench, on the same page, went on to say that important questions with likely repercussions in other industries and substantial matters of law affecting jurisdiction can give rise to matters of sufficient importance in the public interest to justify an appeal. The *RRIA* decision was cited with approval and applied in the recent Full Bench decision of *CSA v Shean* (2005) 85 WAIG 2993 at 2995-2997.

53 The CSA argues that it is the public interest that it be determined whether the RT Act acts as a statutory barrier for an employer to institute disciplinary proceedings which are tenancy disputes. This they say is a question that is not only of interest to all government officers who are lessees of government housing, but to employees of private employers who lease premises from their employer. However this question is not a matter that can be conclusively determined in this appeal as there were insufficient agreed facts before the Arbitrator.

54 The Arbitrator may have misinterpreted the first order sought by the CSA at the conference by finding such an order will in effect, be a final order. The employer submitted to the Full Bench that, despite the unfortunate use by the CSA of the word 'cease' as opposed to for example 'suspend', it is clear that what was sought by the CSA was a temporary cessation of the disciplinary proceedings to enable the Arbitrator to make findings. However, irrespective of whether the Arbitrator was led into error, in my opinion, the subject matter of this appeal is not of such importance that, in the public interest, an appeal should lie.

55 This appeal is an appeal against an order dismissing an application for an interim order. The reason why the order to dismiss was made was on two grounds:

(a) An order requiring cessation of disciplinary proceedings would not be in effect an interim order;

(b) The preconditions for the exercise of the power in s 44(6)(ba) of the Act were not met.

56 Whilst it is arguable the Arbitrator erred in making the first finding, in my opinion he did not err in making the second finding. Unless the preconditions for making an interim order are met, irrespective of the terms of an order that is sought, there is no power to make an interim order under s 44 of the Act.

57 There was nothing before the Arbitrator upon which it could be said the preconditions were met which would properly give rise to an argument that he should have formed the requisite opinion. Section 44(6)(ba) of the Act provides:

> The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may —
>
> > with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —
> >
> > (i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter; or
> >
> > (ii) enable conciliation or arbitration to resolve the matter in question; or
> >
> > (iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question;

58 Whilst the conditions of tenancy agreements made under the GEH Act may be of general interest to the members of the CSA, the allegations made in the notice served on Ms Hazelton deal solely with her conduct. The interim order sought by the CSA could not be said to be necessary to prevent the deterioration of industrial relations within the meaning of s 44(6)(ba)(i). To the contrary there was no material before the Arbitrator upon which such an opinion could have been formed.

59 It is also difficult to see how an interim order could have encouraged the parties to exchange or divulge attitudes or information which would assist in the resolution of the matter. There was no material before the Arbitrator which could have led him to form such an opinion. A bare statement by the CSA that such an order would assist in this regard without some explanation to the Full Bench as to how such an order would do so does not provide merit to such a submission.

60 Nor could the order sought be said to enable conciliation and arbitration of the matter in question (i.e. the substantive issue) within the meaning of s 44(6)(ba)(ii). An interim order to suspend the investigation into the allegations contained in the notice was not necessary to enable the issue of whether the RT Act acts as a statutory bar to disciplinary proceedings being instituted against Ms Hazelton, being referred for hearing and determination under s 44(12a) of the Act. To the contrary, an argument that the employer is prohibited from instituting and continuing disciplinary action under s 80 of the PSM Act by operation of s 12A of the RT Act is not a matter that can be determined in the absence of findings of fact.

61 In any event, Justice Anderson in ***Civil Service Association of Western Australia Inc v Director General of Department for Community Development*** made it clear that unless the allegations on the face of a notice of suspected breach of discipline are baseless, the Commission should not intervene in an investigation. In that matter his Honour made the following observations about the proper exercise of discretion conferred on the Arbitrator to intervene in an investigation of a breach of discipline under the PSM Act:

> (a) If an employer suspects that there may have been an actionable breach of discipline, and there are reasonable grounds for that suspicion, the employer ought to be allowed to carry out its own statutory duty to conduct an investigation [20];
>
> (b) Prima facie it would not seem to be a proper exercise of discretion by the Arbitrator to stop the employer from doing so on the basis of the Arbitrator's own investigation of the facts [20];
>
> (c) It is perfectly proper for the Arbitrator to stop baseless disciplinary proceedings. A judgment as to whether the proceedings are or are not baseless should be made by reference only to the matters alleged in the complaint (notice of suspected breach of discipline) [20].

62 When these principles are applied to the facts of this matter, it cannot be said the allegations made against Ms Hazelton in the letter dated 7 October 2013 are baseless. The allegations set out facts upon which the employer relies in its allegation that Ms Hazelton may have committed an act or acts of misconduct. The terms of the letter also specify particulars of the acts of misconduct, which on their face not only appear to be serious, but relate to the alleged factual circumstances set out in the notice.

63 This appeal turns on its own facts and whether the preconditions for the making of an interim order were met which does not require the consideration of any new or novel point of law.

64 In any event, I am not satisfied the CSA's application for an interim order to suspend the investigation, had any merit. Firstly, I have some difficulty with the submission made by the CSA that the dispute between the CSA and the employer is a dispute that can be characterised as a prescribed dispute within the meaning of s 12 of the RT Act. The CSA is not and cannot (in the circumstances relied upon by the CSA) be said to a party to a residential tenancy agreement. The substance of the central argument put by the CSA is whether the employer and Ms Hazelton can be said to be in dispute about a matter that can be characterised as a 'prescribed dispute' within the meaning of s 12 and s 12A of the RT Act.

65 Secondly, inherent in the submissions made on behalf of the employer is the contention that, in my opinion, must be accepted, and that is the notice of suspected discipline simply sets out an allegation that Ms Hazelton entered into a sublease. The employer has not made a finding of such a fact. All the employer has done is formed a suspicion that Ms Hazelton had entered into a sublease.

66 Until an investigation is concluded neither the employer nor Ms Hazelton will be in a position to conclusively join issue in any 'dispute' as to whether a sublease was at the material time in existence.

67 In any event, whilst the employer specifies in the letter that Ms Hazelton entered into a sublease and breached the provisions of the RT Act by soliciting payment from Ms Belotti, the allegations are not confined to this allegation. In particular it is alleged that Ms Hazelton concealed the fact that she received payments from Ms Belotti and that Ms Hazelton falsely advised that she had not received such payments. Whilst some of these allegations raise an alleged breach of the provisions of the RT Act, it is difficult to see how an investigation of the matter without findings of facts being made would raise a matter that could be said to be the subject of an application under the RT Act, so as to be characterised as a 'prescribed dispute' within the meaning of s 12 of the RT Act.

68 In the absence of any findings of fact it is difficult to ascertain with certainty what application or applications could be made under the RT Act.

69 If, for example, after the investigator interviews relevant persons, such as Ms Belotti, and obtains relevant documentation, a finding could be made whether Ms Belotti had exclusive possession of part or all of the premises in question so as to make a determination at law whether a sublease existed, or whether Ms Bellotti was simply a boarder or lodger. As counsel for the employer points out, the investigator may find there is no sublease but find there was an element of dishonesty or improper gain to justify an adverse finding. Alternatively, the investigator may find facts upon which a finding can be made that the allegations have no foundation.

70 There is also merit in the employer's submission that if the investigation or disciplinary proceedings were to be suspended, the parties would be left in limbo about the facts that may or may not be in dispute between the parties. Until the investigator makes a finding that the sublease is a live issue, the issue whether the provisions of the RT Act acts as a statutory bar to further proceedings cannot be determined.

71 In this appeal it would be premature for this Full Bench to determine whether s 12 and s 12A of the RT Act acts as a statutory bar at some later stage of the disciplinary process in this matter, as the determination of that issue will in part turn on the facts found by the investigator and the findings of the investigator that are accepted or rejected by the employer.

72 For these reasons, I am of the opinion that this matter is not of such importance that, in the public interest, an appeal should lie.

73 For these reasons, I am of the opinion that an order should be made to dismiss the appeal.

BEECH CC

74 I agree that the matter is not of such importance that, in the public interest, an appeal should lie. I have read in advance the reasons for decision of the Acting President which I gratefully adopt and have nothing to add.

SCOTT ASC

75 I have read a draft of the reasons for decision of her Honour, the Acting President. I agree with those reasons and have nothing to add.

2014 WAIRC 00077

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF HOUSING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 FEBRUARY 2014
FILE NO.	FBA 21 OF 2013
CITATION NO.	2014 WAIRC 00077

Result	Appeal dismissed
Appearances	
Appellant	Mr M E Shipman (of counsel) and with him Mr K Rukunga
Respondent	Mr S Thackrah (of counsel) and with him Ms M Elderfield (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 22 January 2014, and having heard Mr M E Shipman (of counsel) and with him Mr K Rukunga on behalf of the appellant and Mr S Thackrah (of counsel) and with him Ms M Elderfield (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 4 February 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 00028

APPEALS AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 229 OF 2012 GIVEN ON 18 JULY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00028
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 28 OCTOBER 2013
DELIVERED	**:**	TUESDAY, 21 JANUARY 2014
FILE NO.	**:**	FBA 6 OF 2013
BETWEEN	**:**	MR MATTHEW KENNETH MILLER
		Appellant
		AND
		WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC.
		Respondent
FILE NO.	**:**	FBA 8 OF 2013
BETWEEN	**:**	WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC.
		Appellant
		AND
		MATTHEW MILLER
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S M Mayman**
Citation	**:**	**[2013] WAIRC 00432; (2013) 93 WAIG 1313**
File No	**:**	**U 229 of 2012**

Catchwords	**:**	Industrial Law (WA) - Appeal against decision of Commission - Alleged harsh, oppressive, unfair dismissal - Declaration made that employee was unfairly dismissed and order for compensation made - No error demonstrated in declaration that employee unfairly dismissed - Order for compensation sought to be varied - Principles regarding assessment of compensation considered - Award made found to be arbitrary and not supported by the evidence - Whether an allowance in the award of compensation should have been made for taxation required to be withheld by an employer considered - No error in making an award gross - Order for compensation set aside and varied
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 23, s 23(1), s 23A, s23A(6), s 23A(7), s 23A(8), s 29(1)(b)(i), s 29(1)(b)(ii), s 49(2), s 49(11);
		Minimum Conditions of Employment Act 1993 (WA);
		Income Tax Assessment Act 1997 (Cth) s 82.130;
		Taxation Administration Act 1953 (Cth) sch 1, sch 32;
		Income Tax Assessment Act 1936 (Cth);
		Vocational Education and Training Act 1996 (WA) s 60H, s 60H(2);
		Fair Work Act 2009 (Cth) s 60, s 117, s 392, s 392(4).
Result	**:**	FBA 6 of 2013 - appeal dismissed
		FBA 8 of 2013 - appeal upheld in part

Representation:

Appellant/Respondent	**:**	Mr G McCorry, as agent
Respondent/Appellant	**:**	Mr S Bibby, as agent

Case(s) referred to in reasons:

Atlas Tiles Limited v Briers (1978) 144 CLR 202

Bennett & Dix (a firm) v Higgins [2005] WASCA 197; (2005) 85 WAIG 3653

Bogunovich v Bayside Western Australia Pty Ltd (1998) 79 WAIG 8

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

Capewell v Cadbury Schweppes Australia Ltd (1997) 78 WAIG 299

Cullen v Trappell (1980) 146 CLR 1

Damevski v Giudice [2003] FCAFC 252

Dellys v Elderslie Finance Corporation Ltd [2002] WASCA 161; (2002) 82 WAIG 1193

Fisher & Paykel Australia Pty Ltd v Skinner [2006] WAIRC 05839; (2006) 87 WAIG 1

Garbett v Midland Brick Co Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893

Gilmore v Cecil Bros, FDR Pty Ltd and Cecil Bros Pty Ltd (1996) 76 WAIG 4434

Haines v Bendall [1991] HCA 15; (1991) 172 CLR 60

Hornsby v Elders Ltd [2006] WAIRC 04463; (2006) 86 WAIG 1229

Kilburn v Enzed Precision Products (Australia) Pty Ltd (1988) 4 VIR 31

Malec v JC Hutton Pty Ltd (1990) 92 ALR 545; (1990) 169 CLR 638

Manning v Huntingdale Veterinary Clinic (1998) 78 WAIG 1107

Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 84 WAIG 2152

Merredin Customer Service Pty Ltd v Green [2007] WAIRC 01002; (2007) 87 WAIG 2771

Michael v Director General, Department of Education and Training [2009] WAIRC 01180; (2009) 89 WAIG 2266

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

New South Wales Cancer Society v Sarfaty (1992) 28 NSWLR 68

Quinn v Jack Chia (Australia) Ltd [1992] 1 VR 567

Rankin v Marine Power International Pty Ltd [2001] VSC 150; (2001) 107 IR 117

Reed v Blue Line Cruises Ltd (1996) 73 IR 420

Sheldrick v WT Partnership (Aust) Pty Ltd [1998] FCA 1794

Shorten v Australian Meat Holdings Pty Ltd (1996) 70 IR 360

Slifka v J W Sanders Pty Ltd (1995) 67 IR 316

Sprigg v Paul's Licensed Festival Supermarket (1998) 88 IR 21

Squirrell v Bibra Lakes Adventure World Pty Ltd (1984) 64 WAIG 1834

WT Partnership (Aust) Pty Ltd v Sheldrick [1999] FCA 843

Case(s) also cited:

Shire of Esperance v Mouritz (1991) 71 WAIG 891

The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd [2005] WAIRC 01916; (2005) 85 WAIG 1954

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

Reasons for Decision

SMITH AP AND BEECH CC:

The appeals and the order appealed against

1 These appeals are instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the Act) against a decision made by the Commission on 18 July 2013 in U 229 of 2012. Application U 229 of 2012 was an industrial matter referred to the Commission by Mr Matthew Kenneth Miller under s 29(1)(b)(i) of the Act. Mr Miller claimed that he had been harshly, oppressively or unfairly dismissed by the Wheatbelt Individual & Family Support Association Inc. (the association) on 17 October 2012. Order 1 of the decision is a declaration that the dismissal of Mr Miller by the association was unfair and that reinstatement or re-employment is impracticable. Order 2 of the decision requires the association to pay Mr Miller 19 weeks' remuneration in the sum of $4,474.90 gross within 30 days of the date of the decision.

2 By consent the decision was stayed by an order made pursuant to s 49(11) of the Act on 14 August 2013: [2013] WAIRC 00718; (2013) 93 WAIG 1237.

3 FBA 8 of 2013 is an appeal by the association against the whole of the order. The association seeks that the order be quashed and the originating application in matter U 229 of 2012 be dismissed. In the alternative, if the Full Bench finds the dismissal was unfair, the association seeks that order 2 be amended to amend the sum of compensation to be paid by the association.

4 In appeal FBA 6 of 2013 Mr Miller seeks that order 2 be set aside and in place thereof it be ordered that the association pay to him a net sum equal to 10 months loss of earnings calculated at the rate of $248 per week.

The factual background

5 Mr Miller commenced work with the association from sometime in November 2009 on a casual basis as a support worker. When he first commenced employment he worked 10 to 15 hours each week and over time his hours of work increased to 25 to 28 a week by February 2011. On 11 February 2011, Mr Miller commenced a training contract with the association to work towards the occupation of disability services officer: AB 48, FBA 6 of 2013. The traineeship was for disability work (level 3) and the traineeship required Mr Miller to study at TAFE to obtain a Certificate III in disability. The 'nominal term' of the traineeship was for 18 months and the 'expected completion date' was 11 August 2012: AB 47, FBA 6 of 2013.

6 It is common ground that the terms of the traineeship were set out in a letter dated 11 February 2011 from Mrs Karen Miller, who was at that time the chief executive officer of the association. Mrs Karen Miller is the mother of Mr Miller. The letter stated the terms of Mr Miller's traineeship as follows:

- You are guaranteed a minimum of 40 hours per fortnight wages at the Traineeship level of $17.00 per hour, i.e. $680 per fortnight Gross.

  (This rate is calculated as the minimum Award Wage of $15.45 ph plus $1.55 ph as WIFSA's additional, above award rate of pay as per our usual method of wage rates.)

- Any hours worked above 40 hours per fortnight will be paid at the Casual Rate of $20.00 per hour.
- All other Conditions of Employment are as per the Minimum Conditions of Employment Act 1993.

  (This Award is available for perusal at the WIFSA office or online at the Wageline website)

7 Mr Miller was also engaged by the association from time to time on a casual basis to carry out IT technician support on an irregular basis.

8 Until his employment was terminated Mr Miller worked 20 hours a week under the terms of his contract. He also regularly worked extra hours each week. Mr Miller was not paid all of his wages in cash. Six hundred dollars per fortnight of his wages was salary sacrificed to the EPAC Commission.

9 When Mr Miller's traineeship was due to expire in August 2012, he had not completed all of the TAFE units necessary to obtain a Certificate III in disability. However, he anticipated he would finish the remaining units by the end of the year. At the time the traineeship was due to expire in August 2012, Mr Miller and another trainee employed by the association had discussions with Mrs Miller about extending the traineeships until the end of the year to allow both Mr Miller and the other trainee to obtain their qualification. Mr Miller formed the impression that his lecturer was to put forward the paperwork that would allow him and the other trainee to complete the traineeships. However, about one week before the term of Mr Miller's traineeship came to an end in August 2012 the employment of his mother abruptly ceased and Mr Michael Cooper was appointed the acting chief executive officer of the association. After Mrs Miller ceased to be employed by the association, Mr Miller continued to work as usual and attended classes at TAFE.

10 On Friday, 12 October 2012, Mr Miller received a text message on his mobile telephone from Ms Tina King, the manager of services co-ordination. In the text message, Ms King asked Mr Miller to attend a traineeship review on the following Wednesday, 17 October 2012 at 11.30am at the office. Ms King also asked Mr Miller in the text message whether he would be able to work additional hours 'to support' a particular client from Friday the following week, which would have been Friday, 19 October 2012.

11 On Monday, 15 October 2012, Mr Miller attended a traineeship class at TAFE. Later that day he spoke to Mr Cooper about the proposed review. Mr Miller was concerned that he might be in trouble with his job because his mother had recently ceased working for the association and had commenced legal action against the association. Mr Miller was also concerned that Ms King had previously had a grievance against him. Mr Cooper told Mr Miller he had no knowledge of who would be attending the meeting, but it would just be a review to see where Mr Miller is up to and whether he, Mr Miller, was likely to finish by the end of the year. Mr Miller asked Mr Cooper whether he might be in some trouble with his job and Mr Cooper assured him that he was not aware of anything like that. Mr Miller went to work as usual on Tuesday and attended the traineeship review on Wednesday, 17 October 2012.

12 Mr Cooper did not attend the meeting on 17 October 2012. Mr Miller met with Mrs Katrien Baker, the chairperson of the association, and Mr Levi Fordham from the ApprentiCentre. Mr Miller had met Mrs Baker before, but he had not met Mr Fordham. Mr Fordham told Mr Miller that his traineeship would not be extended as the association had decided not to renew his contract. He also told Mr Miller that he had the option of finding other work with another employer and continuing his studies. Mr Fordham then left the meeting. Mrs Baker then told him that his employment would no longer be continued. She also told him he had the opportunity to work out two weeks' notice which was a condition of the traineeship contract that had expired. Mr Miller told Mrs Baker he wanted to continue to work for the association and Mrs Baker told him that that was not going to happen and that she thought he knew why. She also told him that it had nothing to do with his mother; that it was purely on his 'conduct and performance'. When Mrs Baker said this she was referring to an incident that occurred sometime in late 2011. In 2011, Mr Miller had falsely claimed that he had taken a client to a movie and claimed for time that had not been worked. Ms King and Mrs Miller raised the matter with Mr Miller shortly after the claim for time worked was made. Following an investigation, Mr Miller received a verbal warning, he apologised to those involved and returned the overpayment of wages to the association. Mr Miller said to Mrs Baker that the matter was something that had happened 18 months ago and it had been resolved. Mrs Baker told Mr Miller that it had not been resolved because the board of the association was not made aware of the incident and she had only been made aware of it recently. Mrs Baker then told Mr Miller that had the board been informed at the time of the incident, it would have been dealt with very differently. Mr Miller then said to Mrs Baker that he was going to seek legal advice and that was the end of the meeting.

13 Mrs Baker is not employed by the association. The office of the association is located in York. Mrs Baker is the co-ordinator of the Merredin Retirement Village. She lives two hours away from York and travels to either York or Northam for board meetings. Prior to Mr Miller's employment coming to an end, Mrs Baker was aware that Mr Miller had a traineeship with the association but had no knowledge of what it involved or when the traineeship was going to finish because the board did not deal with day to day internal matters. Prior to dealing with the issue involving Mr Miller, the board had not dealt with any employment issues. Mrs Baker gave evidence, however, that she would have expected to be made aware of disciplinary matters concerning Mr Miller because it would be a conflict of interest for Mrs Miller to deal with the matter and that Mrs Miller should have notified the board about the issue when it arose and got someone else to deal with it. After Mrs Miller abruptly left the association in August 2012, Mrs Baker spent some time trying to find out where the association was at or whether there were any problems that needed to be addressed. About a week after Mr Miller's traineeship had expired she was informed of that fact. Mrs Baker asked each one of the staff individually whether there were any problems that the board needed to address and Ms King told Mrs Baker about the incident in 2011 when Mr Miller had falsified hours of work and that Mrs Miller was aware of it. Mrs Baker told the Commission when she gave evidence that she regarded the issue as very serious because the clients have disabilities and that when the client was interviewed Mr Miller told the client that they did go to the movies and the client kept saying 'No, we didn't. We didn't go to the movies'. In Mrs Baker's opinion, it was inexcusable to put the client in that position and in her view the actions of Mr Miller constituted gross misconduct. After Ms King told Mrs Baker about the incident, Mrs Baker contacted the ApprentiCentre and spoke to Mr Fordham who informed her that the association were under no obligation to extend the contract or the traineeship. Mrs Baker then spoke to the executive committee of the board and it was agreed that in view of the information that had come to light about Mr Miller's previous conduct and the advice that they were under no obligation to extend the traineeship, that they would not extend Mr Miller's traineeship.

14 When Ms King gave evidence she agreed that she had offered Mr Miller additional hours of work on 12 October 2012. She said that at that time she was not aware of any discussions going on between Mr Miller and Mrs Baker and she was not aware that Mr Miller's traineeship agreement had come to an end.

15 After the meeting with Mrs Baker, Mr Miller spoke to Mr Cooper. Mr Cooper apologised to Mr Miller about what had happened. He told Mr Miller that he had no knowledge that Mr Miller was going to be terminated in his absence. Mr Miller discussed with Mr Cooper whether he could be paid out two weeks' notice without having to work and Mr Cooper agreed to that and apologised to Mr Miller again.

16 Following his termination of employment with the association, Mr Miller received an unsigned letter from Mrs Baker. In the letter Mrs Baker stated as follows:

> Further to our meeting of 17 October 2012 you were advised that your trainee-ship 391313T1 ended on 11th August 2012.
>
> At the meeting it was noted there were issues concerning your performance that were of concern to the Organisation.
>
> In the circumstances the Organisation is prepared to agree to a termination of your contract by mutual consent.
>
> If you could please come in and sign a copy of this letter I will then make arrangements to pay your outstanding monies into your bank account (AB 66, FBA 6 of 2013).

17 Shortly after his employment with the association was terminated Mr Miller was contacted by the mother of a client of the association that Mr Miller had worked with for a period of three years. The client's mother told Mr Miller she wanted to employ him directly because Mr Miller had forged a bond with her son. She asked Mr Miller to start working each week on Tuesdays and Fridays. Mr Miller commenced working directly for this client on the Friday after his employment was terminated by the association. He has continued to be employed by that employer since that time and has earned an average of $250 per week from that work.

18 Mr Miller responded to the letter sent to him by Mrs Baker in an email to Mrs Baker on 30 October 2012. In the email he stated as follows:

> At a meeting with yourself and Levi Fordham from the Apprenticentre on 17th October 2012, I was dismissed from my Traineeship and all other employment with WIFSA.
>
> I was told I was being dismissed because: –
>
> **1) I was not completing sufficient hours (20 hpw) to meet my Traineeship.**
>
> I point out that:
>
> a) it is the employer's responsibility to ensure they are providing me with sufficient hours to meet my Traineeship Agreement.
>
> b) I had frequently requested an increase in my hours over the past year.
>
> c) Levi Fordham, Apprenticentre, also advised you, on 17th October 2012, of WIFSA's failure to provide me with sufficient hours and of your failure to follow WIFSA's Policies and Procedures regarding sufficient warnings prior to dismissal.
>
> **2) I had incorrectly filled out a Timesheet <u>18 months</u> prior.**
>
> This matter was dealt with by the CEO in full accordance with the WIFSA's Policies and Procedures. I was given a Verbal Warning, I apologised to those involved, returned incorrect wages to WIFSA and the matter was closed.
>
> There have been **NO** other issues <u>ever</u> raised about my performance.

> On 25th October I received an undated letter from yourself, as attached, asking me to sign a document with a totally incorrect version of events, e.g. that the decision to terminate my employment was 'by mutual consent', that there were performance issues and that you would withhold my 'outstanding monies' unless I signed the abovementioned document.
>
> The issues of my Traineeship termination and employment dismissal are being addressed elsewhere. Meanwhile, I ask that you immediately release the 'outstanding monies' I am entitled to and cease further coercionary correspondence.

The Commissioner's findings – unfair dismissal

19 After considering the evidence and submissions made on behalf of the parties, the Commissioner made the following findings:

(a) The evidence given by Mr Miller was truthful and plausible. The evidence given by Mrs Baker and Ms King was given clearly and to the best of each person's ability

(b) The notice of termination of employment came as a shock to Mr Miller and was unexpected. Before 17 October 2012, Mr Miller had no knowledge of his impending termination, nor was he warned by the association of any performance concerns other than the single verbal warning given in late 2011. Mr Miller was disciplined for the incident that occurred in late 2011 when the chief executive officer investigated the matter, required Mr Miller to pay restitution, to apologise to the client and issued him with a verbal warning. This misconduct was dealt with promptly and in accordance with the nature and severity of the particular matter. Mr Miller's behaviour in 2011 did not warrant termination.

(c) When Mrs Baker and the board of the association made the decision to terminate Mr Miller's employment in 2012, it was purely on his conduct and performance referring to the incident of late 2011. In particular:

(i) in Mrs Baker's view, because the chief executive officer failed to report the matter to the board 18 months earlier, Mr Miller was being terminated;

(ii) any matters of an employment nature would not normally be dealt with as board matters;

(iii) Mrs Baker's distress was not a concern with Mr Miller but with Mr Miller's mother for failing to report the matter to the board, yet the then chief executive officer's failure to do so would have been inconsistent with what had been normal practice for the previous 10 years for the board to deal with matters of employment.

(d) Mr Miller had already been disciplined for the incident. In effect, the association was disciplining Mr Miller for the events of 2011 for a second time; on this occasion, however, he was being terminated. At no stage did the association take into account that Mr Miller had already been disciplined for the same event.

(e) The test of determining whether or not a termination is unfair is set out in the decision of ***Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385 (***Undercliffe case***). The question to be answered is whether the employer's right to terminate the employment has been exercised so harshly or oppressively or unfairly against Mr Miller as to amount to an abuse of the right. When this test is considered, Mr Miller was not afforded 'a fair go all round'.

(f) On the evidence the working relationship between Mr Miller and the association had broken down such that an order for reinstatement would be impracticable.

The Commissioner's findings – compensation and taxation

(a) Submissions made by the parties

20 The following written submissions were made on behalf of Mr Miller about the assessment of his loss:

(a) In the 2011/2012 financial year Mr Miller earned $26,903 upon which he paid $1,826 tax: PAYG payment summary, AB 45, FBA 6 of 2013. Thus, Mr Miller was earning approximately $482 per week (net) in the previous financial year. That was based on a wage that increased from the beginning of this financial year as the contract of employment applied the *Minimum Conditions of Employment Act 1993* (WA) (the MCE Act) rates of pay plus an above award payment of $1.55 per hour.

(b) The rates of pay under the MCE Act increased by 3.39% [sic] with effect from 1 July 2012: [2012] WAIRC 00359; (2012) 92 WAIG 568. Mr Miller's net income for the 2012/2013 financial year could reasonably be expected to increase proportionally to $25,927 or $498 per week.

(c) Mr Miller mitigated his loss by obtaining alternative employment. His income from the alternative employment is $250 per week (net). His net economic loss for the period November 2012 onward is thus $248 per week.

(d) Mr Miller's net losses to the date of trial were 21 weeks x $248 or $5,208.

(e) If not unfairly dismissed Mr Miller could reasonably have expected to remain employed by the association indefinitely. Discounting for contingencies a reasonable period for expected continuation of employment would be at least 12 months.

(f) Mr Miller's net loss over the 12 month period would thus be approximately $12,500. This amount is what Mr Miller would have earned in a six month period and is the maximum permissible compensation under the Act.

(g) Mr Miller worked for a public benevolent institution and was entitled to and had tax concessions on his earnings: PAYG payment summary, AB 45, FBA 6 of 2013.

(h) The *Income Tax Assessment Act 1997* (Cth) makes any payments made by way of compensation for termination of employment an eligible termination payment. The *Taxation Administration Act 1953* (Cth) requires tax to be withheld from an eligible termination payment of under $180,000 at the rate of 31.5%.

(i) An award of compensation is designed to put the injured employee back, so far as it can reasonably be achieved, in the position he would have been in if his employment had not been terminated: see, for example, the discussion in ***Haines v Bendall*** [1991] HCA 15; (1991) 172 CLR 60. That requires Mr Miller to be compensated on a net basis ((ie) on the basis of a net loss of $248 per week).

(j) Where tax obligations have the effect of changing the net outcome of a judgment it is permissible to gross up the net payment to allow for the obligation to withhold tax from the compensation payment: ***Sheldrick v WT Partnership (Aust) Pty Ltd*** [1998] FCA 1794 and ***WT Partnership (Aust) Pty Ltd v Sheldrick*** [1999] FCA 843.

(k) The Commission should therefore make the compensation order in net terms ((ie) the association is to pay to Mr Miller a net amount or gross up the net amount to accommodate the tax liabilities). The grossed up amount payable with a tax liability of 31.5% on a net amount of $248 per week is $362 per week.

21 The association made the following written submissions about loss:

(a) Compensation should be assessed on base contract to base hours only of 20 hours per fortnight.

(b) The evidence shows that the contract was terminated with two weeks' notice on 17 October 2012. Given the TAFE would have closed on 14 December 2012, Mr Miller therefore had a total of 8.2 weeks of the training contract to run.

(c) This amounts to:

(i) 8.2 weeks x 20 hours work per fortnight at $19.64 = $392.80 per fortnight or $196.40 per week;

(ii) 8.2 weeks x $196.40 = $1,610.48 less two weeks' pay = $392.80 = $1,217.68 gross.

(d) From this, he would need to reduce the amount by the monies earned by the employee since 17 October 2012. Mr Miller earned $250 per week. This would equate to an amount of $2,050 for the period in question.

(e) The maximum the Commission can find in terms of loss is $1,217.68 gross, but that given his earnings exceeded this amount after the traineeship agreement had ended hence there is no compensation warranted.

(f) In ***Sheldrick v WT Partnership (Aust) Pty Ltd*** the Federal Court determined damages that arose from a cost engineer who was terminated summarily and consequently was not able to work out three months' notice on an overseas deployment in Malaysia: see ***Sheldrick v WT Partnership (Aust) Pty Ltd*** (9.1). The employee had an arrangement where he was remunerated 'tax free'. The court in awarding damages took this into account and made allowance for the fact that he would be liable to taxation on this lump sum in Australia. Given that he was terminated without notice, the court accepted the evidence of the employee's accountant that he would be liable for taxation on this lump sum payment on his return to Australia.

(g) On appeal, the employer sought to have the damages reduced by the taxation rates that would have been paid in Hong Kong or Malaysia. Given that this was not argued in the first instance and given there was no apparent injustice the Federal Court declined to interfere with the judgment of the primary judge.

(h) It is difficult to understand how this case can be relevant to the present matter. There was no arrangement to pay Mr Miller during the term of his employment 'tax free'. Hence, any further remuneration would have been paid in line with the payments made to him during the course of his employment - which was taxed at the appropriate rate under the *Income Tax Assessment Act 1936* (Cth).

22 The association later corrected its submission about loss in an email sent to the Commission from the association's representative on 11 July 2013 when it was stated the average weekly rate of pay was $392.80. This concession was correctly made as Mr Miller was contracted to work 20 hours a week, not 20 hours a fortnight.

(b) The Commissioner's findings and loss

23 After considering the written submissions of the parties, the Commissioner had regard to the evidence given by Mrs Baker that Mr Miller had said in the meeting on 17 October 2012 that he wanted to continue working with the association and that Mr Miller had been employed for two years by the association prior to the traineeship commencing. She found there had been ongoing employment and there seemed to have been no reason for the employment of Mr Miller to cease. The Commissioner then found that Mr Miller would have continued to be employed by the association once his traineeship had been concluded. The Commissioner also found that there was no shortage of hours to be worked as Mr Miller was requested by Ms King to work an additional five hours per week on the Friday just one week before he was terminated.

24 The Commissioner accepted the submission made on behalf of the association that the taxation arrangements in ***Sheldrick v WT Partnership (Aust) Pty Ltd*** were not relevant where an employee is employed within Australia and therefore taxation rates were appropriate to be dealt with under the *Income Tax Assessment Act 1936.*

25 The Commissioner then went on to find that Mr Miller had a reasonable prospect of ongoing work with the association if he had not been unfairly terminated and on this basis he would have had an expectation of ongoing employment with the association for at least 10 months. Having regard to all of the circumstance of the case, the Commissioner concluded that Mr Miller should be compensated for his loss. The Commissioner found Mr Miller's loss to be as follows:

> Lost wages for 10 months (in the Commission's view is a reasonable length of time for the applicant to have remained working with the respondent); however the Commission is capped at s 23A under the Act in the awarding of compensation at six months.

26 Although the Commissioner found Mr Miller's loss to be 10 months' wages, the Commissioner found that Mr Miller should be awarded compensation in the amount of 19 weeks' wages. The parties were then directed to confer and consult on a draft minute of a proposed order.

27 Prior to the Commissioner making an order, the parties made submissions about the hours of casual work that Mr Miller worked on average each week. In an email to Mayman C from Mr Miller's representative on 11 July 2013, a submission was made that according to exhibit WIFSA 2 (Mr Miller's payslips) Mr Miller was paid $19.64 per hour for the 20 hours part-time work and $23.10 per hour for the casual work (ignoring the casual IT work). The payslips indicate that on average he worked about four hours as a casual each week. This indicated an average weekly wage of $485.20. Nineteen weeks at this rate of pay amounted to $9,218.80.

28 A submission was then made on behalf of Mr Miller that if regard was had to Mr Miller's income for the previous financial year he had an income of $517.36 per week. He then had a 3.39% [sic] wage increase in the 2012 financial year because his wages were linked to the minimum wage under the MCE Act which gave an average weekly wage of $534.90 and that 19 weeks' pay at $534.90 was $10,163.10.

29 An alternative submission was also put on behalf of Mr Miller that if the 3.39% [sic] wage increase was not taken into consideration and only the average for the previous year was used, 19 weeks at the rate of $517.36 per week was $9,829.94.

30 The association also made submissions to Mayman C by email on 11 July 2013 in which they set out the following table which averaged the casual hours of work worked by Mr Miller on and between 23 July 2012 to 14 October 2012 as an average of 3.42 hours a week. This table provided as follows:

Date	Weeks	Casual Hours
23rd July to 5th August	2	1.00
6th August to 19th August	2	6.50
20th August to 2nd September	2	7.75
3rd September to 16th September	2	5.75
17th September to 30th September	2	9.00
1st October to 14th October	2	11.00
Totals	12	41.00
Average Hours 23rd July to 14th October	3.42	

31 In the email the association submitted that:

(a) the average weekly rate that would be paid to Mr Miller during that period was $392.80; and

(b) if $392.80 is added to $79 a week which amounts to $471.80 per week calculated at 19 weeks' pay would be a sum of $8,964.20.

32 At the speaking to the minutes of a proposed order on 18 July 2013, the transcript of the proceedings records Mayman C informed the parties that she had calculated 19 weeks' compensation by taking into account two weeks' pay in lieu of notice so her assessment of Mr Miller's loss was in fact 21 weeks' pay. Commissioner Mayman also informed the parties that although she had found that Mr Miller had mitigated his loss, she had failed to take into account in the calculations of loss (ts 72).

33 The Commissioner then issued the following decision in which reasons for decision are recorded as follows:

> WHEREAS ON 5 July 2013 the Western Australian Industrial Relations Commission (the Commission) issued in its Reasons for Decision in this matter that Mr Miller (the applicant) had been unfairly dismissed from his employment with Wheatbelt Individual & Family Support Association Inc. (the respondent) and that the applicant was entitled to be paid 19 weeks' remuneration as compensation;
>
> AND WHEREAS the applicant's representative and the respondent's representative were required to confer within seven days of the Reasons for Decision issuing as to the appropriate amount to be paid to the applicant;
>
> AND WHEREAS on 11 July 2013 the respondent advised the Commission in writing that the applicant's contracted weekly rate of pay was $392.80 per week, hence an amount of $8,964.20 gross was owed;
>
> AND WHEREAS on 11 July 2013 the applicant advised the Commission in writing that they were seeking an order for $9,829.94;
>
> AND WHEREAS having considered the written submissions from Mr G McCorry on behalf of the applicant and from Mr S Bibby on behalf of the respondent;
>
> NOW the Commission considers the compensation for Mr Miller ought include in addition to the 20 hours per week; an average of 3.5 hours at the casual rate per week and, for 14 of the 19 weeks' compensation, a 3.4% increase based on the 2012 State Wage Case (92 WAIG 568).
>
> The Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:
>
> 1. DECLARES THAT the dismissal of Mr Miller by the respondent was unfair and that reinstatement or re-employment is impracticable.

2. ORDERS THAT the respondent pay Mr Miller 19 weeks' remuneration less the sum of $4,750 being the wages received in the period since the termination. The respondent to pay the sum of $4,474.90 gross within 30 days of the date of this order issuing.

34 Despite the fact that on behalf of Mr Miller it was submitted that loss should be calculated on the basis of four hours casual pay per week and the association made a submission loss should be calculated at 3.42 hours a week, the material finding was that Mr Miller's loss of casual work should be assessed at 3.5 hours a week. In addition, whilst the Commissioner found the 3.4% minimum wage increase should be taken into account, no regard was had to the calculations put forward on behalf of Mr Miller that included this increase.

Grounds of appeal – FBA 8 of 2013

35 The grounds of appeal in FBA 8 of 2013 are as follows:

Unfair Dismissal

- The Commission erred in fact and in law in failing to make a determination as to whether the training contract the Applicant was bound by continued to apply to the employment relationship as at the time of the termination.
- The Commission erred in fact and in law in determining that the dismissal was unfair:

  The training contract had an express term that allowed for the agreement to end if the training competencies had not been completed.

  The Applicant's evidence suggested that he had not completed his training competencies.

  There was no evidence that the Applicant had taken the formal steps to extend his contract with the Department of Training and so the Respondent had no obligation to continue with the employment relationship.
- The Commission failed to have regard or sufficient regard to the evidence of the Respondent's chairperson that the termination proceeded on the basis of the express term of the contract and not solely on the basis of the Applicant's misconduct in 2011.
- The Commission erred in fact and in law in finding that:

  The termination was 'purely on the basis of the Applicant's conduct and performance'.

  That the applicant was not afforded a fair go all round given that the termination was in part on the grounds of misconduct which had not been disclosed to the Board of Management.

Compensation

In the alternative, if the Full Bench find that the termination was unfair:

- The Commission failed to have regard for the principles of *Bogunavich* [sic] *v Bayside WA Pty Ltd* [79 WAIG 8] in making its determination on the compensation to be awarded.
- The Commission erred in fact and in law in finding that that the employment would continue for a further 10 months from the date of termination.
- The Commission erred in fact and in law in finding the above period and awarding 19 weeks compensation:

  The facts suggest that the training agreement had come to an end and there was no obligation for the employer to continue the employment relationship beyond the termination date.

  The Commission failed to have regard or sufficient regard to the evidence of both the Applicant and the Respondent in that the outer limit of the training agreement would have ended at the end of the TAFE College term in December 2012.

  The Commission erred in fact and in law in failing to reduce the compensation paid to the Respondent by the amount of notice paid on termination.

36 As the association's grounds of appeal in respect of the compensation awarded is on all fours with the issues raised by Mr Miller in FBA 6 of 2013, the issues raised in these grounds will be dealt with in these reasons together with the grounds of appeal in FBA 6 of 2013.

The association's submissions in support of FBA 8 of 2013

37 At the hearing of the appeals, it was conceded on behalf of the association that the training contract entered into by Mr Miller under the *Vocational Education and Training Act 1996* (WA) (the VET Act) came to an end on 11 August 2012 and from 12 August 2012 a new contract between the parties came into existence. The association says, however, that terms of the contract on foot between the parties from 12 August 2012 was in the same terms as the terms of the training contract which had been in force under the VET Act.

38 In the association's first ground of appeal the association points out that the Commissioner made no determination concerning the status of the contract that was in existence at the time of termination and makes a submission that as a matter of law it was incumbent on her to do so. The association says that if such a finding had been made then it should have been found that an express term of the contract of employment on foot between the parties at the time of termination was a term which was expressly set out in the statutory training contract as follows:

For the employer, apprentice or trainee, and parent or guardian (where applicable) We agree that:

h) this Contract expires if it reaches the term of the apprenticeship/traineeship referred to in question 4 without the apprentice/trainee having attained all the required:

competencies or a request for an extension of the contract having been endorsed by a State/Territory Training Authority (AB 49, FBA 6 of 2013);

39 The term in question 4 was stated as a nominal term of apprenticeship/traineeship of 18 months. In question 3, the commencement date was stated as 11 February 2011: AB 50, FBA 6 of 2013.

40 It is argued on behalf of the association that it was able to rely upon cl (h) of the Training Contract Obligations to bring the common law contract to an end. The association points out that Mr Miller was aware that the statutory training contract had expired on 11 August 2012 and it was uncontested that the association had obtained advice from Mr Fordham that the association were not under a contractual obligation to continue with the statutory training contract. The association argues from these facts it can be inferred that no extension of the contract had been endorsed by the Department of Training and that it was also clear from the evidence given by Mr Miller that he had not attained all of the required competencies. In these circumstances, the association argues the preconditions set out in cl (h) of the contract were met so as to enable the association to terminate Mr Miller's contract of employment.

41 The association also challenges the finding made by the Commissioner that it had terminated Mr Miller's employment solely on the basis of Mr Miller's conduct in 2011. The association says that when proper regard is given to the evidence, it is clear that the board of the association relied upon the advice by Mr Fordham that they were under no obligation to extend the contract or the traineeship and they chose not to do so. In addition, the evidence of Mrs Baker was that the decision to terminate Mr Miller's employment was only in part made on the basis of misconduct, but this was not the sole reason for not extending the contract. The association says as an employer it had exercised its right to end the contract and this decision had been influenced by the fact that Mr Miller had committed misconduct. Consequently, the association says it is open to the Full Bench to find that the association had the right to rely upon the terms of the common law contract to bring the contract to an end. Further, it is open for the Full Bench to conclude that there was no contractual obligation on the association to continue the employment relationship and that the association had exercised its option not to do so. Thus, it is also open for the Full Bench to find there was no unfairness in terminating Mr Miller's employment and that an order dismissing the original application should be made.

Mr Miller's submissions - FBA 8 of 2013

42 On behalf of Mr Miller it is pointed out that:

(a) From 12 August 2012 the parties continued to act on the basis of the terms in the statutory training contract until the date of termination.

(b) What occurred after 11 August 2012 was an employment agreement or arrangement contemplated by s 60H(2) of the VET Act. Section 60H of the VET Act provides:

(1) If a training contract ceases to have effect, whether under section 60F(6) or because it is terminated or expires or for any other reason, the employment of the apprentice by the employer under the contract ceases.

(2) Subsection (1) does not prevent the parties entering into another employment agreement or arrangement.

43 Thus, as the statutory training contract expired and Mr Miller's employment came to an end on 11 August 2012, but the parties continued to act in accordance with the terms of the statutory training contract until 17 October 2012, then through the conduct of the parties a new employment relationship was established. It is well established that the existence of a contract can be evinced by the conduct of the parties: ***Damevski v Giudice*** [2003] FCAFC 252 [81] - [99].

44 The association's decision to terminate Mr Miller's common law contract on 17 October 2012 was a decision to terminate a contract which had the same terms as the statutory training contract. The actions of the association on 17 October 2012 did not in fact or in law amount to declining to extend the statutory training contract.

45 Although the association says that the Commissioner erred in fact and law in determining that the dismissal was unfair, it is not arguable for the association to rely on the express term of the contract which provided that the contract would come to an end if the training competencies had not been completed. The question is not whether there was a legal right to dismiss, but rather whether the association's legal right to dismiss had been exercised so harshly or oppressively towards the employee as to amount to an abuse of that right: ***Undercliffe case***. The Commissioner applied this test and found there was no acceptable reason for the dismissal. The Commissioner also found that Mrs Baker had relied upon Mr Miller's admitted 'conduct and performance' and the failure of Mrs Miller to report the matter to the board 18 months earlier as the grounds for dismissal. Such a finding was open on the evidence. The Commissioner properly found that Mr Miller had been disciplined for his misconduct 18 months previously, and that Mrs Baker's distress was because of the failure of Mrs Miller to report it to the board, notwithstanding it had not been the practice to make such reports for the previous 10 years. The Commissioner also properly found that Mr Miller was being disciplined twice for the same event. Consequently, the Commissioner did not err in finding that the termination was because of the event 18 months previously and rejecting Mrs Baker's evidence to the contrary.

Consideration – FBA 8 of 2013 – Did the Commissioner err in finding Mr Miller had been unfairly dismissed?

46 The first ground of appeal raises the issue whether the Commissioner erred in failing to find whether the statutory training contract continued to apply to the employment relationship at the time of the termination of Mr Miller's employment. In respect of the second ground of appeal, the association, in its oral submissions, put forward an argument that the following findings of fact should have been made:

(a) A new contract of employment between the parties commenced on 12 August 2012, the terms of which were the same as the statutory training contract which ceased on 11 August 2012.

(b) Clause (h) of the contract entitled the association to bring the new contract to an end as Mr Miller had not attained all the required competencies or made a request for an extension of the contract that had been endorsed by a state training authority.

47 The association's submission that the terms of the contract between the parties were not identified at the time of the termination of the contract of employment is correct. This failure, whilst an error of law, is not, in our opinion, in this matter material, as when cl (h) of the contract is analysed in the circumstances of this matter, it is clear that the terms of cl (h) did not authorise the association to terminate the employment of Mr Miller.

48 Although it is common ground that from 12 August 2012 a common law contract was in existence, the terms of which were the same as the statutory training contract, the terms cannot be said to be identical. An express term of the statutory training contract was to create a contract of employment for a fixed term which, pursuant to cl (h), was an 18 month term (referred to in question 4 of the statutory training contract). The fixed term commenced on 11 February 2011 and expired on 11 August 2012. Thus, pursuant to cl (h) and s 60H of the VET Act, the statutory training contract expired and ceased to have effect after 11 August 2012 (the nominal date of expiry) as the term of the statutory training contract had been reached without Mr Miller having attained all of the required competencies for a Certificate III in disability and it appears that no request for an extension of the contract had been endorsed by a state training authority by the nominal date of expiry.

49 From 12 August 2012, Mr Miller continued to work and attend TAFE. Notwithstanding that the statutory training contract expired on 11 August 2012, prior to the expiry of the statutory training contract and whilst his mother was still the chief executive officer of the association, Mr Miller took steps to seek an extension of the statutory training contract. However, as the fixed term of the statutory training contract expired prior to an extension of the contract being endorsed by a state training authority, no extension occurred. However, it would have been open to the parties to enter into a new statutory training contract.

50 The fixed term in the statutory training contract could not be a term of the new contract, as that term had expired. In any event, the uncontradicted evidence of Mr Miller was that he had spoken to Mrs Miller about extending the training contract until the end of the year to enable him to complete the required competencies. Although this arrangement was not finalised, it is apparent from the conduct of the parties prior to 17 October 2012 that the new contract as a training contract could not be for indefinite work, but for a term that would enable Mr Miller to complete the Certificate III in disability. Whether the completion of the Certificate III required the parties to enter into a new statutory training contract and obtain the endorsement by a state training authority is not clear. The evidence given on behalf of the parties did not address this issue.

51 In any event, we are not satisfied that cl (h) enabled the association to bring the contract to an end on 17 October 2012 as nothing was required to be done to bring the statutory training contract to an end as it had expired. The new contract was on foot, a fixed term of which had not been fixed, but it could be inferred by the conduct of the parties that the parties intended the new training contract to be on foot until the end of the year. Thus, cl (h) could have no effect in the new contract.

52 At the time the proposed arrangement was discussed by the parties, Mrs Miller was the chief executive officer. As the chief executive officer she had the authority to bind the association to such an arrangement. The evidence of Mrs Baker was that she was aware that Mr Miller had a traineeship with the association. She did not say, however, that Mrs Miller had no authority to engage Mr Miller under a statutory training contract.

53 Clause (i) of the statutory training contract also became a term of the new contract. Clause (i) provided that the contract may be terminated in accordance with state/territory legislation. There was, however, no operative state or commonwealth legislation that applied to the employment of Mr Miller that provided for the termination of a common law contract of employment. Although s 117 of the *Fair Work Act 2009* (Cth) establishes a national minimum employment standard which requires an employer to give an employee employed for more than a year and less than three years two weeks' notice of termination or two weeks' pay in lieu of notice, this provision only applies to national system employers and employees: s 60 of the *Fair Work Act*. There is no Western Australian legislation that confers an express power on any employer to terminate a common law contract of employment. However, the scheme enacted by s 23, s 23A and s 29(1)(b)(i) of the Act prohibits an employer from harshly, oppressively or unfairly dismissing an employee. These provisions do not, however, confer the right to dismiss an employee. The right to do so is implied by law into the relationship of employment. This implied term confers on an employer the right to terminate the employment at will on giving reasonable notice and to dismiss summarily for misconduct: ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, 452 (McHugh and Gummow JJ). The right to terminate for misconduct arises out of the right to rescind a contract for breach of a condition or the manifestation of an intention not to perform contractual obligations in the future: ***Rankin v Marine Power International Pty Ltd*** [2001] VSC 150; (2001) 107 IR 117 [251] - [253] (Gillard J).

54 The right to terminate by notice is excluded by the nature of a fixed term contract. Whilst in this matter it can be inferred from the conduct of the parties that they intended to put in place the necessary arrangements to allow Mr Miller to complete the competencies for a Certificate III in disability at TAFE by 'the end of the year', given that arrangements were not completed to bind the parties to an extension of the statutory training contract or the entering into a new statutory training contract, it cannot be inferred that the contract of employment that was in existence after 12 August 2012 was for a fixed term, only that such a term was contemplated by the parties.

55 Consequently, in October 2012 the association had the right to terminate Mr Miller's contract of employment as he was not employed for a fixed term. However, as the Commissioner at first instance properly found, the issue was whether the association exercised its right to dismiss so harshly, oppressively or unfairly against Mr Miller as to amount to an abuse of that right: ***Undercliffe case*** (386) (Brinsden J). The determination of whether the dismissal of Mr Miller was harsh, oppressive or unfair turned on the weight to be given to the evidence, in particular the evidence given by Mrs Baker. An assessment of

Mrs Baker's evidence was not only evaluative, but was an exercise of discretion by the Commissioner after having observed all of the witnesses give their evidence.

56 As the Full Bench in ***Hornsby v Elders Ltd*** [2006] WAIRC 04463; (2006) 86 WAIG 1229 explained in an appeal against a discretionary decision [47] - [48]:

> … There are limits to the circumstances in which an appeal against such a discretionary decision may be allowed. These limits are partly due to the nature of a discretionary decision, involving a decision making process in which no one consideration and no combination of considerations is necessarily determinative of the result, so that the decision maker is allowed some latitude as to the choice of decision to be made (see *Coal and Allied Operations Pty Ltd v AIRC and Others* (2000) 203 CLR 194 per Gleeson CJ, Gaudron and Hayne JJ at paragraph [19]).
>
> The limits upon appellate intervention were described in the following way by Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 in a passage which has been cited and quoted in numerous decisions of the Full Bench:-
>
> > '*The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred*.'

57 A Full Bench is required to accord an evaluative decision made by a Commissioner that a dismissal was or was not fair with significant deference: ***Michael v Director General, Department of Education and Training*** [2009] WAIRC 01180; (2009) 89 WAIG 2266 [139]. In particular, Ritter AP observed in ***Michael*** [143]:

> These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although 'error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge'. This is because, in considering an appeal against a discretionary decision it is 'well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion', and that when 'no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight'. (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]).

58 When the evidence given in this matter is reviewed, it is apparent that the association is unable to demonstrate any error. It was open to the Commissioner to reject the evidence given by Mrs Baker that part of the reason for the dismissal was the reliance on the advice given to the board by Mr Fordham that the association were under no obligation to extend the traineeship. Given the fact that Mrs Baker was aware that Mr Miller had been engaged as a trainee and that no steps were taken by Mrs Baker or the board to terminate the employment of Mr Miller until approximately two months after the departure of Mr Miller's mother as chief executive officer and until after Mrs Baker had become aware of the disciplinary issue in 2011, it cannot be said that the rejection of Mrs Baker's evidence in respect of this issue was glaringly improbable.

59 The fact that the misconduct that occurred in 2011 was not disclosed to the board is not a matter that could be said to have been caused by or the fault of Mr Miller. If a conflict of interest arose in Mrs Miller dealing with the matter, it was a matter going to the conduct of Mrs Miller, not Mr Miller.

60 As the Commissioner found, Mr Miller had been the subject of a disciplinary inquiry in 2011. He had received an oral warning, paid restitution and apologised to the client. Given that he had, since the time of the disciplinary inquiry, worked without further incident, appeared to be well regarded by the acting chief executive officer and had been offered increased hours of work a few days before he was dismissed, it was open to the Commissioner to find the termination of the employment of Mr Miller was unfair. In particular, it was open for the Commissioner to find it was unfair for the association to impose a disciplinary sanction on Mr Miller for a second time.

61 For these reasons, we are of the opinion the association has failed to demonstrate any error in respect of the declaration made by the Commissioner that the dismissal of Mr Miller was unfair.

Grounds of appeal - FBA 6 of 2013

62 The grounds of appeal in FBA 6 of 2013 are as follows:

> The Commissioner erred in law in determining that the quantum of compensation should be:
>
> a) amended at the speaking to the minutes;
>
> b) 19 weeks wages;
>
> c) calculated in the mathematical manner the Commissioner utilised;
>
> d) calculated on a gross rather than a net basis; and
>
> e) not grossed up to account for the tax treatment required of eligible termination payments

Particulars

a) The Commissioner was functus officio once she had issued the minutes of the proposed order on 17 July 2013 and the amendment to the quantum of compensation made on 18 July 2013 was made on the basis of an admission by the Commissioner that she had wrongly calculated the quantum;

b) The applicant's losses from the dismissal were found to be 10 month's wages (ie 43.33 weeks) which loss was greater than the 19 weeks loss awarded and less than the six months cap provided for under section 23A of the Act: the calculations should have been based on the net loss over the 10 month period;

c) The Commissioner's calculations of gross loss appear to be based on the rates of pay applicable prior to 1 July 2012 for 5 of the 19 weeks and for 14 of the 19 weeks, that rate plus 3.4%, when the calculations should have been based on the amount of the loss each week for the relevant period;

d) The Commissioner's calculating of the compensation on a gross wage basis resulted in an average weekly loss over 19 weeks of $235.52 (gross) when the applicant's average loss calculated on a net basis for the same period was $248.00 per week;

e) The Commissioner found that the principles of the Federal Court decisions in *Sheldrick v WT Partnership (Aust) Pty Ltd* [1998] FCA 1794 and *WT Partnership (Aust) Pty Ltd v Sheldrick* [1999] FCA 843 were not relevant because the factual matrix of that case occurred outside Australia, whereas the principle applies to the tax treatment of all compensation/damages payments made in Australia.

Mr Miller's submissions in support of FBA 6 of 2013

63 In respect of ground (a) of Mr Miller's grounds of appeal, it is contended that there was no power to alter the substance of the minute of proposed order. At the speaking to the minutes the Commissioner informed the parties that when issuing the minute of proposed order she had failed to take into consideration what Mr Miller had earned after his dismissal. Whilst Mr Miller acknowledges that the Commissioner was in error in not doing so, he says that the Commissioner had no power to correct any such error because she was at that time functus officio and any such error could only be corrected on appeal. It is, however, conceded by Mr McCorry, agent for Mr Miller, that such an error would have been appealable and ground (a) of the grounds of appeal was not pressed.

64 The remaining grounds of appeal in FBA 6 of 2013 essentially raise two issues. The first issue is that having found that Mr Miller was likely to have remained employed by the association for a further 10 months and suffered loss of wages for that period, the Commissioner failed to compensate Mr Miller to the fullest extent in respect of his loss or injury, up to the statutory limit, subject to the cap imposed by s 23A of the Act. The full extent of his loss is said to be $10,745 net. As that amount was less than the statutory cap, this was the amount the Commission was required to order to be paid. The second issue raised in the grounds of appeal is that to compensate Mr Miller to the fullest extent, an award should have been made on the basis of an assessment of the net loss to Mr Miller and not the gross loss.

65 In respect of the first issue, the following submissions are made on behalf of Mr Miller:

(a) It was argued on behalf of Mr Miller that allowing for contingencies Mr Miller would have remained employed by the association for a period of at least 12 months. Those contingencies are that he was employed in a small town in a small area, whereby the ongoing ability to be provided with work was not affected much by economic reasons. This is because the purpose of the association's work is to provide support to people who are disabled. Subject to the financial state of the government and the grants made then a long period of employment was not an unreasonable expectation.

(b) It is not contended, however, that the Commissioner erred in finding that Mr Miller was likely to be employed for a period of 10 months. However, it is argued that a loss of 10 months' wages does not equal 19 or 21 weeks' pay.

(c) If Mr Miller was not unfairly dismissed based on his previous financial year earnings of $26,903 he could have expected to earn a minimum of $22,419 in 10 months. However, Mr Miller would have been entitled to the increase in pay in July 2012 as his contract of employment linked his wage to the minimum wage. The minimum wage increased by 3.4% from the beginning of July 2012: [2012] WAIRC 00359; (2012) 92 WAIG 568. Thus, Mr Miller could have expected to earn $23,181 gross in 10 months past the termination of his employment with the association, if the termination had not occurred.

(d) As the association is a public benevolent institution, Mr Miller was entitled to tax concessions. In the 2010/2011 financial year he paid 6.79% of his total earnings in tax: PAYG summary, AB 45, FBA 6 of 2013. He could thus reasonably expect the net cash and non-cash benefits from a further 10 months employment to be $21,607 or an average of $534.90 which calculated to $498 net (rounded) per week. Mr Miller mitigated his loss. He obtained employment that earned him $250 net per week. His loss over a 10 month period was thus $10,745 net. The cap for the purposes of s 23A of the Act was 26 weeks x $498 net or $12,948 net. Mr Miller's losses over a 10 month period were less than the cap.

(e) The Commissioner at first instance awarded him $9,224.90 gross and then reduced this to $4,474.90 gross. This was apparently calculated on the basis of losses to the date of hearing, less two weeks paid in lieu of notice. In doing so the Commissioner erred.

66 As to the second issue raised in Mr Miller's appeal, on behalf of Mr Miller the following submissions are made:

(a) President Sharkey in ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 79 WAIG 8 made it clear that compensation is not compensation, as defined, if it does not, as much as possible, put the person who suffered the injury, loss or damage back in the position in which, but for the injury loss or damage, the person would have been.

(b) An award of compensation for an unfair dismissal is an employment termination payment for the purposes of the *Income Tax Assessment Act 1997* (s 82.130). Section 12-85, Sub-division 12-C of Division 12 of Schedule 1 of the *Taxation Administration Act* requires an employer to withhold an amount from an employment termination payment made to an employee. Section 15-25, Sub-division 15-B of Division 15 confers on the Commissioner of Taxation the ability to make schedules of withholding tax amounts for the purposes of Sub-division 12-C. The Commissioner of Taxation has made a schedule requiring tax at the rate of 31.5% to be withheld from any compensation paid to Mr Miller because of his unfair dismissal: NAT 70980 Schedule 32, withholding schedule made by the Commissioner of Taxation in accordance with s 15-25 and s 15-30 of Schedule 1 to the *Taxation Administration Act* (Schedule 32). The employer must withhold the tax or be subjected to a penalty: ***Bennett & Dix (a firm) v Higgins*** [2005] WASCA 197; (2005) 85 WAIG 3653.

(c) The Commissioner erred in failing to apply the principles in ***Sheldrick v WT Partnership (Aust) Pty Ltd*** in which compensation awarded to an employee was grossed up to take account of the withholding tax obligations. If ***Sheldrick v WT Partnership (Aust) Pty Ltd*** is applied, Mr Miller will be put back in the position in which, but for the injury loss or damage, the person would have been. The Commissioner declined to apply this decision and wrongly accepted the employer's submission that because ***Sheldrick v WT Partnership (Aust) Pty Ltd*** involved matters outside Australia it was not relevant and that the tax rates under the *Income Tax Assessment Act 1936* were appropriate. ***Sheldrick v WT Partnership (Aust) Pty Ltd*** principles do not depend on where the loss or damage is incurred but the tax regime where the remedy is effected. It is a direct application of the principle in ***Bogunovich*** ((8) 2. and (8) 5.(g)). ***Sheldrick v WT Partnership (Aust) Pty Ltd*** has been applied by the Industrial Relations Court of Australia in ***Slifka v J W Sanders Pty Ltd*** (1995) 67 IR 316, 328 - 333. This principle is also applied in unfair dismissal proceedings in the Fair Work Commission.

(d) Section 23A of the Act does not require awards of compensation to be calculated on a pre-tax basis. It is permissible to calculate remuneration in the context of s 23A on a net basis.

67 On 5 December 2013, the Full Bench requested submissions from the parties in respect of the following matter:

Whilst Schedule 32 requires an employer to withhold 31.5% of an amount awarded as compensation for unfair dismissal, is the whole of an award of compensation included as assessable income by the Commissioner of Taxation?

If the answer to this question is yes:

(a) is the tax to be paid by the employee on the award as distinct from withheld by the employer dependent on the income earned by an employee during a financial year; and

(b) for example, if the employee's taxable income (including the award) is less than $18,200 for the financial year of 2012/2013 no tax will be payable on the award, or if their taxable income is less than $37,000 then 19c in each dollar is to be paid for each $1 over $18,200?

If the answer to the question is no, then is it the case that the rate of tax that is payable by the employee, the same as the rate of tax to be withheld by the employer?

68 On 10 December 2013, the following submission was made on behalf of Mr Miller:

1. An award of compensation for unfair dismissal is an *employment termination payment* (Section 82-130 ITAA) under the *Income Tax Assessment Act 1997* (ITAA). Employment termination payments may be taxable or tax free or a combination of taxable and tax free (Only invalidity and pre July 1983 components of an employment termination payment are tax free - section 82 - 140 ITAA).

2. The tax on an award of compensation is governed by Part 2 - 40 of the ITAA (Section 82 - 10). Subsection 82.10(2) provides that the taxable component of the payment (The expression *life benefit termination payment* in subsection (1) is misleading but is defined in section 82.130(2) to be a payment received in consequence of the termination of employment) is assessable income.

3. Hence the answer to the first question from the Full Bench is YES: the award of compensation for unfair dismissal is included as assessable income of the taxpayer. An employee's *taxable income* (Section 4.15 ITAA) is the employee's assessable income less permissible deductions.

4. Subsection 82.10(3) of ITAA provides that the taxpayer is entitled to a tax offset that ensures that the rate of tax on an employment termination payment that is below the cap amount (Section 82.160 ITAA) - currently $180,000 - does not exceed 30 percent (15 percent if the employee is above the preservation age of 55). Employment termination payments that do exceed the cap amount are taxed at the highest marginal rate. The Medicare levy of 1.5 percent applies to all of an employee's taxable income.

5. The ultimate tax paid by an employee on an award of compensation for unfair dismissal is thus dependent upon the total taxable income of the employee. The amount of tax ultimately payable on the award may be less than the amount required to be withheld by the employer at the time of payment as the following examples illustrate.

<u>Example (1)</u>

Wages earned = $18,200	Tax withheld = 0
Compensation = $12,800	Tax withheld = $4,032
Assessable income = $31,000	Total tax liability (Ignoring any deductions that might reduce the assessable income) = $2,624 (Schedule 7 *Income Tax Rates Act 1986* + 1.5% Medicare levy)
Tax Refund = $1,408	

Example (2)

Wages earned = $37,000 Tax withheld = $3,572

Compensation = $12,800 Tax withheld = $4,032

Assessable income = $49,800

Total tax liability = $3,572 + 33% x ($49,800 -$37,000) (Schedule 7 *Income Tax Rates Act 1986* + 1.5% Medicare levy)

= $3,572 + *$4,224*

= $7,796

But the tax on the compensation component of the total assessable income is limited by section 80.10(3) of the ITAA to $4,032 which is less than the $4,224 calculated liability shown above (in italics) so there is a $192 tax offset applied to the calculated tax liability. The actual tax liability on the award of compensation is then the same as the amount required to be withheld.

The association's submissions – compensation – FBA 6 of 2013 and FBA 8 of 2013

69 In FBA 8 of 2013 the association puts forward an argument that if the Full Bench finds that the termination of Mr Miller was unfair, the Commissioner was required pursuant to the principles set out in ***Bogunovich*** to make findings in respect of the following matters:

(a) The employee is required to establish his loss on the balance of probabilities, and also his injury. If no loss or injury is established, there is nothing to compensate.

(b) There must be a causal link between the loss and/or injury claimed and the termination of employment.

(c) The Commission is required to make a finding as to the loss and/or injury which is a different exercise from assessing compensation.

(d) Findings as to future loss, for example, will sometimes involve a finding on the balance of probabilities, as to how long a claimant might have remained in his/her current employment had he/she not been unfairly dismissed.

(e) The Commission must then assess the proper amount of compensation for loss and/or injury in the light of all the relevant circumstances but disregarding the cap.

(f) A decision as to compensation must not be arbitrary.

(g) In deciding questions of future loss, assistance can be derived from ***Malec v JC Hutton Pty Ltd*** (1990) 92 ALR 545; (1990) 169 CLR 638, where Deane, Gaudron and McHugh JJ held that the court must assess the degree of probability that an event would have occurred or might occur, and adjust its award of damages to reflect the degree of probability. Unless the chance is so low as to be regarded as speculative or so high as to be practically certain the court will take that chance into account in assessing the damages.

70 The evidence establishes that at the time of the termination of Mr Miller's employment the only contract on foot was the common law contract which on its terms were those set out in the statutory training contract.

71 The evidence given by Mr Miller was that steps had been taken to extend the traineeship to allow him and the other trainee to finish their qualifications. The association submits that the end of the year would have been the end of the TAFE year which, when the TAFE website is consulted, the final term in 2012 ended on 14 December 2012. Consequently, the association says that if this evidence had been properly considered a finding would have been made that Mr Miller's employment would not have continued beyond 14 December 2012. The association also in their written submissions points to the evidence of Ms King in cross-examination that the association was able to satisfy the demand of their clients after Mr Miller's termination of employment (ts 52). Ms King also gave evidence that whilst work for a client may have been regular, it was also possible for the work to be interrupted due to a client's unavailability (ts 53).

72 In the association's written submissions in FBA 8 of 2013 the association also puts forward a submission that any extension to Mr Miller's traineeship had not been formalised and as there was no obligation on the association to extend the training contract and that Mr Miller's traineeship could be taken up by another employer, there was no evidence upon which it could be found that Mr Miller suffered any loss. However, in oral submissions this submission was not pressed.

73 In the reasons for decision which are recorded in the decision that issued in statements that begin with 'Whereas', 'And Whereas' and 'Now', the Commissioner found that Mr Miller ought to be awarded an average of 3.5 hours a week at the casual rate of pay and, for 14 of the 19 weeks' compensation, a 3.4% increase based on the 2012 State Wage Case. Whilst this finding is not challenged by the association, in its written submissions filed in FBA 6 of 2013, the association points out that it seems that the Commissioner opted to accept a compromise and determined that the average hours for casual employment at 3.5 hours per fortnight. This finding it says was open for the Commissioner to make.

74 In relation to the submission made on behalf of Mr Miller that the assessment of compensation should be made on a net basis, the association says the decision in ***Sheldrick v WT Partnership (Aust) Pty Ltd*** is distinguishable. In ***Sheldrick v WT Partnership (Aust) Pty Ltd*** the Federal Court determined damages that arose when a cost engineer was terminated summarily and consequently not able to work out three months' notice on an overseas deployment in Malaysia. The employee had an arrangement where he was remunerated 'tax free'. The court in awarding damages took this into account and made allowance for the fact that he would be liable to taxation on the lump sum of damages in Australia. Given that he was terminated without notice, the court accepted the evidence of the employee's accountant that he would be liable for taxation on this lump sum payment on his return to Australia. On appeal, the employer sought to have the damages reduced by an amount equivalent to the amount of tax that would have been paid in Hong Kong or Malaysia. Given that this was not argued at first instance, and

given there was no apparent injustice, the Federal Court declined to interfere with the judgment of the primary judge. The association says that this case is not relevant to the present matter as there was no arrangement to pay Mr Miller during the term of his employment 'tax free'. Hence, any further remuneration that would have been paid in line with the payments made to him during the course of his employment was taxed at the appropriate rate under the *Income Tax Assessment Act 1936*. The association therefore submits that the Commissioner did not err in finding that ***Sheldrick v WT Partnership (Aust) Pty Ltd*** had no relevance and that the appropriate amount of taxation should apply to any compensation awarded.

FBA 6 of 2013 and the ground of appeal raised in FBA 8 of 2013 going to compensation – Did the Commissioner err in making the award of compensation?

(a) Assessment of loss

75 The making of an award of compensation is also an exercise of discretion. Thus, for an award to be set aside, error must be demonstrated.

76 The grounds upon which the Commissioner found that if Mr Miller's employment had not been unfairly terminated on 17 October 2012 he would have continued to be employed by the association for at least 10 months, were that:

(a) Mr Miller had been employed by the association for a period of two years prior to the commencement of the statutory training contract;

(b) but for the decision of the board, there was no reason for the employment to cease; and

(c) there was no shortage of work as one week prior to the termination Ms King had requested Mr Miller to work an additional five hours a week.

77 Whilst the parties did not challenge the finding that Mr Miller was employed for two years prior to the parties entering into the statutory training contract, this is an error. Mr Miller was in fact employed for approximately 15 months prior to commencing work as a trainee pursuant to the terms of the statutory training contract. This error is not, in our opinion, material. However, a material fact was that prior to entering into the statutory training contract, Mr Miller was engaged as a casual employee, as a support worker.

78 Traditionally, at common law casual employment consists of a series of distinct contracts, whereby a casual employee has occasional and irregular work.

79 In ***Reed v Blue Line Cruises Ltd*** (1996) 73 IR 420, Moore J observed:

> A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual (425).

80 In ***Squirrell v Bibra Lakes Adventure World Pty Ltd*** (1984) 64 WAIG 1834 Fielding C observed:

> The concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration (1835).
>
> (applied by Sharkey P in ***Serco (Australia) Pty Ltd v Moreno*** (1996) 76 WAIG 937, 939).

81 Whilst Mr Miller may have wished to remain employed by the association after he obtained a Certificate III in disability, the only evidence that could support a finding that Mr Miller would have continued to be employed by the association after he attained the Certificate III was:

(a) the evidence that Ms King had requested Mr Miller to work an additional five hours a week as a support worker because the employee who had been carrying out that work was unable to continue to work on a Friday and that subject to the client requiring support services each week that work would be 'regular';

(b) the uncontradicted evidence given by Mr Miller that other than the incident in 2011, no complaints had been made about his performance and that the acting chief executive officer, Mr Cooper, had assured Mr Miller that he was not in trouble with his job.

82 As Kenner C pointed out in ***Fisher & Paykel Australia Pty Ltd v Skinner*** [2006] WAIRC 05839; (2006) 87 WAIG 1, where it is alleged that an award of compensation is excessive based upon the likelihood of employment continuing, there must be a sound evidentiary basis that such a finding would be open [77]: applied by Ritter AP in ***Merredin Customer Service Pty Ltd v Green*** [2007] WAIRC 01002; (2007) 87 WAIG 2771 [33].

83 In ***Manning v Huntingdale Veterinary Clinic*** (1998) 78 WAIG 1107, Sharkey P pointed out an unfairly dismissed employee is to be compensated to the fullest extent of his or her loss and that the calculation of loss must not be arbitrary.

84 The evidence was that Mr Miller had been employed as a casual employee by the association as a support worker prior to commencing the statutory training contract. The question that should have been considered by the Commission at first instance was whether there was a likelihood of work being provided after Mr Miller had completed a Certificate III in disability at the end of 2012. Part of that task was to assess the chance of ongoing work being provided in light of the evidence that prior employment had been on a casual basis and the evidence of Ms King that although support work could be regarded as regular, whether the same hours were to be worked each week was dependent upon the needs of each client. Also, it was relevant to consider that there was no evidence any undertaking had been made at any time by anyone in a management position in the association that work would be made available to Mr Miller after he obtained a Certificate III in disability.

85 In these circumstances, the finding that Mr Miller had a reasonable prospect of ongoing employment for at least 10 months cannot be said to be soundly based. To find that he would have continued to be employed for a period of 10 months in the circumstances was speculative. Whether he would have been offered casual work as a support worker after completing a

Certificate III in disability is not clear as little, if any, evidence was adduced as to whether such work would have been offered if the board of the association had not been informed about the incident in 2011.

86 Therefore, we are satisfied that the Commissioner erred in awarding 19 weeks' compensation.

87 It is apparent from the submissions made on behalf of the parties that the Full Bench is in a position to assess compensation. As there was reliable evidence upon which it could be found Mr Miller's employment would have continued until the end of the TAFE year in 2012, we are of the opinion that Mr Miller's loss should have been assessed as a loss of work from 18 October 2012 until 14 December 2012, which is eight weeks and two days of work.

88 On behalf of Mr Miller it is contended that his weekly rate of pay should have been assessed at a rate of $534.90 which would have been for 20 hours' work at the minimum wage prescribed by the MCE Act and four hours' casual work at the rate of $23.10. The four hours of casual work a week was calculated by having regard to the average number of casual hours of work Mr Miller had worked in the 2011/2012 financial year: AB 9 and 45, FBA 6 of 2013.

89 The association says that Mr Miller was paid $19.64 an hour for 20 hours a week and an average of 3.42 hours of casual work at the rate of $23.10 which calculates at $392.80 per week (AB 8 and 41, FBA 6 of 2013). The 3.42 hours was calculated by regard to the casual hours worked by Mr Miller from 23 July 2012 to 14 October 2012. The association's calculations do not take into account the minimum wage increase of 3.4% which was to be paid pursuant to the 2012 State Wage decision of the Commission which increased the minimum wage by $20.60 per week: [2012] WAIRC 00359; (2012) 92 WAIG 568, 584.

90 By assessing a casual weekly rate of hours as 3.5 a week, the Commissioner erred as such a finding was not supported by the evidence and as such was arbitrary. The Commissioner should have adopted a calculation that was supported by the evidence. That is, she should have either calculated the amount of additional casual work by regard to the casual hours worked in the previous financial year or over the last four months of employment.

91 The Commissioner also erred in determining that the 2012 3.4% minimum wage increase would be accounted for in the amount of compensation awarded, but then not doing so.

92 Given that days before Mr Miller's employment was terminated he had been offered an additional five hours a week, and the fact that a minimum rate increase to the weekly rate of pay was payable as a condition of Mr Miller's contract of employment, these facts would found a finding that the association's calculations of a weekly rate of pay should be rejected. In these circumstances, we are satisfied the calculations as to the quantum of remuneration put forward on behalf of Mr Miller should be accepted as it is apparent that it was reasonable to assume Mr Miller would have regularly worked at least four hours casual work a week until 14 December 2012 at a rate of $534.90 gross. This assessment is a gross amount and does not take account of any amount that should be allowed for taxation.

(b) Should an allowance have been made in the award of compensation for tax payable?

93 The effect of the submission made on behalf of Mr Miller that the weekly rate of compensation should be assessed by applying a rate of taxation of 6.79% which would be expressed as an award of $498 (net) a week is in essence an argument that the amount of compensation awarded should include an amount to compensate Mr Miller for the rate of 31.5% tax that will be payable on the award.

94 Pursuant to Schedule 32, the Commissioner of Taxation has prescribed that 31.5% tax is to be withheld on a payment made by an employer on any payment of compensation for unfair dismissal. A payment of an amount of compensation for unfair dismissal is described in Schedule 32 as an employment termination payment. The rate of 31.5% is also prescribed in Schedule 32 for delayed termination payments when a tax file number is provided. A delayed termination payment is a payment made outside 12 months after the date of termination of employment. If Mr Miller had remained employed by the association he would have paid an average of 6.79% tax on his wages as he was able to salary sacrifice part of his income. Thus, it is argued that if the award of compensation is calculated to take account of the additional amount of tax that is payable, Mr Miller would be put back in the position but for the termination of employment he would have been.

95 The discretionary power of this Commission to make an award of compensation for the loss caused by a dismissal of an employee is created solely by s 23A(6) of the Act. In ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114; (2004) 84 WAIG 2152 EM Heenan J remarked when considering the distinction that must be made between the claims for contractual benefits under s 29(1)(b)(ii) of the Act and remedies available for a proved case of harsh, oppressive and unfair dismissal that the remedies for the latter:

> … as set out in s 23A of the Act, include the special statutory remedies which the Act provides for the Commission alone to grant, including orders for re-instatement, re-employment in another position or the payment of compensation for loss or injury caused by the dismissal which do not exist under the contract of employment or, otherwise, under the general law.
>
> This unique feature, being the statutory origin of these remedies which the Commission may grant in cases of unfair dismissal, renders it both significant and appropriate that the power to award monetary payment to the employee for loss or injury caused by the [unfair dismissal] is referred to as 'compensation' and not as damages or by any other term. This signifies the particular character and unique quality of that component of the remedies and, at the same time, distinguishes that remedy from the species of relief which may be available under the contract of employment [60] - [61].

96 An award of compensation for a harsh, oppressive or unfair dismissal is a statutory remedy that is the subject of conditions that prescribe the limit and extent of an award to loss or injury not exceeding six months' remuneration.

97 In ***Garbett v Midland Brick Co Pty Ltd*** [2003] WASCA 36; (2003) 83 WAIG 893 [102] - [103] EM Heenan J explained how an award of compensation is to be assessed, when his Honour said:

> Earlier in these reasons I have observed that the measure of damages at law for wrongful dismissal of an employee is not necessarily the same as an employee's entitlement to compensation or other relief under s 23A of the *Industrial Relations Act* for a case of harsh, oppressive or unfair dismissal even though, in both instances, the principle underlying the measure of relief to be granted is compensatory and not punitive. Indeed, ***FDR Pty Ltd & Ors v Gilmore; Gilmore v Cecil Bros &***

Ors (*supra*) is an example of where a large severance payment made by the employer did not discharge the employer's liability to pay compensation for that unfair dismissal - although there are some special features of that case involving the manner by which the employer had assigned the severance payment which may have contributed materially to that result.

Nevertheless, the claim of an employee who has had his employment terminated in breach of contract, but who has been paid wages in lieu of notice, will seldom generate an entitlement to damages for breach of contract. This is because, as explained by Brennan CJ, Dawson and Toohey JJ in ***Byrne & Frew*** (*supra*) at 428 –

> 'Even if an employee who is wrongfully dismissed chooses to keep the contract of employment on foot, he or she cannot claim remuneration in respect of any period after the wrongful dismissal because the right to receive remuneration for services is dependent upon the services having been rendered. The employee is also under a duty to mitigate any damage. Moreover, a court will not, save in exceptional circumstances, order specific performance of the contract of personal service. The possible continuation of the contract of employment after a wrongful dismissal will, therefore, ordinarily be of no real significance as it will for all practical purposes be at an end.'

The position is fully apparent from the judgment of Anderson J in this Court in ***Dellys v Elderslie Finance Corporation Ltd*** (*supra*) at [39] where his Honour said –

> 'In the absence of express terms in the contract of employment providing for special payments on termination and where summary dismissal is not justified, the single obligation on the employer in terminating the contract is to give reasonable notice that if he fails to do so, there will be a wrongful dismissal entitling the employee to the single remedy of damages. The general rule with respect to the quantification of damages for wrongful dismissal is that the starting-point is the gross amount which would have been earned during the period of reasonable notice had the contract continued. From this must be deducted the gross amount actually received by the employee during that period: *Kilburn v Enzed Precision Products (Australia) Pty Ltd* (1988) 4 VIR 31 at 33 - 34. The amounts to be deducted include all payments made to the employee by the employer (including payments for leave which is due to the employee) as well as all remuneration earned by the employee in other employment: *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567 at 581. Of course, the employee will be entitled to have the benefit of any accrued rights such as wages actually earned, but not paid.'

98 Compensation awarded for pecuniary loss caused by a dismissal on the basis that an employee should be awarded a sum that he or she would have earned had the employment continued is a principle that applies not only when an assessment of loss of future income is made under s 23A of the Act, but also in an action at common law for wrongful dismissal. This is apparent from the reasoning of Anderson J in ***Dellys v Elderslie Finance Corporation Ltd*** [2002] WASCA 161; (2002) 82 WAIG 1193 set out in the passage cited by EM Heenan J in ***Garbett*** at [103]. In ***Dellys***, Anderson J applied the principles for assessment of damages considered in ***Quinn v Jack Chia (Australia) Ltd*** [1992] 1 VR 567 which was an action by an employee at common law claiming that the termination of employment was in breach of contract and that he was entitled to reasonable notice of termination being two years. In ***Quinn***, Ashley J applied the method of calculating damages in ***Kilburn v Enzed Precision Products (Australia) Pty Ltd*** (1988) 4 VIR 31. ***Kilburn*** was also a proceeding for a claim for damages at common law for wrongful dismissal. In that matter a question arose whether the damages awarded in respect of loss of salary and allowance should be reduced by the tax for which the plaintiff would have been liable if his employment had not been terminated. After considering the principle applied in ***Cullen v Trappell*** (1980) 146 CLR 1 that tax must be taken into account when assessing damages for wrongful dismissal, O'Bryan J in ***Kilburn*** found that the amendments made to the *Income Tax Assessment Act* in 1984 by Act No 47 had the effect that the assessable income of a taxpayer shall include the amount received by way of an eligible termination payment. Thus, it was not necessary for the court to take taxation into account and damages for loss of earnings could be assessed as a gross amount (34). This is because the tax payable on eligible termination payments was incorporated into a taxpayer's assessable income.

99 In this matter, the effect of the current provisions of the *Income Tax Assessment Act 1997* is that an award of compensation made by this Commission is to be included as assessable income. In these circumstances, the argument that the tax liability on Mr Miller's earnings if not dismissed would have been less than the tax liability on an award of compensation cannot be made out. Whilst Mr Miller may have only paid a rate of taxation on his earnings assessed at 6.79% as he was able to salary sacrifice part of his income, because an award of compensation is assessable income despite the fact that the association will be required to withhold 31.5% of the award as taxation, the Commission cannot, on the evidence before it, make any assessment whether an actual amount of taxation will be assessed as payable by Mr Miller on the award of compensation. This is clear from the written submissions filed on behalf of Mr Miller on 10 December 2013.

100 For these reasons, in our opinion, the Commissioner did not err in law in making an order for an amount of compensation that was assessed as a gross amount.

101 On this basis, we would calculate the loss caused by the unfair termination of Mr Miller's employment as $1,673.36. This amount has been calculated as follows:

(a) Taking into account the fact that Mr Miller was paid two weeks' pay in lieu of notice, six weeks and two days' pay at the rate of $534.90 gross per week: $3,423.36.

(b) From the amount in (a) $250 a week for eight weeks should be deducted as Mr Miller mitigated his loss by obtaining and commencing alternative employment on Friday, 19 October 2012. The amount to be deducted is an amount of $2,000.

102 For these reasons, we are of the opinion that an order should be made to dismiss FBA 6 of 2013. An order should also be made to uphold FBA 8 of 2013 in part, together with an order that order 2 of the decision be varied to order the association to pay Mr Miller $1,423.36 (gross) as compensation caused by the unfair dismissal, within 30 days of the date of an order being issued by the Full Bench.

KENNER C:

103 I have had the advantage of reading in draft form the joint reasons of Smith AP and Beech CC in these two appeals. I agree that the learned Commissioner was correct to find at first instance that the dismissal of Mr Miller was harsh, oppressive and unfair. I also agree that the learned Commissioner was in error in her findings of fact as to loss and her assessment of compensation for the purposes of ss 23A (6), (7) and (8) of the Act. Compensation should have been assessed for the period of likely ongoing employment from 18 October 2012 to 14 December 2012. As to the taxation treatment of compensation, arising from a finding of unfair dismissal, I consider for the following reasons, that the adoption of a gross amount by the Commission at first instance was correct.

104 Since the decision of the Full Bench of the Commission in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8, the principles in relation to the assessment of compensation have been well settled in this jurisdiction. (See also *Gilmore v Cecil Bros, FDR Pty Ltd and Cecil Bros Pty Ltd* (1996) 76 WAIG 4434 and *Capewell v Cadbury Schweppes Australia Ltd* (1997) 78 WAIG 299).

105 Compensation which is ordered to be paid to an unfairly dismissed employee under s 23A of the Act, is to compensate the unfairly dismissed employee, as far as possible, for the "loss or injury caused by the dismissal": s 23A(6). The notion of compensation, in the context of s 23A of the Act, is not the same as a payment to an employee for the denial of a contractual benefit due to the employee under their contract of employment. The latter payment, which the Commission is empowered to order under s 23(1) of the Act, on a claim under s 29(1)(b)(ii), is in the nature of damages: *Matthews v Cool or Cosy Pty Ltd* (2004) 84 WAIG 2152 per Steytler J at pars 22-27; Pullin J at pars 49-54 and EM Heenan J at pars 71-76. There is a distinction to be drawn between an order for damages in respect of a denied contractual benefit under s 23(1) of the Act on the one hand, and an order for compensation for unfair dismissal under s 23A of the Act, on the other.

106 In *Matthews* EM Heenan J noted the distinction between the concepts of damages in lieu of a denied contractual benefit, and compensation for unfair dismissal, in the following terms at pars 59-63:

> 59 I agree that there are differences in the powers which the Commission possesses when dealing with an employee's claim alleging harsh, oppressive or unfair dismissal under s 29(1)(b)(i) and s 23A of the Act on the one hand, and when dealing with a claim by an employee that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment, pursuant to s 29(1)(b)(ii) and s 23 of the Act on the other hand. Only in the former case is the compensation which may be awarded to the employee for loss or injury caused by the dismissal limited to not more than six months' remuneration of the employee (s 23A(4) of the Act as it stood in August 2001, the date material to this application, and s 23A(8) of the Act as since amended by Act No 20 of 2002). It is important to note that, when dealing with monetary relief in a case of harsh, oppressive or unfair dismissal under s 23A, the relief which the Commission could grant, at the time of these proceedings before the recent amendment to s 23A, was of one or more of the following kinds:
>
> (a) an ability to order payment of any amount to which the employee is entitled (former s 23A(1)(a));
>
> (b) subject to subsections 1(a) and (4) an ability to order the employer to pay compensation to the employee for loss or injury caused by this dismissal;
>
> (c) in other circumstances, where an employer fails to comply with an order made under the former subs 23A(1)(b), an ability to make an order for the payment of compensation for loss or injury caused by the dismissal.
>
> These provisions distinguish between the payment "of any amount to which the claimant is entitled" and the payment of "compensation -- for loss or injury caused by the dismissal". This same distinction continues in s 23A, as amended, when read in conjunction with s 29(1)(b)(ii) except that now, the Commission in a case of harsh, oppressive or unfair dismissal, has the power to order the employer to pay to the employee "the remuneration lost, or likely to have been lost by the employee because of the [unfair] dismissal" – s 23A(5), as well as having the power to order the employer to pay an amount of compensation for loss or injury caused by [unfair] dismissal under subs 23A(6) which is capped at six months' remuneration by subs 23A(8).
>
> 60 The significance of this distinction, to my mind, is explained by the fact that "any amount to which the claimant is entitled" or payment of "a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment" (s 29(1)(b)(ii)) are each entitlements which the employee has arising out of his contract of employment with the employer. They are contractual and, therefore, common law claims which exist independently of the provisions of the Act and which could, if necessary, be pursued in any court of appropriate general civil jurisdiction. By contrast, the remedies available for a proved case of harsh, oppressive or unfair dismissal, as set out in s 23A of the Act, include the special statutory remedies which the Act provides for the Commission alone to grant, including orders for re-instatement, re-employment in another position or the payment of compensation for loss or injury caused by the dismissal which do not exist under the contract of employment or, otherwise, under the general law.
>
> 61 This unique feature, being the statutory origin of these remedies which the Commission may grant in cases of unfair dismissal, renders it both significant and appropriate that the power to award monetary payment to the employee for loss or injury caused by the [unfair dismissal] is referred to as "compensation" and not as damages or by any other term. This signifies the particular character and unique quality of that component of the remedies and, at the same time, distinguishes that remedy from the species of relief which may be available under the contract of employment.
>
> …

> 63 There is nothing in s 23, s 23A or s 29(1)(b) of the Act which diminishes the rights of an employee against his or her employer which arise from the terms of the contract between them relating to the payment of moneys earned for the performance of the work or for other ancillary benefits arising under the contract or from the relationship of employer and employee. The existence of the statutory claim for relief in the case of harsh, oppressive or unfair dismissal conferred by s 23, s 23A and recognised by s 29 of the Act provides additional remedies to an employee beyond those arising from the contract or from the employment relationship at law. The inter-relationship or overlap of the common law and statutory remedies, which sometimes arises, needs to be taken into account in particular cases to avoid double compensation occurring whether in whole or in part. This is another reason for recognizing that s 23A(4) of the Act as it was (now s 23A(8)) caps the maximum "compensation" payable for the statutory remedy to six months' remuneration but, in doing so, does not entrench upon any greater entitlement which the employee might have under the contract.

107 Thus compensation under s 23A of the Act, is to be regarded as a separate species of statutory remedy, unique to the Commission, and entirely separate to the common law remedy for breach of contract, be it for unlawful dismissal or otherwise.

108 The common law cases dealing with the assessment of damages for wrongful dismissal recognise the impact of taxation on an award of damages for lost earnings. The principle adopted is to ensure an injured plaintiff is placed in the position they would have been, if the breach of contract had not occurred: *Atlas Tiles Limited v Briers* (1978) 144 CLR 202; *Cullen v Trappell* (1980) 146 CLR 1; *New South Wales Cancer Society v Sarfaty* (1992) 28 NSWLR 68. The present position appears to be that where the rates of tax applicable to the lost earnings and the award of damages is the same, gross earnings are used as the measure of damages. Where the rates of tax are different, net earnings are used and the final sum is "grossed up" by the applicable rate of tax payable on the damages award: Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment* (7th ed, 2011) 426 - 427. An example of the latter "two step" process is seen in *Slifka v JW Sanders Pty Limited* (1995) 67 IR 316.

109 A similar approach appears to have been taken by the former Australian Industrial Relations Commission to the assessment of compensation under the then Commonwealth legislation in relation to unfair dismissal claims: *Shorten v Australian Meat Holdings Pty Ltd* (1996) 70 IR 360; *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21. The AIRC in *Shorten* adopted the approach to the assessment of compensation taken in *Slifka*. It is of some significance to note however, that the statutory provisions then under consideration, focussed on "loss of remuneration", when determining compensation for an unfair dismissal. Remuneration lost and future remuneration lost, are also prominent in the assessment of compensation under the current s 392 of the Fair Work Act 2009 (Cth). Shock, distress, humiliation and analogous concepts, are now expressly excluded from awards of compensation under s 392(4) of the FW Act.

110 In contrast, the assessment of compensation for the purposes of s 23A(6) of the Act, is in respect of "loss or injury" caused by the dismissal. "Loss", is a broad concept that encompasses, but is not limited to, lost earnings prior to a dismissal or future earnings, benefits and other remuneration that may be in the form of non-cash benefits, as part of the broader concept of "remuneration": *Capewell* at 303. Similarly, "injury" is also a broad concept, incorporating "all manner of wrongs": *Capewell* at 303; *Gilmore* at 4446-4447. "Injury", was recognised as contemplating "humiliation, injury to feelings, being treated with callousness", loss of reputation and nervous shock. The list is not seen as exhaustive: *Bogunovich* at 10.

111 Accordingly, an award of compensation under s 23A of the Act may take into account a broad range of factors, not just lost income, that would otherwise be taxable in an employee's hands, had they remained in employment. If tax is to be taken into account as contended by Mr Miller, this would require the Commission in each case, to separately identify and itemise each component of compensation, to enable that part attributable to past and future loss of income that would otherwise be taxable as earnings, to be focussed on and separately calculated. This would, in effect, require the Commission to separate components of an award of compensation, and weight them differently, by reason of taxation considerations.

112 This approach to the assessment of compensation is not a requirement of s 23A of the Act and has not been the approach of this Commission in the past. I see no reason to depart from the longstanding approach to the assessment of compensation on this occasion, in the context of the broad discretion given to the Commission to assess compensation under the Act. In particular, the focus on the broad concepts of "loss or injury" in s 23A(6) in this jurisdiction, makes it neither necessary nor desirable for the Commission to embark on an examination of the taxation treatment of components of an award of compensation.

113 If the Commission were to generally endorse the approach to take taxation into account in the assessment of compensation, I also foresee some not insignificant practical issues arising. For example, given the number of unrepresented parties appearing before the Commission in unfair dismissal matters, for taxation to be accurately taken into account by the Commission in making orders of compensation, will require reliable information from parties as to their taxation rates and arrangements. This is not always material that is readily available in such cases. Furthermore, generally, the determination of appropriate rates of taxation for the purposes of adjusting awards of compensation, and their tax treatment under the Income Tax Assessment Act 1997 (Cth), is far from straight forward, as Mr Miller's supplementary submissions on this issue reveal (see also Australian Taxation Office, *Schedule 32 Pay as you go (PAYG) withholding*, NAT 70980 (May 2013)). As orders of the Commission create enforceable obligations, certainty in their terms is important.

114 There is nothing preventing the Commission in any particular case, or generally, to avoid any adverse or unforeseen consequences of not specifically considering the taxation treatment of orders for compensation, from including a form of words in an order along the lines that the quantum of compensation ordered is less any sum required to be deducted from it by the employer under the Income Tax Assessment Act 1997 (Cth) and actually paid.

115 In the final analysis, I see no difficulty in leaving the appropriate tax liability calculations arising from an order of compensation for unfair dismissal, to the parties to the order, and the Australian Taxation Office.

116 I agree with the orders proposed.

2014 WAIRC 00029

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR MATTHEW KENNETH MILLER
	APPELLANT
	-and-
	WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC.
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 21 JANUARY 2014
FILE NO.	FBA 6 OF 2013
CITATION NO.	2014 WAIRC 00029

Result	Appeal dismissed
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Mr S Bibby, as agent

Order

This appeal having come on for hearing before the Full Bench on 28 October 2013, and having heard Mr G McCorry, as agent, on behalf of the appellant and Mr S Bibby, as agent, on behalf of the respondent, and reasons for decision having been delivered on 21 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 00038

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WHEATBELT INDIVIDUAL & FAMILY SUPPORT ASSOCIATION INC.
	APPELLANT
	-and-
	MATTHEW MILLER
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 28 JANUARY 2014
FILE NO.	FBA 8 OF 2013
CITATION NO.	2014 WAIRC 00038

Result	Appeal upheld in part
Appearances	
Appellant	Mr S Bibby, as agent
Respondent	Mr G McCorry, as agent

Order

This appeal having come on for hearing before the Full Bench on 28 October 2013, and having heard Mr S Bibby, as agent, on behalf of the appellant and Mr G McCorry, as agent, on behalf of the respondent, and reasons for decision having been delivered on 21 January 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be upheld in part;
2. Order 2. of the decision made by the Commission at first instance on 18 July 2013 in U 229 of 2012 be varied by deleting all the words that appear after the words 'ORDERS THAT' and inserting the words:

'the respondent pay Mr Miller the sum of $1,423.60 (gross) within 30 days of the date of the variation of this order by the Full Bench.'

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2014 WAIRC 00040

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 204 OF 2012 GIVEN ON 2 JULY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00040
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	THURSDAY, 21 NOVEMBER 2013
DELIVERED	**:**	WEDNESDAY, 29 JANUARY 2014
FILE NO.	**:**	FBA 7 OF 2013
BETWEEN	**:**	PETER EVAN JOHN MORRIS
		Appellant
		AND
		LIFT EQUIPT PTY LTD
		Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner J L Harrison**
Citation	**:**	**[2013] WAIRC 00389; (2013) 93 WAIG 608**
File No.	**:**	**B 204 of 2012**

Catchwords	**:**	Industrial law (WA) - Appeal filed out of time - Not satisfied appeal has any prospects of success - Leave not granted to institute an appeal
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 27(1)(n), s 29(1)(b)(ii), s 49, s 49(3)
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Ms M Johnston

Case(s) referred to in reasons:

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

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

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

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

Reasons for Decision

SMITH AP:

Introduction

1 Peter Evan John Morris seeks to institute an appeal under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision given on 2 July 2013 by the Commission, constituted by a single Commissioner. The decision is an order that Mr Morris pay to his former employer, Lift Equipt Pty Ltd, the sum of $551.40 by way of costs. The order for costs was made following a decision issued by the Commission on 11 March 2013 dismissing an application by Mr Morris against Lift Equipt Pty Ltd in which Mr Morris had claimed that he was owed benefits which were due to him under his contract of employment.

2 Section 29(1)(b)(ii) of the Act provides that an industrial matter may be referred to the Commission by an employee that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment.

3 In Mr Morris' application for contractual benefits he made the following claims:

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

(b) $3,747 in overtime payments;

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

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

(e) $386 reimbursement of car parking costs at Perth Airport when he flew to Karratha to work with Lift Equipt Pty Ltd.

4 It was common ground between the parties that Mr Morris' terms and conditions of employment were set out in a comprehensive written contract of employment which was executed by both parties (ts 3, 1 February 2013). The basis of Mr Morris' claim for payment of overtime was that he was entitled to be paid time and a half for hours worked over 40 hours per week pursuant to the provisions of the *Metal Trades (General) Award 1966* (the award). However, Mr Morris' contracted hourly rate of pay was $44 an hour as a flat rate and was expressed to be inclusive of overtime: cl 4.2 and Item 8 of the Schedule.

5 After hearing evidence from the parties, the Commissioner found that it was clear that Mr Morris had no entitlement under the terms of his contract of employment to any of the claims he made. In respect of each claim the Commissioner made the following findings:

(a) Payment for the balance of Mr Morris' six month period of probation

The relevant terms of the contract did not provide for Mr Morris to be employed by Lift Equipt Pty Ltd for a minimum period of six months. As the contract allowed Lift Equipt Pty Ltd to terminate Mr Morris' employment within the probationary period of six months, Mr Morris was not due to be paid wages for the remaining 22 weeks of the six month period of probation that he did not work for Lift Equipt Pty Ltd.

(b) Overtime payments

The contract did not contain any provision entitling Mr Morris to be paid overtime rates for hours worked in excess of 38 or 40 hours per week. In particular, the contract did not include the overtime provisions contained in the award. Mr Morris was properly paid the additional hours he worked over 38 hours each week at the ordinary rate of $44 per hour in accordance with the terms of the contract.

(c) Reimbursement of the cost of an impact gun and sockets

There was no provision in the contract that Lift Equipt Pty Ltd would reimburse Mr Morris for any tools purchased by him and Mr Morris conceded when giving evidence that there was no verbal agreement that if he purchased these tools Lift Equipt Pty Ltd would reimburse him.

(d) Reimbursement for the cost of prescription safety glasses

There was no term in Mr Morris' contract of employment that he would be reimbursed for the cost of prescription safety glasses. Nor was there any oral agreement which created such an entitlement. Clause 8.4 of the contract provided that Lift Equipt Pty Ltd had an obligation to supply protective equipment to Mr Morris. The evidence given by Mr Brett Johnston was accepted that safety glasses were supplied to Mr Morris at his induction on the first day of his employment and a pair of safety glasses was also available for Mr Morris' use in Lift Equipt Pty Ltd's vehicle.

(e) Reimbursement of Perth Airport parking costs

The contract did not provide for the reimbursement of these costs and there was no evidence that Mr Morris and Lift Equipt Pty Ltd had a verbal agreement for payment of these costs.

6 In the decision delivered by the Commission on 11 March 2013 two orders were made. The first order was that liberty to apply was granted to Lift Equipt Pty Ltd to make an application for costs and the second order was that the application was otherwise dismissed.

7 Lift Equipt Pty Ltd made an application for costs. On 2 July 2013, the decision issued by the Commission making an order for costs which is the subject of this appeal. In reasons for decision delivered by the Commission on 14 June 2013, the Commissioner set out her reasons for making an order for costs. In her reasons she found as follows:

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

> The test to be applied in awarding costs under s 27(1)(c) of the Act is set out in ***Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands*** (1992) 73 WAIG 26 where the Full Bench held that '[t]he general policy in industrial jurisdictions is that costs ought not to be awarded, except in extreme cases' (27). It is also the case that costs may be awarded against a party where an application has no merit and is 'manifestly groundless' or 'so manifestly faulty that it does not admit of argument' (see ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 75 WAIG 9, 11).
>
> I am satisfied that the circumstances of this matter are such as to warrant an order for costs. I find that the applicant's claims for wages and overtime owing to him were groundless, lacked merit and had no prospect of success. Furthermore, the items for which the applicant was seeking reimbursement were not agreed to be paid by the respondent, nor was payment for these items contemplated in the applicant's contract of employment with the respondent. These claims therefore had no prospect of success. After taking into account s 26 considerations, and my conclusions that the applicant's claims were baseless and had no prospect of success, I will order that the applicant pay the respondent some of the costs being sought … [7] - [9].

8 Whilst the Commissioner gave no specific reason why the claim for wages and overtime said to be owing to Mr Morris were groundless, lacked merit and had no prospect of success, her reasons for making this finding were set out in her reasons given on 7 March 2013.

The appeal

9 Mr Morris does not seek to appeal the decision given by the Commission on 11 March 2013 to dismiss his application for contractual benefits. Mr Morris solely seeks to institute an appeal against the decision requiring him to pay an amount of costs to Lift Equipt Pty Ltd.

10 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. Mr Morris filed his notice of appeal and attached grounds of appeal on 24 July 2013. Consequently, the notice of appeal was filed one day out of time.

11 As the grounds attached to the notice of appeal did not appear to address any grounds why the decision to award costs to Lift Equipt Pty Ltd should be set aside, on 9 September 2013 the Full Bench, on its own motion, called the matter on for Mr Morris to show cause why the appeal should not be dismissed for failure to provide particulars of the grounds of appeal and the failure to file and serve an appeal book in the approved form. On 20 September 2013, Mr Morris filed a bundle of documents which he says is an appeal book.

12 The matter was called on for mention on 8 October 2013. However, Mr Morris sought an adjournment as a family emergency arose. After hearing from the representative of Lift Equipt Pty Ltd the Full Bench granted an adjournment and the matter was called on for mention on 21 November 2013. At the hearing on 21 November 2013, Mr Morris was informed by the Full Bench that it would allow him the opportunity of filing written submissions as to why his appeal should be allowed to proceed. On 9 December 2013, Mr Morris filed a brief written submission, together with a number of attached documents.

Should leave be granted to extend time to Mr Morris to institute an appeal?

13 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).

14 In my opinion, this is a clear case where an appeal has no prospects of success. In the document filed on 9 December 2013, Mr Morris sets out a number of matters, many of which are irrelevant. The submissions appear to address a claim that was not made before the Commission and could not have been made before the Commission and that is that his termination of employment by Lift Equipt Pty Ltd was unfair. He does, however, make a submission about his claim for overtime and in his submission he stated:

> The commissioner spent a lot of time finding test cases to support the order she handed down, but failed to read the paper work in front of her, this case was brought to the Industrial Relation Tribunal because of not being paid overtime because everyone gets paid overtime the contract states no overtime paid when your employer asked you to come in on Saturdays and pays you, also has work organised for the days past time for one to go home and pays you, that contract is void as the employer drew up that contract and the contract revert to the rules of the normal employees pay scheme overtime being paid of time and a half, the Commissioner rewarded the other party, now I have to pay costs, if companies are rewarded that behaves in this manner, what is the point of any law or laws to support workers, and on this basics this case must not be closed, this company should not be rewarded anything, the last e/male indicates there was problems with the company and its workers before I arrived this was also produced under the discovery act by Lift Equipt.

15 The first difficulty with this submission is it appears to make a submission that the contract of employment should be amended. This is a submission that cannot be considered in a claim for contractual benefits. It is not open to the Commission to vary the terms of a contract of employment.

16 The second problem with Mr Morris' submission is that in a claim for contractual benefits, the Commission, under s 29(1)(b)(ii) of the Act, has no jurisdiction to hear and determine a claim that is said to be a benefit under an award. In any event, it appears that Mr Morris was paid a rate of pay that was in excess of any amount he could claim under the award. In submissions made on behalf of Lift Equipt Pty Ltd during the hearing at first instance the provisions of the award were addressed in which a submission was made that Mr Morris' contract of employment provided for a rate of pay that was in excess of the amounts that Mr Morris would have been entitled to had the provisions of the award applied. In particular, that if the C 10 award rate was applied, together with a tool allowance of $12.80 per week and a district allowance of $28.50 per week for working in the Karratha area, the rate of pay at normal time under the award would have been $16 per hour. Thus,

the contracted rate of pay of $44 per hour was in excess of double time for all hours worked. Thus, it is clear that Mr Morris' claim for payment of overtime was groundless.

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

BEECH CC

18 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.

SCOTT ASC

19 I have had the benefit of reading the draft reasons for decision of the Acting President. I agree with those reasons. However, I wish to comment regarding the applicant's assertion that 'everyone gets overtime' in the context of examining whether the appeal had any prospects of success. This assertion is not supported by any evidence. Further, due to the nature of the Commission's work, the Commission is familiar with the many and various terms and conditions of employment contracts and awards. From that experience and familiarity, I can say that overtime is not universally paid, that is, not everyone gets overtime.

20 Secondly, in claims of denied contractual benefits made under s 29(1)(b)(ii), such as this claim, the Commission's role is not to create conditions of employment which an applicant may seek but which are not otherwise provided in the contract of employment. It is to determine, amongst other things, whether the benefit claimed existed as a benefit under the contract of employment (*Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307). The contract of employment applicable to the applicant, about which he makes this claim, contains no provision for the payment of overtime.

21 Further, the appellant appears to suggest that a term providing for overtime ought to be implied into the contract because of this being a normal condition of employment. This does not meet the conditions necessary for such an implication (*BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337).

22 In those circumstances, there is no entitlement to overtime under the contract of employment and therefore no benefit could have been ordered by the Commission.

2014 WAIRC 00041

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER EVAN JOHN MORRIS
	APPELLANT
	-and-
	LIFT EQUIPT PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 JANUARY 2014
FILE NO.	FBA 7 OF 2013
CITATION NO.	2014 WAIRC 00041

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Ms M Johnston

Order

This appeal having come on for hearing before the Full Bench on 21 November 2013, and having heard the appellant and Ms M Johnston on behalf of the respondent, and reasons for decision having been delivered on 29 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

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2014 WAIRC 00167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRENDAN REEVE
	APPLICANT
	-and-
	THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 6 MARCH 2014
FILE NO/S	PRES 1 OF 2012
CITATION NO.	2014 WAIRC 00167

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

Order

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

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

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

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

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2014 WAIRC 00148

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	ANIMAL RESOURCES AUTHORITY AND OTHERS
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 FEBRUARY 2014
FILE NO/S	P 1 OF 2014
CITATION NO.	2014 WAIRC 00148

Result	Award varied
Representation	
Applicant	Mr M Sims
Respondent	Ms C Moxey and with her Mr R Heaperman, as agent

Order

HAVING heard Mr Sims on behalf of The Civil Service Association of Western Australia Incorporated and Ms Moxey from Department of Commerce as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Government Officers Salaries, Allowances and Conditions Award 1989* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 27th day of February 2014.

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

SCHEDULE

1. Schedule L – Other Allowances: Delete this schedule and insert the following in lieu thereof:

SCHEDULE L – OTHER ALLOWANCES

(1) Diving - (Clause 44)

$7.14 per hour or part thereof.

(2) Flying - (Clause 45)

(a) Observation and photographic duties in fixed wing aircraft - $13.19 per hour or part thereof.

(b) Cloud seeding and firebombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $18.07 per hour or part thereof.

(c) When required to fly in a helicopter on firebombing duties, observation and photographic duties or stock surveillance - $24.99 per hour or part thereof.

(3) Seagoing Allowances (Clause 51)

(a) Victualling

(i) Government Vessel - meals on board not prepared by a cook - $33.70 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $25.30 per day.

(iii) Non-Government Vessel - $30.75 each overnight period.

(b) Hard Living Allowance - 70 cents per hour or part thereof.

2. Clause 55. – Mortuary Allowance: Delete this clause and insert the following in lieu thereof:

55. – MORTUARY ALLOWANCE

(1) Laboratory Technicians and Assistants employed by the Board of Western Australia Centre for Pathology and Medical Research, engaged in mortuary duties associated with Coronial Inquiries shall receive an allowance of $2,176 per annum, payable by fortnightly instalments.

(2) This allowance is compensation for the following matters:

(a) the disabilities involved in the handling of and autopsy work associated with decomposed, obnoxious, vermin infested and infected bodies; and

(b) the need to perform work in refrigerated and other low temperature storage areas of the Mortuary.

(Operative from the first pay period commencing on or after 27/02/14)

2014 WAIRC 00157

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF COMMERCE AND OTHERS
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 MARCH 2014
FILE NO/S	P 7 OF 2006
CITATION NO.	2014 WAIRC 00157

Result Award varied

Order

HAVING heard Ms J O'Keefe on behalf of The Civil Service Association of Western Australia Incorporated and Ms H Dooley on behalf of the Department of Commerce, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 be varied in accordance with the following Schedule and that such variation shall have effect on and from the 25th day of February 2014.

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

SCHEDULE

1. Clause 12. – Salaries Specified Callings: Delete this clause and insert the following in lieu thereof:

12. - SALARIES SPECIFIED CALLINGS

(1) Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Dental Officer, Dietician, Education Officer, Engineer, Forestry Officer, Geologist, Laboratory Technologist, Land Surveyor, Land Valuer, Legal Officer, Librarian, Medical Officer, Medical Scientist, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, shall be entitled to annual salaries as contained in Schedule E.

(2) Subject to subclause (5) of this Clause, on appointment or promotion to the Level 1 under this clause.

(a) Officers, who have completed an approved three-year tertiary qualification, relevant to their calling, shall commence at the first year increment.

(b) Officers who have completed an approved four-year tertiary qualification, relevant to their calling, shall commence at the second year increment.

(c) Officers, who have completed an approved Masters or PhD degree relevant to their calling shall commence on the third year increment.

Provided that officers who attain a higher tertiary level qualification after appointment shall not be entitled to any advanced progression through the range.

(3) The Executive Director, Labour Relations, Department of Consumer and Employment Protection shall be exclusively responsible for determining the relevant acceptable qualifications for appointment for the callings covered by this clause and shall maintain a manual setting out such qualifications.

(4) The Executive Director, Labour Relations, Department of Consumer and Employment Protection in allocating levels pursuant to subclause (1) of this clause may determine a commencing salary above level 1 for a particular calling/s.

(5) The following conditions shall apply to officers in the callings detailed below:

(a) Education Officers - Officers employed in the calling of Education Officer and appointed or promoted to level 1 under this Award shall commence on the following salary points:

(i) Officers who have completed an approved three-year qualification, relevant to their calling, shall commence at the first year of the range, subject to subparagraph (v) of this subclause.

(ii) Officers who have completed an approved four-year tertiary qualification, relevant to their calling, shall commence at the second year of the range, subject to subparagraph (v) of this subclause.

(iii) Officers, who hold a relevant qualification such as an Honours or other four year degree (or equivalent) plus a Diploma of Education, or a relevant Masters degree or PhD, shall commence at the third year of the range subject to subparagraph (v) of this subclause.

(iv) Officers, who hold a relevant Masters Degree or PhD plus a Diploma of Education, shall commence at the fourth year of the range, subject to subparagraph (v) of this subclause.

(v) Officers, who have not less than two years of relevant experience, shall receive an additional increment at the time of appointment. Where the officer has had three or more years of relevant experience, two additional increments shall be granted at the time of commencement.

(b) Engineers -

(i) Officers employed in the calling of Engineer and who are classified level 1 under this Award shall be paid a minimum salary at the rate prescribed for the maximum of level 1 where the officer is an "experienced engineer" as defined.

For the purposes of this paragraph "experienced engineer" shall mean: -

(aa) An engineer appointed to perform professional engineering duties and who is a Corporate Member of the Institution of Engineers, Australia or who attains that status during service.

(bb) An engineer appointed to perform professional duties who is not a Corporate Member of The Institution of Engineers, Australia but who possesses a degree or diploma from a University, College or Institution acceptable to the Executive Director, Labour Relations, Department of Consumer and Employment Protection on the recommendation of the Institution of Engineers, Australia, and who -

(A) having graduated in a four or five year degree course at a University or Institution recognised by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, has had four years' experience on professional engineering duties acceptable to the employer since becoming a qualified engineer, or

(B) not having a University degree but possessing a diploma recognised by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, has had five years' experience on professional engineering duties, recognised by the employer since becoming a qualified engineer.

(c) Legal Officers - there shall be for the calling of Legal Officer an additional salary point which shall be the salary applicable to Level 6 (maximum) plus a special allowance equivalent to half the difference between Level 6 (maximum) and Level 7.

(d) Medical Officers and Psychiatrists - there shall be for the callings of Medical Officers and Psychiatrists two additional salary points which may be used. These salary points shall be:

(i) The salary applicable to Level 7 plus a Special Allowance equivalent to half the difference between Level 7 and Level 8.

(ii) The salary applicable to Level 8 plus a Special Allowance equivalent to half the difference between Level 8 and Level 9.

(e) Architectural Graduate - Officers employed in the calling of Architectural Graduate, as defined, and appointed or promoted to Level 1 shall commence on the following salary points:

(i) Officers who have completed an approved five-year tertiary qualification, relevant to this calling, shall commence at the second year increment.

(ii) Officers who have completed and approved Masters or PHD degree, relevant to this calling, shall commence at the third year increment.

For the purposes of this paragraph "Architectural Graduate" shall mean an officer who possesses a relevant tertiary level qualification or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection but is not registered with the Architects Board of Western Australia as an Architect, and who undertakes such duties as are necessary for achieving such registration with the Architects Board of Western Australia.

(f) Architect - Officers employed in the calling of Architect, as defined, and appointed or promoted to Level 1 shall commence at the fourth year increment.

For the purposes of this paragraph "Architect" shall mean an officer who possesses a relevant tertiary level qualification or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and possesses the necessary experience and is registered with the Architects Board of Western Australia as an Architect.

(g) Land Valuer –

(i) Officers employed in the calling of Land Valuer who are not licensed will usually be appointed at level 1.1 and progress to level 1.3 by annual increments.

(ii) Officers in the calling of Land Valuer shall not progress beyond Level 1.3 without being licensed.

(iii) On attainment of a licence in accordance with the *Land Valuers Licensing Act 1978* (WA), a Land Valuer shall progress to level 1.4.

(iv) A licensed Land Valuer appointed at level 1 shall have a minimum commencement of level 1.4.

2. Schedule E. – Salaries – Specified Callings: Delete this schedule and insert the following in lieu thereof:

SCHEDULE E. – SALARIES – SPECIFIED CALLINGS

(1) Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Dental Officer, Dietitian, Educational Officer, Engineer, Forestry Officer, Geologist, Laboratory Technologist, Land Surveyor, Land Valuer, Legal Officer, Librarian, Medical Officer, Medical Scientist, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional

calling determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, shall be entitled to annual salaries as follows:

Level	Salary Per Annum$	Arbitrated Safety Net Adjustment$	Total Salary Per Annum$
Level 1			
1.1	28306	15274	43580
1.2	29748	15323	45071
1.3	31346	15377	46723
1.4	33344	15445	48789
1.5	36442	15442	51884
1.6	38461	15403	53864
Level 2			
2.1	40433	15470	55903
2.2	41766	15515	57281
2.3	43151	15562	58713
2.4	44588	15611	60199
Level 3			
3.1	46899	15690	62589
3.2	48470	15743	64213
3.3	50096	15799	65895
3.4	51832	15858	67690
Level 4			
4.1	54494	15948	70442
4.2	56336	16011	72347
4.3	58340	16079	74419
Level 5			
5.1	61597	16190	77787
5.2	63930	16269	80199
5.3	66823	16367	83190
Level 6			
6.1	70436	16490	86926
6.2	72877	16573	89450
6.3	75661	16668	92329
Level 7	79871	16811	96682
Level 8	84081	16954	101035
Level 9	88289	17097	105386
Level 10	92499	17240	109739

SPECIFED CALLING CLASSIFICATION DESCRIPTOR TRANSLATION TABLE

The following table details the translation of specified calling employees to the new classification descriptors.

Previous Level	New Level
Level 2/4.1	Level 1.1
Level 2/4.2	Level 1.2
Level 2/4.3	Level 1.3
Level 2/4.4	Level 1.4
Level 2/4.5	Level 1.5
Level 2/4.6	Level 1.6
Level 5.1	Level 2.1
Level 5.2	Level 2.2
Level 5.3	Level 2.3
Level 5.4	Level 2.4
Level 6.1	Level 3.1
Level 6.2	Level 3.2
Level 6.3	Level 3.3
Level 6.4	Level 3.4

Previous Level	New Level
Level 7.1	Level 4.1
Level 7.2	Level 4.2
Level 7.3	Level 4.3
Level 8.1	Level 5.1
Level 8.2	Level 5.2
Level 8.3	Level 5.3
Level 9.1	Level 6.1
Level 9.2	Level 6.2
Level 9.3	Level 6.3
Class 1	Level 7
Class 2	Level 8
Class 3	Level 9
Class 4	Level 10

2014 WAIRC 00149

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

CHEMISTRY CENTRE RESOURCES AND OTHERS

RESPONDENTS

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S M MAYMAN

DATE FRIDAY, 28 FEBRUARY 2014

FILE NO/S P 2 OF 2014

CITATION NO. 2014 WAIRC 00149

Result Award varied

Representation

Applicant Mr M Sims

Respondent Ms C Moxey and with her Mr R Heaperman, as agent

Order

HAVING heard Mr Sims on behalf of The Civil Service Association of Western Australia Incorporated and Ms Moxey from Department of Commerce as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Public Service Award 1992* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 27th day of February 2014.

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

SCHEDULE

1. Schedule K – Diving, Flying and Seagoing Allowances: Delete this schedule and insert the following in lieu thereof:

SCHEDULE K - DIVING, FLYING AND SEAGOING ALLOWANCES

(1) Diving - (Clause 45)

$7.14 per hour or part thereof

(2) Flying - (Clause 46)

(a) Observation and photographic duties in fixed wing aircraft - $13.19 per hour or part thereof.

(b) Cloud seeding and firebombing duties, observation and photographic duties involving operations in which fixed wing aircraft are used at heights less than 304 metres or in unpressurised aircraft at heights more than 3048 metres - $18.07 per hour or part thereof.

(c) When required to fly in a helicopter on firebombing duties, observation and photographic duties or stock surveillance - $24.99 per hour or part thereof.

(3) Seagoing Allowances (Clause 52)

(a) Victualling

(i) Government Vessel - meals on board not prepared by a cook - $33.70 per day.

(ii) Government Vessel - meals on board are prepared by a cook - $25.30 per day.

(iii) Non Government Vessel - $30.75 each overnight period.

(b) Hard Living Allowance - 70 cents per hour or part thereof.

2014 WAIRC 00156

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF COMMERCE AND OTHERS
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 MARCH 2014
FILE NO/S	P 6 OF 2006
CITATION NO.	2014 WAIRC 00156

Result Award varied

Order

HAVING heard Ms J O'Keefe on behalf of The Civil Service Association of Western Australia Incorporated and Ms H Dooley on behalf of the Department of Commerce, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Public Service Award 1992 be varied in accordance with the following Schedule and that such variation shall have effect on and from the 25th day of February 2014.

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

SCHEDULE

1. Clause 12. – Salaries Specified Callings: Delete this clause and replace the following in lieu thereof:

12. - SALARIES SPECIFIED CALLINGS

(1) Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Dental Officer, Dietician, Education Officer, Engineer, Forestry Officer, Geologist, Laboratory Technologist, Land Surveyor, Land Valuer, Legal Officer, Librarian, Medical Officer, Medical Scientist, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, shall be entitled to annual salaries as contained in Schedule B.

(2) Subject to subclause (5) of this Clause, on appointment or promotion to the Level 1 under this clause.

(a) Officers, who have completed an approved three-year tertiary qualification, relevant to their calling, shall commence at the first year increment.

(b) Officers who have completed an approved four-year tertiary qualification, relevant to their calling, shall commence at the second year increment.

(c) Officers, who have completed an approved Masters or PhD degree relevant to their calling shall commence on the third year increment.

Provided that officers who attain a higher tertiary level qualification after appointment shall not be entitled to any advanced progression through the range.

(3) The Executive Director, Labour Relations, Department of Consumer and Employment Protection shall be exclusively responsible for determining the relevant acceptable qualifications for appointment for the callings covered by this clause and shall maintain a manual setting out such qualifications.

(4) The Executive Director, Labour Relations, Department of Consumer and Employment Protection in allocating levels pursuant to subclause (1) of this clause may determine a commencing salary above level 1 for a particular calling/s.

(5) The following conditions shall apply to officers in the callings detailed below:

(a) Education Officers - Officers employed in the calling of Education Officer and appointed or promoted to level 1 under this Award shall commence on the following salary points:

(i) Officers who have completed an approved three-year qualification, relevant to their calling, shall commence at the first year of the range, subject to subparagraph (v) of this subclause.

(ii) Officers who have completed an approved four-year tertiary qualification, relevant to their calling, shall commence at the second year of the range, subject to subparagraph (v) of this subclause.

(iii) Officers, who hold a relevant qualification such as an Honours or other four year degree (or equivalent) plus a Diploma of Education, or a relevant Masters degree or PhD, shall commence at the third year of the range subject to subparagraph (v) of this subclause.

(iv) Officers, who hold a relevant Masters Degree or PhD plus a Diploma of Education, shall commence at the fourth year of the range, subject to subparagraph (v) of this subclause.

(v) Officers, who have not less than two years of relevant experience, shall receive an additional increment at the time of appointment. Where the officer has had three or more years of relevant experience, two additional increments shall be granted at the time of commencement.

(b) Engineers -

(i) Officers employed in the calling of Engineer and who are classified level 1 under this Award shall be paid a minimum salary at the rate prescribed for the maximum of level 1 where the officer is an "experienced engineer" as defined.

For the purposes of this paragraph "experienced engineer" shall mean: -

(aa) An engineer appointed to perform professional engineering duties and who is a Corporate Member of the Institution of Engineers, Australia or who attains that status during service.

(bb) An engineer appointed to perform professional duties who is not a Corporate Member of The Institution of Engineers, Australia but who possesses a degree or diploma from a University, College or Institution acceptable to the Executive Director, Labour Relations, Department of Consumer and Employment Protection on the recommendation of the Institution of Engineers, Australia, and who -

(A) having graduated in a four or five year degree course at a University or Institution recognised by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, has had four years' experience on professional engineering duties acceptable to the employer since becoming a qualified engineer, or

(B) not having a University degree but possessing a diploma recognised by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, has had five years' experience on professional engineering duties, recognised by the employer since becoming a qualified engineer.

(c) Legal Officers - there shall be for the calling of Legal Officer an additional salary point which shall be the salary applicable to Level 6 (maximum) plus a special allowance equivalent to half the difference between Level 6 (maximum) and Level 7.

(d) Medical Officers and Psychiatrists - there shall be for the callings of Medical Officers and Psychiatrists two additional salary points which may be used. These salary points shall be:

(i) The salary applicable to Level 7 plus a Special Allowance equivalent to half the difference between Level 7 and Level 8.

(ii) The salary applicable to Level 8 plus a Special Allowance equivalent to half the difference between Level 8 and Level 9.

(e) Architectural Graduate - Officers employed in the calling of Architectural Graduate, as defined, and appointed or promoted to Level 1 shall commence on the following salary points:

(i) Officers who have completed an approved five-year tertiary qualification, relevant to this calling, shall commence at the second year increment.

(ii) Officers who have completed and approved Masters or PHD degree, relevant to this calling, shall commence at the third year increment.

For the purposes of this paragraph "Architectural Graduate" shall mean an officer who possesses a relevant tertiary level qualification or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection but is not registered with the Architects Board of Western Australia as an Architect, and who undertakes such duties as are necessary for achieving such registration with the Architects Board of Western Australia.

(f) Architect - Officers employed in the calling of Architect, as defined, and appointed or promoted to Level 1 shall commence at the fourth year increment.

For the purposes of this paragraph "Architect" shall mean an officer who possesses a relevant tertiary level qualification or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and possesses the necessary experience and is registered with the Architects Board of Western Australia as an Architect.

(g) Land Valuer –

(i) Officers employed in the calling of Land Valuer who are not licensed will usually be appointed at level 1.1 and progress to level 1.3 by annual increments.

(ii) Officers in the calling of Land Valuer shall not progress beyond Level 1.3 without being licensed.

(iii) On attainment of a licence in accordance with the *Land Valuers Licensing Act 1978* (WA), a Land Valuer shall progress to level 1.4.

(iv) A licensed Land Valuer appointed at level 1 shall have a minimum commencement of level 1.4.

2. Schedule B – Salaries Specified Callings: Delete this schedule and insert the following in lieu thereof:

SCHEDULE B. – SALARIES – SPECIFIED CALLINGS

(1) Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Dental Officer, Dietitian, Educational Officer, Engineer, Forestry Officer, Geologist, Laboratory Technologist, Land Surveyor, Land Valuer, Legal Officer, Librarian, Medical Officer, Medical Scientist, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection, shall be entitled to annual salaries as follows:

Level	Salary Per Annum$	Arbitrated Safety Net Adjustment$	Total Salary Per Annum$
Level 1			
1.1	28306	15274	43580
1.2	29748	15323	45071
1.3	31346	15377	46723
1.4	33344	15445	48789
1.5	36442	15442	51884
1.6	38461	15403	53864
Level 2			
2.1	40433	15470	55903
2.2	41766	15515	57281
2.3	43151	15562	58713
2.4	44588	15611	60199
Level 3			
3.1	46899	15690	62589
3.2	48470	15743	64213
3.3	50096	15799	65895
3.4	51832	15858	67690

Level	Salary Per Annum$	Arbitrated Safety Net Adjustment$	Total Salary Per Annum$
Level 4			
4.1	54494	15948	70442
4.2	56336	16011	72347
4.3	58340	16079	74419
Level 5			
5.1	61597	16190	77787
5.2	63930	16269	80199
5.3	66823	16367	83190
Level 6			
6.1	70436	16490	86926
6.2	72877	16573	89450
6.3	75661	16668	92329
Level 7	79871	16811	96682
Level 8	84081	16954	101035
Level 9	88289	17097	105386
Level 10	92499	17240	109739

SPECIFED CALLING CLASSIFICATION DESCRIPTOR TRANSLATION TABLE

The following table details the translation of specified calling employees to the new classification descriptors.

Previous Level	New Level
Level 2/4.1	Level 1.1
Level 2/4.2	Level 1.2
Level 2/4.3	Level 1.3
Level 2/4.4	Level 1.4
Level 2/4.5	Level 1.5
Level 2/4.6	Level 1.6
Level 5.1	Level 2.1
Level 5.2	Level 2.2
Level 5.3	Level 2.3
Level 5.4	Level 2.4
Level 6.1	Level 3.1
Level 6.2	Level 3.2
Level 6.3	Level 3.3
Level 6.4	Level 3.4
Level 7.1	Level 4.1
Level 7.2	Level 4.2
Level 7.3	Level 4.3
Level 8.1	Level 5.1
Level 8.2	Level 5.2
Level 8.3	Level 5.3
Level 9.1	Level 6.1
Level 9.2	Level 6.2
Level 9.3	Level 6.3
Class 1	Level 7
Class 2	Level 8
Class 3	Level 9
Class 4	Level 10

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2014 WAIRC 00073

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY, THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS - WESTERN AUSTRALIAN BRANCH, ELECTRICAL TRADES UNION WA

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE TUESDAY, 4 FEBRUARY 2014

FILE NO/S APPL 2 OF 2014

CITATION NO. 2014 WAIRC 00073

Result Varied

Representation

Applicant Mr R Raven and with him Mr P Robinson

Respondent Ms J Allen-Rana

Other Respondents No Appearance

Order

HAVING heard Mr R Raven and with him Mr P Robinson on behalf of the applicant and Ms J Allen-Rana on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Railway Employees' Award No. 18 of 1969 be varied in accordance with the following schedule and that such variation shall have effect on or from today, 4 February 2014.

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

SCHEDULE

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

4.3. - EXPERIENCE ALLOWANCE

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes:

After 12 months service with the employer - $ 6.10

After 24 months service with the employer - $ 12.40

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete paragraph (a) of subclause 4.4.1 of this clause and insert the following in lieu thereof:

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of $15.20 per week to such tradesperson/apprentice.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 - Leading Hands: Delete this clause and insert the following in lieu thereof:

4.5. - LEADING HANDS

Leading Hands shall be paid the following rate per week:

(a) Class 3

When in charge of not less than three and not more than ten others, paid $28.20 extra per week

(b) Class 2

When in charge of more than 10 but fewer than twenty others, paid $42.50 extra per week

(c) Class 1

When in charge of more than twenty others, paid $54.70 extra per week

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 4.6. - Electrical Licence Allowance: Delete this clause and insert the following in lieu thereof:

4.6. - ELECTRICAL LICENCE ALLOWANCE

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $20.10 per week.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.1 – On Call Allowances: Delete subclause 5.1.2 - On Call Allowance of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of $4.17 per hour.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3 - After Hours Contact: Meals and Expenses: Delete paragraph (a) of subclause 5.3.1 – Meal Breaks of this clause and insert the following in lieu thereof:

(a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of $10.60 as provided under this Award.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics

7. Clause 5.4. - Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where sub clause 5.4.1. applies, the employee shall be paid an allowance of $45.40 per day except when the accommodation includes dining facilities and meals, in which case an allowance of $34.00 per day shall be paid.

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of $11.95 per day.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.6. - Travelling Time – Traffic: Delete subclauses 5.6.2 and 5.6.3 of this clause and insert the following in lieu thereof:

5.6.2 When the distance the employee is required to travel from the usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employees home depot, the employee shall be paid an allowance of $1.66 per kilometre in both directions for the extra distance the employee is required to travel.

Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance travelled. It will be adjusted from time to time in accordance with changes to the Department of Transport Taxi Industry Board (as reorganised, renamed or superseded) metropolitan weekday Tariff 1 rate per km.

5.6.3 When the period of relief is for one week or less an allowance of $6.95 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.

The above rate will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

9. Clause 5.7. - Meal Allowance: Delete subclauses 5.7.1 and 5.7.2 of this clause and insert the following in lieu thereof:

5.7. - MEAL ALLOWANCE

5.7.1 Refreshment Allowance

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of $5.35 where:

(a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and

(a) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid $10.60 in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above rate will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

10. Clause 5.8. - Shifts and/or Night Work Allowance - (Six - Day Shift Work): Delete subclause 5.8.1 of this clause and insert the following in lieu thereof:

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

(a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $2.52 an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of $2.90 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of $2.52 an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of $2.90 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of $3.00 per hour.

The above rates will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

PUBLIC SERVICE ARBITRATOR—Matters dealt with—

2003 WAIRC 08587

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, MINISTRY OF JUSTICE

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 30 JUNE 2003

FILE NO/S P 27 OF 2001

CITATION NO. 2003 WAIRC 08587

Catchwords	Employee discipline – Disciplinary charges **–** Disciplinary charges withdrawn – No penalties imposed on officers – Report prepared as to whether other officer acted improperly – Order for production of report sought – Jurisdiction of public service arbitrator – Principles of equity – Whether denied — Report ought not be provided – Jurisdiction to order apology doubted – No jurisdiction to award compensation – Application dismissed – *Industrial Relations Act 1979 (WA)* s 7, s 26(1)(a), s 27(1)(a), s 33(3), s 33(4), s 33(5), s 49(a), s 80E, s 80F, s 80I; *Public Sector Management Act 1994 (WA)* s 29(1); *Prisons Act 1981 (WA)* s 9; *Freedom of Information Act 1992 (WA)* s 90, Sch 1, cl 5(1)(b); *Workplace Relations Act 1996 (Cth)* "industrial matter"; "industrial dispute"
Result	Application dismissed. Order issued
Representation	
Applicant	Ms M In De Braekt of counsel
Respondent	Mr R Andretich of counsel

Reasons for Decision

1 This application is brought pursuant to ss 80E and 80F of the Industrial Relations Act 1979 ("the Act"). The application relates to a matter that has a long and somewhat torturous history. The applicant seeks orders for the production of a copy of a document known as the "Hedges Report" to three senior present and former officers of the prison's division of the respondent, Messrs John MacColl, James Fisher and Dean McClue ("the Senior Officers"). The report was prepared by Mr Frank Hedges, arising, in short, from concerns expressed by the Senior Officers, concerning disciplinary proceedings taken against them, which were ultimately abandoned, pursuant to the Public Sector Management Act 1994 ("the PSM Act").

2 The specific orders sought by the applicant are set out in the notice of application and are as follows:

> *1. The decision of the respondent to deny Messrs MacColl, Fisher and McClue access to the "Hedges Report" and related documents is void ab initio.*
>
> *2. The respondent is to provide to the applicant and to Messrs MacColl, Fisher and McClue, complete and unedited copies of the Hedges Report and all related documents, within 7 calendar days of the date of this order.*
>
> *3. Within 7 days of the date of this order, the respondent is to provide a written apology to the employees for any detriment they suffered as a result of the disciplinary proceedings taken against them and subsequently discontinued by the respondent.*
>
> *4. The respondent is to pay Messrs MacColl, Fisher and McClue damages (insert specific amount)* within 7 days of the date of this order, for breaching its obligation to maintain faith and confidence in the employment relationship, by failing to provide them with a copy of the Hedges Report.*
>
> ** The applicant respectfully reserves the right to address the PSA on the quantum of damages payable by the respondent, in the event that the applicant proves its case, and accordingly a specific amount of damages would then need to be inserted.*

3 The respondent, by notice of answer and counter proposal, objected to and opposed the applicant's claim for relief. Furthermore, issue was taken with the Commission's jurisdiction to make orders as sought by the applicant primarily on the grounds that the subject matter of the application was not an industrial matter, for the purposes of s 7 of the Act. This matter came before Scott C and she determined, by decision dated 19 December 2001 that the subject matter of the application was an industrial matter for the purposes of the Act: (2002) 82 WAIG 104.

4 The substantive application was reallocated to the Commission as presently constituted.

Background

5 As I have already observed, the history of the matters underlying these proceedings, is long indeed. The proceedings arise from an incident that occurred in September 1992, in relation to the recovery of a prisoner from the roof of the special handing unit at Casuarina Prison on 19 September 1992. Disciplinary proceedings were commenced by the respondent, arising out of this incident. Given the extensive history, which was set out in some detail in the respondent's written outline of submissions, I reproduce relevant parts of that outline, as it helpfully traces the background to the present proceedings as follows:

> *"The applicant has sought orders in connection with disciplinary proceedings instituted by the Director General against three employees, Mr MacColl, Mr McClue and Mr Fisher. Those disciplinary proceedings were commenced at the time when Mr MacColl was the Acting Director of Prison Operations, Mr Fisher, the Superintendent of Casuarina Prison and Mr McClue the Deputy Superintendent. The employees are Public Service Officers under the Public Sector Management Act.*
>
> *The events in respect of which the disciplinary actions were commenced concerned the recovery of Prisoner Chapman from the roof of the Special Handling Unit in Casuarina Prison on the 19th of September, 1992.*
>
> *Superintendent Peter Moore was appointed by the then Director General, Mr Grant, by notice dated the 30th of September, 1994, to undertake an inquiry at Casuarina pursuant to section 9 of the Prisons Act into matters coming within the terms of the notice. One of those matters investigated was the recovery of Chapman. Mr Moore's investigations led him to believe that Chapman may have been assaulted by seven MSU officers to an extent beyond that*

which was reasonable to secure his recovery. It was possible then that Fisher and McClue who were present witnessed the assault but had failed to mention it in their initial reports and interviews he had with them in October of 1994 whilst conducting his section 9 investigation.

On the basis of Mr Moore's investigations Mr McClue was on the 26th of May 1995 charged under the Public Sector Management Act with witnessing Prisoner Chapman's assault but that he had "failed to report fully and accurately the circumstances of the above incident in your formal statement provided to Reporting Officer Superintendent Peter R Moore on 10th October, 1994 at Casuarina Prison". The charge was made by the then Director General, Mr Grant.

Mr Fisher was charged by the Director General on the 25th of May, 1995, with having witnessed prisoner Chapman being assaulted by the use of force which was excessive to that necessary and that Mr Fisher was "negligent in the discharge of your duties in failing to report fully and accurately the circumstances of the above incident in your formal statement sworn in the presence of Superintendent Moore at 19 Pier Street, Perth, on the 11th of October, 1994".

Mr Fisher was the subject of a further charge in similar terms except that he was alleged to have been "negligent in the discharge of your duties in failing to report fully and accurately the circumstances of the above incident in your formal written report dated 21st September, 1992."

Mr MacColl was not present at Casuarina during the recovery of prisoner Chapman. He was charged under the Public Sector Management Act on the 16th of March, 1995 by Director General Grant, that in preparing "your report dated 4th December, 1992, in the manner and in all the circumstances alleged herein you were neglectful in complying with the Executive Director's instruction, dated 26th November, 1992 to re-examine and re-evaluate the pertinent circumstances relating to the Chapman incident, with the appropriate level of care and attention which could reasonably be expected of a person in your position, resulting in your report being less than full and accurate as it should have been as to the fact and detail and making it, consequently, misleading in content."

The product from Mr Moore's section 9 enquiries was referred to the Director of Public Prosecutions who carried out his own investigations. The result was that criminal charges were laid against the seven MSU officers, Mr McClue, Mr Fisher and one other. Mr McClue and Mr Fisher were charged on the 16th of January, 1995 with being accessories after the fact and attempting to pervert the course of justice. Those charges proceeded to a committal hearing on the 26th of June, 1995, at which both gave evidence. Both were committed for trial to the District Court, as were the 7 MSU officers.

The indictment against Mr Fisher and Mr McClue is in identical terms. It provides:

"On the 10th of October, 1994, at Casuarina by providing false or misleading information as to the circumstances in which Derek Chapman, a prisoner at Casuarina, sustained injuries on the 19th of September, 1992, to Peter Ronald Moore, an officer appointed pursuant to section 9 of the Prisons Act 1981 to enquire into and report upon any matter which touched upon or bore upon the fulfilments of duties and activities of employees of the Ministry of Justice at Casuarina Prison and their effect on the prisoners at that prison, attempted to pervert the course of justice upon the prosecution of a prison officer or officers in respect of any disciplinary offence or criminal offence arising out of the said inquiry."

A second count against each provides:

On the 11th of October, 1994, at Perth by providing false or misleading information as to the circumstances in which a chemical agent was applied to Derek Chapman, a prisoner at Casuarina Prison, on 19th September, 1992 to Peter Ronald Moore, an officer appointed pursuant to section 9 of the Prisons Act 1981 to enquire into and report upon any matter which touched upon or bore upon the performance of duties and activities of employees of the Ministry of Justice at Casuarina Prison and their effect on prisoners at that prison attempted to pervert the course of justice upon the prosecution of a prison officer or officers in respect of any disciplinary offence or criminal proceeding arising out of the said inquiry. (28 of the Respondent's Docs)

The similarity between the indictment and the disciplinary charges is apparent.

On application by the accused, including Messrs Fisher and McClue, a voir dire was held before Judge Jackson in the District Court on the 16th of February, 1996 specifically to determine the admissibility of the statements made to Mr Moore in October, 1994, which are germane to the disciplinary and criminal charges. It was submitted that the statements were given under compulsion and unfairly obtained. In his reasons Judge Jackson dismissed both of these contentions and referred unfavourably to the attack which was made upon Mr Moore's character (63 of Respondent's Docs). He found Superintendent Moore to be "an impressive and courageous witness" and "where there is a significant or relevant difference between the evidence called by the Crown and that of any of the accused I prefer that led by the Crown. Let me explain here that I positively disbelieve a number of the accused's for reasons I will for the most part only touch on. Those reasons include not only that some of the accused made serious allegations against Superintendent Moore …but that their own evidence lacked credibility. Some of them went out of their way indeed to blacken Superintendent Moore's name by innuendo that he was untrustworthy. In my assessment a number of the accused were untrustworthy and dishonest witnesses themselves. That this includes people of the rank of Prison Superintendent is a matter of grave concern." (615 Transcript).

In relation to Mr Fisher Judge Jackson accepted Mr Moore's evidence where there was a difference with Mr Fisher's. Mr Fisher's evidence that he did not voluntarily attend the interview on the 10th of October sat ill "with his evidence that there had been no wrongdoing during the Chapman incident; indeed that he had recommended commendations for those involved, that he was not worried about appearing before the inquiry, which he wished to reach a truthful understanding, and that he wanted to tell what he knew."

In relation to Mr McClue again Judge Jackson preferred Superintendent Moore's evidence. He concluded at page 622 of the transcript: "I see nothing legally wrong with the procedures followed or the uses to which the provisions have been put - nor anything inconsistent with public policy. The implication that Fisher, McClue and Touchell were tricked into admitting that they were present falls very poorly from men of experience and seniority entrusted with the management of prisons and the care of prisoners."

It is important to note that the voir dire proceedings continued for one week and were devoted to simply the admissibility of the statements taken by Mr Moore during the section 9 proceedings from the ten accused. Against the assessment made by Judge Jackson and the time devoted to determining whether the statements were properly obtained one wonders what purpose has been achieved in going over this ground again.

What Judge Jackson identified as unworthy gratuitous attacks made by the employees on Mr Moore has been a feature of his involvement in the section 9 proceeding from the time he was appointed to conduct them. This is something that I will return to later.

The disciplinary charges were stayed pending the outcome of the criminal hearings. The MSU officers trials proceeded in the first instance only in relation to the attempt to pervert the course of justice in respect of which the charges of acquittal were returned by the jury on the 28th of November, 1996. Fisher, McClue and Touchell's trial on this charge proceeded in December of 1996 with the jury returning an acquittal on the 18th of December 1996 in relation to the counts involving an attempt to pervert the course of justice.

On the 14th of January, 1997, the Director of Public Prosecutions advised Fisher and McClue that he would discontinue the prosecution of the remaining offences of being accessories after the fact to an indictable offence. A nolle prosequi was provided to the Court on the 19th of February, 1997. (30 of Respondent's Docs)

By letter dated 31st January, 1997, the then Director General, Mr Byron, advised each of the employees that he had reviewed the outstanding disciplinary matters involving them and had decided that the charges would not be proceeded with. It is important to quote the remainder of his letter to the employees:

> *"I also therefore wish to inform you that, unless you expressly request to the contrary, any record appearing on your personal file held by the Ministry pertaining to the institution of the disciplinary proceedings leading up to and including the laying of the charge, is to be removed from that file.*
>
> *As your employer I advise that neither the history of the disciplinary proceedings generally, nor any record relating thereto, which is required to be retained by the Ministry, will be allowed so far as the Ministry is concerned to prejudice your future in the Ministry of Justice." (31, 67, 118 of Respondent's Docs)*

Throughout the section 9 investigation and the disciplinary process the employees have alleged procedural irregularity, abuse of position, bias and dishonesty on the part of Mr Moore, notwithstanding his behaviour being the subject of scrutiny on three occasions by the District Court, the Director of Public Prosecutions and the Magistrate in the committal proceedings.

Initial complaints made to the Director General regarding the section 9 process and disciplinary proceedings were resolved to the satisfaction of the Director General to whom they were made but not to the employees. Ultimately complaints regarding Mr Moore's conduct made to the Anti Corruption Commission and the Public Sector Standards Commission were referred to the Director General for investigation in January, 1999. The Anti Corruption Commission recommended that an independent person be appointed to investigate the complaints. As a result the Director General entered into an agreement with Mr Frank Hedges, dated the 22nd of February, 1999, by which it was agreed Mr Hedges was to be "engaged to conduct a preliminary investigation of all of the matters contained in the complaints of Messrs J P Fisher, A D McClue, M T Touchall, J A Schilo and J D R MacColl outlined in a letter dated 7th January, 1999 from the Anti-Corruption Commission ……. the consultant shall report to the Director General on the result of his preliminary investigation and make recommendations as to whether an inquiry should be undertaken under the Public Sector Management Act 1994." Paragraph 4 of the agreement is the relevant paragraph in so far as Mr Hedges' task is concerned and clause 3 of the schedule to the agreement. (86 of Respondent's Docs)

Mr Hedges completed his report around September of 1999. The Director General considered the report and advised the employees for reasons contained in his letters, to which I will refer later, that he was not prepared to provide the report or to action its recommendations. His decision was accepted by the agencies which referred the employee's complaints, that is the Anti Corruption Commission and the Public Sector Standards Commissioner."

Jurisdiction

6 As I have already observed, Scott C has previously determined in this matter, that the subject matter of these proceedings is an industrial matter for the purposes of s 80E(1) of the Act, dealing with the jurisdiction of a Public Service Arbitrator. Relevantly, s 80E(1) provides as follows:

> *(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a Government officer, a group of Government officers or Government officers generally."*

7 Despite the earlier determination by Scott C on this question, counsel for the respondent, Mr Andretich pressed the point again, before the Commission as presently constituted, that the subject matter of these proceedings did not constitute an industrial matter, for the purposes of s 80E(1) of the Act, and was therefore beyond jurisdiction and power.

8 I do not consider myself bound by the decision of Scott C on this question. I note that the decision of Scott C was the subject of an appeal to the Full Bench of this Commission in appeals FBA 3 and 4 of 2002: (2002) 82 WAIG 752. FBA 3 of 2002, an appeal instituted by the respondent in these proceedings, raised the issue which Mr Andretich now presses again. For reasons

not relevant for present purposes, appeal FBA 3 of 2002 was dismissed on the basis that the Full Bench was not persuaded that there was a sufficient factual substratum in the decision of Scott C under appeal, to demonstrate that there was a serious question of jurisdiction to be determined. It was held therefore, that the Full Bench had not been persuaded, that in the public interest an appeal should lie, for the purposes of s 49(2)(a) of the Act. Appeal FBA 4 of 2002, was discontinued by leave. As a consequence of those proceedings, the Full Bench did not determine the question of jurisdiction now raised again.

9 It is trite to observe that it is not every matter that constitutes an industrial matter for the purposes of the Commission's and Arbitrator's jurisdiction under the Act. There has been an abundance of authority by way of decisions of the Full Bench and the Industrial Appeal Court, as to the scope and meaning of industrial matter for the purposes of s 7 of the Act.

10 As part of dealing with the issue of jurisdiction, it is necessary to canvas the evidence led in these proceedings, as that goes directly in my opinion, to the necessary substratum of fact, in order that the question of jurisdiction can be determined. Extensive evidence was given in these proceedings by the Senior Officers, Mr D Seal, a former employee relations manager of the respondent, Ms Maureen Smith, a management consultant and Mr Alan Piper, the executive director of the respondent. The respondent also called a number of witnesses including the original inquirer under s 9 of the Prisons Act 1981 ("the s 9 Inquiry") Mr Moore, Mr Terry Simpson and Ms Stephanie Withers, other senior officers of the respondent.

11 It would appear to me that, notwithstanding the proceedings before Scott C were dealt with on the basis of submissions only, for the question of jurisdiction to be determined, a substratum of facts would need to be established, as to if and how the report the central subject of these proceedings, known as the "Hedges Report", concerns the "work, privileges, rights or duties" of the officers concerned, in connection with the employee/employer relationship on foot at the material times. I have some doubts, as to whether that matter can be determined in isolation from evidence as to the relevant facts, including jurisdictional facts, as they existed at the material times.

12 Mr MacColl has been employed continuously in this State as a public servant for 27 years. Since about 1993, Mr MacColl has been employed by the respondent and prior to that, the Department of Corrective Services. As at the time of these proceedings, Mr MacColl held the position of director regional prisons, prison services level 9 of the respondent. In this capacity, Mr MacColl was responsible for the management of all regional prisons and work camps in the State. He was a member of the senior executive service.

13 Mr MacColl, in his affidavit tendered as exhibit A52, outlined the background to the preparation of the Hedges Report, which commenced in September 1992, concerning the recovery of prisoner Mr Derek Chapman from the Casuarina prison. In particular, Mr MacColl testified in relation to charges laid against him in March 1995 under the PSM Act, arising from his alleged negligent report into the Chapman incident.

14 As a consequence, Mr MacColl said that he was transferred from the respondent to the Education Department for 12 months from March 1995. In July 1996, when he attempted to return to work with the respondent, Mr MacColl testified that he was advised that if he did so, no meaningful work would be assigned to him. From July to November 1996, Mr MacColl said that the respondent expected him to remain at home, whilst still being paid. Instead, Mr MacColl did other things.

15 During the two-year period in relation to which these disciplinary proceedings took place Mr MacColl said that he was subject to considerable stress and anxiety, by reason of the publicity that the matters received in the press. In January 1997, MacColl, along with Mr Fisher and Mr McClue commenced proceedings in the Supreme Court for prerogative writs in relation to the outstanding disciplinary and substandard performance proceedings. Shortly thereafter, on 31 January 1997, MacColl, along with Mr Fisher and Mr McClue, were advised by the respondent that it no longer intended to pursue the disciplinary charges and no further action would be taken. Mr MacColl said that the respondent provided no reasons for its decision and he never received any apology or expression of regret, privately or publicly, for the stress and detriment he said he suffered during the course of this period. It was Mr MacColl's evidence that he found the manner in which the respondent discontinued the proceedings, to be hurtful and demeaning, particularly given the length of time that the matters had been on foot.

16 Mr MacColl testified about complaints he made in 1998 to the Anti Corruption Commission ("ACC") about the manner in which the respondent had conducted itself in the disciplinary proceedings taken against him. In October 1998, Mr MacColl was advised by the ACC that it had recommended to the respondent, that a review of its conduct in the disciplinary proceedings against Mr MacColl be undertaken. As a consequence of several freedom of information applications, and other steps taken, Mr MacColl received copies of documents described as the "Smith Report"; the "Wallace Report", and the "Flack Report", arising from the respondent's conduct in the s 9 inquiry and subsequent disciplinary and substandard performance proceedings and his transfer to the Education Department. Copies of these reports were provided to Mr MacColl.

17 In February 1999, Mr MacColl was informed that Mr Frank Hedges had been appointed to enquire into both his and Mrs Fisher and Mr McClue's complaints concerning the respondent's handling of the disciplinary proceedings. Mr MacColl gave evidence about the involvement he had in this process, including being interviewed by Mr Hedges on at least two occasions. In April 2000, Mr MacColl became aware that Mr Hedges had concluded his inquiries, and the Hedges Report had been produced. Despite requests, Mr MacColl was denied access to a copy of the Hedges Report. Mr MacColl became aware that copies of the Hedges Report had been provided to the ACC and the Office of the Public Sector Standards Commissioner, both of whom were satisfied with the content of it and no further action would be taken. A copy of the Hedges Report was not given to the Senior Officers, on the grounds of confidentiality.

18 Ultimately, the Senior Officers approached the applicant to commence proceedings before the Arbitrator, in relation to these matters.

19 Mr MacColl gave evidence generally about the impact of not receiving a copy of the Hedges Report had on him. He testified that from his participation in the inquiry, he always had an expectation that a copy of it would be provided to him at the conclusion of the process. This was so on Mr MacColl's evidence, because the inquiry had been initiated by himself and his colleagues, and in his view, directly related to him. Mr MacColl testified that it was always his understanding, that through his full and frank participation in the Hedges inquiry, that its purpose was to provide an open and transparent examination of the

respondent's treatment of him and Mrs Fisher and Mr McClue. It was Mr MacColl's evidence, that seeing the Hedges Report, would, because of all of the stress and disruption to his life arising from the disciplinary proceedings, bring "closure" to the whole affair. He said that for nearly two years, he had these matters constantly on his mind. He testified that the Hedges Report may help to clarify any misunderstandings and inaccuracies, arising from the disciplinary proceedings.

20 In general terms, Mr MacColl testified that as a consequence of the respondent's failure to provide a copy of the report to him, he has experienced stress and anxiety, anger and a loss of faith and confidence in the respondent's commitment to openness and transparency under the PSM Act.

21 Mr Fisher has been continuously employed as a public servant in the prison system for about 29 years in this State. At the time of these proceedings, he held the position of assistant director, training and specialist services level 9 at the respondent. In that position, Mr Fisher was responsible for staff training, information analysis and emergency support work. As with the other Senior Officers, Mr Fisher outlined the background to the alleged misconduct and criminal charges brought against him.

22 Mr Fisher referred to the publicity surrounding the Chapman incident, and the stress and anxiety that this caused both he and his family. Additionally, Mr Fisher referred to complaints by he and his colleagues, to various agencies, concerning the conduct of the s 9 Inquiry and subsequent events. He testified that he received a copy of the Smith Report, and accordingly, assumed, from his participation in the Hedges inquiry, that likewise, he would receive a copy of the Hedges Report. Mr Fisher testified as to the effect that the respondent's failure to provide a copy of the Hedges Report has had on him, in terms of frustration, anger and a loss of confidence and respect for the respondent. It was his evidence, that from his dealings with Mr Hedges, he had the clear impression that when the inquiry was complete, he would receive a copy of the Hedges Report.

23 In relation to the Smith Report, Dr Smith was called by the applicant. She gave evidence about her background in conducting inquiries on behalf of public sector agencies, having formerly occupied a senior management role in a government department. Dr Smith testified that in September 1999, she was requested to undertake an inquiry and report on Mr MacNaughton, the then manager of the internal investigations unit of the respondent, concerning his investigation into Mr Fisher. She testified that she was to inquire into possible non-compliance with the terms of the Public Sector Code of Ethics, public sector standards, the offender management Code of Conduct, and general principles of human resource management under the PSM Act. Dr Smith said there was no reference to a grievance or grievance resolution in her terms of reference. Her evidence was she was requested to undertake this inquiry under s 29(1) of the PSM Act.

24 Having completed her enquiries and submitted a report to the respondent in October 1999, it was her evidence that she understood a copy of the Smith Report was given to Messrs MacNaughton and Fisher. Her evidence also was that where such reports directly affect the rights and interests of particular persons, those persons are generally given a copy of the report, even if possible disciplinary proceedings may arise.

25 In relation to the respondent's policy on the release of reports, the applicant called Mr David Seal to give evidence. Mr Seal was employed by the respondent between May 1996 and April 2000, in various employee relations management roles. He testified that in these positions, he had regular involvement in various enquiries, discipline proceedings, and other matters, which required him to have a sound knowledge of the respondent's policies, practices and procedures.

26 According to Mr Seal, he was never aware of any policy as such, that would preclude the provision of the Hedges Report, to the Senior Officers. Mr Seal testified that occasions where reports may not be provided, involved investigations by the internal investigations unit, and possibly equal opportunity complaints. Mr Seal said he was aware of the allegations made by Messrs Fisher, MacColl and McClue. His evidence was that from his experience, he was surprised that they were not provided with a copy of the Hedges Report.

27 The author of the Hedges Report, Mr Hedges, was also called to give evidence. He testified that in February 1999 he was engaged by the director general of the respondent, to conduct a preliminary investigation into complaints made by Mrs Fisher, Mr MacColl and Mr McClue, into the manner in which they were allegedly treated by the respondent flowing from the s 9 Inquiry. Mr Hedges outlined the process he undertook in his inquiry, and that he interviewed the Senior Officers concerned. As to the release of any report, it was Mr Hedges' evidence that this matter was not directly raised by the respondent with him. However, it was Mr Hedges' evidence that he thought it likely that there may be some content of the report not known to the Senior Officers, and from a personal perspective, would have no difficulty in a copy of his report being made available to them.

28 Mr Moore is presently in the position of monitor, custodial contracts in the prisons division of the respondent. He has been employed by the respondent for about 22 years. Mr Moore gave evidence about how he became involved in the Chapman incident and his conduct of the s 9 Inquiry. Mr Moore testified that from the outset of the section 9 Inquiry process, Messrs Fisher, MacColl and McClue accused him of bias. As a result, it was agreed with the then director general of the respondent, that Mr Moore would make no "end of line" decisions as to any outcomes from the s 9 Inquiry, with all such decisions being made by the director general, upon legal advice.

29 In terms of the section 9 Inquiry itself, Mr Moore testified that the enquiries into the Chapman incident, was only one of some 37 lines of inquiry the subject of the process. In terms of his relationship with the Senior Officers, Mr Moore testified that since the s 9 Inquiry, he has come under sustained attack from them through various agencies, referred to above.

30 In relation to the Hedges Inquiry, Mr Moore said that because his concerns as to the process, he declined to be interviewed. This was also because he was the subject of the inquiry process.

31 Overall, Mr Moore described the Senior Officers' conduct, flowing from the s 9 Inquiry, as a form of vendetta against him which in his view, would only continue if the Hedges Report was released. It was Mr Moore's strong view in evidence, that if the Hedges Report was made available to the Senior Officers, then it would be selectively used against him as a part of this ongoing and very long standing campaign. This campaign against him, included according to Mr Moore, contrived allegations

as to his conduct, which were never substantiated. In short, Mr Moore said that if the Hedges Report is released, then there will be no end to these matters.

32 Allegations in relation to damage to the careers of the Senior Officers were responded to by Mr Terry Simpson. Mr Simpson is the executive director prisons division of the respondent. He testified that he has known the Senior Officers and has worked with them for a considerable period of time. Mr Simpson testified that all three of the Senior Officers are well thought of and highly regarded within the prison system. His evidence was that in his view, from his direct experience, none of them had been prejudiced in any way, as a result of the discontinuance of the disciplinary proceedings.

33 As to any policy in the release of such a report, Mr Simpson said that according to his understanding, reports such as the Hedges Report are not released and are available only to those who "need to know", which in this case, did not include himself.

34 In relation to the respondent's policy on such matters, Ms Withers, the director of human resources, testified that reports in relation to whether disciplinary charges should be instituted against an employee are not released by the respondent. This has been the case as far as she can recall and for as long as she has occupied her present position, since January 1997.

35 Ms Withers testified that because of the nature of these enquiries and reports, confidentiality is paramount. This is because of the potential damage that may be caused by the release of such documents, given that no decision may be made to institute disciplinary proceedings. In the case of the Hedges Report, Ms Withers said that it would be consistent with this practice, for the Senior Officers to not be given a copy of it. It would be normal procedure however, for the subject of the inquiry, in this case Mr Moore, to be given an opportunity to respond.

36 In terms of other reports, Ms Withers distinguished the Smith Report as being a grievance report pursuant to s 29(1)(l) of the PSM Act. In relation to the Flack and Wallis Reports, she testified they were produced by the Public Sector Standards Commission, and not the respondent. It was a decision by that agency, to release those reports.

37 The question of confidentiality of such investigation reports, was also dealt with in the evidence of Mr Langmair the manager of the internal investigations unit of the respondent. He outlined the role of the internal investigation unit, and the types of inquiries used by it. Mr Langmair's evidence was that given that investigations conducted by his unit rely heavily upon information given by various persons including informants, in the interests of protecting identities of persons providing information, those reports are not released. His evidence was the release of reports such as this, would greatly diminish the capacity of the respondent to properly investigate such kinds of matters.

38 The Smith Report was also commented on by Mr Harvey, who was at the time of that matter, executive director offender management of the respondent. Mr Harvey gave evidence that Dr Smith was retained to investigate allegations made by Mr Fisher, with such an investigation having the purpose of forming part of the grievance resolution process in accordance with s 29(1)(l) of the PSM Act. He testified that there was no intention that this process be used as a preliminary investigation into whether discipline ought to be imposed. As it was a grievance resolution report, copies were provided to both Messrs MacNaughton and Fisher for comment.

39 Mr Piper, the director general of the respondent was called to give evidence by the applicant under summons. He has been a public servant for about 30 years. Mr Piper said that the Hedges Report was a result of a preliminary investigation by Mr Hedges into the conduct of Mr Moore, arising from complaints by the Senior Officers. The Hedges Report, according to Mr Piper, does not deal with whether the Senior Officers were treated properly or improperly, in relation to the disciplinary proceedings commenced against them.

40 It was Mr Piper's evidence that it was not his practice, previously or now, to publish disciplinary reports because of the large number of vexatious complaints that are made. Mr Piper sought to compare and contrast the Hedges Report from the Smith matter, with the latter being a grievance inquiry properly involving both the complainant and the subject.

41 It was said by Mr Piper, that the respondent's long standing practice, as far as he could recall, was for disciplinary reports not being released given their nature and potential prejudicial effect on other employees.

42 Mr Piper also expressed the view, that given the concerns expressed by the Senior Officers, the content of the Hedges Report does not deal with them, rather it deals with Mr Moore, and he did not consider that provision of the Hedges Report would in any way bring closure to the matter for the Senior Officers. In this regard, Mr Piper referred to a letter dated 15 December 2000, to each of the Senior Officers. In that letter, Mr Piper confirmed that the Hedges Report would not be released, as it was treated as a confidential report and exempt matter pursuant to clause 5(1)(b) of Schedule 1 of the Freedom of Information Act 1992 ("FOI Act"). Given its significance, that letter, formal parts omitted, is reproduced as follows:

> *"As you are aware, Mr Hedges has finalised his review into the matters referred from two external agencies. As a matter of policy, this is being treated as a confidential report to myself and is held as an exempt matter under clause 5(1)(b) to Schedule 1 of the Freedom of Information Act 1992. I therefore do not intend to release the report outside the provisions of the FOI Act. I am willing, however, to share with you the outcome of the review and how the decision was derived at.*
>
> *The review found that some matters could be dismissed and other matters may merit further inquiry under the Public Sector Management Act 1994. I took careful consideration of Mr Moore's submission in defence of the allegations and took legal opinion on the recommendations.*
>
> *It was considered that, due to the detailed nature of the review and the elapse of time, it was unlikely that a further inquiry would be able to further clarify or substantiate the suspected breaches. Where evidence of suspected breaches was obtained, advice indicated that the circumstances were such that these suspected breaches, if substantiated, were not likely to result in significant sanctions and not serious enough to warrant further action.*

On this basis, I have decided not to pursue further action against Mr Moore under the Public Sector Management Act 1994. The file has been closed and I assure you that the events have been vigorously reviewed to the satisfaction of both external parties. "

43 It was Mr Piper's evidence that the Senior Officers did not take up his invitation, set out above, to discuss with them the outcome of the review and how the decision was arrived at.

44 As to any impact on their careers, Mr Piper testified that he held the Senior Officers in high regard, and they were appointed to senior positions within the respondent, contrary to any assertion by them that their careers had in some way been damaged by this whole matter.

Consideration

Industrial Matter

45 At the outset of these reasons reference is made to the repeated challenge by counsel for the respondent, to the Commission's jurisdiction to enquire into and deal with this matter, on the basis that it is not an "industrial matter" for the purposes of the Act.

46 In light of all of the evidence, in my opinion, the claim for the provision of the Hedges Report is clearly an industrial matter attracting the Commission's jurisdiction. It is clear to me that the allegations by the Senior Officers, in relation to the conduct of Mr Moore, arising from the s 9 Inquiry had a direct and not inconsequential relationship to their employment relationship with the respondent. That is, in my opinion, a claim for the production of the Hedges Report, is a matter "affecting or relating to" the work, privileges rights or duties of the Senior Officers of the respondent. I note also that as a consequence of the terms of s 185 of the Labour Relations Reform Act 2002, which came into effect on 1 August 2002, the definition of "industrial matter" now includes any matter "pertaining to" the above.

47 There are a number of factors relevant to this conclusion. Firstly, is the case that the Hedges Inquiry came about from complaints by the Senior Officers themselves. Those complaints alleged that Mr Moore's enquiries into the Senior Officers were inappropriate and contrary to the PSM Act. The complaints also alleged that Mr Moore engaged in an unlawful conspiracy and attempted to pervert the course of justice, contrary to the Criminal Code. Whilst counsel for the respondent attempted to suggest that the allegations were against Mr Moore personally, in my opinion, given that Mr Moore was at all times acting for and on behalf of the respondent, the allegations against Mr Moore, must be seen as allegations against the respondent, in terms of its conduct.

48 In my view, the provision of the Hedges Report as a claim touches the relationship of employer and/or employee, in a direct and not inconsequential way. I pause to observe however, that authorities dealing with the scope and definition of "industrial matter" and "industrial dispute" under the Workplace Relations Act 1996 (Cth), and its predecessors, are not directly in point as the definition of industrial matter under s 7 of the Act is considerably wider.

49 Plainly, in my view, the Senior Officers, on their evidence, felt aggrieved as a consequence of their participation in the Hedges Inquiry, and the failure by the respondent to furnish a copy of the Hedges Report at its conclusion.

50 Furthermore, the provision of reports arising from investigations, in my opinion, given that the Senior Officers were complainants, is a matter affecting or relating to their work, in terms of any possible impact upon their working careers, whether that is so or not; their privileges, in terms of whether or not there is any right, entitlement or obligation on the respondent to provide such reports; their rights, in the same vein, and whether the respondent, as an employer, has a duty to provide such reports to employees in the circumstances of the Senior Officers. In my opinion, the present claim is a matter that affects or relates to, these various matters and is therefore an industrial matter for the purposes of the Act.

51 Whilst it may be the case, that the disciplinary proceedings originally commenced against the Senior Officers were ultimately discontinued some years ago, it is plain on all of the evidence, that the provision of the Hedges Report has been an ongoing issue between the Senior Officers and the respondent, as soon as the decision to not make it available was made known to them. On the evidence, it is not the case of a matter that has been dormant for many years and has only recently been revived. On the contrary, as I have already observed, the matter has had a long and somewhat torturous history, in relation to dealings between the respondent and the Senior Officers.

52 Additionally in my opinion, it matters not whether the Hedges Report, or any other report for that matter, is categorised as confidential or not, for the purposes of determining the jurisdiction of this Commission. Whether a document is truly confidential or not, may condition the nature of the orders that are made by the Commission, however the confidentiality or otherwise of a document, does not alter the character of the claim as an industrial matter. Section 27(1a) and s 33(3), s 33(4) and s 33(5) of the Act at least in part, recognise these types of matters.

53 I therefore reject the submission of the respondent that the claim for the Hedges Report is not an industrial matter for the purposes of the Act.

54 However, given the terms of the FOI Act, in particular schedule 1 of it, I consider it strongly arguable that the Hedges Report, notwithstanding my conclusions below, would be an exempt document for the purposes of that Act, in any event. If that were so, given the terms of s 90 of the FOI Act, dealing with obligations on the Supreme Court not to disclose the content of exempt matter on a review of a decision of the Information Commissioner's under the FOI Act, this would seem to be a powerful reason for the Commission to not order its production in any proceedings before it.

55 In relation to the nature of the Commission's jurisdiction, in response to submissions by the applicant, counsel for the respondent also submitted that the Commission's jurisdiction is statutory and there is no general equitable jurisdiction conferred upon the Commission or the Commission constituted as an Arbitrator under the Act. Whilst it is trite to observe that the Commission is not a court of equitable jurisdiction, in my view, given that the touchstone of the Commission's jurisdiction is to enquire into and deal with industrial matters "in accordance with equity, good conscience and the substantial merits of the

case" under s 26(1)(a) of the Act, it is appropriate for the Commission to have regard to relevant equitable principles, as part of "inquiring into and dealing with" an industrial matter.

56 The injunction in s 26(1)(a), governs the manner of the exercise of the Commission's jurisdiction, and somewhat tritely, is not a source of power in itself. However, what it does permit is the departure from strict legal entitlement, in circumstances where the equity and good conscience compels such a conclusion. For example, in a contractual benefits claim, in circumstances where the applicant may be strictly entitled to a benefit under his or her contract of employment, but the circumstances of the case reveal that the applicant engaged in some form of misconduct or deceit in relation to the matter the subject of the claim, the Commission is empowered in my opinion, pursuant to s 26(1)(a), to deny an applicant relief. This approach would appear to accord with the two important maxims of equity, they being that "he who seeks equity must do equity and that "he must also come with clean hands". In my opinion, there is nothing inconsistent with the Commission's jurisdiction, for the application of these broad principles, having regard to s 26(1)(a) of the Act.

Provision of the Hedges Report

57 I am satisfied from the evidence and I find that the purpose of the Hedges Inquiry was to conduct a preliminary investigation only, as to whether any disciplinary proceedings should be instituted against Mr Moore. The purpose of the inquiry was not to investigate the conduct of the Senior Officers and I find accordingly.

58 It being a preliminary investigation, I am satisfied on the evidence that the purpose of the Hedges inquiry, was to ascertain whether there was any further basis for conducting further disciplinary enquiries as to Mr Moore's conduct. In that sense, in my opinion irrefutably, the process was examining not the Senior Officers themselves, but Mr Moore and whether, the respondent as the employer, ought to commence proceedings of a disciplinary nature, against him.

59 On the evidence, I accept that there is a distinction between grievance enquiries and reports, and disciplinary matters. That distinction is borne of both logic and practicality. In the case of grievance matters, by their nature, they will involve two or more persons, between whom there is conflict in the workplace arising from the conduct of one or other of those persons. Naturally, a complainant in that circumstance, having initiated complaints as to his or her treatment by that person, would logically be entitled to know not just the outcome of the inquiry, but additionally, to receive a copy of any report generated. In my opinion, there is a qualitative difference between such a process, and a preliminary investigation by an employer, into the conduct of an employee, as to whether disciplinary proceedings should be commenced against that employee. Ultimately, the question of whether discipline ought to be imposed or not, is a matter for an employer.

60 The nature of such processes is that no doubt from time to time, unsubstantiated and malicious allegations may be made by employees against other employees and/or management. It would in my opinion, be quite counter-productive to harmony in an organisation, for reports prepared in relation to such matters, to simply be released upon request. Not only may the subject matter of the inquiry be prejudiced as a result, additionally, other persons who may have contributed to the inquiry process may not, for good reason, wish to have their identities disclosed to either the subject matter of the inquiry or the persons who initiated it.

61 Each case will no doubt largely turn on its own facts and circumstances. From the evidence in this matter, in particular from Mr Piper, subject to the terms of the FOI Act in any case, there are strong policy reasons as to why such materials ought not to be disclosed, unless good cause is shown to the contrary. I must accept Mr Piper's evidence, in the absence of evidence to the contrary, that the content of the Hedges Report deals with the conduct of Mr Moore and sheds little if any light, on the conduct and behaviour of the Senior Officers. Whether such a report ought to be released, in the circumstances, will also be conditioned to an extent, by the extent to which if any, the content of any such report bears directly upon the circumstances of a complainant. If it does not, but rather concerns itself with the conduct of another employee, I can see little policy reason why such material ought to be generally disclosed. This is particularly so in the case of disciplinary matters, where the decision to either institute disciplinary proceedings or not, is solely the province of the employer, in this case the respondent, under the PSM Act.

62 From all of the evidence and the entire history of this matter, I do not consider as a matter of equity and good conscience, that the provision of the Hedges Report would in any way bring closure for the Senior Officers, and on the contrary, may only serve to fuel the fire of conflict which clearly has existed between them and Mr Moore, over many years past.

63 In this regard, I accept the evidence of Mr Moore, that this matter has over many years, caused him considerable anguish and stress. Likewise, I also accept that the Senior Officers concerned, have suffered stress and anxiety, as have their families.

64 Having carefully considered all of the evidence, in the context of the long history of this matter, I am simply not persuaded that the provision of a copy of the Hedges Report would serve any useful purpose, and may indeed, open up old wounds which in my opinion, should now be well left alone.

65 I should also add that I do not accept that the careers of the Senior Officers have in any way been detrimentally affected, by the discontinuance of the disciplinary proceedings. I accept the respondent's evidence that they were and continued at the time of these proceedings, to be regarded as senior and well respected officers of the respondent. Indeed, the positions which the Senior Officers occupied, was testimony to that in my opinion. There was no evidence before the Commission, upon which any alternative finding could be made.

Apology

66 A further order sought by the applicant on behalf of the Senior Officers was that the respondent apologise to them "for any detriment suffered as a result of the disciplinary proceedings taken against them and subsequently discontinued by the respondent".

67 I have considerable doubts as to whether the Commission has jurisdiction and power to order any party to provide an apology. Notwithstanding the question of jurisdiction and power, in any event, in my opinion, on the facts of this matter, I do not regard an apology as being appropriate. The furnishing of an apology conveys an acknowledgement by the person giving it, of

wrongdoing against the other party. In all of the circumstances of the present matter, there is no warrant in my opinion, for the respondent to apologise to the Senior Officers.

68 The disciplinary proceedings that were instituted were discontinued. The director general of the respondent, advised the Senior Officers of this and that there would be no further action taken in relation to these matters and none of the history of the issues, would influence his decision in relation to the careers of the Senior Officers. In my opinion, the discontinuance of the disciplinary proceedings alone was a strong statement by the respondent, that it did not regard the Senior Officers in any poor light. On the contrary, such discontinuance must be seen logically, as a resolution in the favour of the Senior Officers.

69 Likewise, the acquittal of the Senior Officers of the criminal charges in the District Court is restorative of the Senior Officers' characters and cannot be held against any of them in the future.

70 In my opinion, having regard to all of these matters, even if there was jurisdiction for the Commission to order an employer to provide an apology, which in my opinion is very doubtful, there is no merit in it in this case.

Damages

71 The final head of relief sought in these proceedings, by the applicant, is damages in favour of the Senior Officers, for breaches of the obligation to maintain faith and confidence in the employment relationship.

72 Earlier, I have set out the relevant provisions of the Act in relation to the jurisdiction of an Arbitrator. By s 80E(1) the Arbitrator has exclusive jurisdiction to "enquire into and deal with any industrial matter relating to a Government officer, a group of officers or Government officers generally." Furthermore, s 80E(5) provides as follows:

> *(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any Government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."*

73 The jurisdiction and powers of an Arbitrator, and for that matter, the Public Service Appeal Board, do not extend, as opposed to for example, the Commission in unfair dismissal matters, to any express power to award compensation. Furthermore, the Commission has no general jurisdiction and power to award damages as such: *Perth Finishing School v Watts* (1989) 69 WAIG 2307 at 2313.

74 In *State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169, the Industrial Appeal Court held that the jurisdiction of the Public Service Appeal Board, pursuant to s 80I(1) of the Act, did not extend to the awarding of compensation.

75 Similarly, in my opinion, the jurisdiction of an Arbitrator under s 80E of the Act does not extend to the awarding of damages or compensation. I do not consider that the express powers of an Arbitrator under s 80E(5) of the Act, dealing as they do with the power to "review, nullify, modify or vary" any decision of an employer falling within the Arbitrator's jurisdiction, encompasses a power to award compensation. In my opinion, the awarding of compensation or damages, would be an act done as a consequence of the decision of the employer, and not one that "reviews, nullifies, modifies or varies" the decision itself, taken by the employer.

Conclusion

76 For the foregoing reasons, the application is dismissed.

2003 WAIRC 08583

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, MINISTRY OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 JUNE 2003
FILE NO/S	P 27 OF 2001
CITATION NO.	2003 WAIRC 08583

Result	Order issued
Representation	
Applicant	Ms M In De Braekt of counsel
Respondent	Mr R Andretich of counsel

Order

HAVING heard Ms M In De Braekt of counsel on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the application be and is hereby dismissed.

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

2014 WAIRC 00135

AN ORDER TO MAINTAIN TRAVEL ALLOWANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETR PODLAHA
	APPLICANT
	-v-
	COMMISSIONER OF MAIN ROADS
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO	P 1 OF 2013
CITATION NO.	2014 WAIRC 00135

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 80E(2)(a) of the *Industrial Relations Act 1979*; and

WHEREAS by a Notice of Hearing dated the 4th day of February 2014, the Public Service Arbitrator advised the applicant that a hearing would be convened on the 24th day of February 2014 at 9.15 am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 24th day of February 2014 there was no appearance for or by the applicant; and

WHEREAS the Public Service Arbitrator took account of the history of the filing of the application and other matters and decided to dismiss the application;

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

THAT this application be, and is hereby dismissed.

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

INDUSTRIAL MAGISTRATE—Claims before—

2014 WAIRC 00166

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2014 WAIRC 00166
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 26 FEBRUARY 2014
DELIVERED	**:**	THURSDAY, 6 MARCH 2014
FILE NO.	**:**	M 188 OF 2013
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		APPLICANT
		AND
		DIRECTOR GENERAL DEPARTMENT OF TRANSPORT
		RESPONDENT

Catchwords	**:**	Alleged breach of clause 36(6) of the Public Service Award 1992; Application pursuant to sections 83(5) and 83(7) of the *Industrial Relations Act 1979* seeking an interim order preventing contravention of the Public Service Award 1992.
Legislation	**:**	*Industrial Relations Act 1979*, sections 83(1), 83(5), 83(7), 80E and 80I
		Public Sector Management Act 1994, sections 78, 80, 81, 82A
Instruments	**:**	Public Service Award 1992, clause 36
Cases referred to in Judgment	**:**	***Ruth Mary Hart-Roach v Neil Cady and Jewell House (YMCA)*** [2011] WASC 90
		Australian Course Grain Pool Pty Ltd v Barley Marketing Board of Queensland (1982) 57 ALJR 425
		Bullock v Federated Furnishing Trades Society of Australia (No 1) (1985) 5 FCR 464
		Commissioner of Fair Trading v Holz [2005] WASC 202
		Twinside Pty Ltd v Venetian Nominees Pty Ltd [2008] WASC 110
		Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WALR 670
		Madaffari and Anor v Labenai Nominees Pty Ltd [2002] WASC 67
		Castlemaine Tooheys Ltd v The State of South Australia [1986] HCA 58; (1986) 161 CLR 148
Result	**:**	Application granted; Order made
Representation		
Applicant	**:**	Mr D Wayda appeared as agent for the Applicant
Respondent	**:**	Mr S Barrett appeared as agent for the Respondent

REASONS FOR DECISION

Background

1 On 20 December 2013 The Civil Service Association of Western Australia Incorporated (CSA) lodged its Claim in this matter alleging that the Director General of the Department of Transport (DoT) had failed to comply with Clause 36(6), of the Public Service Award 1992 (the Award). The allegation is denied.

2 Clause 36(6) of the Award provides:

> "*The employer recognises that it is paramount that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.*"

3 The DoT employs Anthony Bodinner as a motor vehicle assessor. Mr Bodinner is a member of the CSA and at all material times was the CSA's delegate at the DoT's workplace.

4 For most of 2013 the CSA was involved in a campaign against outsourcing of service delivery arrangements managed by the DoT. Between 5 and 7 November 2013, Mr Bodinner and other staff members at the DoT's workplace received a series of emails from management concerning the suspension of a DoT client. The client had been suspended from conducting vehicle inspections. It is not in dispute that soon after having received those emails Mr Bodinner sent copies of them to the CSA. He did so as a union delegate in order to assist the CSA in its campaign. The CSA then sent those emails to the *The West Australian* newspaper. The emails then became the subject of a newspaper article published on 16 November 2013. The DoT contends that the emails sent by Mr Bodinner were confidential. The CSA denies their confidentiality.

5 On 22 November 2013, the Director General of the DoT alleged that Mr Bodinner had committed a breach of discipline by disclosing confidential information to the CSA. On 12 December 2013 the CSA, on behalf of Mr Bodinner, disputed that assertion and claimed the protection of clause 36(6) of the Award.

6 On 16 December 2013 the Director General of the DoT advised Mr Bodinner that he had appointed a person to conduct an investigation under Part 5, Division 3 of the *Public Sector Management Act 1994* (the "PSM Act") to inquire into whether Mr Bodinner had committed an act or acts of misconduct.

7 On 12 February 2014 the Director General of the DoT wrote to Mr Bodinner to inform him that the investigator had concluded his investigation and that it had been found that breaches of discipline had occurred. The identified breaches were:

1. the disclosure of confidential information to the CSA on two occasions on 8 November 2013; and
2. the publication on Saturday, 16 November 2013 of an article in *The West Australian* newspaper.

8 In the same letter, he informed Mr Bodinner that he intended to take disciplinary action against him only in respect to the disclosure of confidential information. Mr Bodinner was advised that subject to any submissions that might be made by 26 February 2014, the following outcome would eventuate:

> "*(a) Improvement action (one on one training); and*
>
> *(b) A reprimand.*"

9 At the commencement of the hearing of this Application I was informed that the Director General of the DoT had extended the deadline for submissions until after the determination of this Application.

The Application

10 The CSA asserts that because Mr Bodinner acted as a union representative he is now subject to the DoT's disciplinary proceedings which threatens his job security and causes him disadvantage. The CSA's Claim is made under section 83(1) of the *Industrial Relations Act 1979* (the IR Act) for the enforcement of Clause 36(6) of the Award.

11 Section 83(7) of the IR Act provides:

> "*An interim order may be made under subsection (5) pending final determination of an application under subsection (1).*"

12 Relevantly, section 83(5) of the IR Act provides:

> "*If a contravention or failure to comply with a provision of an instrument to which this section applies is proved against a person as mentioned in sub section (4) the industrial magistrate's court may, in addition to imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision.*"

13 On 11 February 2014, the CSA, pursuant to section 83(7) of the IR Act, made an Application for the following interim order:

> "t*hat the Respondent cease all disciplinary processes against Mr A Bodinner in relation to clause 36 of the Public Service Award pending determination of the Originating Claim...*"

14 The Application is supported by affidavits made by employees of the CSA. Warwick Douglas Claydon affirmed his affidavit on 6 February 2014 and both Michelle Julie Sheehy and Michael Patrick Suter, respectively, affirmed theirs on 20 February 2014.

15 The Director General of the DoT has not lodged any affidavit evidence in opposition to the Application. Rather he has annexed three groups of documents to his "Form 8.1 - Case Outline/Further and Better Particulars of Case Outline" which was lodged 24 February 2014. The documents annexed to the Form 8.1 are entitled "Exhibits" and comprise copies of the DoT's *Code of Conduct*, an *Internet & E-mail Access Application Form* purportedly signed by Mr Bodinner, three *Confidentiality Undertakings*, two purportedly signed by Mr Bodinner and the other unsigned and a letter dated 12 February 2014 detailing the outcome of the disciplinary investigation. None of those documents have been verified under oath or affirmation, and accordingly attract little weight.

16 The Director General of the DoT opposes the grant of the interim order sought by contending that the Industrial Magistrates Court (WA) (the Court) lacks jurisdiction to stop the PSM Act disciplinary proceeding currently under way. He says section 80E of the IR Act provides the Public Service Arbitrator exclusive jurisdiction to enquire into and deal with any matter relating to a government officer. That stance is in line with his response lodged on 8 January 2014, wherein it is submitted that the Claim is brought for the improper purpose of subverting the conduct of the investigation.

Determination

17 Dealing firstly with the jurisdictional issue, I observe that the disciplinary action taking place is an administrative proceeding. It is being conducted pursuant to sections 81 and 82A of the PSM Act. Neither the Public Service Arbitrator nor the Public Service Appeal Board has any function in the process. They have not been called upon to judicially consider or determine Mr Bodinner's alleged misconduct.

18 In bringing this Application the CSA is not asking the Court to intervene in order to stop judicial proceedings. Rather, it is asking the Court to prevent an act (the disciplinary proceedings) which, by their very nature, may constitute a breach of Clause 36(6) of the Award. The Application is aimed at preventing such a breach. I note that neither the Public Service Arbitrator nor the Public Service Appeal Board has jurisdiction to consider and determine the issue of whether an award has been breached, nor are they empowered to prevent a breach.

19 Sections 83(5) and 83(7) of the IR Act specifically empower the Court to prevent a breach of an award. That includes the stopping of any administrative action that might be in breach of an award.

Principles of Interim Injunction

20 This Application is in the nature of an application for an interim injunction. The same principles that apply to the making of interim injunctions, apply in this matter.

21 The principles governing the consideration of this type of application were succinctly set out by His Honour Commissioner Sleight in ***Ruth Mary Hart-Roach v Neil Cady and Jewell House (YMCA)*** [2011] WASC 90 (paragraphs 11-15). I repeat His Honour's observations:

> *"11 To obtain an interim injunction, the applicant must establish that there is a serious issue to be tried and that the balance of convenient* (sic) *favours the applicant:* ***Australian Course Grain Pool Pty Ltd v Barley Marketing Board of Queensland*** *(1982) 57 ALJR 425.*
>
> *12 The likely success of the applicant at trial is a relevant factor as to whether there is* (sic) *serious question to be tried and whether the balance of convenience favours granting the injunction:* ***Bullock v Federated Furnishing Trades Society of Australia (No 1)*** *(1985) 5 FCR 464, 472.*
>
> *13 In* ***Commissioner for Fair Trading v Holz*** *[2005] WASC 202 Le Miere J stated as follows:*

> *'The court must be satisfied that there is a serious question to be tried. If there is a serious question to be tried then the court must consider the balance of convenience. Once the court is satisfied that there is a serious question to be tried, the strength or weakness of the plaintiff's case may become a relevant factor touching on the balance of convenience or the exercise of discretion [15].'*

14 *The grant of an injunction involves balancing the injustice which might be suffered by the defendant if the injunction is granted and the plaintiff later fails at trial, against the injustice which might be suffered by the plaintiff if the injunction is not granted and the plaintiff later succeeds at trial:* ***Twinside Pty Ltd v Venetian Nominees Pty Ltd*** *[2008] WASC 110 [11];* ***Films Rover International Ltd v Canon Film Sales Ltd*** *[1987] 1 WLR 670;* ***Madaffari v Labenai Nominees Pty Ltd*** *[2002] WASC 67 (14).*

15 *It is relevant to consider whether an award of damages will be an adequate remedy. Normally it must be shown that irreparable injury will be suffered if an injunction is not granted and will not be adequately compensated unless an injunction is granted:* ***Castlemaine Tooheys Ltd v The State of South Australia*** *[1986] HCA 58; (1986) 161 CLR 148, 153 (Mason ACJ)."*

22 The Originating Claim and the affidavits lodged in support of this Application reveal that there are serious matters to be tried. From the available evidence it appears that Mr Bodinner was at all material times a union delegate. It is contended that his acts of sending the client emails was done in furtherance of the objectives expressed in Clause 36(1) of the Award, and in particular "representing members' interests in the workplace". The CSA says that there was nothing impermissible in what he did and that the emails that were sent were not subject to confidentiality. The affidavits affirmed by Mr Claydon, Miss Sheehy and Mr Suter support those contentions.

23 Whether or not Mr Bodinner's actions were impermissible is likely to depend on whether the emails sent were confidential. The CSA's position is that for the documents to be confidential or limited to a particular audience they must expressly say so on their face. The emails on their face (see Exhibit H of Mr Claydon's affidavit) do not appear to indicate that. In my view the CSA's contention is certainly arguable. It follows that if Mr Bodinner's acts were permissible, then the disciplinary action taken against him because he sent the emails to the CSA, in his capacity as union delegate, is arguably in breach of the Award.

24 It appears that there are serious issues of fact and/or law to be tried. The prevention of a potential breach of the Award is a matter of paramount importance. In those circumstances the balance of convenience falls in favour of the CSA. If the Application were not granted there is potential for Clause 36(6) of the Award to be breached. If the Director General is permitted to reprimand Mr Bodinner and take improvement action against him, it may well affect his reputation and standing at the workplace, even if the reprimand were later to be withdrawn. Clearly, any improvement action taken cannot be undone. If the Director General carries out intended disciplinary outcomes, but is later found to have acted inappropriately, there is little that can be done to rectify the situation. The award of damages is not open. On the other hand, there will be no detriment to the Respondent. The Respondent does not face irreversible consequences. If the Respondent's contentions are found to be correct, then at worst, there will simply be a delay in the implementation of the proposed disciplinary outcomes.

25 In those circumstances it is appropriate to grant the Application. I propose that the following order be made:

> Until further order of this Court, the Respondent shall not take any further steps in the disciplinary proceedings (which have been commenced pursuant to section 81 of the *Public Sector Management Act 1994*) against Mr Anthony Bodinner.

G. CICCHINI
INDUSTRIAL MAGISTRATE

2014 WAIRC 00175

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2014 WAIRC 00175
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	THURSDAY, 20 FEBRUARY 2014
DELIVERED	**:**	THURSDAY, 20 FEBRUARY 2014
FILE NO.	**:**	CP 1 OF 2013
BETWEEN	**:**	DEPARTMENT OF COMMERCE
		COMPLAINANT
		AND
		MCDONALDS AUSTRALIA LIMITED ACN 43 008 596 928
		ACCUSED

Legislation	:	*Children and Community Services Act 2004*
		Sentencing Act 1995
Result	:	Conviction entered, penalty imposed
Prosecution	:	Mr J. Lee (of Counsel)
Accused	:	Ms L. Nickels (of Counsel)

Sentencing Remarks

(These sentencing remarks were delivered extemporaneously on 20 February 2014 and have been edited from the transcript)

1 The Accused is charged with having contravened section 190(1) of the *Children and Community Services Act 2004* (the Act). In part the Act's objective is to provide laws for the promotion of the wellbeing of children. That is found in section 6(a) of that Act. The Act is also aimed at protecting children from exploitation in employment. That objective is found in section 6(e) of the Act.

2 In determining matters of this type the Court must bear in mind that the primary requirement of the Act is foster the best interests of children. A child or children are to be protected from harm.

3 The nature of the charge before me suggests that the Accused has exploited a child in employment. That is the gist of the allegation.

4 Sections 190 and 191 of the Act prohibit a child working beyond 10:00pm. In this matter, the child concerned finished work in one instance at 11:02pm, in another instance at 10:22pm, in the third instance at 12:10am on a school day that followed and in the final instance finished work at 10:23pm.

5 It is also accepted by the Accused, that the same child commenced work at about 3:30pm on Saturday, 4 August 2012, and finished work at 6:03am the following morning. That comprises about a 14½ hour shift.

6 It is accepted that the last of the matters is a most serious event. The circumstance where the child worked until 12.10am on a school day is also seriously significant. The other breaches, although significant, are clearly of lesser seriousness than those two particular instances.

7 The Accused says that notwithstanding its best efforts, the offence occurred. It is conceded that the Accused was the subject of prosecutions and convictions for similar offences in 2007. That was soon after the promulgation of the Act.

8 The Accused has submitted that it has instigated significant measures in order to avoid breaches of the law in this regard. Indeed store managers and their supervisors are alerted to risk of potential breaches. The Accused says that notwithstanding its best endeavours to prevent breaches of the law, that a rogue manager in this instance has disregarded the systems in operation and has enabled this to occur.

9 The Accused says it is entirely speculative as to why it occurred. I accept that it may be speculative. However the fact that it did occur against a background of warnings given to managers indicates a major breakdown in the system.

10 The reality is that although the Accused is remorseful about its conduct and accepts responsibility, it cannot divorce itself from the acts of its manager which gave rise to the offending behaviour. Clearly the acts of the manager, despite whether the acts were deliberate, reckless or otherwise, constitutes a serious departure from what is expected from a prudent employer employing children.

11 In the end result the child was required or permitted to work outside normal hours and as I have indicated was in one instance was required to work a 14½ hour shift. In my view, permitting or requiring a child to work a 14½ hour shift amounts to exploitation.

12 The *Sentencing Act 1995* requires me to impose a penalty which is commensurate with the seriousness of the offence. Subsection 6(2) provides that:

> "The seriousness of the offence must be determined by taking into account –
>
> (a) the statutory penalty of the offence; and
>
> (b) the circumstances of the commission of the offence including the vulnerability of any victim of the offence; and
>
> (c) any aggravating factors; and
>
> (d) any mitigating factors."

13 The starting point in determining the appropriate penalty is a consideration of the penalty available to the Court. In this instance by virtue of application of section 40(5) of the *Sentencing Act 1995* the maximum fine available is $120,000.00. That penalty reflects the Parliament's concern with this type of offending behaviour.

14 The Court must also have regard to the particular circumstances of the commission of the offence. This offence is constituted by various events. Three of the events are clearly less serious. The event of the child working beyond midnight is serious. The event of the child has working a 14½ hour shift ending at 6:03am is the most serious incident.

15 A child working in those circumstances is vulnerable. Working to the extent that the child's schooling may be impacted, as occurred when the subject child worked beyond midnight, is of real concern and of significance to the child. Furthermore the

fact that the child worked very long hours in one shift is also real significance to the child and will have impacted the child's welfare and health.

16 Children often feel that they need to work long hours for various reasons. It could be to accumulate money for themselves or there may be because of pressures put upon them by members of their family. Alternatively they may believe that they need to work in order to keep their job. Given their lack of experience and maturity they will be placed in a vulnerable situation when confronted with a request or requirement that they work hours longer than permitted. There is a real issue in this case relating to the vulnerability of the victim. The vulnerability of the victim is of relevance relating to the circumstances of the commission of the offence.

17 In determining the appropriate penalty I must have regard to aggravating factors. I accept the submissions made by counsel for the Accused that the Accused's knowledge of the law is of itself not an aggravating factor. I also accept the other submissions that she made in relation to the lack of policies concerning the picking up of children finishing late. I accept that that is not an aggravating factor with respect to this offending.

18 What is aggravating however is the fact that the child in question was permitted to work or required to work for such lengthy periods beyond the normal time a child is permitted to work. It would have been obvious, or should have been obvious, to the manager at the time, given the manager's knowledge of the law and the manager's knowledge of the child's age that there was a serious breach of the law occurring by the very fact that the child continued to work after 10:00pm in each instance.

19 The Court must also take into account mitigating factors. I take into account that the Accused has not committed this type of offence for a significant period. There has been a significant break in the offending. I accept that since this offending last occurred there have been some significant changes in the Accused's systems and that it takes its responsibilities seriously. It has addressed the requirements of the legislation.

20 I accept that the Accused has, by its plea of guilty at an early opportunity, indicated its remorse in relation to the matter. I accept that the Accused has cooperated with the prosecuting authority. It has facilitated all the investigations that have been conducted in relation to this matter. That is a matter of significance. I accept also that the Accused has been and continues to be a good corporate citizen. I accept that to some degree it engages in philanthropy which assists the community.

21 In the end however, there needs to be a penalty imposed which reflects the seriousness of the offence. The penalty must be commensurate with the seriousness of the offence. There is a need for a general and specific deterrent penalty to be imposed. There needs to be a general deterrent penalty imposed to ensure that not only the Accused, but others who act in this way, know that there are serious consequences for such offending.

22 In this case it is important that the Accused be given a specific deterrent penalty. It is not the first time that the Accused has come before this Court in relation to a matter of this type. Having said that I recognise that the Accused cannot be penalised for its prior convictions. The penalty to be imposed cannot be based on prior convictions or alternatively by reason that the previously penalties imposed have not had the desired effect.

23 Despite that there is nevertheless the need to ensure by a specific deterrent penalty so that the Accused ensures that systems are in place so this type of offending behaviour will not be repeated.

24 In the end having weighed the submissions of the Prosecution and the Accused I conclude that the offending, although serious, is one classed as being moderate in the range of offending. I further acknowledge that there has been a break in offending. In this instance the penalty should be of significance without being crushing.

25 I recognise that in this instance there was one child involved and that the offence occurred over a short period of time. In that regard a systemic failure is not demonstrated. I accept that, although serious it is a one-off situation. Although a significant penalty needs to be imposed the penalty must be tempered by those particular factors.

26 I note also that unlike some of the previous matters that have come before me which involve multiple breaches and children this involves fewer breaches in offending.

27 Having made those observations, I am of the view that the starting point for the imposition of a penalty is that of $20,000.00. However, I take into account the fact that the Accused has pleaded guilty at an early opportunity. In submissions made to me by the counsel for the Accused, it was submitted that the Court should discount the appropriate penalty by 25% by virtue of the provisions of section 9AA of the *Sentencing Act 1995*. It is true that section 9AA of the *Sentencing Act 1995* requires this Court to take into account the benefit to the community, to witnesses and to all concerned of an early plea of guilty. However the 25% rule only refers to sentences of imprisonment as provided for in section 9AA(4). There is no specific percentage that this Court must take into account or should take into account in respect of the deduction made with respect to fine imposed after an early plea of guilty.

28 Notwithstanding that, I would have thought that a 25% discount is nevertheless an appropriate discount in this instance. The fact that the Accused has pleaded guilty to the charge has clearly benefited the State, the victim and witnesses in this matter and as a consequence of that there should be an appropriate credit given to the Accused.

29 The end result is that the Accused is fined of $15,000.00 taking into account the 25% discount to which I have referred. The Accused is also required to pay the Court costs in this matter. The amount of costs sought is not contentious. Costs are ordered in the sum of $304.70.

G. CICCHINI
INDUSTRIAL MAGISTRATE

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

2014 WAIRC 00118

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00118
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	BY WRITTEN SUBMISSIONS
DELIVERED	**:**	THURSDAY, 20 FEBRUARY 2014
FILE NO.	**:**	APPL 14 OF 2013
BETWEEN	**:**	CAPE AUSTRALIA T/A CAPE MARINE AND OFFSHORE PTY LTD
		Applicant
		AND
		THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
		Respondent

CatchWords	**:**	Construction Industry Long Service Leave Payments Board – What constitutes an assessment – Notice of Intention – Procedural fairness – Assessment ultra vires
Legislation	**:**	*Construction Industry Portable Paid Long Service Leave Act 1985* s 34(2)(b), s 34(2)(d)(i), s 34(6), s 34(6)(a), s 34(6)(b), s 50, s 50(1)
		Construction Industry Portable Paid Long Service Leave Regulations 1986
		Interpretation Act 1984 (WA) s 55
Result	**:**	Decision set aside and another decision substituted
Representation:		
Applicant	**:**	Ms K McPherson of counsel
Respondent	**:**	Mr S Kemp of counsel

Supplementary Reasons for Decision

1 On 15 November 2013, Reasons for Decision (the original Reasons) were issued in this matter ([2013] WAIRC 00972), and the parties were invited to make submissions in writing as to the appropriate orders to flow from those Reasons. The parties sought and were granted an extension of time in which to make those submissions to enable them to confer with a view to resolving the matter. The parties subsequently advised that they had been unable to reach agreement and each filed written submissions. The issue for submissions was whether the respondent's letter of 12 March 2013 (the second letter) constituted an assessment for the purposes of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act) such as to enliven the review provisions under s 50 of the Act. This is in the context of my finding in [29] of the original Reasons that the first letter, being a letter from the respondent to the applicant, dated 10 December 2012, appeared to be an assessment of some sort made by the Board and as to whether or not the second letter constituted an assessment. I noted in the original Reasons [30]:

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

2 The original Reasons went on to note that it was difficult to know whether the second letter was an assessment, and if so, whether notice and an opportunity to make submissions had been provided in accordance with the requirements of s 34(6) of the Act, 'other than the suggestion in the letter that there had been a meeting and discussion between the parties' [31].

3 I went on to note that '[i]n the circumstances, it is not possible to determine whether the second letter is an assessment and whether it has any standing, or whether it brings with it the right of review' [32]. In the circumstances, I noted that the most appropriate order may be that the application for review be dismissed, but invited the parties' submissions.

4 In addition to relying on its submissions in [4] - [12] of 14 May 2013, the applicant provided the following information:

> 3 …
>
> (a) on 3 August 2011, the Agreement was approved by Fair Work Australia;
>
> (b) between 4 August 2011 to November 2012, if a return from the Applicant to the Respondent was deficient or more than the Applicant was required to pay in contributions, the Respondent would issue a Debit or a Credit Note to the Applicant if it was of the opinion that the amount of money paid by the Applicant was not in accordance with the Act;

(c) on 1 November 2012, representatives from the Respondent attended the offices of the Applicant in Western Australia in accordance with the Respondent's usual practice of conducting routine visits to audit the payment of employees covered by the Act;

(d) on 5 November 2012, Ms Heather Carter, Payroll Manager for the Applicant, received an email from an inspector of the Respondent, Mr Silvio Cinquina (see **Annexure A**), regarding the returns to be submitted by the Applicant to the Respondent;

(e) on 10 December 2012, the Applicant received the First Letter from the Respondent (see **Annexure B**), following which it continued to pay contributions in accordance with the information set out in this letter;

(f) within approximately two weeks before the Second Letter was received by the Applicant, the Respondent telephoned and emailed the Payroll Administrator of the Applicant, Ms Amanda Freeman, to advise that the Respondent had revised its decision and had changed the required calculations of contributions. The Respondent's email dated 25 February 2013 is annexed (see **Annexure C**);

(g) on 12 March 2013, the Applicant received the Second Letter (see **Annexure D**). The Applicant calculated that by making contributions that also include Saturdays, Sundays and 4.8 hours during the week on additional pay, as requested under the Second Letter, the Applicant would have to pay a further amount in contributions in addition to the contributions it was already paying the Respondent each quarter for employees employed under the Agreement; and

(h) Around this period, Ms Carter and Mr Cinquina spoke via telephone on several occasions during which the Respondent was informed that the Applicant was ceasing to employ employees under the Agreement, as the Kipper Tuna & Turrum Project (**Project**) had ceased.

5 Annexure A to the applicant's submission, referred to in [3(d)], is the email in which an Inspector of the respondent, Mr Silvio Cinquina, wrote to Ms Heather Carter as follows (formal parts omitted):

> Regarding to my visit on 1st November 2012. The CEO has instructed that Cape Marine & Offshore contribute thier[sic] returns based on the gross pay their employees receive. This is only releveant[sic] to the employees engaged under the Cape Australia Kipper Tuna & Turrum Enterprise Agreement 2011.
>
> As you are aware Brunnel who also have employees under this agreement and they contribute based on the gross payments made to employees.
>
> Allowances are to be included only if they are paid on annual leave.
>
> Forwarded for your information.

6 The respondent then wrote to the applicant the first letter dated 10 December 2012 about which I previously commented that it appeared to be an assessment of some sort made by the Board.

7 Also attached to the applicant's further submission was Annexure C which is an email from Tim Daly, Operations Manager, MyLeave, which I take to be a trading name of the respondent, addressed to the applicant's payroll section, in the following terms (formal parts omitted):

> As per our phone call this morning I would like to confirm that there has been a change in the way that contribution days are calculated for persons working on the KTT project. Previously we have advised you that in our assessment of 'Contribution Days' that only Monday to Friday inclusive would be recorded as Contribution Days. Our assessment was based on our interpretation of clause 28 in the KTT Project Agreement which details that Saturday and Sundays are "… at double the ordinary hourly rate…." therefore we (incorrectly) determined that Saturday and Sundays were not eligible as Contribution Days.
>
> Since the above information was communicated to you, we have obtained legal advice on the KTT Project Agreement to ensure our assessment of 'Contribution Days' and 'Gross Pay for Contribution Days' is correct. As we discussed this morningy[sic] our lawyers have advised that, in their opinion, a Contribution Day includes not only Monday – Fridays inclusive but also Saturdays and Sundays.
>
> In line with the above advice we would be pleased to receive amended returns from Cape Marine Ofshore[sic] with Monday – Sunday inclusive recorded as Contribution Days. Obviously the Monday - Sunday is only for the days when the workers are working on site.
>
> This will likely mean that the workers under the KTT award[sic] will receive a greater number of Days of Service credited to them.
>
> Thank you for your assistance in this matter. In need contact me on [tel number] to discuss.

8 Approximately two weeks later, on 12 March 2013, the second letter was sent to the applicant.

9 The applicant's submission goes on to note that:

> [I]t was the common practice of the Respondent, if the Applicant had furnished a return which was deficient, to issue a Debit Note to the Applicant requiring payment of the correct amount of contributions when the Respondent was of the opinion that the amount of money paid by the Applicant was not in accordance with the Act (see, for example, the Debit Note at **Annexure E**).

10 Annexure E to the applicant's supplementary submission is a Debit Note from the respondent to the applicant for the period July to September 2012 said to be 'JUL/SEP 2012 SHORTPAID AS RETURN AMENDED' and the total debit amount stated.

11 The applicant says that it is not the usual practice of the Respondent to carefully follow each of the formal requirements in s 34 of the Act before requiring an employer return to be amended, saying that it would not be efficient, considering the number of employees covered by this scheme and the number of administrative errors in returns that might be made, to have to go through the process of issuing a Notice of Intention and inviting submissions every single time that an assessment is made.

12 The applicant says that the first and second letters ought to be treated as assessments for the purposes of the Act and for the purposes of the review of the assessment by this Commission. Reference was made to the decision in *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344 where the Court rejected the argument that the Migration Review Tribunal had no jurisdiction to review a decision of a Minister's delegate that failed to comply with a procedural requirement or involved an error of law. The applicant says the need to serve a Notice of Intention on the employer and to provide the employer an opportunity to make submissions, under s 34(6) of the Act, are not essential prerequisites before an assessment will be considered to be an assessment under the Act. The applicant says that the fact that the respondent did not follow the two procedural fairness requirements under s 34(6)(a) and (b) of the Act, cannot affect the nature of its decision in the second letter to require adjustments to be made. Accordingly, the applicant says that the second letter was an assessment under s 34 of the Act.

13 The applicant has also used its further submissions to seek to further argue the calculation of the employer's contribution which I have dealt with in [35] onwards of the original Reasons. The purpose of the parties having an opportunity to make further submissions was to deal with the issue of whether or not there was a reviewable decision and the orders which ought to flow as a consequence. It was not my intention to invite the parties to revisit the issue of the calculation of the employer's contributions and I do not intend to do so now.

14 The respondent's supplementary submissions note that the onus is on the applicant to establish that the Commission has jurisdiction to review a decision of the Board and that, in those circumstances, it was for the applicant to establish that the Board's letter of 12 March 2013, against which it formally sought a review in its Form 9B filed on 2 April 2013, was a formal assessment. Given the findings in [32] of the original Reasons, the respondent says that the applicant has failed to establish that this letter is a formal assessment and, accordingly, has failed to establish that it was a review of a decision under s 50(1) of the Act.

15 In those circumstances, the respondent says that the appropriate order is that the application be dismissed.

Consideration

16 My intention in these Supplementary Reasons for Decision is to consider the parties' submissions in deciding whether the second letter constituted an assessment, rather than to revisit what was set out in [1] – [34] of the original Reasons.

17 I note the communications between the parties referred to in the applicant's submissions at [3], in particular what the applicant says about the way in which the respondent and the applicant communicated over the calculation of amounts to be paid by the applicant to the respondent as contributions. I have already noted in the original Reasons what appeared to be a very informal if not loose process. Paragraphs 3(b), (c), (d), (f) and (h) of the Applicant's Outline of Further Submissions only go to reinforce that the process was indeed very loose. For example, while there appear to have been meetings and discussions, emails and formal letters between the parties, the respondent also had a practice that 'if a return from the Applicant to the Respondent was deficient or more than the Applicant was required to pay in contributions, the Respondent would issue a Debit or Credit Note to the Applicant if it was of the opinion that the amount of money paid by the Applicant was not in accordance with the Act' [3(b)].

18 This situation, dealt with by the respondent by way of a debit or credit note, seems to be in lieu of the type of situation covered by s 34(2)(b) and (d)(i) of the Act. These are circumstances which the Act provides for the Board to cause an assessment to be made, and for the procedural elements required by s 34(6) to be applied. This suggests that the Board used the debit and credit note, as well as formal correspondence and emails, as notification that an assessment had been made, and did so without the procedural fairness requirements of s 34(6) to which I referred in the original Reasons. Although the applicant says that to do so, that is to undertake a formal process in accordance with the requirements of the Act, would not be efficient due to the number of employees covered by the Scheme and the number of administrative errors in returns that might be made [16], it is clear that that is what the legislation requires. It cannot choose not to apply the law for the sake of administrative convenience.

19 In the circumstances, the applicant says the formal letter should be seen as an assessment. However, the question arises as to when and if an assessment was made.

20 I have examined the correspondence in the two letters and the emails and I accept the applicant's supplementary submission that the second letter, when read in conjunction with the first letter, makes clear that the respondent had made an assessment and it revised that assessment. The second letter refers to the 'assessment of Contribution Days' in the letter of 10 December 2012 and explained the basis of that 'assessment'. It went on to explain that since that letter of 10 December 2012 and the subsequent meeting and discussions between the parties, the respondent had obtained legal advice and had 'revised' its position.

21 The *Interpretation Act 1984* (WA), s 55 provides:

> **55. Errors when exercising certain powers or duties may be corrected**
>
> Where a written law confers a power or imposes a duty upon a person to do any act or thing of an administrative or executive character or to make any appointment, the power or duty may be exercised or performed as often as is necessary to correct any error or omission in any previous purported exercise or performance of the power or duty, notwithstanding that the power or duty is not in general capable of being exercised or performed from time to time.

22 I find that the respondent, having issued its assessment by the first letter, went on to correct the error it says was contained in its first letter, of relying only on Monday to Friday as Contribution Days, to advise that the correct assessment was to include Saturdays and Sundays also.

23 In this context, the respondent again exercised the power to make an assessment, in accordance with s 34 of the Act and in accordance with s 55 of the *Interpretation Act 1984* (WA), to correct the error. In exercising that power, the requirements of s 34(6) of the Act were to be met.

24 The question then arises as to whether that exercise of power was valid in the absence of the procedural fairness aspects being met, and the assessment was ultra vires.

25 The language of s 34(6), that '[t]he Board *shall not* make an assessment under subsection (2) unless' it has '*served*' a '*notice of intention*' on the employer, and given the employer an opportunity to make a submission, makes clear that these are essential pre-conditions to the exercise of the power (emphasis added). This is the strong language of prohibition. The consequences of an assessment being undertaken are serious and significant, and this is reinforced by the fact of the respondent having power to impose a surcharge.

26 Therefore, in the absence of compliance with the procedural fairness elements, the assessment is ultra vires.

27 In any event, notwithstanding that the second letter was correct in respect of contributions being assessed so as to include Saturday and Sunday, as noted in the original Reasons at [35] the Board referred to 'Contribution Days'. Neither the Act nor the *Construction Industry Portable Paid Long Service Leave Regulations 1986* provide for such a term – the basis of calculations is the week or part week, and more particularly by reference to 'ordinary pay payable'. In this case, the decision, even if valid, is still in error.

28 The powers of the WAIRC on review of such a decision are to:

(a) affirm the decision; or

(b) vary the decision; or

(c) set aside the decision and

(i) substitute another decision; or

(ii) send the matter back to the Board for reconsideration in accordance with any directions or recommendations that the WAIRC considers appropriate.

(s 50(3) of the Act)

29 In the circumstances of this matter having already been the subject of negotiations between the parties following the original Reasons and informal communications prior to the filing of the application, the most appropriate means of resolution, notwithstanding that the assessment was ultra vires, is for the decision to be set aside and another decision substituted. That decision is that the calculations are to be in accordance with the rationale set out in [35] onwards in the original Reasons. As the applicant employed only employees who were entitled to paid leave, the appropriate calculation is that particularly contained in [42] and [45].

30 Therefore the calculation of 2% of ordinary pay payable is to be based on the rate of pay the person is entitled to for annual leave, which is calculated by reference to the employee's total earnings per annum, and includes allowances as if at work, to take account of 12 hours per day Monday to Sunday, also taking account of the work cycle.

2014 WAIRC 00155

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAPE AUSTRALIA T/A CAPE MARINE AND OFFSHORE PTY LTD
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 MARCH 2014
FILE NO/S	APPL 14 OF 2013
CITATION NO.	2014 WAIRC 00155

Result	Decision set aside and another decision substituted

Order

HAVING heard Ms K McPherson of counsel by written submissions on behalf of the applicant and Mr S Kemp of counsel by written submissions on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* and the *Construction Industry Portable Paid Long Service Leave Act 1985*, hereby orders:

1. THAT the decision of the respondent contained in its letter of the 12th day of March 2013 is set aside.

2. THAT the following decision is to be in substitution for the respondent's decision of the 12th day of March 2013:

> The applicant pay to the respondent contributions based on 2% of ordinary pay payable, which is to be calculated at the rate of pay the person is entitled to for annual leave, which is calculated by reference to the employee's total earnings per annum and allowances as if at work, taking account of 12 hours per day Monday to Sunday, also taking into account the work cycle.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2014 WAIRC 00124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRONWIN BENT
	APPLICANT
	-v-
	M.D HARRISON AND M.J HARRISON
	JURIEN JETTY CAFE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO/S	U 172 OF 2013
CITATION NO.	2014 WAIRC 00124

Result	Application discontinued
Representation	
Applicant	Ms B Bent
Respondent	Mr G Newton and with him Ms L Cornish (both of counsel)

Order

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

AND WHEREAS on 12 December 2013 a conference between the parties was convened;

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

AND WHEREAS on 10 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.

2014 WAIRC 00152

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00152
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	THURSDAY, 20 FEBRUARY 2014
DELIVERED	**:**	FRIDAY, 28 FEBRUARY 2014
FILE NO.	**:**	U 12 OF 2014
BETWEEN	**:**	DONALD BROWN
		Applicant
		AND
		STUART RANDELL @ SACRED TATTOOS
		Respondent

CatchWords	**:**	Industrial Law (WA) - Alleged harsh, oppressive, unfair dismissal - Application filed outside time – Application for extension of time – Principles applied – Application dismissed
Legislation	**:**	Industrial Relations Act 1979 (WA) s 29(1) & (2)
Result	**:**	Claim of unfair dismissal made out of time dismissed
Representation:		
Applicant	**:**	Mr D L Brown, in person
Respondent	**:**	Mr S Randell, by written submission

Case(s) referred to in reasons:

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

Reasons for Decision

1 On 10 January 2014 the Commission received an unsigned and incomplete claim of unfair dismissal from Mr Brown. The Registry made contact with Mr Brown and he forwarded to the Commission on 16 January 2014 a complete Notice of Application. In the application he states that his date of dismissal was 12 December 2013. Claims of unfair dismissal must be referred to the Commission no later than 28 days after the day the employment terminated.

2 Mr Brown's claim is 7 days out of time using the complete claim received on 16 January 2014.

3 The Commission may accept a claim of unfair dismissal that was out of time if the Commission considers it would be unfair not to do so. Accordingly, Mr Brown's claim was set down for hearing to allow Mr Brown, and the respondent Mr Randell, an opportunity to be heard on whether it would be unfair not to accept the claim.

The Hearing

4 On the day of the hearing Mr Brown represented himself and gave evidence under oath. There was no appearance by, or on behalf of, the respondent Mr Randell. Commission staff contacted Mr Randell who informed them that he was at work and unable to attend. He had thought the hearing was on a different day.

5 The hearing therefore proceeded in the absence of Mr Randell.

Considerations

6 Considerations which are usually relevant in considering whether it would be unfair not to accept a claim of unfair dismissal that is out of time are discussed in the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683. These considerations, in the context of Mr Brown's claim, are as follows.

1. The length of the delay

7 Although Mr Brown's claim states that his dismissal occurred on 12 December 2013, when he gave evidence under oath, he was not sure of the date and indicated it could have been earlier, perhaps 8 December 2013. In the end, it is not possible to decide with certainty the date of the dismissal. Accordingly, it is not possible to decide with certainty the length of the delay.

8 Therefore, if the date of termination was 12 December 2013 there is a delay of approximately 7 days longer than the 28 days after his employment terminated, being the period between 12 December 2013 and 16 January 2014; but it may be 11 days if the date of termination was 8 December 2013. In either case, it is not an overly long delay relative to the 28 day period prescribed under the Industrial Relations Act 1979.

2. The reasons for the delay

9 Mr Brown's evidence is that he made contact with the Commission 'sometime in December' and when he was advised that there was a $50 filing fee, he did not have the money. He gave evidence that since 2009 he has had a number of health issues which he believes he has now overcome, however he is on a pension of $470 per fortnight and has a wife and two children.

Mr Brown's evidence is supported by the application to waive the fee he attached to his claim of unfair dismissal. I am inclined to accept Mr Brown's evidence that the reason for the delay was his inability to pay the filing fee.

10 I note that Mr Brown's Notice of Application and application to waive the fee were signed on 13 January 2014 and the schedule of particulars attached to it was signed on 28 December 2013. This is consistent with his evidence that he made contact with the Commission in December and was sent the paperwork. The latter date shows that Mr Brown did commence the process to challenge his dismissal within the 28 day period, even though he did not refer his claim to the Commission within the 28 day period. This supports accepting his claim out of time.

3. The merits of Mr Brown's claim

11 When considering whether it would be unfair not to accept Mr Brown's claim of unfair dismissal out of time, it is also relevant to make some assessment of the merits of his claim because it would not be unfair to reject a claim that is out of time if the claim could not succeed anyway. Similarly, it might be more difficult to refuse to accept a claim that is out of time if it appears to be a strongly arguable case of unfair dismissal.

12 Mr Brown has only outlined what his case would be if his claim is accepted. His evidence was that he and Mr Randell have had a long association. Mr Brown stated that for approximately 12 months before his dismissal, he had worked for Mr Randell on Sundays. However, at some time in November 2013 Mr Randell had told Mr Brown he would be put on a roster and become fulltime 'a few days a week'. Mr Randell had given the keys to the business to Mr Brown. Mr Randell used Mr Brown's name on his website.

13 Mr Brown says he has no idea why he was dismissed, apart from him not going in to work on the Wednesday and Thursday however, he didn't have a roster and did not have any shifts. On each occasion he worked other than Sundays, Mr Randell would pick him up to go to work; on these two days, Mr Randell didn't pick him up. It was only those two days he didn't work; before then he had worked every day for 10 days in a row.

14 On the day that he was dismissed Mr Randell had said to him that he couldn't afford to pay him anymore. Mr Brown's evidence is that it was 'completely out of the blue'. In his view, there was no reason for him to have been dismissed. Mr Brown's evidence is that he has been a tattoo artist for approximately 40 years and he has a good reputation. Mr Randell had at one stage been his apprentice. He feels the dismissal is unfair because he believed he had achieved fulltime employment and was now able to earn a proper income.

15 Mr Randell has filed a Notice of Answer, and Mr Brown gave evidence in response to the contents of it.

16 Mr Randell's primary opposition to Mr Brown's claim of unfair dismissal is that he believes Mr Brown was an independent contractor. Mr Randell writes that he contracted with Mr Brown to perform tattooing services under a contract for services on Sundays and on such other occasions that Mr Randell required, and that Mr Brown was available, for such hours as agreed from time to time and at the rate of 70% of the payment Mr Brown received for each tattoo job that he undertook.

17 Mr Brown initially stated that the submission that he was a subcontractor 'could possibly be true'. However, he subsequently said if he had been a contractor then he would be handling the money but it was Mr Randell who was handling the money: Mr Brown would put the money into Mr Randell's account and Mr Randell paid him from that account. Therefore he believed he was not a contractor, although he said his work on Sundays would be contracting because he was paid at the end of each shift.

18 My understanding of Mr Brown's evidence, at this preliminary stage, is that Mr Brown gave all of the money he received from clients to Mr Randell. The contract he had with Mr Randell was that he would receive 70% of each fee. Mr Brown showed the book in which he wrote down his attendance times and the clients he tattooed; the pages of the book were headed 'Invoice/Statement'. Mr Randell had accompanied him to a bank where Mr Randell opened a bank account into which his money would be paid; the name of the account was not Mr Brown's own name but in the name of AAA Australian Tattoo Crew. Mr Brown performed his work in Mr Randell's premises. Mr Randell told Mr Brown when he would work, and indeed collected him from his house and drove him to work and took him home again subsequently. Mr Brown used his own hand tools, however Mr Randell supplied the photocopier, thermal copier and inks, although Mr Brown preferred to use his own inks. Mr Randell provided the alcohol, the wash and sterilising equipment.

19 Mr Randell's Notice of Answer then continues that even if Mr Brown had been an employee, his employment was always intended to be on a trial basis. In his evidence during the hearing, Mr Brown denied that a trial had formed part of any discussions between himself and Mr Randell regarding him becoming fulltime.

20 Mr Randell's Notice of Answer also says that it was intended that Mr Brown was always intended to be a casual and the hours he would work would be variable. Mr Brown said he did not have anything to say about this.

21 Mr Randell's Notice of Answer also stated that the reason why he terminated Mr Brown's contract for services, or his casual employment, was that in Mr Randell's opinion the relationship was not working to his satisfaction. There was not a sufficient number of clients coming to the shop for a tattoo that would justify keeping him on.

22 Mr Brown responded that he did not believe there were insufficient customers; there were 10 customers between 27 November and 1 December 2013 and he did not see why he was not able to be employed. He also said that if Mr Randell could not have afforded to retain his employment at the rate of 70% of earnings, Mr Brown would have been prepared to accept a lesser percentage, perhaps 60% or even 50%, rather than be dismissed, but there was no discussion about it.

23 Mr Randell's Notice of Answer also stated that in addition to the insufficient number of clients, on or about 11 or 12 December 2013 the managing agent for the owner of the premises advised Mr Randell that when he called in at the business on or about 11 or 12 December 2013 he noticed Mr Brown smoking what appeared to be a cigarette and he smelled the aroma of burning cannabis coming from Mr Brown's cigarette. The managing agent informed Mr Randell that smoking cannabis and the possession of cannabis in or immediately adjacent to the premises was not only illegal but constituted a breach of Mr Randell's lease which could lead to the termination of the lease. Mr Randell said that he had previously advised Mr Brown against this.

24 Mr Brown refuted the allegation. His evidence is that he does not smoke at all; while he has been known to smoke pot and doesn't mind it, this allegation is untrue. At one stage he did smoke a cigar which he got from the office when Mr Randell was handing them out.

25 Mr Randell's letter continues that he had previously advised Mr Brown that the possession of, and the smoking of, cannabis in or immediately adjacent to the business premises was a breach of the lease, and was illegal, and he was not to do it. Mr Randell concludes that the contract, or the employment, had not worked to his reasonable satisfaction, especially in relation to the work available. The casual basis was to see how things went in the short term and whether the amount of work justified it continuing; in his opinion it did not.

26 In addition, Mr Randell was most concerned that if the managing agent told the owner of the premises that Mr Brown had smoked cannabis in or immediately adjacent to the premises, the owner might seek to terminate Mr Randell's lease.

27 Mr Randell has attached to his Notice of Answer an undated statement 'To whom it may concern' from the managing agent stating what he had seen, and smelled, when Mr Brown was smoking when he visited the shop on 11 or 12 December 2013. The statement also states that Mr Brown had proceeded to use Mr Randell's computer internet service and whilst doing so made verbal and vulgar comments, including the full repertoire of swear words heard in the English language, regarding the topics he was looking at on the internet; to make matters worse, there were paying customers in the store at the time who had to hear what Mr Brown was saying.

28 At this preliminary stage I would not rate the merit of Mr Brown's claim of unfair dismissal as strong. Mr Randell's Notice of Answer is clearly written and shows what his evidence is likely to be if this claim proceeds to a hearing. The dismissal may have come out of the blue, however Mr Randell would be entitled to dismiss Mr Brown for lack of work if he shows there were insufficient customers from a business point of view to retain Mr Brown. That assessment is Mr Randell's to make. The 'fulltime' employment had commenced only recently and it is not unlikely that its continuation would depend upon the numbers of customers, even if the word 'trial' was not used as Mr Brown's evidence indicates.

29 Importantly, if Mr Brown was an employee, his employment was most likely to have been casual with varied hours: Mr Brown himself described his employment as casual with varied hours in the schedule of particulars attached to his Notice of Application and Mr Randell's Notice of Answer states that Mr Brown was a casual. The word 'casual' in the context of an employment relationship may have many meanings, but it will be more difficult for Mr Brown to argue his dismissal was unfair if he was indeed a casual employee with varied hours.

30 Also, I do attach weight to the managing agent's statement. The fact that the conduct he alleges occurred on the day before, or the day of, the termination, and Mr Randell relies on it together with the insufficient number of clients to justify the dismissal, makes it a significant issue. Even though Mr Brown refutes the specific allegation, Mr Brown did not suggest the statement itself was a fabrication and I accept the statement as representing what the managing agent's evidence is likely to be if this claim proceeds to a hearing and he is called to give evidence. The allegation is a live issue and Mr Randell would be entitled to dismiss Mr Brown for the incident if the managing agent's evidence in a hearing is preferred over Mr Brown's evidence, particularly if Mr Randell had previously told Mr Brown that this conduct was not acceptable.

4. Action taken by Mr Brown to contest the dismissal other than making the claim

31 Mr Brown did not take any action to contest the dismissal other than making the claim. He did not inform Mr Randell that he contested his dismissal either at the time it occurred, or subsequently.

5. Prejudice to Mr Randell including prejudice caused by the delay

32 Mr Randell's letter does not specifically say that he would be prejudiced by the Commission accepting Mr Brown's claim out of time. I accept, however, that Mr Randell would be put to the time and trouble of attending the Commission to oppose the claim, including perhaps asking the managing agent to give evidence. Necessarily, this would take Mr Randell away from his business. It is not clear that Mr Randell would otherwise suffer any prejudice from the delay in making the claim.

6. Considerations of fairness as between Mr Brown and other persons in like position

33 There is no suggestion that there are other employees in a similar position to Mr Brown. This consideration does not assist in deciding whether it would be unfair not to accept the claim out of time.

Conclusion

34 The starting point in considering whether it would be unfair not to accept Mr Brown's claim out of time is that the legislative time limit of 28 days after his employment terminated should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend. Special circumstances are not necessary but the Commission must be positively satisfied that the prescribed period should be extended.

35 The decision whether it would be unfair not to accept the claim involves notions of fairness. In the *Malik* case referred to earlier, it was said this means fairness to all, obviously to Mr Brown and to Mr Randell, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.

36 In this case, it is in Mr Brown's favour that he commenced the process of challenging the fairness of his dismissal within the 28 days by completing part of the Notice of Application. The fact that he could not afford the filing fee, which stopped him completing and filing the claim within the 28 days, should not be held against him, although this is only one of the matters to be taken into account.

37 Mr Randell does not indicate that the length of the delay itself is a reason for it not to be accepted out of time; his objection to accepting the claim out of time is that in his view the claim is without merit, primarily because there was no employment relationship.

38 It is important to note that at this preliminary stage there is no obligation on Mr Brown's part to establish any degree of merit (see the *Malik* case referred to earlier, per Justice Steytler at paragraphs [25]-[27]). This hearing about whether it would be unfair not to accept the claim out of time, not to decide the claim.

39 Nevertheless, it is clear Mr Brown's claim does face some difficulties. The issue of whether he was an employee or a contractor is not clear. The distinction in law between a person being an employee or a contractor is not straightforward and Mr Brown may be excused for his uncertainty. However, if he was a contractor on Sundays as he says, it is not clear to me why he would not be a contractor at other times – the issue will be decided on the totality of their relationship and not merely whether he was paid at the end of each shift.

40 Mr Randell's Notice of Answer does not give any detail why he believes Mr Brown was a contractor; a person is not a contractor merely because it is alleged that he is a contractor. Mr Brown's evidence shows some indicators that he was, and other indicators that he was not, a contractor. Therefore at this preliminary stage it is not at all clear whether Mr Brown was an employee or a contractor.

41 Even if Mr Brown was an employee, his likely status as a casual with varied hours does not assist him, and Mr Randell's knowledge of the business and its costs, would lend weight to his evidence about insufficient customers over Mr Brown's evidence. The likely evidence of the managing agent would also be problematic for Mr Brown's claim.

42 Ultimately, the Commission must be positively satisfied that the prescribed period should be extended and taking all of the above into consideration, I am not positively satisfied that it should be. Mr Brown has not shown it would be unfair not to accept his claim out of time. Therefore, the claim of unfair dismissal made out of time will be dismissed.

2014 WAIRC 00153

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONALD BROWN
	APPLICANT
	-v-
	STUART RANDELL @ SACRED TATTOOS
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 28 FEBRUARY 2014
FILE NO/S	U 12 OF 2014
CITATION NO.	2014 WAIRC 00153

Result	Claim of unfair dismissal made out of time dismissed
Representation	
Applicant	Mr D L Brown
Respondent	Mr S Randell, by written submission

Order

HAVING heard Mr DL Brown on his own behalf and Mr S Randell on his own behalf by written submission;

AND HAVING given reasons for decision, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order:

THAT this claim of unfair dismissal made out of time be dismissed.

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

2014 WAIRC 00147

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR NEIL CHATFIELD
	APPLICANT
	-v-
	KW & PM HARVEY CONCRETE CARTERS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 28 FEBRUARY 2014
FILE NO/S	U 175 OF 2013
CITATION NO.	2014 WAIRC 00147

Result	Application discontinued
Representation	
Applicant	Mr T Petherick, of counsel
Respondent	Mr K Harvey, of counsel

Order

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

AND WHEREAS on 9 December 2013 a conference between the parties was convened;

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

AND WHEREAS on 24 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.

2014 WAIRC 00172

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK GRANITTO
	APPLICANT
	-v-
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 7 MARCH 2014
FILE NO/S	B 96 OF 2011
CITATION NO.	2014 WAIRC 00172

Result	Application dismissed
Representation	
Applicant	Mr T Hammond of counsel
Respondent	Mr I Curlewis of counsel

Order

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

WHEREAS on the 19th day of July 2011, the 25th day of October 2011, the 15th day of December 2011, the 12th day of November 2013, the 3rd day of December 2013 and the 24th January 2014 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the last such conference the parties reached an agreement in principle; and

WHEREAS on the 19th day of 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*, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00171

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK GRANITTO
	APPLICANT
	-v-
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 7 MARCH 2014
FILE NO/S	U 96 OF 2011
CITATION NO.	2014 WAIRC 00171

Result	Application dismissed
Representation	
Applicant	Mr T Hammond of counsel
Respondent	Mr I Curlewis of counsel

Order

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

WHEREAS on the 19th day of July 2011, the 25th day of October 2011, the 15th day of December 2011, the 12th day of November 2013, the 3rd day of December 2013 and the 24th January 2014 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the last such conference the parties reached an agreement in principle; and

WHEREAS on the 19th day of 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*, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00174

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR PATRICK GURETTI
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 7 MARCH 2014
FILE NO/S	U 29 OF 2013
CITATION NO.	2014 WAIRC 00174

Result	Order for Reinstatement issued
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Ms S Young

Order

WHEREAS on 29 August 2013 the Western Australian Industrial Relations Commission (the Commission) issued Reasons for Decision and a Minute in this matter;

WHEREAS on 3 September 2013 an Order was issued by the Commission (2013 WAIRC 00785) declaring Mr Guretti had been unfairly dismissed by the respondent and ordering that the application be relisted before the Commission on the question of reinstatement or re-employment on a date to be fixed;

WHEREAS the matter was appealed to the Full Bench and an Order was issued on 4 February 2014 (2014 WAIRC 0075) dismissing the appeal;

WHEREAS the Commission sent out a Notice of Hearing listing the matter on Friday,7 March 2014 to hear from the parties on the question of reinstatement or re-employment;

WHEREAS at the hearing the Commission was advised that the parties had discussed the final form of Order that should issue and had reached agreement on the matter;

NOW HAVING HEARD Mr D Stojanoski, of counsel on behalf of the applicant and Ms S Young on behalf of the respondent, the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders that:

1. The applicant be reinstated with the respondent in the Perth metropolitan region with no loss of entitlements.
2. The applicant be reimbursed his Financial and Professional Incentive under the Country Teaching Program pursuant to the *School Education Act Employee's (Teachers and Administrators) General Agreement 2011* from the date the applicant was terminated up to the date the applicant was reinstated.
3. The applicant be reimbursed his Locality Allowance pursuant to the *Teacher's (Public Sector Technical and Further Education) Award 1993* from the date the applicant was terminated up to the date the applicant was reinstated.

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

2014 WAIRC 00129

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JESSICA KELLY HAMILTON
	APPLICANT
	-v-
	SUNFLOWERS ANIMAL FARM AND FARMSTAY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO/S	U 200 OF 2013
CITATION NO.	2014 WAIRC 00129

Result	Application discontinued
Representation	
Applicant	Ms J K Hamilton
Respondent	Ms D Jones

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 an agreement was reached between the parties;

AND WHEREAS on 11 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.

2014 WAIRC 00130

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYNA HARWOOD
	APPLICANT
	-v-
	S.J EDNER & J.W JUNGSTEDT T/AS VIKING DELICATESSEN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO/S	U 28 OF 2013
CITATION NO.	2014 WAIRC 00130

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol (TWU)
Respondent	Mr S J Edner

Order

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

AND WHEREAS on 26 March 2013 and 12 April 2013 a conference between the parties was convened;

AND WHEREAS on 18 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.

2014 WAIRC 00123

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA CECELIA LOVE
	APPLICANT
	-v-
	CENTRAL INSTITUTE OF TECHNOLOGY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 21 FEBRUARY 2014
FILE NO/S	B 193 OF 2013
CITATION NO.	2014 WAIRC 00123

Result	Order issued
Representation	
Applicant	Ms L Love
Respondent	Mr P Watson

Order

HAVING heard Ms L Love on her own behalf and Mr P Watson 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.

2014 WAIRC 00139

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEFAN LYTWYNIW
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 26 FEBRUARY 2014
FILE NO/S	U 113 OF 2013
CITATION NO.	2014 WAIRC 00139

Result	Application discontinued
Representation	
Applicant	Mr D Stojanoski, of counsel
Respondent	Mr R Bathurst, of counsel

Order

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

AND WHEREAS on 4 September 2013 a conference between the parties was convened;

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

AND WHEREAS on 25 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.

2014 WAIRC 00168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00168
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	FRIDAY, 29 NOVEMBER 2013 AND WRITTEN SUBMISSIONS BY 26 FEBRUARY 2014
DELIVERED	**:**	FRIDAY, 7 MARCH 2014
FILE NO.	**:**	B 52 OF 2013
BETWEEN	**:**	MC
		Applicant
		AND
		JEMS
		Respondent

CatchWords	**:**	Entitlements under contract of employment - Principles applied - Whether contract of employment entered into - Onus of proof - application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) - s 27(1)(d), s 29(1)(ii)(b)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Ms V Hamilton (of counsel)
Respondent	**:**	No appearance

Case(s) referred to in reasons:

Fisheries v Froggett (1983) 63 WAIG 2394

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

Reasons for Decision

1 This application is filed pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the Act) in which MC (the applicant) alleges that on or about August 2012 she was denied a contractual benefit by the respondent. For reasons of privacy the applicant will be referred to throughout these reasons as MC. The applicant was first employed by JEMS (the respondent) on 17 August 2012 and terminated on 27 August 2012.

2 The applicant worked in Port Hedland as a sex worker for the respondent and claims she was owed a total of $3,900 comprised of $3,300 in wages which Ms Woodward, the respondent failed to pay the applicant and $600 for goods that were kept by the respondent despite several requests to have them sent to the applicant in Melbourne following the applicant's termination. These goods included a hair straightener, two pairs of boots, a wig, a diary and a mobile phone to the value of $600.

3 Conciliation proceedings in relation to this application pursuant to the Act did not occur as the respondent failed to attend the conciliation conferences set down to deal with this application despite being notified of the conferences. The respondent failed to submit a Form 5 – Notice of Answer and Counter-proposal. The matter was referred to the Commission for hearing and determination.

4 A Notice of Hearing was sent to the parties at the addresses set out in the application. The respondent was sent a copy of the Notice of Hearing by email and by registered mail on 23 September 2013. I am satisfied that the Notice of Hearing which was mailed to the respondent was not returned to the Commission and was therefore successfully sent to the respondent. Therefore, pursuant to s 27(1)(d) of the Act the Commission determined at the hearing that this matter should be heard in the absence of the respondent.

5 The hearing was by video with the applicant and her counsel appearing from Melbourne. The applicant's counsel sought leave to appear in Western Australia as a friend of the court. Leave was granted.

6 MC gave evidence in these proceedings. MC's evidence was that this was the second time she had been employed by JEMS. On the first occasion her employment had lasted for two weeks and there had been no problems. The applicant gave evidence she was allowed one night off, however, she was not informed that she was not allowed to leave her place of work. The idea with the second round of employment was when the respondent rang the witness in Melbourne MC was to go up to Port Hedland for two weeks. The procedure is that the pay week stretches from Tuesday to Tuesday and the witness gave evidence she was paid on Fridays. She did not invoice the respondent for the money. The respondent kept all of the money and paid the applicant on the number of jobs carried out during the week, less the accommodation costs.

7 Prior to working for the respondent the applicant gave evidence she had worked in the industry where she was paid on a nightly basis so the arrangement with this respondent was a little unusual. The applicant indicated that on her day off she went out with one of her clients. While she was away from the premises the respondent rang and asked the applicant to return:

> She threw – threw me out, basically like threw me out like a dog. I didn't even get time to get my stuff together, just whatever was in my room, and she told him that he was no – that she's going to have him beaten up.
>
> (ts 5)

8 MC gave evidence she contacted the respondent who informed the applicant that she had cost her a lot of money and she was not going to send her belongings back nor would she be sending on her wages owed. MC gave evidence that the diary (which remained in her room at JEMS) was of particular relevance for the recording of hours worked.

9 MC gave evidence that the respondent acknowledged she owed the applicant the money as she indicated by phone that she would pay her the following week:

> Be in your account next week. (ts 6)

10 MC gave evidence that she worked out the amount of money that she was owed by phoning Tammy the receptionist who informed the applicant that the amount of $3,300 was reflected in the respondent's work book and that was the amount the applicant was due. In addition, Tammy informed the applicant that all of her private belongings had been put together and placed to one side.

11 The applicant was asked by counsel whether she ever saw credit card or cash jobs to which she gave evidence I have no knowledge as to how the customers pay I just receive my pay at the end of the week.

12 The Commissioner adjourned the hearing and provided the applicant with a further opportunity to subpoena time and wage records or alternatively the applicant's diary from the respondent or any other relevant information. Correspondence was forwarded to the applicant with a copy to the respondent by the Commission seeking further submissions by close of business on 26 February 2014. No such submissions were received.

Conclusion

13 The Commission accepts that the evidence given by the applicant in these proceedings was given honestly and to the best of her recollection. It was unfortunate that the applicant's evidence was unable to be validated by any form of documentation even though the proceedings were adjourned to allow for such materials to be submitted.

14 In such an application for contractual benefits under s 29(1)(b)(ii) of the Act the responsibility lies with the applicant to establish that the subject of the claim is a benefit to which the applicant is entitled under her contract of employment. It is for the Commission to then determine the terms of the contract of employment and to decide whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act in

accordance with the provisions of the Act. The cases the Commission has had regard for ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307 and ***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394.

15 The Commission finds that the applicant has been unable to establish her claim that she should be paid $3,300 in wages and $600 in personal items or belongings owned by the applicant. The Commission is not wholly satisfied that the applicant was employed under a contract of employment. However, even if the Commission is incorrect in reaching that view in the absence of MC being able to demonstrate that the respondent owed her $3,300 in wages I am unable to determine on the information before me that the $3,300 is a benefit that has been denied. Similarly, with respect to the personal items, a wig, a hair straightener, two pairs of boots, a diary and a mobile phone, the Commission is unable to determine on the information before it that these are benefits that have been denied under a contract of employment.

16 Accordingly, an order will issue dismissing the application.

2014 WAIRC 00170

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MC

APPLICANT

-v-

JEMS

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE FRIDAY, 7 MARCH 2014
FILE NO/S B 52 OF 2013
CITATION NO. 2014 WAIRC 00170

Result Application dismissed
Representation
Applicant Ms V Hamilton (of counsel)
Respondent No appearance

Order

HAVING HEARD Ms V Hamilton (of counsel) on behalf of the applicant and there being no appearance by the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders:

THAT the application be, and is hereby dismissed.

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

2014 WAIRC 00131

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JASON MILLER

APPLICANT

-v-

LEANNE CALDWELL TRADING AS SLIKAZ HOLDINGS

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 24 FEBRUARY 2014
FILE NO/S U 168 OF 2013
CITATION NO. 2014 WAIRC 00131

Result Application discontinued
Representation
Applicant Mr A Dzieciol (TWU)
Respondent Ms L Caldwell

Order

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

AND WHEREAS on 19 November 2013 and 24 January 2014 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference on 24 January 2014 an agreement was reached between the parties;

AND WHEREAS on 19 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.

2014 WAIRC 00176

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00176
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	FRIDAY, 6 DECEMBER 2013, MONDAY, 25 NOVEMBER 2013
DELIVERED	**:**	FRIDAY, 7 MARCH 2014
FILE NO.	**:**	U & B 99 OF 2013
BETWEEN	**:**	LIAM CHRISTOPHER PORTER
		Applicant
		AND
		MR CESARE VIOLANTI AND MRS SOMSRI VIOLANTI TRADING AS KWINANA PIZZA
		Respondents

CatchWords	**:**	Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive and unfair dismissal - Principles applied - Applicant unfairly dismissed - Application upheld - Compensation ordered - Contractual benefit claim - Jurisdiction challenged - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) - s 29(1)(b)(i), s 29(1)(b)(ii), s 32
Result	**:**	Unfair dismissal, application upheld
		Denied contractual benefit, application dismissed
Representation:		
Applicant	**:**	Mr L Porter
Respondent	**:**	Ms V Mountain (of counsel)

Case(s) referred to in reasons:

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

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

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

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

Reasons for Decision

1 The Western Australian Industrial Relations Commission (the Commission) has before it two applications, the first is an unfair dismissal application brought by Mr Liam Porter (the applicant) against Kwinana Pizza (the respondent) under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (the Act) claiming the manner in which the respondent dismissed the applicant was harsh, unreasonable and unfair. The respondent opposes the application submitting the applicant was dismissed for misconduct.

2 The second application by the applicant is brought under s 29(1)(b)(ii) of the Act and seeks to recover certain contractual entitlements which the applicant says were denied by the respondent, in particular 12 weeks and 1.5 days of annual leave:

1st year - 4 weeks of annual leave at $350 (gross) per week - $1,400

2nd year -4 weeks of annual leave at $500 (gross) per week - $2,000

3rd year - 4 weeks of annual leave at $500 (gross) per week -	$2,000
4th year - 1.5 days of annual leave at $180 (gross)	$ 180
	TOTAL $5,580

3 It is conceded by the respondent that for the third year (2013) some four weeks and an additional amount is owed to the applicant and has yet to be paid.

4 Shortly after the hearing commenced the Commission was advised by the applicant the respondent had been incorrectly named in each of the original applications. At the hearing the parties agreed that the respondent should be properly identified as Mr Cesare Violanti and Mrs Somsri Violanti trading as Kwinana Pizza. Accordingly, the Commission issued orders making the change for each application.

5 At the outset of the hearing an order issued for witnesses to remain out of court unless they were giving evidence.

Applicant

6 Ms Porter described the applicant as a loyal, responsible and trusted employee of the respondent. For the last three years and four months that service had been for the current respondent. It was submitted that the applicant had made himself available for additional shifts even though he received no extra money for such shifts. Further, it was submitted the applicant was honest and hard-working and his commitment to the respondent was above and beyond what was required. During the period when the respondent's wife was in hospital the applicant worked for a period of 20 days without a break. For this he received no additional money. The applicant worked seven days a week for five weeks during 2012. Once again no extra money was received for this work. The applicant has never stolen anything from the respondent. Further, he was never given any warning relating to his employment and denies all allegations made against him.

7 Mr Liam Christopher Porter gave evidence that he first worked for the current respondent in October 2009 when Mr Violanti purchased the business from the applicant's previous owner. The applicant gave evidence he commenced a traineeship in February 2010 and during the first year he was paid $350 gross per week. The witness indicated that was when he turned 18. The following year it increased to $500 a week gross and it remained at the same rate for the next two years until April 2013 when the rate of pay was increased to $600 a week gross. The applicant indicated when he first started work he was 17 years old. Up until February 2010 the number of hours worked per week was 38 or more. The applicant gave evidence that exhibit Porter 1 indicated his declaration of annual earnings to Centrelink.

8 The applicant gave evidence that in 2010 and 2011 he worked on Monday and Wednesday from 5.00 pm until 9.00 pm and on Tuesday, Thursday, Saturday and Sunday, 2.00 pm until 9.30 pm. In 2012 and 2013 the applicant worked Sundays instead of Fridays. The applicant gave evidence that he worked outside normal working hours when Mr Violanti was in hospital. The applicant would be called in either on his day off or if he was already working he would be required to work additional hours. The applicant gave evidence that for any additional hours worked he received no extra money. On one occasion the applicant gave evidence he had a day's illness when he went home during his shift. Other than that the applicant gave evidence he did not receive any meal breaks.

9 It was the evidence of the applicant that he had never received a pay slip nor had he been required to sign time sheets. On a number of occasions the applicant had asked for payslips. Furthermore, the applicant gave evidence he had been required to work public holidays and had never received any additional money for working those days.

10 The applicant gave evidence he had got the position in 2008 when he saw the advertisement in the window of the respondent. At the time he handed in his resume and got a job trial the following week. In answer to a question from the Commissioner as to whether he was employed under an award the applicant replied '--- At that time I had no idea' (ts 9). The applicant gave evidence that he had never taken any holidays in the time he had been employed by Mr Violanti.

11 The applicant denied he had been given any warnings by the respondent during his employment. Furthermore he denied he had ever stolen anything from the respondent.

12 The applicant gave evidence that Mr Violanti informed the applicant he was dismissed on 28 May 2013 however he did not leave his employment until 1 June 2013. During that period the applicant gave evidence he served customers and at no stage was he told not to desist from serving customers. Also, he was not questioned by police regarding missing money. The witness gave evidence he worked his notice as he was under the impression that he would receive all his unpaid entitlements including his annual leave.

13 In cross-examination the applicant denied he was given any warnings by the respondent, suggesting that the reason for his dismissal was that the respondent understood the applicant no longer wanted to take over the business. The witness denied he was treated as a family member by the respondent although he accepted they would speak on a daily basis as they were working long hours. Counsel for the respondent put it to the witness that he received holiday pay in cash in February 2011 and in February 2012, again in cash. The applicant denied having received such a payment in either year. The witness gave evidence his mother's Centrelink benefit was unaffected by the applicant's income from the respondent.

14 Ms Sharon Porter, the mother of the applicant gave evidence for the applicant that in late 2010 the respondent wished to sell the business and the applicant was interested in purchasing the business for $280,000. The witness gave evidence that at the time she expressed her concern and emailed Eagle Boys Pizza (exhibit Porter 4) who made contact with the witness. At the time of the applicant's dismissal the witness accompanied the applicant to the respondent's business. She gave evidence that Mr Violanti became quite aggressive with the applicant when she asked for the applicant's separation certificate. In fact Mr Violanti refused to provide the certificate and threatened to report Ms Porter to Centrelink. The witness indicated the applicant's earnings did not affect her Centrelink benefits.

15 The witness gave evidence indicating that when the applicant refused to purchase the business the respondent then suggested that he rent the business for $2,500 a week. It was the evidence of Ms Porter that when Mr Violanti discovered the applicant was not going to take up the option of rental that the applicant was ultimately dismissed. The witness gave evidence that until the applicant's last few months at work he had had a model record at work.

16 Ms Jean Anne Nelson the grandmother of the applicant, gave evidence for the applicant. The witness gave evidence the applicant expressed a desire to purchase the respondent's business for the amount the respondent had asked for; $280,000. Her grandson expressed to her that a large part of the purchase cost was goodwill associated with the business. The witness expressed her concern to the applicant at the time, a concern she had raised with her daughter. Eagle Boys Pizza, by way of email (exhibit Porter 4) had advised her daughter they had not heard of the respondent's business and they were certainly not interested in purchasing the business.

17 The witness spoke of a further incident in July 2011 whereby a health inspector had visited the respondent and allegedly fined the applicant $1,850 because the applicant's hair was long at the time and was not contained under a hat. The applicant was informed by Mr Violanti that the fine had to be paid so the respondent deducted $150 a week from the applicant's wages until the fine was paid in full. The witness gave evidence that she subsequently rang Kwinana Town Council and informed them about the fine that her grandson had been asked to pay. The witness gave evidence she received a call later that day from a woman at the Council stating:

> … they had no record of a fine to Kwinana Pizza and after this fine - anyway, after this time - they were fined because he didn't have a hat on, Liam was issued with a hat and I believe a hairnet to wear at work. (ts 32)

18 In concluding for the applicant Ms Porter submitted the applicant was seeking 26 weeks compensation for being unfairly dismissed. At the time of his dismissal the applicant was being paid $600 per week. Since his dismissal the applicant has applied to many different places of employment (exhibit Porter 6). The applicant received no warnings in relation to his employment and at no stage did he drink on-the-job, exchange drugs as was alleged or steal money. Mr Violanti's opinion changed once the applicant determined he was not going to purchase or lease the business.

Respondent

19 Ms Somsri Violanti and Mr Cesare Violanti are the joint owners of the respondent's business. The applicant was provided with one week's notice of his termination effective as of 22 May 2013. The decision to terminate the applicant's employment was based on a number of warnings regarding unacceptable behaviour demonstrated by the applicant over the previous year commencing in January 2013. It was the submission of the respondent that at least two of the previous warnings may have resulted in instant dismissal without notice due to the seriousness of the circumstances. The respondent was prepared to continue with the applicant's employment. Up until January 2013 the applicant's employment had been model. It was the view of the respondent that the relationship between the parties was friendly and it had been hoped that the applicant would take over the business in due course. The warnings that were given were, in the first instance, a warning regarding alcohol being consumed on the respondent's premises. Mr Violanti spoke to the applicant regarding this issue in January 2013. A second warning was given in relation to a matter relating to the handling of drugs on the premises that allegedly occurred on or about May 2013 when the respondent asserted an employee informed her father that she had possibly seen drugs change hands between the applicant and another employee. Mr Violanti spoke to Elias who promised that he would take steps to deal with the issue.

20 The third issue related to the missing money from the respondent's till. It was submitted by the respondent that over a period of approximately eight weeks money disappeared from the till and on a particular night approximately $230 to $240 cash went missing which could only have been taken by one of three people; Mr Violanti, Mrs Violanti or the applicant. It was the view of the respondent it could only have been the applicant. Accordingly, in light of the previous incidents, the applicant was advised he was terminated effective as of 29 May 2013.

21 With respect to the contractual benefit claim the respondent claimed he paid the applicant in 2011 some $1,326 in cash in lieu of his annual leave entitlement and again in 2012 the respondent paid the applicant $1,788 in cash in lieu of his annual leave entitlement. It was conceded on the record by the respondent that for the third year (2013) some four weeks and an additional amount was owed to the applicant and had yet to be paid.

22 Miss Brooke Bamkin a 14 year old child gave evidence for the respondent. The Commissioner, in accordance with s 106F of the *Evidence Act 1906* (WA) appointed a suitable and competent communicator, Ms Sue Hutchinson, whose function it was to explain to the child questions put to the child and, where necessary, to explain to the court the evidence given by the child. The particular section of the *Evidence Act* is as follows:

> **106F - Child witness may be given assistance**
>
> (1) Where a child is to give evidence in any proceeding in a court, the court may appoint a person that it considers suitable and competent to act as a communicator for the child.
>
> (2) The function of a person appointed under this section is, if requested by the judge, to communicate and explain —
>
> (a) to the child questions put to the child; and
>
> (b) to the court, the evidence given by the child.
>
> (3) A person appointed under this section is to take an oath or make a declaration, in such form as the court thinks fit, that he or she will faithfully perform his or her function under subsection (2).
>
> (4) A person appointed under this section who, while performing or purportedly performing his or her function under subsection (2), wilfully makes any false or misleading statement to the child or to the court commits a crime and is liable on conviction to imprisonment for 5 years.

23 In accordance with the provisions of s 106F(3) of the *Evidence Act* in addition to swearing in the witness Ms Hutchinson was also required to take the oath prior to assuming her role. The Commissioner explained Ms Hutchinson's role as a court communicator to Miss Bamkin before examination-in-chief commencing.

24 Miss Brooke Bamkin gave evidence she worked part-time for the respondent answering phones and taking orders. The witness gave evidence she had worked at the same time as the applicant, some six or seven months earlier. Miss Bamkin gave evidence she could not recall anything the applicant may have been given a warning for. She went on to say:

--- who was the delivery man? --- Yeah. They were just talking about parties and stuff like that and then - and then the phone rang so I just went and then did my work and then I went in the cool room, I think it was to get my drink bottle, I'm not sure, and they were handing over what looked like drugs and then I just went straight back out and went - did my work again and then the delivery driver at the time was - he told me to go to his car and I got a CD off of him and then he took the drugs out of his pocket and, like, put it in his wallet, so at that time I seen it. I'm not quite sure what it was but ---

Okay. So when you - when you saw it a bit closer, the - when he took it out of his pocket and you thought it was drugs, why did you - why did you think it was drugs? --- Well, they were talking about it at the start and it - it just looked like it. It was browny-green – like, brown and green, so it – yeah,, so it ---

So what sort of drugs did it look like? Did - can you ---? --- Probably weed.

MAYMAN C: Careful of leading

MOUNTAIN, MS: Why - are you able to say why you – you - why you thought that?

What ---? --- It was that way it looked. It was ---

The way it looked? --- Yeah.

And do you - how do you know about the way drugs looked? Are you --- ? --- Well, we learn about it at school and everything, yeah.

You learn about it at school, so you know - you – you learn about drugs at school, is that what you're saying? --- (no audible answer)

Okay. So from your view of what you saw, you think that it was drugs. So just going back. If you could just tell me, the parcel that you saw that - that you recognised as marijuana, was that the same parcel that was given ---

MAYMAN C: She didn't say that. Be careful about leading Ms Mountain.

(ts 44)

25 In cross-examination Miss Bamkin admitted she was not sure what drugs looked like. She agreed that something was in the delivery driver's pocket that she may not have been able to see although the driver did take something out and when she saw him looking at her he said 'don't worry, I'm not a bad person' (ts 46). Miss Bamkin agreed that the exchange did not prove that Elias the driver had received the drugs from the applicant.

26 Master Brody Wayne Denny Parker, another child under the age of 18 years, gave evidence for the employer. The Commissioner, in accordance with s 106F of the *Evidence Act* retained Ms Hutchinson as a court communicator to assist the child in the giving of his evidence. Master Parker gave evidence that he had been employed by the employer for some two years as a part-time employee. Master Parker indicated he was in Year 9 at school and that while he was working for the employer the applicant was also working at night when the employer was not working. Master Parker gave evidence he came across the applicant at the till counting $50 notes and putting some in his pocket. The witness also saw the applicant sort slips on the docket station and throw a couple away. The witness gave evidence he also saw the applicant on one occasion go into the cool room and drink a beer.

27 Mr Glenn William Leahy gave evidence for the respondent having been a driver delivering pizzas. The witness gave evidence he commenced in the position early in January 2012. During that time he came to know the applicant.

Are you aware of any behaviour that would have given cause for the owners of the shop to give Mr Porter a warning? --- The smell of alcohol, yes.

Okay. So you smelt alcohol on his --- ? --- Yes, I did.

--- breath. What sort of time was that, I mean, was it before, after work, during work, if you can ---? --- During work hours.

During work hours? --- Yeah.

Did that have any effect on --- ? --- No, I didn't think it really took effect on him but I thought that having the smell of alcohol on him - because he was also serving up the front as well.

(ts 60)

28 Mr Matthew Lee Beard gave evidence for the respondent. Mr Beard works as a pizza maker and is currently employed as a trainee.

29 Mrs Somsri Violanti gave evidence for the respondent. Together with her husband they own the business. Counsel for the respondent asked the witness the following questions:

Do you have any information to give the court today about any warnings that were given to Mr Porter during the time that he was employed with you in the Kwinana Pizza Shop, his behaviour? Can you tell me anything about his behaviour that may have incurred a warning from the owner? --- In the morning?

Warning. When Mr Porter was dismissed, what were the reasons – the reasons for Mr Porter finishing at the shop?

MAYMAN C: Mr Violanti, you can't ---? --- The ---

MOUNTAIN, MS: Liam? --- Finish?

Yes. He finished working at the shop. What reason why? --- Yes. He steal money.

How do you know that? --- I saw him

You saw him? --- Yes.

…

> Okay. And, Mrs Violanti, were you in any way intimidated? Were you - did anyone tell you you had to come in today to give evidence? --- Yes.
>
> Who told you that? --- Had to come here?
>
> Yes? --- My husband.
>
> Your husband said you had to come in? --- Yes.
>
> Yes. Because you're one of the owners? --- Yeah.
>
> Did he tell you what you had to say? Did he say to you, "You must say this"? --- Yes.
>
> (ts 73)

30 Mr Cesare Violanti gave evidence for the respondent having been a business owner for 35 years in the pizza industry. The witness gave evidence he bought this particular business at the end of 2010 and at the time the applicant was working with the previous owner. The witness gave evidence that a traineeship was offered to the applicant. In order to do so special permission was required because the applicant was a student at the time and wanted to leave school. Signatures from a parent and verification from the Education Department were required.

31 The witness gave evidence that the wage records for the applicant were stolen, an investigation that was still ongoing with the police. However, all money paid to employees was recorded in a business cashbook. The document was initially put forward as a matter for information as it was initially objected to by the applicant. It subsequently was accepted.

32 Around January 2013 the witness considered his relationship with the applicant started to go downhill. The witness mentioned he was arguing with his wife, the till was not balancing and there appeared to be a number of dollars missing and there were only three persons in the shop; the applicant, his wife and himself. That was the night he gave the applicant notice as he gave evidence he knew his wife would not steal from him therefore the conclusion drawn was it had to be the applicant.

33 The witness indicated the initial issues in 2013 were the drinking and on the third occasion the drinking occurred Mr Violanti spoke to the applicant and the drinking ceased. The witness then went on to speak of an allegation raised with him by an employee's father relating to drugs. The witness gave evidence he spoke with Elias about the matter and it did not happen again.

34 The third occasion related to the disappearance of money. When the witness confronted the applicant he denied having taken any money from the till and demonstrated to the witness that his wallet was empty. The witness indicated it was then the applicant was given a week's notice. The witness indicated that the applicant during his employment was offered the lease on the shop by the respondent when he had finished his traineeship. It would not have been an outright sale.

35 The witness gave evidence that he paid the applicant four weeks' holiday pay less taxes on two occasions in 2011 and 2012. It was the witness' view the applicant did not want holidays as he preferred to have the cash. The witness conceded that he had not paid the applicant his holiday pay for 2013 which was owed plus some additional annual leave owed for the applicant's fourth year of service.

36 In concluding, counsel for the respondent submitted that the applicant was terminated, the final issue relied upon being that the applicant had taken money from the till. It was submitted that the respondent could have terminated the applicant for being intoxicated at work or handling drugs on the premises of the respondent. In this matter the employer chose not to because of its close relationship with the applicant. It was not until, it was submitted by the respondent, the allegations arose regarding the stealing that the respondent took the action to dismiss the applicant for misconduct.

37 In matters such as these it is the responsibility of the employer to apply procedural fairness in investigating such matters. In ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224 and ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677 observations were made where it was said that the Commission must make an objective assessment of the circumstances of the conduct which is said to be the basis of a dismissal. That assessment is then used to determine whether the employer has acted reasonably in making its decision to dismiss.

Conclusion

38 In all contested matters the Commission is required to determine the facts. Some facts in these proceedings are not in dispute, but where the facts are disputed the Commission is required to assess the credibility of witnesses, weigh their evidence and give reasons as to why one version is preferred over another. At all times the burden of proof that applies is on the balance of probabilities. I have listened carefully to the evidence given by the applicant and closely observed him. In my view the evidence given, was given honestly and to the best of his recollection. Further, I have assessed the evidence of Ms Porter and Ms Nelson and in my view their evidence was given honestly and to the best of their recollection. In assessing the credibility of all witnesses the Commission is duty bound to make the following comment regarding the extent to which counsel for the respondent lead evidence from the respondent's witnesses during examination-in-chief which ultimately, has made the task difficult in assessing the honesty of the respondent's witnesses. Section 26 of the Act provides:

> **26 Commission to act according to equity and good conscience**
>
> (1) In the exercise of its jurisdiction under this Act the Commission –
>
> …
>
> (b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and

39 While the Commission recognises the provisions of s 26(1)(b) of the Act, I can place little weight on the evidence given in particular by Miss Brooke Bamkin because of the number of leading questions put to that witness relating to the alleged exchange of drugs between the applicant and the delivery driver. The Commission on the basis of the evidence accepts the applicant's evidence over that of Miss Bamkin, which is unfortunate as I do not believe Miss Bamkin to be a dishonest person, it was simply the way in which the questions were put to the witness by counsel for the respondent. Similarly, in the case of Mr Mathew Beard, the Commission considers his evidence to be unreliable simply because of the number of leading questions

that were put during examination-in-chief in relation to the applicant having allegedly stolen money from the till. Again the Commission does not consider Mr Beard to be a dishonest person. Similarly, in the case of Master Brody Parker, the Commission considers his evidence in relation to pocketing $50 notes to be unreliable simply because of the number of leading questions that were put during examination-in-chief. The Commission does not consider Master Parker to be a dishonest person in fact he presented as being quite forthright. In respect of Mrs Violanti the Commission accepts she may have been instructed by her husband as to what to say in the witness box although I do accept there was a language difficulty.

40 The Commission accepts in part the evidence given by Mr Violanti with the exception of the elements relating to the allegation of drug handling and stealing by the applicant.

41 In relation to the issue of stealing money the Commission was presented with unusual evidence. From the respondent the evidence was there were only three people in the shop; Mr Violanti, his wife and the applicant, therefore the person stealing the money had to be the applicant. The evidence of Mr Beard has already been rejected on the basis of the manner in which the questions were put during examination-in-chief. As already referred to, the Commission considers Mrs Violanti may have been instructed by her husband as to what to say in the witness box. This leaves the evidence of Master Brody Parker whose evidence was rejected by the Commission as being unreliable.

42 In dealing with the question of whether the Commission considers the applicant was unfairly terminated by the respondent I make the following specific findings in relation to the applicant's employment with the respondent:

- on balance the Commission considers the incident relating to the alleged handling of drugs did not occur, or if it did the applicant was not involved;
- on balance, the applicant may have consumed alcohol on the premises early in 2013 however the Commission does not accept the evidence of Mr Violanti that he warned the applicant regarding the incident therefore the matter went unchecked;
- the Commission finds that the day the applicant was advised he was to be terminated was Wednesday 22 May 2013 some seven days before his termination took effect (29 June 2013). In this case I have accepted the submissions of the respondent in that one week's notice was provided and the evidence of the applicant in that during the period of notice he continued to work for the respondent, including serving customers; and
- the Commission considers that the real reason for terminating the applicant was that the relationship between the respondent and the applicant deteriorated from the point at which the applicant refused to purchase or lease the business from the respondent.

43 The Commission considers it passing strange that a respondent terminates an employee for stealing and proceeds to allow the applicant during his period of notice to continue serving customers. To do so is somewhat incongruous and accordingly the Commission on balance, rejects the suggestion that the applicant was stealing from the respondent, taking into account the respondent's flexibility in using the applicant to serve customers during his period of notice in addition to considering:

- the applicant's ‘exemplary behaviour’ as stated by the respondent’s counsel (ts 39);
- the applicant's length of service including his traineeship (he was first employed in 2009); and
- the applicant’s willingness to work many additional hours (ts 8 and 9).

44 The Commission in such matters is not to become a manager and apply its own standards of decision making, but to consider all of the surrounding events and make a conclusion based upon the fairness or otherwise of the decision. The Commission is satisfied that there was a dismissal. The test in matters of this nature was most famously stated in ***Miles t/as the Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385. The question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right.

45 The respondent claimed the applicant was fairly dismissed and sought the application be dismissed. Conversely, the applicant claimed he had been harshly and oppressively dismissed. If he was found to be unfairly dismissed in the first instance the applicant sought to be compensated. Having had regard for all of the evidence both written and oral, and the issues raised in these proceedings, I am of the conclusion on balance that the dismissal of the applicant was, in all of the circumstances, harsh, oppressive and unfair. On all of the evidence, I have no doubt that the true working relationship between the applicant and the respondent prior to 2013 was a sound one.

46 The termination was a dismissal with notice and in such circumstances consideration by the Commission must be determined in accordance with equity, good conscience and the substantial merits of the case.

47 Reinstatement and re-employment in this matter are not being sought by the applicant. I am satisfied on the evidence that the working relationship between the applicant and respondent had broken down such that an order for reinstatement or re-employment would be impracticable. It is clear on the evidence (exhibit Porter 6) that the applicant satisfied the onus to seek out alternative employment. The Commission is satisfied the applicant took reasonable steps to mitigate his losses. It is the case that the applicant has been unable to find work since being terminated.

48 I therefore now turn to the question of compensation. I apply the principles set out in ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635. It is the Commission’s view that had the applicant not been terminated he would have had an expectation of ongoing employment with the respondent. Having regard to all of the circumstance of the case I conclude that the applicant should be compensated for his loss.

49 I find the applicant’s loss to be 10 weeks. In the Commission’s view this is a reasonable length of time having regard for the applicant’s length of service with the respondent and other relevant matters already referred to.

50 Having regard to all of the circumstances of the case I therefore order that the applicant be paid $5,400 as a gross amount. $600 gross per week x 10 which equals $6,000 less $600 being notice paid at termination which equals $5,400 as compensation for the unfair termination.

51 A Minute will now issue.

Denied Contractual Benefit

52 Turning to the question of denied contractual benefits. The respondent raised a jurisdictional aspect relating to this application, that being that there is no ability for the Commission to hear or determine matters relating to an entitlement covered under an order or industrial award issued by this Commission. The denied benefit sought by the applicant was a provision of the Restaurant, Tearoom and Catering Workers' Award, an award issued by order of the state Commission. It was the view of the respondent that the Commission therefore did not have the jurisdiction to determine the denied contractual benefit application. The applicant conceded that this was a matter that should be heard in another place.

53 It is the view of the Commission the respondent is correct that jurisdiction does not exist for this application to be determined. In proceedings where the denied contractual benefit sought is the subject of an order of the state Commission such as a state award then the matter cannot be brought before the Commission by way of a s 29(1)(b)(ii) application such as that as has been made by the applicant.

54 Accordingly, an Order will issue dismissing the denied contractual benefits application.

2014 WAIRC 00178

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIAM CHRISTOPHER PORTER
	APPLICANT
	-v-
	MR CESARE VIOLANTI AND MRS SOMSI VIOLANTI TRADING AS KWINANA PIZZA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 7 MARCH 2014
FILE NO/S	B 99 OF 2013
CITATION NO.	2014 WAIRC 00178

Result	Order issued
Representation	
Applicant	Ms S Porter as agent
Respondent	Ms V Mountain (of counsel)

Order

HAVING heard Ms S Porter on behalf of the applicant and Ms V Mountain on behalf of the respondent, the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby:

ORDERS THAT the contractual entitlements application filed by the applicant, namely B 99 of 2013, be and is hereby dismissed.

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

2014 WAIRC 00198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIAM CHRISTOPHER PORTER
	APPLICANT
	-v-
	MR CESARE VIOLANTI AND MRS SOMSI VIOLANTI TRADING AS KWINANA PIZZA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 11 MARCH 2014
FILE NO/S	U 99 OF 2013
CITATION NO.	2014 WAIRC 00198

Result	Order issued
Representation	
Applicant	Ms S Porter (as agent)
Respondent	Ms V Mountain (of counsel)

Order

HAVING heard Ms S Porter on behalf of the applicant and Ms V Mountain on behalf of the respondent, the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby:

DECLARES THAT the dismissal of Mr L Porter by the respondent was unfair and that reinstatement or re-employment is impracticable.

ORDERS THAT the respondent pay to Mr L Porter 10 weeks' remuneration less the sum of $600, being the one week's notice received in the period since dismissal was notified. The respondent to pay the sum of $5,400 gross to the applicant.

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

2014 WAIRC 00132

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAL SAFRATA
	APPLICANT
	-v-
	VERONICA LYNNE BARLEY AND NIGEL PATRICK BARLEY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO/S	B 205 OF 2013
CITATION NO.	2014 WAIRC 00132

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 21 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.

2014 WAIRC 00114

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEENA SAJE
	APPLICANT
	-v-
	JOHN WALKER CHOCOLATIER
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 19 FEBRUARY 2014
FILE NO/S	U 201 OF 2013
CITATION NO.	2014 WAIRC 00114

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr J Walker

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979.*

On 5 February 2014 the Commission convened a conference for the purpose of conciliating between the parties however no agreement was reached.

At the conference the applicant advised the Commission that she did not wish to proceed with her application.

The applicant filed a Notice of Withdrawal or Discontinuance form on 5 February 2014 in respect of the application. 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 00128

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYRILLOS SAWERES
	APPLICANT
	-v-
	SALVATORE SCAFFIDI - MUTA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO/S	B 190 OF 2013
CITATION NO.	2014 WAIRC 00128

Result	Application discontinued
Representation	
Applicant	Mr K Saweres
Respondent	Ms J Swift (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 13 January 2014 a conference between the parties was convened;

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

AND WHEREAS on 10 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.

2014 WAIRC 00125

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYRILLOS SAWERES
	APPLICANT
	-v-
	SALVATORE SCAFFIDI - MUTA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO/S	U 190 OF 2013
CITATION NO.	2014 WAIRC 00125

Result	Application discontinued
Representation	
Applicant	Mr K Saweres
Respondent	Ms J Swift (of counsel)

Order

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

AND WHEREAS on 13 January 2014 a conference between the parties was convened;

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

AND WHEREAS on 10 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.

2014 WAIRC 00101

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00101
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 11 FEBRUARY 2014
DELIVERED	**:**	FRIDAY, 14 FEBRUARY 2014
FILE NO.	**:**	B 152 OF 2013
BETWEEN	**:**	RICHARD SIMPSON
		Applicant
		AND
		UDUC BROOK FARMS PTY LTD
		Respondent

CatchWords	**:**	Denied contractual entitlements – Unpaid wages – Whether payments were gross or net
Result	**:**	Application granted in part
Representation:		
Applicant	**:**	Mr R Simpson on his own behalf
Respondent	**:**	Mr M Taylor and with him Mr C Batistich

Reasons for Decision

1 The respondent operates a dairy farm at Harvey. The applicant was employed by the respondent as a farm labourer commencing employment on 9 August 2012 and finishing on 14 November 2012, being a period of 14 weeks' employment. The applicant claims that he was not paid for all hours worked and seeks an order for payment of those hours, totalling $1,650.

2 The parties agree that the applicant was to work approximately 40 hours per week and to be paid at $20 per hour. There was initially some dispute between the parties as to whether this $20 per hour was net or gross of tax, however, the evidence is clear that the applicant was paid either by cheque or into his bank account, $800 per week each week of his employment and, in addition, the respondent made payments to the Australian Taxation Office in respect of those amounts. Therefore, it is clear that the amount of $20 per hour was a net amount.

3 The applicant submitted into evidence a schedule of his working hours for the period of his employment (exhibit 1) and the respondent conceded that he was unable to challenge these hours as he had no alternative records.

4 The applicant's schedule of hours indicates that for many of the weeks in which he was employed, he worked in excess of 40 hours each week, sometimes as much as 50 and 51 hours per week. On a small number of occasions, he worked less than 40 hours per week. However, the hours in accordance with his schedule, which the respondent is not able to challenge, totals 618.5 hours. Had he been paid $20 per hour for each of these hours, the applicant would have been paid $12,370. He was in fact paid for 40 hours per week over 14 weeks, which totals 560 hours. In the circumstances then, the applicant is entitled to be paid for an additional 58.5 hours at $20 per hour, totalling $1,170 net.

5 In addition, the applicant says that he is owed payment for six extra milkings at $80 per milking. He says these were undertaken on 22, 23, 24, 27 and 28 August and 23 September 2012. However, in examining the applicant's schedule, exhibit 1, for the dates on which the applicant says he undertook these extra milkings, he has recorded the hours for those milkings as part of his daily hours, which go to make up the total number of hours for the whole period of employment. To claim payment for the milkings on top of the hours which were already recorded would be a double counting. Therefore, I find that the extra milkings are already accounted for and would dismiss that part of the claim.

6 Accordingly, an Order will issue that the respondent pay to the applicant the amount of $1,170 net on account of unpaid wages for the hours worked. Such payment is to be made within 21 days of the date of the Order.

2014 WAIRC 00154

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD SIMPSON
	APPLICANT
	-v-
	UDUC BROOK FARMS PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 MARCH 2014
FILE NO/S	B 152 OF 2013
CITATION NO.	2014 WAIRC 00154

Result Application granted in part

Order

HAVING heard Mr R Simpson on his own behalf and Mr M Taylor and with him Mr C Batistich on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the respondent pay to the applicant the amount of $1,170 net on account of unpaid wages.
2. THAT the payment referred to in paragraph 1 above is to be made within 21 days of the date of this Order.
3. THAT the application be, and is otherwise hereby dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Azis Arslanovski	Official Secretary to the Governor of Western Australia on behalf of the Governor's Establishment	U 162/2013	Commissioner S J Kenner	Discontinued
Craig Davey	Pilbara Mining Alliance Pty Ltd	B 90/2013	Commissioner S J Kenner	Discontinued
Rodney James McAtee	Knights of the Southern Cross (WA) Incorporated	U 160/2013	Commissioner S J Kenner	Discontinued
Valerie Burman	Bicton Travel Pty Ltd	B 185/2013	Commissioner S J Kenner	Discontinued

CONFERENCES—Matters referred—

2014 WAIRC 00091

DISPUTE RE ROSTERING PRACTICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00091
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 22 AUGUST 2013, FRIDAY, 23 AUGUST 2013, THURSDAY, 24 OCTOBER 2013, FRIDAY, 25 OCTOBER 2013
DELIVERED	**:**	TUESDAY, 11 FEBRUARY 2014
FILE NO.	**:**	CR 29 OF 2012
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

Catchwords	**:**	Industrial law (WA) – Matter referred for hearing and determination under s 44(9) of the Act – Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011 – Dispute regarding changes to Passenger Ticketing Assistants' rostering arrangements on the Armadale Line – Contracting out of Authority work – Access to the Authority's Rostering and Payments System – Principles applied – Interpretation of Agreement – Work/life balance – Deployment of labour – Operational requirements – Managerial prerogative – Discretion cannot be exercised arbitrarily, capriciously or unreasonably – Implied duty of trust and confidence – The Authority did not act capriciously or unreasonably by maintaining the use of spare lincs on the Base Roster or engaging contracted security services – Union and rostering representatives should have full access to the Authority's Rostering and Payments System – Application granted in part
Legislation	**:**	Industrial Relations Act 1979 (WA) ss 44, 44(9)
Result	**:**	Application granted in part
Representation:		
Counsel:		
Applicant	**:**	Mr C Fogliani and with him Mr K Singh
Respondent	**:**	Mr R Farrell and with him Ms J Allen-Rana

Case(s) referred to in reasons:

Abu Dhabi National Tanker Co. v Product Star Shipping Ltd. (The "Product Star") (No. 2) [1993] 1 Lloyd's Rep 397

Amalgamated Metal Workers and Shipwrights Union v Robe River Iron Associates (1986) 67 WAIG 2

Amcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241

Commonwealth Bank of Australia v Barker (2013) 214 FCR 450

City of Wanneroo v Holmes (1989) 30 IR 362

Foggo v O'Sullivan Partners (Advisory) Pty Ltd (2011) 206 IR 87

Horkulak v Cantor Fitzgerald International [2004] EWCA Civ 1287

Kucks v CSR Limited (1996) 66 IR 182

Malik v Bank of Credit and Commerce International S.A. [1998] AC 20

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority (2012) 92 WAIG 894

The Australian Workers' Union, West Australian Branch and Ors v BHP Iron Ore Ltd (2002) 82 WAIG 2558

Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165

Case(s) also cited:

PTA and ARTBIUWA (2009) 89 WAIG 1148

WA Prison Officers' Union of Workers v Minister for Corrective Services (1989) 69 WAIG 2217

Federated Miscellaneous Workers Union v Sir Charles Gairdner Hospital (1991) 71 WAIG 2200

ASDSTE v Mt Newman Mining (1991) 71 WAIG 1077

Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd (1987) 163 CLR 117

Delooze v Healey [2007] WASCA 157

Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 144

Rogan-Gardiner v Woolworths [No 2] [2010] WASC 290

Whittaker v Unisys (2010) 26 VR 668

Hussain v Surrey & Sussex Healthcare NHS Trust [2011] EWHC 1670 **(QB)**

Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357

Rankin v Marine Power International [2001] VSC 150

Mallone v BPB Industries Plc [2002] IRLR 452

Reasons for Decision

Background to dispute

1 The present dispute has a lengthy history. It concerns rostering arrangements applying to Passenger Ticketing Assistants employed by the Authority on its Armadale Line. The Armadale Line runs from Perth Station to Armadale Station, within some 20 stations in between. The line is a busy line, with in excess of nine and a half million passengers in the 2012-13 year. PTAs were introduced into the urban rail network in 2006. The job of a PTA involves providing patrons with advice on train schedules, timetables and ticketing. They also assist in revenue protection, by checking tickets and issuing fare evasion infringements at fare gates. The employment of PTAs is covered by the terms of the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011.

2 The present dispute concerns a change to the roster for PTAs on the Armadale Line in July 2012. At that time, a change was made to the employees' Base Roster, in particular, by removing the Sunday Armadale 2 shift from a permanent location on the roster. As a result of an earlier dispute about this matter, an agreement was reached between the Authority and the affected employees, in February 2010. This involved the permanent allocation of the Armadale 2 shift to a line in the roster, over the fortnightly roster cycle. There were other consequences of this change, flowing from the incorporation of the Armadale 2 shift into the roster.

3 In early 2012, the situation was altered. The Authority determined that the Armadale 2 shift would no longer be permanently allocated a line in the roster and would return to being a floating shift, and would be paid as overtime and not as an ordinary weekend shift. Additionally, other changes were made. These included changes to the Thornlie shifts by reducing shift hours Monday to Thursday by 15 minutes. This enabled the Authority to increase Friday shifts at the Kelmscott Station by one hour, without incurring overtime penalties, as was the case prior to this change. The introduced changes were based on the Authority's need for operational efficiency and budgetary constraints.

4 As a consequence of these alterations, the Union notified the Authority of a dispute in relation to the roster on the Armadale Line. A number of issues were raised by the Union with the Authority arising from the roster changes. These issues included:

(a) A complaint that there are too many "spare lincs" on the Armadale Line base roster;

(b) The fact that the Armadale 2 shift was not allocated to a line in the roster;

(c) That the employees wished to implement a balanced roster;

(d) The differing shift lengths in the new proposed roster made shift swaps difficult, if not impossible;

(e) Complaints in relation to the unfair allocation of overtime and that PTAs on the Armadale Line were the lowest paid generally;

(f) That contractors were being used to perform work on the line which could be performed by PTAs; and

(g) That the employees' access to the Authority's Rostering and Payments System had been withdrawn.

5 As a result of these matters the Union made an application to the Commission under s 44 of the Industrial Relations Act 1979. A number of compulsory conferences were convened, which did not resolve the issues in dispute. The Union sought an

interim order preventing the Authority from implementing the new Base Roster. The Commission declined to make an interim order, on the basis that if the issues remained in dispute, evidence in relation to the actual workings of the new Base Roster would inform the Commission in relation to the matters to be determined. The Authority introduced the new Base Roster from 1 July 2012. Further compulsory conferences from that time up until March 2013 did not resolve the issues in dispute. Accordingly, the matter was ultimately referred for hearing and determination under s 44(9) of the Act.

Orders sought

6 The Union seeks two orders, put in the alternative. The first order sought, is that the current Base Roster for PTAs on the Armadale Line be replaced by a proposed roster set out at attachment A, annexed to the notice of referral. Amongst other things, that roster provides for the Armadale 2 shift to be allocated permanently to a line in the roster. In the alternative, the Union seeks an order that the Authority be directed to further consult with the Union and the PTAs in order to produce a roster which contains the following:

(a) Work day and rostered day off patterns and the start and finish times for each shift that the employees could reasonably be expected to work be shown in every linc in the Base Roster;

(b) All shifts on the Armadale Line Base Roster for PTAs, wherever possible, should be ten hours in length;

(c) All shifts that are typically worked by the Armadale Line PTAs (including those on the Armadale 2 Sunday shift) should be permanently allocated to a linc on the Base Roster;

(d) That the Base Roster must contain balanced weeks of work;

(e) That work at the Victoria Park Station between the hours of 2:35pm and 4:45pm be assigned to the Armadale Line PTAs;

(f) That Union delegates, rostering representatives and PTAs on the Armadale Line be given access to RAPS; and

(g) That as an alternative to (a), if the Commission finds that the existence of relief lincs in the Base Roster are consistent with cl 3.3.6(c) of the Agreement, that the number of spare lincs be reduced from the present three to two.

7 Before considering the specific issues in dispute, in terms of the orders sought, I first refer to some matters of principle dealt with in the submissions of the parties.

Issues of principle

8 The Union advanced its case as one being based on the overriding principle of work/life balance. The Union contended that the current Base Roster, resulting from the changes made in July 2012, is not consistent with this broad overarching principle. It was submitted that the Authority had placed an over-reliance upon its operational requirements, to the detriment of the work/life balance of the PTAs on the Armadale Line.

9 It was submitted by the Authority, and accepted by the Union, that the principle of management's prerogative to manage is not to be lightly interfered with. This principle found expression in some detail in *Amalgamated Metal Workers and Shipwrights Union of Western Australia and Ors v Robe River Iron Associates* (1986) 67 WAIG 2, a decision of the Commission in Court Session, dealing with a major industrial dispute in the iron ore industry. In that case, Gregor C referred to the relevant authorities in relation to managerial prerogative. Whilst the quotes are lengthy, they are important observations on matters of principle. They are in the following terms:

> The philosophy of industrial tribunals is founded on the historical rights of people to conduct their own business within the law, to employ whoever they like and be employed by whom they like. In fact early legislation in this country withheld from industrial tribunals the power to arbitrate disputes about how an employer should manage his business. An outline of the origin, development and acceptance by tribunals of their role in such disputes was set down by Wright J. in the Federated Clerks Union *v*. Public Service Board and Others (128 CAR 219) as follows:
>
> > As stated in our reasons for decision this Commission, and the Arbitration Court before it, have throughout their existence acknowledged the right of an employer to manage and regulate his own business, subject to the protection of his employees from injustice or unreasonable demands. Because I feel that this concept is soundly based, and indeed fundamental to the jurisprudence of this Commission, I consider it appropriate to take this opportunity of tracing in outline its origin, development and acceptance by the tribunals. It was expressed thus in 1906 by the first President of the Court (O'Connor J.) in the first case dealt with under the Act:
> >
> > > On the other hand the right of the employer is to manage his business in his own way without interference of any kind except in so far as the Court may deem it necessary to interfere for the purpose of making effective the right given by the Act to the combination of employees to fair wages.
> >
> > The second President (Higgins J.) put it this way:
> >
> > > The Court refuses to dictate to employers what work they should carry on, or how; or what functionaries they should employ, or what functions for each employee . . .
> > >
> > > The Court leaves every employer free to carry on the business on his own system, so long as he does not perpetuate industrial trouble or endanger industrial peace . . .; free to make use of new machines, of improved methods, of financial advantages, . . . of superior knowledge; free to put the utmost pressure on anything and everything except human life.

Another version of the same doctrine states:

> . . . industrial tribunals usually adopt the attitude that in the absence of evidence that the employer is abusing his powers by acting harshly, oppressively or unjustly . . . they will not interfere with his common law right to manage his own business . . .

O'Mara J. in 1942 said:

> I do not propose to substitute my opinion or to allow the opinion of the employees to be substituted for that of the management as to the best way in which these works can be carried on in the best interest of the community.

Kelly J. in 1943 said:

> . . . the time has, I think, come to restate the general principle that this Court will not interfere with an employer's right to regulate his own business, unless in his regulation of it he imposes unjust or unreasonable demands upon his employees.
>
> According to my experience and reading, neither the Court nor the Commission has ever deviated from these versions of the principle and numerous examples of its application by the Court and Commission are found in the Reports. E.g. Tonkin, Conciliation Commissioner and Morrison, Conciliation Commissioner.
>
> The same general principle has been adopted over a considerable period by the New South Wales' state tribunal, as is exemplified by a long line of cases dealt with in the State.

In a matter involving Nabalco Pty Limited *v.* Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch No. C 2340 of 1974 (Print C 4814) the principle was further developed by Mr Justice Coldham particularly in respect to how it ought to be applied in circumstances involving demarcation arguments. Even though the issue then under consideration was demarcation, the principle is nevertheless relevant.

> It is the employer who manages the operations which give employment to the men who are members of unions which raise demarcation issues. The employer is the manager. It is his operation in his establishment which is under review. As part of the management of his operation the employer must employ men. He employs men for the purpose of commencing and maintaining his operation. He deploys men for the purpose of achieving and maintaining the more efficient conduct of his operation. His views on deployment are matters for him. Closely related to the deployment of men is demarcation of work. When demarcation issues are called before the Commission it is for the Commission to take the responsibility of deciding upon those issues. However the status of the employer must be given full recognition and his views on demarcation issues must be given special respect because of that status. Those issues must, if possible, be settled in a manner consonant with the employer's views upon the efficiency of management.

The philosophy which underlies the statements made by the various tribunals over the years has been given effect in this jurisdiction on many occasions, but particularly in a matter in many ways similar to the issue currently before this Commission in Court Session. The principles are consistently applied in a decision of Mr Commissioner B.J. Collier (as he then was) in Hamersley Iron Pty Ltd (Claimant) and the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and Others (Respondents), No. CR 24B of 1981 (64 WAIG 1795). In disposing of the various matters before it during that case, the Commission applied the principle against the background of the particular facts which were then described to it. At page 1800 of the decision it clearly encapsulated the principle as follows:

> As stated earlier an offer of reasonable overtime is clearly the prerogative of management. The Commission should not query the prudence of management in the exercise of that right or interfere unless it can be shown that employees have been unjustly treated by the manner in which the right is exercised.

10 These principles apply with equal force now, as in the past. The principle also applies in the same way where an employer proposes to introduce change to its operations. In *The Australian Workers' Union, West Australian Branch and Ors v BHP Iron Ore Ltd* (2002) 82 WAIG 2558 I said at pars 16 and 17 as follows:

> 16 It is common ground that the respondent has the right under both the Award and had the right under the previous industrial instruments, to require employees to change from one shift to another. That proposition is clearly correct in my view.
>
> 17 It has also been an industrial principle of long standing, that where an employer has a contractual or award right to introduce change, industrial courts and tribunals will not interfere with the exercise of such a right, unless it is established by those opposing such a change, that it would be unfair or unjust for the change to be effected: *BHP v FIA* 1977 AILR para 493 (11) per Watson J; *AMWSU v RRIA* (1986) 67 WAIG 2. Not only does an employer such as the respondent have the right to manage its operations, it has a duty to do so in the most efficient matter, consistent with its obligations as a public company under the Corporations Law. However, these rights and duties must always be tempered by the concept of industrial fairness, such that the exercise of such a right is not harsh, oppressive, or unfair, or otherwise imposes undue burdens on employees. For example, matters such as excessive workloads and occupational health and safety considerations have always been relevant in this respect.
>
> 18 In the present dispute, the respondent is seeking to exercise a right that it undoubtedly has both under the Award, and under previous industrial instruments. As to the submission of the applicants that the status quo must apply, by reason of the application having been filed prior to the making of the Award, I do not accept that argument. The Commission in Court Session rejected a claim by the unions in those proceedings leading to the making of the Award that there be a general liberty in respect of all matters presently before the Commission: *AFMEPKIU and Ors v BHP Iron Ore Ltd and Ors* (2002) 82 WAIG 2060 at 2066.

11 Rostering is a matter prescribed by the Agreement. The provisions relevant to the Base Roster and changes to it are set out in cls 3.3.5-3.3.8. It is convenient to set out these clauses now and they are as follows:

> 3.3.5 Base Roster: The Employer shall construct a Base Roster for each employee group following consultation with the elected Employee Rostering Representative for that group.
>
> 3.3.6 Base Rosters will:
>
> a) be readily available for perusal by employees;
>
> b) show lines of work for all rostered employees for a typical roster cycle;
>
> c) Show work day and rostered day off patterns and show start and finish times for each line of work;
>
> d) comply with fatigue management principles;
>
> e) be balanced, to the extent that it is reasonably practicable, so that all employees work a similar number of hours over the roster cycle;
>
> f) make all reasonable endeavours to maximize the number of weekends off in a roster cycle, to the extent that this is practicable taking into account the constraints and operational requirements for employees working 24/7 shift work;
>
> g) provide for Balanced Weeks where the conditions of subclause 3.3.7 are satisfied; and
>
> h) only be modified to accommodate changes expected to persist for at least three months.
>
> 3.3.7 Where the majority of employees to whom a Base Roster applies have notified the Employer prior to the implementation of a modification to that Base Roster that they would prefer their roster to provide for Balanced Weeks, then any modification to the Base Roster will provide for Balanced Weeks. A Base Roster will provide Balanced Weeks where an employee is not rostered to work more than 43 ordinary hours in any week of the roster cycle. Where the Employer receives later notification from the majority of employees to whom a Base Roster applies that they do not prefer their roster to provide for Balanced Weeks, then any modification to the Base Roster following that notification need not provide for Balanced Weeks.
>
> 3.3.8 Where the Employer proposes to implement a modified or new Base Roster, the Employer shall:
>
> a) give 3 weeks' notice to employees who would be affected by the change
>
> b) advise the Union, and consult with the Union regarding amendments which may be necessary to:
>
> i) any Aggregated Wage Rate, under subclause 4.3; or
>
> ii) annual leave loading calculations under subclause 6.2.11.e); and
>
> c) Advise the Employee Committee Representatives on the Consultative Committee.

12 The purpose of a Base Roster is to provide employees with advanced notice, of their proposed working patterns and rostered days off. The Operational Roster, based on the Base Roster, is the roster that the Authority will require employees to actually work, and on which employees names are physically placed: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority* (2012) 92 WAIG 894 per Kenner C at par 5. As it is clear from cl 3.3.6(h) of the Agreement, changes to the Base Roster are only to be made where they are of some significance.

13 Thus far, in the context of the relevant provisions of the Agreement, and the application of the relevant industrial principles, it is only if the employer's exercise of a right under the Agreement regarding rosters and changes to them, is demonstrated to involve an unfair exercise of its right to manage, that the Commission should interfere.

14 The Union made some further submissions in relation to matters of principle. It was contended that the law implies into contracts of employment, a term to the effect that the employer shall not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them: *Malik v Bank of Credit and Commerce International S.A.* [1998] AC 20. Reference was also made by the Union in its submissions, to the implied obligation of good faith, and the obligation on an employer to not exercise its managerial discretion arbitrarily, capriciously, unreasonably or for a collateral purpose: *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287; *Abu Dhabi National Tanker Co. v Product Star Shipping Ltd. (The "Product Star") (No. 2)* [1993] 1 Lloyd's Rep 397; *Foggo v O'Sullivan Partners (Advisory) Pty Ltd* (2011) 206 IR 87. As to the latter proposition, there can be no question that in a case where discretion is to be exercised, it should not be arbitrary or capricious. How the exercise of the discretion is to be regarded in this context will also depend on the terms of the relevant contract, and all of the circumstances of the case.

15 The issue of whether there exists an implied term of mutual trust and confidence in Australian law is more controversial. Most recently, this was recognised as part of the Australian common law by the majority (Jacobson and Lander JJ; Jessup J dissenting) in *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450. This decision is now on appeal to the High Court. The issue will have to await the outcome of the appeal.

16 Reference was also made by the Union to the International Labour Organisation's *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (Convention No. 156, 1981). Australia ratified this Convention in March 1990. The Convention applies to employees who have dependent children and others in their care. It refers to measures to be taken to enable employees with family responsibilities to become and remain integrated with the labour force. The terms of the Convention have been given effect in domestic law in Australia in various equal opportunity statutes. The focus of the provisions is to prevent discrimination against, for example, employees, on the grounds of family responsibilities. It is unlawful for an employer to discriminate against an employee on the grounds of family responsibilities.

17 I will now consider the issues for determination, consistent with the way in which the parties put their respective cases before the Commission.

Spare lincs

18 The present Base Roster operates over two weeks and comprises ten "lincs". A linc is a line in the roster, which shows an employee's pattern of work for the two week period covered by the roster. Each line in the Base Roster is required under the Agreement, to show the start and finish times for each shift and the days off over the roster cycle.

19 A "spare linc" in the roster, is one to which no start and finish times, or day off patterns, are allocated. No stations are referred to. It is represented as a blank line on the roster and described as "spare". There are presently three spare lincs on the current Base Roster. The Union says that if there are to be spare lincs, then there should be only two. The existence of spare lincs is not new. They have been a feature of rosters for the Authority since the inception of the PTA position in 2006. The purpose of a spare linc is to provide coverage for planned absences such as annual leave, long service leave, leave without pay and training etc. They are also used to provide coverage for unplanned absences, such as sick leave and workers' compensation. According to the Authority, on the evidence of Mr Luff the Manager Customer Service for Transperth Train Operations, the objective of spare lincs is to provide relief coverage for approximately 20 per cent of staff on a particular line. Presently, according to Mr Luff, the Armadale Line has coverage of approximately 18 per cent of the staff for the line, which is consistent with most other lines on the Authority's network.

20 The Commission notes that while the present dispute emanates from changes to the Base Roster made from July 2012, Base Rosters prior to this time, as far back as 2010, also had three spare lincs: exhibit R1 tab 2.

21 The Union contends that spare lincs deprive employees of certainty as to their hours of work and day off patterns. It was submitted that this undermines the purpose of a Base Roster, which is, amongst other things, to provide some certainty to employees in relation to their projected working hours in the future. Specifically, the Union submitted that the existence of three spare lincs means that employees cannot properly plan their personal lives; requires them to work eight hours per day on spare lincs which affects their ability to access days off; the Authority is withholding meaningful work for employees; spare lincs are being used as a tool of favouritism by the Authority; and generally, their use is capricious and unreasonable.

22 From its own analysis, the Union contended that the Authority needs to cover some 60 weeks' of annual leave and training leave for the Armadale Line PTAs. On the basis of three spare lincs in the Base Roster, this gives the Authority some 156 weeks of coverage each year, which is 96 weeks in excess of what they need, according to the Union. Adopting two spare lincs instead, will give 104 weeks of coverage, which are some 44 weeks in excess of the coverage needed. No account however, is taken in these figures, of the need to cover for long service leave and for unplanned absences, such as sick leave and workers compensation, for example.

23 For the Authority it was contended that spare lincs are necessary to respond to both planned and unplanned absences. To reduce the spare lincs from the current three to two, would impact on the Authority's operational flexibility.

24 Witnesses for the Union gave evidence about the impact of spare lincs. Mr Jesse Watts has been a PTA on the Armadale Line since 2006. He was also a rostering representative until 2010. Mr Watts said from his experience, most problems arise from the use of spare lincs. This relates primarily to changes to shifts that occur for employees working on spare lincs. Mr Watts gave an example of hours he worked over the Christmas period 2012. He was rostered to work on a spare linc, covering a person on holidays. He was rostered for 42 hours of work. Mr Watts was then given additional hours, which totalled 56 hours for the week. He was told by his Manager that this was allowed because he was on a relief linc and the employer could do this, as long as it did not exceed 80 hours in a fortnight.

25 Mr Watts also gave evidence in relation to more recent examples, of working on different shifts to cover for absences, when in the second week, the roster changed with different days off. Mr Watts also said he got complaints from employees on relief lincs, who were not getting weekend work. Employees do not understand why this happens and the use of spare lincs causes these sorts of problems, according to Mr Watts. Whilst in cross-examination, Mr Watts could not comment on whether in recent weeks, prior to the hearing of this matter, three lincs were necessary for the Authority to get the required coverage of annual leave, he did say in the past when two spare lincs were used, there was no need for excessive overtime to be worked. Mr Watts had prepared a proposed roster, submitted to the Authority, and which is the Union's preferred position as set out in the annexure to the s 44(9) referral. This proposed Base Roster contains two spare lincs only. Mr Watts said he could see no reason why such a roster could not be worked.

26 Mr Singh has been a PTA on the Armadale Line for in excess of two years. He is the current rostering representative. He said the new Base Roster implemented in July 2012, had implications for him personally. The use of three spare lincs has led to uncertainty for his working arrangements. Mr Singh testified that he was not able to plan ahead and it has also meant that he is not able to spend as much time with his family as he wishes. Mr Singh previously worked as a PTA in Perth, and said there were better rosters at that location. Whilst he worked spare lincs when based in Perth, the hours worked were ten hour shifts and not eight. Mr Singh moved to the Armadale Line to be closer to his family. In cross-examination however, Mr Singh accepted that there is a trade-off between work/life balance and higher income through working shifts carrying penalty rates.

27 In relation to the working of spare lincs, Mr Singh testified that there is a predominance of eight hour shifts and an absence of weekend work. When it was put to him that the absence of weekend work may also be regarded as a positive for work/life balance, Mr Singh said he also had the need for penalty payments to help pay his mortgage. Mr Singh also testified that in one case, when an employee was off on extended workers' compensation, the line was able to cope with two spare lincs. However, in cross-examination, it emerged that in fact, at the time, three spare lincs were in use on the then Base Roster, and the replacement employee was working on one of them.

28 Ms Catalano is a PTA and has been on the Armadale Line since 2006. As well as adult children, Ms Catalano has grandchildren. On the current Base Roster, she complained that she does not get enough time with her grandchildren. In terms of spare lincs, Ms Catalano said that there is a predominance of eight hour shifts, which means little weekend work and no penalties. She also referred to the period of time just prior to the opening of the Mandurah Line. At that time, the Authority had employed a number of extra staff in anticipation of the opening of the new line, and some of them worked on the

Armadale Line, prior to their transfer to Mandurah. At that time, Ms Catalano said that they worked with only two spare lincs on the Base Roster, without difficulty. She could not see the problem in going back to that now.

29 In cross-examination however, Ms Catalano accepted that under the Agreement, the Authority has the ability to roster employees over a minimum of six and a maximum of ten to twelve hours per day. She also accepted that the Authority has an obligation to meet its customer and operational needs, when it compiles its Base Rosters.

30 Ms Flavel has also been a PTA on the Armadale Line since 2006. She moved to other positions within the Authority and returned to the Armadale Line in the last two years or so. Ms Flavel testified that at the time she first started on the Armadale Line, only one or two spare lincs were used. She did not experience a problem with absences for annual leave or any other issues, as far as she could recall. This was also the case just prior to the commencement of the Mandurah Line, when a number of extra PTAs worked on the Armadale Line. Ms Flavel also complained that on the Mandurah Line, where she is presently temporarily based, spare lincs usually contain ten hour shifts, whereas most, if not all, on the Armadale Line, are eight hour shifts.

31 Ms Flavel considered that she earns less income on the Armadale Line, because there is less opportunity to earn penalty rates. This appeared to be common ground. In cross-examination however, Ms Flavel accepted that on the Mandurah Line, because there are fare gates at all stations, operationally, that may explain the existence of ten hour shifts as opposed to eight hour shifts. A further problem identified by Ms Flavel, as with other witnesses, was the inability to plan ahead, when allocated to a spare linc on the roster. I note however, that this equally applies to the Mandurah Line, where Ms Flavel is presently working.

32 Evidence on behalf of the Authority was adduced through Mr Luff. In relation to spare lincs on the Base Roster, Mr Luff testified that the purpose of spare lincs is to cover work that is generally vacant. That is, vacancies that arise from annual leave, workers' compensation, training, sick leave, in particular long term sick leave absences, and for any other reason when a staff member is not at work. Mr Luff also noted that as the rosters for Customer Service Assistants do not contain spare lincs, when a CSA is on annual leave, a PTA will often act up in the position on higher duties. Therefore, according to Mr Luff, whilst the PTA Base Roster for the Armadale Line contains three relief lincs covering ten employees, in effect, they also provide cover for a further seven employees on the CSA roster. As already noted, Mr Luff said that given the general rule of covering for a 20 per cent absenteeism rate, on the Armadale Line in his experience, the Authority fully utilises the three relief lincs most of the time.

33 Additionally, if there is a lower level of absenteeism at any particular time, Mr Luff testified that the PTAs on the relief lincs are assigned to in particular, the Oat Street Station and the Cannington Station, to provide additional customer service. In this respect, Mr Luff undertook some research as to the incidence of coverage at the Oats Street Station. Over the period of twenty weeks or so prior to the hearing, on only two of those weeks, did PTAs attend that station for four days of the week. Mr Luff said that this meant that three spare lincs are justified. Otherwise there would be a PTA presence at Oats Street all the time. The fact that it was only sporadic, demonstrated that three spare lincs are required to cover the other work on the Armadale Line.

34 An issue raised with Mr Luff in his evidence, in relation to predictability, was a proposal discussed some time ago with the employees, of inserting default start and finish times on the relief lincs. Mr Luff said that in the course of the last negotiations for a replacement industrial agreement, there were suggestions that default start and finish times be inserted into spare lincs Monday through to Friday. Mr Luff said however, that when he raised this matter with the rostering representatives for the PTAs on the Armadale Line, they considered that such a step would be too confusing, on the basis that when the Base Roster is populated with employees, and it becomes the Operational Roster, there would be likely significant changes anyway. For that reason, to avoid the confusion, Mr Luff said that the general view at that time seemed to be that employees prefer to leave the current arrangements as they were.

35 In this respect, Mr Luff referred to an email from himself to the employee representatives of 14 June 2013, following a meeting with the relevant rostering representatives. This document is at exhibit R1 p 67. A note under "Item 8" regarding the utilisation of relief lines refers to the general consensus that inserting default times of work and days of work on the Base Roster would be more likely to cause confusion and difficulties amongst employees than the then present arrangements. A preference was expressed, as recorded in the note, for individual arrangements between staff and the managers to overcome any difficulties. Mr Luff testified that he was then of the view that as a general proposition, that the default times appeared not to be supported. However, he did not rule out the possibility of individual lines adopting that approach. I pause to note, that there seemed to be some dispute as to whether the representatives at that particular meeting included representatives for the Armadale Line.

36 Mr Luff was asked about the implications of reducing the number of spare lincs on the Armadale Line from three to two. He said that the consequence for the Authority would be to require work to be done presently in ordinary hours, some other way, including the working of overtime. This would impose extra cost on the Authority. According to Mr Luff, on the Armadale Line, PTAs, for the 2012/13 year, worked approximately an average of 187 hours of overtime per annum. The all line average for that year was 185 hours of overtime. Further, Mr Luff said that generally speaking, with "special events", this work is all covered on overtime. Thus, if employees wished to supplement their income through working additional hours and receive penalties, there is ample opportunity to express an interest in working these additional hours.

37 In relation to the compilation of Base Rosters and the use of spare lincs, Mr Luff referred to the difference between planned and unplanned absences. In the case of planned absences, such as annual leave or an employee acting in a higher position on higher duties for a period of time, the roster clerk, in setting up the rosters will know some time in advance if employees are taking leave and other extended absences, which are then assigned to employees working relief lincs. In the case where there are multiple relief lines on multiple rosters across the network, there is a process for allocation of coverage for absences.

38 The first position is to cover absences on the Armadale Line, for example, from those working relief lincs on that line. In the event that all available relief staff have been utilised, then the Authority will look to other lines for coverage. The practice is to try and allocate staff presently on a transfer list wishing to move from a line, because they generally are residing closer to the line where the relief is needed. If no staff are available having exhausted both of these processes, then the relief is worked on

overtime. In relation to that step, Mr Luff testified that overtime is generally allocated on the basis of those who firstly, volunteer for it. A further consideration is the amount of overtime performed by employees. The decision is generally taken to allocate overtime to the person with the least number of overtime hours worked, on the basis that all other things being equal, they are able to perform the particular work required.

39 In cross-examination Mr Luff accepted that the purpose of the Base Roster is to provide some indication of future working patterns for employees, and that spare lincs to an extent, work against that purpose. None the less, Mr Luff said they are still required to give the Authority necessary operational flexibility. In particular, Mr Luff said that spare lincs could not be removed from the Base Roster, because the Authority does not know what work might be required to be covered in advance. Even with arranged leave, given other changes that may occur, the Authority cannot determine future coverage needs, beyond a couple of weeks in advance. As it was put by Mr Luff in his evidence, the "bottom line" of reducing the spare lincs would be to remove 52 weeks of coverage that would have to be made up some other way. This would be either by working additional overtime, or, by reducing staff numbers, with some positions remaining unfilled.

40 As to this issue generally, I accept that the concerns raised by the employees who have given evidence in this matter are genuinely felt. I also accept that the issue of work/life balance is an important consideration for employees, particularly those with caring responsibilities for family members. The Commission must also, having regard to the principles referred to at the outset of these reasons, balance those considerations against the employer's right to roster staff, in accordance with the provisions of the Agreement, to meet its operational requirements, consistent with its general right to manage its business. This must also include its budget constraints, and the need to deploy its resources, including staff, in the most efficient manner.

41 It is necessary to first observe that the Agreement, to which both the Union and the relevant employees are parties, and are bound by, provides comprehensively for rostering arrangements. The working of shifts, given the operations of the Authority, is a necessary feature of work for PTAs and others employed on the Authority's network. It is a requirement of appointment to a position as a PTA that the person commits to working shift work, including weekends and public holidays. This is made clear in the Job Description Form for the position.

42 As noted, the Union contended that the current approach of the Authority to use spare lincs is inconsistent with cl 3.3.6 of the Agreement. Clause 3.3.6(c) of the Agreement, in relation to Base Rosters, requires a Base Roster to show "work day and rostered day off patterns and show start and finish times for each line of work". On the face of it, this submission by the Union has some substance. However, one then must move to cl 3.3.10(e)(ii), which makes specific reference to employees working a "relief line" on a Base Roster.

43 There is no definition of "relief line" in the Agreement. However, consistent with the generous approach to the interpretation of awards and industrial agreements, a meaning should be given to the terms of the Agreement, consistent with the presumed intentions of the parties at the time the Agreement was made: *Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241; *Kucks v CSR Limited* (1996) 66 IR 182; *City of Wanneroo v Holmes* (1989) 30 IR 362. It needs to be ascertained what a reasonable person would have understood the words in the Agreement to mean, having regard to the surrounding circumstances known to the parties, the text of the Agreement, and its object and purpose: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165. There was no suggestion in these proceedings, that a "relief line", as expressed in cl 3.3.10(e)(ii) has, or was intended to have, some other meaning to that accepted by both parties for the purposes of this case, that being a spare linc, which does not have days, hours of work and rostered days off referred to in it. It seems therefore, that the draftsperson of the Agreement, contemplated the use of relief shifts or spare lincs.

44 Without necessarily finally deciding the issue on this occasion, it seems to be soundly arguable at least, that the reference to "relief line" in a Base Roster for the purposes of cl 3.3.10(e)(ii) of the Agreement, was intended, and should be interpreted as, an exception to the requirements imposed by cl 3.3.6(c). To conclude otherwise, at least even provisionally at this stage, would seem to make little practical sense, and deprive the sub-clause of any meaning. Therefore, based on what is before the Commission, it is open to conclude that the Authority is not acting inconsistently with the Agreement by including spare lincs in a Base Roster.

45 Coming back to the merits of the claim by the Union, the Commission is not able to conclude on the evidence that the Authority has in some way, acted capriciously or unreasonably, by maintaining the use of three spare lincs in the Armadale Line Base Roster. There is ample evidence to support their use in my view. Whilst I accept that necessarily, the existence of spare lincs does decrease the ability of employees to plan ahead in their personal lives, this has always, to some extent at least, been the case. As already noted, spare lincs are not new. They have existed on the Base Roster since the inception of the PTA position in 2006, whether there has been two or three spare lincs in the past. There was no evidence before the Commission to support the proposition that spare lincs have been used as an instrument of favouritism by the Authority, or to punish staff.

46 In terms of access to penalty payments, there was some tension in the evidence in relation to this issue between higher earnings via penalties rates on the one hand and the assertion by employees for increased time off for family purposes, on the other. I note it is an obligation on the Authority under the Agreement, to allocate overtime and access to penalty rates, on an equitable basis. This implies that all other things being equal, any one employee should not work excessive amounts of overtime, compared to others.

47 It must be accepted in my view, that the Authority is required to have staff coverage for its rail network, for both planned and unplanned absences. Whilst the Union correctly referred to the weeks of staff coverage for planned annual leave and training leave, this does not account for long service leave (demands for which will only expand over time) and unplanned absences such as sick leave, workers' compensation and other unanticipated absences.

48 In terms of the optimal use of its resources, the employer is in the best position to make judgements as to where and how it deploys its staff, consistent with its requirement to provide an efficient public transport service to customers, whilst having proper regard to employee welfare. The Commission cannot be satisfied on the balance of probabilities, from what is before it on this issue that the Authority has acted unfairly, regarding its right to manage the working hours of all PTAs on the Armadale Line, in connection with the use of spare lincs on the Base Roster. The manner of the deployment of labour, consistent with the terms of the Agreement, is ultimately a matter for the employer.

49 However, having concluded that the Commission should not intervene in the terms sought by the Union to order the reduction in spare lincs from three to two, a further issue arises. That issue relates to the incorporation of what were referred to as "default" start and finish times in the spare lincs in the Base Roster. On the evidence, this issue was raised some time ago and debated between the affected employees and the management. Arising out of that debate, and referred to in an email from Mr Luff of 6 August 2013 (exhibit R1 p 69), reference is made to an attempt to improve rostering consistency for PTAs when working on relief lincs. Under the heading "Relief Links" in Mr Luff's email, is a series of five steps, as to how staff working on relief lincs would be deployed, depending on absences at any given time. When this issue was put to him in cross-examination, Mr Luff accepted that having the content of those steps set out in the Base Roster, did not cause the Authority any prejudice. It would not involve any increase in costs. In my view, the material included in Mr Luff's email should be incorporated into the Base Roster for the Armadale Line. Whilst, of course, any reference to days, hours of work and rostered day off patterns would be subject to change in the Operational Roster, it may provide some further guidance to employees in relation to their future working arrangements.

Armadale 2 shift

50 As a consequence of agreement reached in the course of the proceedings, it is no longer necessary to consider this issue.

Balanced working weeks

51 As with the above, this issue has now been agreed in principle and no further consideration is necessary in these reasons.

Contracting out of Authority work

52 This issue arises because the Authority presently engages a contractor, MSS Security, to attend the Victoria Park Station between 2.45pm and 4.45pm on weekdays. Two MSS personnel work between 2.45pm and 3.30pm and another two MSS personnel work between 3.30pm and 4.45pm. The Union submitted that this is work that can, and should be done by PTAs, at a lesser cost to the Authority than the present arrangements. Given this work could be done by PTAs the Union contended that the current arrangement is unfair.

53 The background to this issue was outlined in the evidence of Mr Luff. The history of customer service at the Victoria Park Station arises because the Association for the Blind of WA is across the road from the Station. On normal indicators, the Station would not warrant a staff presence, based on patronage. However, given the existence of special needs customers, a presence at the Station was necessary. Based on the customer service model used by the Authority, Mr Luff testified that customer service is generally provided to 3pm, from which time security staff take over coverage. This work is done by Transit Officers.

54 Given the shortage of Transit Officers, some of this work has been given to a contractor, MSS. The Authority does have a mobile security patrol (Delta patrol) based at the Victoria Park Station. However, they have previously been required to leave the Station to attend to other duties, including unlocking "park and ride" facilities in other locations on the Armadale Line. According to Mr Luff, when the MSS staff are not at the Victoria Park Station, they are riding on trains, providing a security presence and performing a revenue protection role. Mr Luff understood the position to be that if the MSS staff were not allocated station duties at the Victoria Park Station, they would spend the same time riding on trains. Thus, no savings would actually be generated if they ceased to perform the station work. On the other hand, Mr Luff said that if the PTA's rostered hours were extended to cover the work done by MSS presently, this would have an impact. Approximately 10 additional hours of work would need to be found from the roster, which would mean a reduction in hours elsewhere.

55 The evidence of Mr Luff on this issue was supplemented by a witness statement of Mr Kitis, the Authority's Transit Manager Security Services. Mr Kitis said that the reasons security personnel are based at stations are to provide safety and security to passengers; to minimise fare evasion; and to provide assistance and information to customers. To achieve these purposes, the Authority engages its own Transit Officers, and also, Revenue Protection Officers, presently under contract with MSS.

56 Mr Kitis referred to the model also mentioned by Mr Luff, in terms of the interface between customer service and security services on the Authority's network. Up until 3pm daily, fare evasion deterrence and customer assistance is provided by customer service employees. After 3pm, these functions are undertaken by security services. Revenue Protection Officers cease train riding, and staff stations, from 3pm to about 6pm.. From 6pm onwards, they resume train riding duties.

57 At the Victoria Park Station, this model is employed, as with other stations on the Authority's network. Mr Kitis referred to the mobile Delta squad, of Transit Officers, who, while based at the Victoria Park Station, are required to leave the Station to unlock "lock and ride" car parks on the Armadale Line, prior to the afternoon peak period. Because of the identified need to have a presence at the Victoria Park Station in their absence, the MSS personnel go to this location between 2.45pm and 5.30pm. They would otherwise be on trains. Mr Kitis said that how MSS staff this work, was a matter for them. He also referred to a review of this coverage at Victoria Park Station, with the discontinuance of "lock and ride" car parks from 1 July 2013.

58 For the Union, Mr Barry Watts said that he did not see a need for a Transit Officer or security presence at the Victoria Park Station, as it is a "special needs station". Along with Mr Britza, the view seemed to be that as MSS provide the same special needs services to customers, this could equally be provided by PTAs. Ms Flavel also expressed similar views. The PTAs could do the MSS work, at a lower hourly rate of pay.

59 As to this issue, the Commission is not persuaded by the Union that the MSS work should be discontinued and the PTAs have their shifts extended to cover the work in question. The principal reason the Authority uses MSS for this work is as a part of the security services, as Revenue Protection Officers. On the evidence of both Mr Luff and Mr Kitis, this work is performed because the existing Transit Officers were required to leave the Victoria Park Station to attend to other duties. If they were not required to do so previously, presumably no need would arise for the MSS involvement. It is not a case of the MSS employees replacing PTAs previously performing this work, or otherwise taking work away from them.

60 The work involved is essentially a support to the security services at the Victoria Park Station. The rest of the time the MSS personnel work on trains to provide a physical presence and revenue protection services. How the security services of the Authority request the deployment of MSS to provide coverage for Victoria Park Station, is a matter for the employer. I am not

satisfied that there has been any unfairness or injustice demonstrated, in the exercise of the Authority's managerial discretion on this issue.

Access to RAPS

61 The Authority operates a system called RAPS. It enables rosters to be constructed on the system, matching payroll data to be generated. It also enables rosters and payments made to employees to be viewed by computer access. The system enables current and historical roster and payroll data to be accessed. Also limited future data is available. Previously, PTAs could access this information. This was subsequently changed to remove access. In particular, the Union contended that the reversal of access to RAPS causes problems for Union delegates and roster representatives, who are asked by PTAs to assist with roster and payroll queries. It was submitted that the Authority's removal of access has frustrated the role of the Union, in particular having regard to the obligations imposed by cl 9.1.4(g) of the Agreement. This enables a Union representative to have access to an employee's work location, name and rostered hours of work.

62 On the other hand, the Authority contended that following a recommendation of the Commission in June 2012, it has given RAPS access to all customer service employees to view their current rosters. The Authority submitted it also provides a PDF copy of current rosters to employees. Accordingly, the Authority contended that it complies with its obligations under the Agreement. It also noted that in terms of historical information, at the close of a roster cycle, the RAPS system is locked so no other changes subsequently made, will appear on the system. It was contended by the Authority, that the previous access arrangements were changed, because of problems arising with PTAs accessing the system, and raising unnecessary issues, without a proper understanding of how the system worked.

63 As the current rostering representative, Mr Singh testified that the Authority had previously given access to RAPS for both current and historical rosters. This was taken away and only partially restored following the Commission's recommendation. Mr Singh was not aware of the reason for its removal in the first place. He testified that he has had employees raise problems with him in relation to their rosters. Ms Flavel said that PTAs used to be able to access RAPS fully. In her view, currently, PTAs have less access on the RAPS system than given to Transit Officers and CSAs. Also, Ms Flavel said that employees are not able to look forward, to view rosters coming up, for the purposes of booking medical appointments and the like.

64 Mr Barry Watts also said that as a Union representative, the lack of full access to the RAPS caused him difficulties. He has had to deal with queries from members on pay issues. Because he could not check prior rosters on the system, he was not able to resolve problems.

65 For the Authority, evidence on this issue was given by Mr Luff. He testified that different levels of access to RAPS are provided for differing groups of employees. For example, Railcar Drivers have no access to the system. Transit Officers do have access at a higher level than PTAs. In the past, according to Mr Luff, PTAs had open access to RAPS but this caused problems. Staff were looking at historical information and raising issues not directly related to their particular circumstances. As a result, there was a meeting between management and the Union representatives, and it was agreed to stop RAPS access and issue PDF copies of rosters to all PTAs instead. Subsequently, the issue has been raised again. A request was made by the Union representatives to review the issue, and be given access to the RAPS as previously.

66 Prior to the present dispute, employees had access to the RAPS without restriction. Transit Officers have fuller access. In June 2012, the Commission recommended that access to the RAPS be restored, but be limited to Union delegates and rostering representatives. In my view, simply because there may have been some problems in the past with access to the system, is no good reason to prevent the restoration of access to RAPS now. In particular, the Commission considers that Union delegates have played a role in the past in relation to resolving issues with employees regarding rostering and payroll. The Joint Commitment to the Role of Management and of Union Delegates and to the Resolution of Disputes (see attachment B to the Authority's written submissions), recognises the role of the Union and delegates in representing members' interests in the workplace.

67 By cl 9.1.4 of the Agreement, the principles in the Joint Commitment are given effect, as minimum obligations. By cl 9.1.4(g), Union representatives are able to have access to "rostered hours of work of employees". In accordance with the principles of interpretation of industrial instruments set out above, in my opinion this should not be read down to only include current rostered hours. To do so, would be inconsistent with the recognised role of the Union, as set out in cl 9.1 of the Agreement. Common issues arising in the workplace are queries and disputes as to pay for example. Hours of work and rosters are essential components in the resolution of such issues. It is difficult to see how a Union representative would be able to discharge their functions effectively to assist a member resolve a pay query for example, if they are not able to view available and relevant historical information.

68 Therefore consistent with the Commission's recommendation made in June 2012, Union representatives and rostering representatives should have full access to RAPS. If problems arise of a similar nature to issues that may have arisen in the past, a general liberty to apply will be provided so that they can be brought back before the Commission, by either party, if necessary.

Conclusions

69 For the foregoing reasons, the Commission will make orders that the Base Roster for the Armadale Line PTAs incorporate the information referred to in exhibit R1 at page 69. How that is best done, should be left to the parties. Additionally, Union delegates and rostering representatives should have unrestricted access to RAPS. In all other respects, the application is dismissed.

2014 WAIRC 00102

DISPUTE RE ROSTERING PRACTICES

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, 14 FEBRUARY 2014
FILE NO/S	CR 29 OF 2012
CITATION NO.	2014 WAIRC 00102

Result	Order issued
Representation	
Applicant	Mr C Fogliani and with him Mr K Singh
Respondent	Mr R Farrell and with him Ms J Allen-Rana

Order

HAVING heard Mr C Fogliani and with him Mr K Singh on behalf of the applicant and Mr R Farrell and with him Ms J Allen-Rana on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the Base Roster for the Armadale Line incorporates the matters referred to in the numbered paragraphs (1) to (5) under the heading "Relief Links" in exhibit R1 at p 69.

(2) THAT delegates of the applicant and rostering representatives employed on the Armadale Line be given full access to the respondent's Rostering and Payments System.

(3) THAT the parties have liberty to apply.

(4) THAT otherwise the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as a delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 for the Metropolitan Health Services B	Mayman C	PSAC 42/2013	15/11/2013 18/11/2013	Dispute re decision of alleged disciplinary process	Discontinued
Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Kenner C	C 193/2013	28/02/2013 6/03/2013 9/05/2013 21/05/2013 20/06/2013 28/06/2013	Dispute re Enterprise Bargaining Agreement negotiations	Discontinued
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority of Western Australia	Kenner C	C 219/2013	3/09/2013 23/10/2013 6/11/2013 13/11/2013	Dispute re enterprise bargaining	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Commissioner of Police	Kenner C	PSAC 39/2013	3/10/2013	Dispute re alleged breach of discipline	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection and Family Support	Scott A/SC	PSAC 40/2013	23/10/2013 8/11/2013	Dispute re alleged failure to comply with clause 23 and subclause 23.8 of the PS&GO General Agreement 2011	Discontinued
The Department of Transport	The Civil Service Association of Western Australia Incorporated	Kenner C	PSAC 16/2013	14/05/2013	Dispute re industrial action	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	Director General of the Department of Education	Scott A/SC	C 67/2012	18/10/2013 26/11/2013	Dispute re transition of year 7 students	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	Director General of the Department of Education	Scott A/SC	C 60/2012	14/11/2012 9/04/2013 6/06/2013 5/08/2013 11/10/2013 7/11/2013 12/02/2014	Dispute re functions and responsibilities of the Western Australian public education System	Discontinued
Western Australian Muncipal Road Boards, Parks and Racecourse Employees' Union of Workers Perth	Botanic Gardens and Parks Authority	Harrison C	C 1/2014	N/A	Dispute re higher duties allowance	Discontinued
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Gnowangerup	Scott A/SC	C 4/2014	25/02/2014	Dispute re alleged denied procedural fairness	Discontinued
Western Australian Prison Officers' Union of Workers	The Minister for Corrective Services	Kenner C	C 49/2012	30/08/2012 5/09/2012 19/10/2012 20/12/2012 8/01/2013 6/02/2014	Dispute re Agreement	Concluded

CORRECTIONS—

2014 WAIRC 00144

DERBARL YERRIGAN HEALTH SERVICES ENTERPRISE AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DERBARL YERRIGAN HEALTH SERVICE INC.

APPLICANT

-v-

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

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE THURSDAY, 27 FEBRUARY 2014

FILE NO/S AG 13 OF 2013

CITATION NO. 2014 WAIRC 00144

Result	Correction Order issued
Representation	
Applicant	Mr S Bibby, as agent – by written submission
Respondent	Mr G Upham – by written submission

Order

WHEREAS on 23 September 2013 the parties applied to the Commission to register the Derbarl Yerrigan Health Services Agreement 2013 as an industrial agreement pursuant to s 41 of the *Industrial Relations Act 1979* (the Act) and attached a copy of the agreement to the application;

AND WHEREAS the Commission required the parties to effect certain variations the Commission considered necessary for the purpose of the agreement complying with the Act;

AND WHEREAS on 19 November 2013 the parties consented to the Commission registering the agreement in the terms of a copy of the agreement provided by the applicant on 11 November 2013 which purported to be a true copy of the agreement as filed containing the variations required;

AND WHEREAS the Commission registered the copy of the agreement provided by the applicant on 19 November 2013 as the Derbarl Yerrigan Health Services Agreement 2013 ([2013] WAIRC 00975);

AND WHEREAS on 31 January 2014 the applicant advised the Commission that the copy of the agreement provided by the applicant on 11 November 2013 contained a number of typographical errors and omissions and requested that the Commission correct the registration by correcting order;

AND WHEREAS on 31 January 2014 the applicant has provided a further copy of the agreement distinguishable by the footer 'Final 16 December 2013' with the assurance that it is a true copy of the agreement as filed containing the variations required;

AND WHEREAS the applicant, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees and United Voice WA agree that the further copy of the agreement provided by the applicant is the copy of the Derbarl Yerrigan Health Services Agreement 2013 which should have been be registered by the order made on 19 November 2013;

AND WHEREAS the Commission agrees to correct the order of 19 November 2013 by substituting the schedule to the order with the copy of the agreement distinguishable by the footer 'Final 16 December 2013',

NOW therefore I, the undersigned, pursuant to the powers conferred on me under the Act, hereby order:

THAT the order [2013] WAIRC 00975 be corrected by -

1. Deleting the words 'THAT the *Derbarl Yerrigan Health Services Enterprise Agreement 2013* as amended in the attached schedule and signed by me for identification be registered under s 41 of the Act as an industrial agreement.' and inserting in lieu:

   THAT the *Derbarl Yerrigan Health Services Enterprise Agreement 2013* filed on 23 September 2013 and amended in the attached schedule be registered under s 41 of the Act as an industrial agreement.

2. Substituting for the schedule attached to the order the copy of the agreement attached to this order.

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

SCHEDULE

A•S•U

Derbarl Yerrigan Health Services

Enterprise Agreement 2013

1 TITLE

1.1 This Agreement shall be known as the Derbarl Yerrigan Health Services Enterprise Agreement 2013.

1

2 ARRANGEMENT

1 TITLE 2
2 ARRANGEMENT 2
3 TERM OF THE AGREEMENT 3
4 SCOPE AND PARTIES BOUND 3
5 RELATIONSHIP WITH AWARDS 4
6 FACILITATED TRANSITION 4
7 DEFINITIONS 5
8 INTRODUCTION OF CHANGE 8
9 DISPUTE RESOLUTION PROCEDURE 9
10 EMPLOYMENT CATEGORIES 9
11 NOTICE OF TERMINATION 12
12 REDUNDANCY 13
13 CLASSIFICATIONS 16
14 CLASSIFICATION LEVELS 16
15 SALARIES AND PAYMENT OF WAGES AND SLARY PACKAGING 17
16 SUPPORTED WAGE SYSTEM FOR EMPLOYEES WITH DISABILITIES 20
17 ALLOWANCES 22
18 SUPERANNUATION 26
19 SCHOOL BASED APPRENTICES 28
20 HOURS OF WORK 28
21 OVERTIME 31
22 FLEXITIME 32
23 EXCESS TRAVELLING TIME 35
24 AMBULANCE DUTY 35
25 SICK LEAVE 35
26 ANNUAL LEAVE 36
27 ANNUAL LEAVE TRAVEL TIME 37
28 FAMILY LEAVE 38
29 PUBLIC HOLIDAYS 39
30 PARENTAL LEAVE 40
31 FUNERAL LEAVE 45
32 CEREMONIAL LEAVE 45
33 SPECIAL AND EMERGENCY LEAVE 46
34 JURY SERVICE 46
35 LONG SERVICE LEAVE 46
36 TRAINING LEAVE 47
37 STUDY LEAVE 47
38 ENGLISH LANGUAGE STUDY LEAVE 48
39 FAMILY VIOLENCE LEAVE 48
40 DELEGATE RIGHTS AND TRAINING LEAVE 48
SCHEDULE A – CLASSIFICATIONS 51
SCHEDULE B - SALARIES 68

3 TERM OF THE AGREEMENT

3.1 This Agreement shall commence operation upon lodgement with the Western Australian Industrial Relations Commission (WAIRC) and shall have a nominal expiry date of 30 June 2015.

3.2 No less than six months prior to the expiration of this Agreement, the employer and the Union shall commence discussions regarding a replacement agreement.

3.3 The terms and conditions of this Agreement shall remain in force until a replacement agreement has been negotiated.

3.4 The *Aboriginal Communities & Organisations (Western Australia) Interim Award 2011 (A 1 of 2011), Aboriginal Medical Services Employee's Award (A 23 of 1985)* and *Motel, Hostel, Service Flats and Boarding House Worker's Award (A 29 of 1974)* applies except to the state of any inconsistency then the *Derbarl Yerrigan Health Services Enterprise Agreement 2013* will apply.

4 SCOPE AND PARTIES BOUND

4.1 The parties to this Agreement shall be;

4.1.1 Derbarl Yerrigan Health Services Inc.[DYHS] (the employer); and

4.1.2 Western Australian Municipal, Administrative, Clerical and Services Union of Employees (the Union); and

4.1.3 United Voice.

4.2 This Agreement covers Employees employed by Derbarl Yerrigan Health Services Inc. who are employed in a classification to which this Agreement applies and who are members of or eligible to be members of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees or United Voice.

4.3 This Agreement does not apply to Registered Nurses, Doctors, Dentists and Allied Health Professionals.

4.4 This Agreement covers approximately 100 employees.

5 RELATIONSHIP WITH AWARDS

5.1 This Agreement is comprehensive and replaces the Award(s) in its entirety; the entitlements provided for in this Agreement will operate in lieu of the Award entitlements while this Agreement remains in force.

5.2 This Agreement operates in conjunction with the *Minimum Conditions of Employment Act 1993*. Certain provisions of this Agreement may supplement the *Minimum Conditions of Employment Act 1993* but nothing in this Agreement will operate such as to provide a detrimental outcome for employees as compared to an entitlement under the *Minimum Conditions of Employment Act 1993.*

6 FACILITATED TRANSITION

6.1 The parties recognise that circumstances may arise during the term of this Agreement which could result in the Organisation becoming a National System Employer and therefore subject to the operation of the *Fair Work Act 2009*. In these circumstances, the parties will work collaboratively to have an Enterprise Agreement in the same terms approved by the Fair Work Commission for the balance of the period through until the nominal expiry date of 30th June 2015.

6.2 Simultaneously the parties will make joint application to the Western Australian Industrial Relations Commission to have this Agreement cancelled in accordance with section 43 of the Industrial Relations Act 1979, ensuring that DYHS and the employees are covered by an enforceable Enterprise Agreement at all times during the transition from the WA Industrial System to the National Employment System.

6.3 The terms and conditions of the state registered agreement will continue to apply up until seven (7) days after the new agreement is approved by the Fair Work Commission and therefore comes into effect.

6.4 Process Timelines

6.4.1 As soon as the employer believes that the organisation in within a transitional period, in that they are transitioning from the coverage of the State Industrial Relations System coverage to the Federal, the employer shall notify the Union and employees in writing.

6.4.2 Within two (2) weeks (or other such times as agreed by the parties) of the receipt of written advice in accordance with 6.4.1, the employer shall provide the Union with a copy of the Agreement, including any proposed amendments necessary to comply with the requirements of the *Fair Work Act 2009.*

6.4.3 Within two (2) weeks (or other such times as agreed by the parties) of the receipt of the amended agreement, in accordance with 6.4.2, the Union shall respond in writing to the employer indicating any objections to the amendments made.

6.4.4 If there is a dispute concerning the time frames in 6.4.2 and/or 6.4.3 the matter will be progressed through the Dispute Settlement Procedure at clause 9 of this Agreement.

6.4.5 If the Union and the employer are unable to reach agreement on the terms of the updated document, within one (1) month of the Union and employees receiving notice under 6.4.1, the matter will be referred to the Fair Work Commission for resolution under the Dispute Resolution Procedure of this Agreement.

7 DEFINITIONS

7.1 **Act** means the Western Australian *Industrial Relations Act 1979.*

7.2 **Aboriginal Health Worker** is defined in accordance with the following;

7.2.1 **'Aboriginal Community Care Worker'** means an employee who does not possess any relevant qualification or possess any experience in health care services. This employee will gain workplace experience and commence training towards Certification level. The work may include but is not limited to;

7.2.1(a) Aboriginal Health

7.2.1(b) Environmental Health

7.2.1(c) Aged Care

7.2.1(d) Counselling

7.2.1(e) Liaison

7.2.1(f) Mental Health

7.2.1(g) Alcohol Care/ Rehabilitation

7.2.2 **'Aboriginal Health Worker Grade 1'** shall mean an employee who possesses a relevant Certificate of which the course content is less than 12 months duration in total. The work may be, but is not limited to;

7.2.2(a) Aboriginal Health

7.2.2(b) Environmental Health

7.2.2(c) Aged Care

7.2.2(d) Counselling

7.2.2(e) Liaison

7.2.2(f) Alcohol Care/ Rehabilitation

7.2.3 **'Aboriginal Health Worker Grade 2'** shall mean an employee who provides a broad range of direct primary health care services and is able to work without direct supervision and/or an employee who possesses a Certificate with Medical Certification Grade 1 and/or Advanced Certificate of which the course content covered over a 12 month period or equivalent, from an accredited education provider in a relevant field. The work may be, but is not limited to;

7.2.3(a) Aboriginal Health

7.2.3(b) Environmental Health

7.2.3(c) Aged Care

7.2.3(d) Counselling

7.2.3(e) Liaison

7.2.3(f) Alcohol Care/ Rehabilitation

7.2.4 **'Aboriginal Health Worker Grade 3'** shall mean an employee who has a highly developed knowledge, skill and capacity for self directed application and is involved in the delivery of primary care, and this many involve supervision of others involved in primary care, and/or possesses a degree by an accredited training provider in the field of Aboriginal Health, and/or a Medication Certificate Grade 2. The work may include but is not limited to;

7.2.4(a) Aboriginal Health

7.2.4(b) Environmental Health

7.2.4(c) Counselling

7.2.4(d) Health Promotion

7.2.4(e) Alcohol Care/ Rehabilitation

7.2.4(f) HIV/STD Co-ordination

7.2.4(g) Health Education

7.2.4(h) Alcohol Rehabilitation

7.2.4(i) Mental Health Work

7.2.4(j) Nutritional Health

Such work shall be the provision of primary care or the supervision of work of a manual or domestic nature or of primary care.

7.2.5 **'Aboriginal Health Worker Grade 4, Level 1**' shall mean an employee, at a level higher than that at Health Worker Grade 3, who delivers primary care in a specialist health service area which shall include but is not limited to Mental Health, Health Promotion, Health Education, Heart Health or Remote Area Health and who is required to hold a qualification from an accredited training provider in the field of Aboriginal Health.

7.2.6 **'Aboriginal Health Worker Grade 4, Level 2'** shall mean an employee who is principally responsible for regional health co-ordination, or the supervision of others delivering primary care in specific projects and who is required to hold a qualification from an accredited training provider in the field of Aboriginal Health.

7.3 **Aboriginal Health Practitioner** means an Aboriginal or Torres Strait Islander person who has completed a Certificate IV in Aboriginal and/or Torres Strait Islander Primary Health Care (Practice) and is registered with the Aboriginal or Torres Strait Islander Health Practice Board in conjunction with the National Agency (Australian Health Practitioner Regulation Agency).

7.4 **Commission** means the Western Australian Industrial Relations Commission.

7.5 **Continuous service** means unbroken service with one particular employer.

7.5.1 Events which do not break an employee's continuous service are:

7.5.1(a) absence from work on paid leave;

7.5.1(b) absence from work on unpaid leave which has been approved by the employer;

7.5.1(c) the end of a funding period.

7.5.2 Absences which do not break an employee's continuous service but which do not count as time worked are:

7.5.2(a) absence from work on unpaid leave which has been approved by the employer in excess of one week in any year of employment. The amount of leave in excess of one week will change an employee's anniversary date for leave accruals and incremental advances in salary.

7.5.3 Absences which count as time worked are:

7.5.3(a) Absence from work on paid leave.

7.5.3(b) Absence from work on unpaid leave which has been approved by the employer, up to a maximum of one week in any year of employment.

7.6 **Council or Board** means the governing body of Derbarl Yerrigan Health Services Inc.

7.7 **CPI** means the Perth All Groups Consumer Price Index commencing the 1st April and ending on the 31st March the following year (as published by the Australian Bureau of Statistics).

7.8 **Employer** means Derbarl Yerrigan Health Services Inc.

7.9 **Immediate family** includes:

7.9.1 a spouse (including a former spouse, de facto spouse, and former de facto spouse). A de facto means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or a different sexes); and

7.9.2 a child or an adult child (including an adopted child, a step child or an ex nuptial child), parent, grandparent, grandchild or sibling of the employee or the employee's spouse.

7.10 **Social and community service work** means work that is designed to aid individuals, groups or communities to attain satisfying standards of life and health through activities that improve personal and social relationships. Social and community service work includes:

7.10.1 collecting and providing information about benefits, services and community resources that are available to clients;

7.10.2 supportive counselling;

7.10.3 crisis counselling;

7.10.4 organising emergency material relief for people who are suffering financial hardship;

7.10.5 providing custodial care, supportive care or social welfare support to people who are in residential accommodation or day and occasional care facilities, or to people who are unable to live independently or who are not living in a family setting. This does not include:

7.10.5(a) nursing services;

7.10.5(b) medical services; or

7.10.5(c) services that provide assistance to people who cannot live independently because of a disability.

7.10.6 assessing individual, family, group or community needs;

7.10.7 developing, implementing and assessing and/or maintaining individual casework programs;

7.10.8 referral to, and liaison with, other workers and professionals, agencies, community groups, organisations or governments;

7.10.9 researching and analysing social and welfare and/or community issues, needs or problems;

7.10.10 developing and maintaining community resources;

7.10.11 developing and organising community campaigns;

7.10.12 developing, maintaining, implementing and evaluating family, group and community programs;

7.10.13 social welfare or community planning and policy development and interpretation and/or implementation;

7.10.14 representation, advocacy, negotiation and mediation within and between communities, agencies, institutions and governments, or with individuals;

7.10.15 counselling or social welfare support for people living at home who are unable to live independently. This does not include nursing services, medical services, or direct personal care services;

7.10.16 developing and transferring skills and knowledge in community organisations, community education, advocacy, resource development, cultural awareness and other relevant areas within the community;

7.10.17 tasks associated with maintaining community services and social welfare projects, including preparing submissions, reports and incidental financial documentation.

7.11 **Union** means the Western Australian Municipal, Administrative, Clerical and Services Union of Employees and/or United Voice.

8 INTRODUCTION OF CHANGE

8.1 Where the employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer shall notify the employees who may be affected by the proposed changes.

8.2 Significant effects include termination of employment; major changes in composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs.

8.3 The employer shall discuss with employees affected and the Union (inter alia) the introduction of the changes and the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees. The employer shall give prompt consideration to matters raised by the employees and/or the Union or Unions in relation to any proposed changes.

8.4 The discussions are to commence as early as practicable after a definite decision has been made by the employer to make any changes.

8.5 For the purpose of such discussion the employer shall provide to the employees concerned and the Union relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees provided that the employer shall not be required to disclose confidential information the disclosure of which would be inimical to the employer's interests.

9 DISPUTE RESOLUTION PROCEDURE

9.1 In relation to any grievances which may arise over matters pertaining to the employment relationship between the employer and employee(s), the parties to this Agreement will jointly attempt to resolve the matter at the workplace level, by reference to the following actions;

9.1.1 In the first instance by discussions between the employee or employees concerned and the relevant supervisor;

9.1.2 If such informal discussions do not resolve the dispute then the matter can be referred formally in writing to more senior levels of management (as appropriate) and the parties must attempt to resolve the matter within ten (10) working days;

9.1.3 If the grievance is not resolved in 9.1.2 the matter is referred to the CEO and the parties must attempt to resolve the matter within a further five (5) working days;

9.1.4 If a dispute is unable to be resolved at the workplace, and all agreed steps for resolving it have been taken, the dispute may be referred to the Commission for conciliation and/or arbitration.

9.2 A party to the dispute may appoint a representative (Union or another person) to represent them in relation to the dispute.

9.3 It is a term of this Agreement that while the dispute resolution procedure is being conducted work shall continue as normally unless an employee has a reasonable concern about an imminent risk to their health or safety.

10 EMPLOYMENT CATEGORIES

10.1 Probationary Employment

10.1.1 An employer may hire new employees on probation for up to the first three months of employment.

10.1.2 Before the new employee commences employment, the employer must provide the employee with written notice of the length of the probation period.

10.1.3 Probation is not compulsory.

10.2 Full Time Employment

10.2.1 An employee engaged for 37.5 hours per week in accordance with Clauses 20, 21, 22, 23 and 24 of this Agreement shall be regarded as full time.

10.2.2 At the time of engagement, an employer must give full-time employees a written notice that states;

10.2.2(a) the hours that the employee will normally work;

10.2.2(b) which days of the week the employee will normally work on; and

10.2.2(c) the usual starting and finishing times for work each day.

10.3 Part Time Employment

10.3.1 An employer may employ part-time employees in any classification in this Agreement.

10.3.2 A part-time employee is an employee who:

10.3.2(a) works less than full-time hours of 37.5 per week, in accordance with Clauses 20, 21, 22, 23 and 24 of this Agreement.

10.3.2(b) has reasonably predictable hours of work.

10.3.2(c) receives pay and conditions that are equivalent to those of a full-time employee, but on a pro rata basis according to the actual hours that he or she works.

10.3.3 At the time of engagement, the employer and the part-time employee must record the regular pattern of work in writing.

10.3.4 The employer and the part-time employee may agree on changes to the regular pattern of work. Any such agreement must be confirmed in writing.

10.3.5 An employer and a part-time employee may mutually agree for the employee temporarily to work more hours than the hours agreed to as the employee's regular pattern of work. The following conditions apply:

10.3.5(a) the extra hours will not change the employee's status as a part-time employee;

10.3.5(b) if the employee temporarily works the hours of a full-time employee, the employee is entitled to all the conditions contained in this Agreement for full-time employees while the employee is working those full-time hours.

10.3.6 Part-time employees are entitled to payment at an hourly rate equivalent to 1/37.5th of the weekly rate applicable to their classification.

10.4 Casual Employment

10.4.1 A casual employee is an employee who is engaged intermittently for work of an unexpected or casual nature. Casual employees do not include employees who could properly be engaged as full-time employees or part-time employees or employees engaged for a specific period or a specific task in accordance with sub clause 10.5 of this Agreement.

10.4.2 Employers are required to engage casual employees for a minimum period of two consecutive hours for each period of engagement.

10.4.3 Casual employees are entitled to payment at an hourly rate equal to 1/37.5th of the weekly rate applicable to their classification, plus a loading of;

10.4.3(a) 24% from the first pay period commencing on or after 1 July 2013; and

10.4.3(b) 25% from the first pay period commencing on or after 1 July 2014.

10.4.4 The casual loading referred to in sub-clause 10.4.3 is in lieu of all paid leave entitlements (excluding long service leave) and payment for public holidays that the employee does not work.

10.4.5 For casual employees who work overtime or outside the span of ordinary hours, the employee's rate of pay is calculated by multiplying the employee's base hourly rate (which excludes the casual loading specified in clause 10.4.3) by the applicable overtime multiplier or penalty rate, and then adding an amount equal to the applicable casual loading in clause 10.4.3.

10.4.6 Caring Responsibilities

10.4.6(a) Subject to the evidentiary and notice requirements, casual employees are entitled to not be available to attend work, or to leave work:

If they need to care for members of their immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency, or the birth of a child; or

Upon the death of an immediate family or household member.

10.4.6(b) The employer and the employee shall agree on the period for which the employee will be entitled to not be available to attend work. In the absence of agreement, the employee is entitled to not be available to attend work for up to 48 hours (i.e. two days) per occasion. The casual employee is not entitled to any payment for the period of non-attendance.

10.4.6(c) An employer must not fail to re-engage a casual employee because the employee accessed the entitlements provided for in this clause. The rights of an employer to engage or not to engage a casual employee are otherwise not affected.

10.5 Specific Period or Specific Task Employment

10.5.1 An employer may engage a full-time employee or a part-time employee to work on a fixed-term basis or for a specific task or tasks. The following conditions apply:

10.5.1(a) The employer must give the employee a written notice which stipulates how long the employee will be employed for.

10.5.1(b) If the employee starts working for the same employer on a permanent basis immediately after finishing the fixed term, the amount of time that the employee spent working on the fixed term will count as continuous service when calculating leave entitlements. Provided that such time will not count as continuous service if the employer has paid the employee in lieu of those leave entitlements.

10.6 Trainees

10.6.1(a) The parties will comply with the terms of the *National Training Wage Award 2000*, as adjusted by any Annual Wage Review, as though they were bound by that award.

10.6.1(b) Where the *National Training Wage Award 2000* is inconsistent with the express provisions of this Agreement, the *National Training Wage Award* as amended will prevail.

10.7 50D Positions

10.7.1 Where Aboriginality is an occupational requirement for any position under Section 50D of the *Equal Opportunity Act 1984*, whether the work is casual, part time or full time, only an Aboriginal or Torres Strait Islander person may be employed in that position.

11 NOTICE OF TERMINATION

11.1 Notice of termination by employer

11.1.1 In order to terminate the employment of an employee the employer must give to the employee the period of notice specified in the table below:

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

11.1.2 In addition to the notice in sub clause 0.1 employees over 45 years of age at the time of the giving of the notice with not less than two years continuous service, are entitled to an additional week's notice.

11.1.3 Payment in lieu of the prescribed notice in sub clause 0and 0 must be made if the appropriate notice period is not required to be worked. Provided that employment may be terminated by the employee working part of the required period of notice and by the employer making payment for the remainder of the period of notice.

11.1.4 The required amount of payment in lieu of notice must equal or exceed the total of all amounts that, if the employee's employment had continued until the end of the required period of notice, the employer would have become liable to pay to the employee because of the employment continuing during that period. That total must be calculated on the basis of:

11.1.4(a) the employee's ordinary hours of work (even if not standard hours); and

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

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

11.1.5 The period of notice in this clause does not apply:

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

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

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

11.1.5(d) to casual employees.

11.1.6 Continuous service is defined in clause 7.5.

11.2 Notice of termination by an employee

11.2.1 The notice of termination required to be given by an employee is the same as that required of an employer, save and except that there is no requirement on the employee to give additional notice based on the age of the employee concerned.

11.2.2 If an employee fails to give the notice specified in sub clause 0.1 the employer has the right to withhold monies due to the employee to a maximum amount equal to the amount the employee would have received under sub clause 0.

11.3 Job Search Entitlement

11.3.1 Where the employer has given notice of termination to an employee, an employee shall be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the employer.

11.4 Transmission of business

11.4.1 Where a business is transmitted from one employer to another, as set out in clause 12.7, the period of continuous service that the employee had with the transmitter or any prior transmitter is deemed to be service with the transmittee and taken into account when calculating notice of termination. However, an employee shall not be entitled to notice of termination or payment in lieu of notice for any period of continuous service in respect of which notice has already been given or paid for.

12 REDUNDANCY

12.1 Definitions

12.1.1 **Business** includes trade, process, business or occupation and includes part of any such business.

12.1.2 **Redundancy** occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone and that decision leads to the termination of employment of the employee, except where this is due to the ordinary and customary turnover of labour.

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

12.1.4 **Week's pay** means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

12.1.4(a) overtime;

12.1.4(b) penalty rates;

12.1.4(c) disability allowances;

12.1.4(d) shift allowances;

12.1.4(e) special rates;

12.1.4(f) fares and travelling time allowances;

12.1.4(g) bonuses; and

12.1.4(h) any other ancillary payments of a like nature.

12.2 Transfer to lower paid duties

12.2.1 Where an employee is transferred to lower paid duties by reason of redundancy the same period of notice must be given as the employee would have been entitled to if the employment had been terminated. The employer shall make payment in lieu thereof of an amount equal to the difference between the former ordinary rate of pay and the new ordinary time rate for a period of 12 months.

12.3 Severance pay

12.3.1 An employee whose employment is terminated by reason of redundancy, is entitled to the following amount of severance pay in respect of a period of continuous service:

Period of continuous service	**Severance pay**
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

(Week's pay as defined in sub clause 12.1.4)

12.3.2 Continuity of service shall be calculated in the manner prescribed by clause 7.5. Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

12.4 Employee leaving during notice period

12.4.1 An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice set out in clause 11 - Notice of Termination. In this circumstance the employee will be entitled to receive the benefits and payments they would have received under this clause had they remained with the employer until the expiry of the notice, but will not be entitled to payment in lieu of notice.

12.5 Alternative Employment

12.5.1 The employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if the employer obtains acceptable alternative employment for an employee.

12.5.2 This provision does not apply in circumstances involving transmission of business as set out in sub clause 12.7

12.6 Job Search Entitlement

12.6.1 During the period of notice of termination given by the employer in accordance with sub clause 11.1.1, an employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

12.6.2 If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the employer, be required to produce proof of attendance at an interview or he or shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

12.6.3 The job search entitlements under this sub clause apply in lieu of the provisions of sub clause 0.

12.7 Transmission of Business

12.7.1 The provisions of this clause are not applicable where the business is transmitted from an employer (in this sub clause called the transmitter) to another employer (in this sub clause called the transmittee), in any of the following circumstances:

12.7.1(a) Where the employee accepts employment with the transmittee which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service of the employee with the transmittee; or

12.7.1(b) Where the employee rejects an offer of employment with the transmittee:

12.7.1(b)(i) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmitter; and

12.7.1(b)(ii) which recognises the period of continuous service which the employee had with the transmitter and any prior transmitter to be continuous service of the employee with the transmittee.

12.7.2 The Commission may vary sub clause 0 if it is satisfied that this provision would operate unfairly in a particular case.

12.8 Employees Exempted

12.8.1 This clause does not apply to:

12.8.1(a) employees terminated as a consequence of serious misconduct that justifies dismissal without notice;

12.8.1(b) probationary employees;

12.8.1(c) apprentices;

12.8.1(d) trainees;

12.8.1(e) employees engaged for a specific period of time or for a specified task or tasks; or

12.8.1(f) casual employees.

12.9 Redundancy Disputes

12.9.1 This clause imposes additional obligations on the employer where the employer contemplates termination of employment due to redundancy and a dispute arises (a redundancy dispute).

12.9.2 Where a redundancy dispute arises, and if it has not already done so, an employer must provide affected employees and the relevant Union or Unions (if requested by any affected employee) in good time, with relevant information including:

12.9.2(a) the reasons for any proposed redundancy;

12.9.2(b) the number and categories of employees likely to be affected; and

12.9.2(c) the period over which any proposed redundancies are intended to be carried out.

12.9.3 Where a redundancy dispute arises and discussions occur in accordance with this clause the employer will, as early as possible, consult on measures taken to avert or to minimise any proposed redundancies and measures to mitigate the adverse affects of any proposed redundancies on the employees concerned.

13 CLASSIFICATIONS

13.1 Notice on Commencement

13.1.1 On commencement of employment an employer must give each employee a written notice which details the employee's classification level and rate of pay.

14 CLASSIFICATION LEVELS

14.1 The classification levels are set out in SCHEDULE A – CLASSIFICATIONS

14.2 Reviewing Employees' Classifications

14.2.1 If an employee makes a written request to the employer for a review of their classification, the employer must review that employee's classification level and provide a written response within six weeks. An employer is not required to review an employee's classification more than once each year.

14.2.2 To review an employee's classification, the employer and the employee must at least consider whether there are any identifiable changes in:

14.2.2(a) the type of work the employee does;

14.2.2(b) the employee's skills, due to training or experience;

14.2.2(c) the employee's level of responsibility;

14.2.2(d) the value of the employee's work.

14.2.3 If an employer promotes an employee to a higher job classification, the employee is entitled to payment at the appropriate rate prescribed by clause 0 for the higher job classification from the date that the employee commences in the higher job classification.

14.2.4 If the minimum rate for the higher job classification is the same as the employee's current salary, the employee is entitled to payment at the first step of the higher classification level which is above the employee's current salary.

14.3 Reclassification

14.3.1 Where an employer reclassifies an employee, it must be on a point-to-point basis. This means that the step that the employee is placed on in the new classification level is determined by the length of time that the employee has been performing the duties on which the reclassification is based.

14.4 Disputes about Classification of Employees

14.4.1 Any disputes about the classification of an employee must be handled in accordance with the dispute settling procedure in clause 9 of this Agreement.

15 SALARIES AND PAYMENT OF WAGES AND SLARY PACKAGING

The minimum annual salaries payable to employees are set out in SCHEDULE B – SALARIES.

15.1 Annual Increments

15.1.1 If a classification level provides for incremental progression, employees are entitled to advance to the next increment after the specified time, or at such a time as the employer sees fit. The following conditions apply;

15.1.1(a) The employee has given satisfactory service over the last 12 months; and

15.1.1(b) The employee has acquired any new and / or improved skills that are required for the employee's position.

15.1.1(c) New employees are entitled to payment at the first year rate of the appropriate classification level. An employer and individual employees may agree to allow the employee to advance by annual increments to the maximum of the appropriate classification level.

15.2 Frequency and time of payment

15.2.1 An employer must pay wages on a fortnightly basis.

15.2.2 An employer must pay wages no later than five days after the end of a pay period.

15.2.3 An employer must pay wages during ordinary hours, on a day that is agreed between the employer and the majority of employees in each workplace.

15.3 Method of Payment

15.3.1 An employer must pay wages either by cheque or by electronic funds transfer into the employee's bank account.

15.4 Calculating Weekly Rates of Pay

15.4.1 An employee's weekly rate of pay is specified in SCHEDULE B – SALARIES and divided by 52.1667.

15.5 The following increases to salaries will apply over the life of this agreement;

15.5.1 With effect from the beginning of the first full pay period on or after 1 July 2013, a 3% salary increase

15.5.2 With effect from the beginning of the first full pay period on or after 1 July 2014, a 3% salary increase

15.5.3 From the nominal expiry date of the agreement until such a time as a replacement agreement is negotiated, employees will receive increases to their rates of pay of 3% from the beginning of the first full pay period on or after 1 July each year, commencing 2015.

15.6 An employer and individual full time or part time employees may agree to introduce salary packaging arrangements. This means that part of an employee's salary is packaged into a fringe benefit that is paid to a genuine third party instead of being paid directly to the employee.

15.7 The following conditions apply to salary packaging arrangements:

15.7.1 An employer may make salary packaging arrangements only with full-time employees and part-time employees.

15.7.2 The salary packaging arrangement must be in writing.

15.7.3 The employer must give the employee a copy of the salary packaging arrangement.

15.7.4 When viewed objectively, the salary packaging arrangement must not be less favourable than the employee's entitlements under this Agreement.

15.7.5 Employees may consult a representative of their choice before signing a salary packaging arrangement.

15.7.6 The employer must ensure that the salary packaging structure complies with taxation laws and other relevant laws.

15.7.7 The employer must give the employee a written notice which:

15.7.7(a) confirms the employee's classification level under Schedule A of this Agreement.

15.7.7(b) Confirms the employee's current salary under Schedule B of this Agreement.

15.7.7(c) Advises the employee that he or she may choose to receive payment of the salary applicable under Schedule B of this Agreement instead of the salary packaging arrangement.

15.7.7(d) Advises the employee that if he or she chooses to accept the salary packaging arrangement, all Agreement conditions other than salary will continue to apply.

15.7.8 An employee may package a maximum of $16,050 into a fringe benefit

15.7.9 The employee must give the employer a written notice which states that the cash component of the salary packaging arrangement is adequate for their ongoing living expenses.

15.7.10 The employer must pay annual leave loading and employer superannuation contributions at the employee's salary rate specified in Schedule B.

15.7.11 Employees are entitled to inspect the details of payments and transactions which are made in accordance with the salary packaging arrangement. If these details are kept in an electronic format, the employee is entitled to a printout of the information.

15.7.12 The employer must ensure that employees do not accrue any benefits under a salary packaging arrangement which go beyond 30 June in any financial year. The employer must also ensure that all benefits that an employee is entitled to under a salary packaging arrangement are paid before 30 June in any financial year.

15.7.13 An employer may cancel an employee's salary packaging arrangement. The employer must give the employee at least one month's notice that the arrangement will be cancelled.

15.7.14 If the employer stops being exempt from fringe benefits tax payment all salary packaging arrangements will terminate, and where possible the employer should provide each individual employee with at least one month's notice that the arrangement will stop. Individual employee's salaries would then go back to the rates specified in Schedule B.

15.7.15 The following arrangements will apply if an employee leaves their employment with the employer for any reason:

15.7.15(a) The salary packaging arrangement will stop on the employee's termination date.

15.7.15(b) If the employee has any accrued unused leave entitlements payable on termination, the employer must pay those entitlements at the employee's salary rate specified in Schedule B of this Agreement.

15.7.15(c) If the employee has any benefits owing under the salary packaging arrangement, the employer must pay those benefits either on the date of termination or beforehand.

16 SUPPORTED WAGE SYSTEM FOR EMPLOYEES WITH DISABILITIES

16.1 Supported Wage System Definitions

16.1.1 **Accredited assessor** means a person who is accredited by the managing unit established by the Commonwealth under the supported wage system to perform assessments of an individual's productive capacity within the supported wage system.

16.1.2 **Assessment instrument** means the form provided for under the supported wage system that records the assessment of the productive capacity of the person to be employed under the supported wage system.

16.1.3 **Disability support pension** means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991* as amended from time to time, or any successor to that scheme.

16.1.4 **Supported wage system** means the Commonwealth government system to promote employment for people who cannot work at full wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.

16.2 Eligibility Criteria

16.2.1 This clause applies to employees who:

16.2.1(a) are unable to perform the range of duties to the level of competence required within the class of work for which the employee is engaged under this Agreement because of the effects of a disability on their productive capacity; and

16.2.1(b) meet the impairment criteria for receipt of a disability support pension.

16.2.2 This clause does not apply to existing employees who have a claim against their employer which is subject to the provisions of workers' compensation legislation or any provision of this Agreement which relates to the rehabilitation of employees who are injured in the course of their employment with the employer.

16.3 **Supported Wage Rates**

16.3.1 Employees covered by this clause are entitled to payment at a percentage of the minimum rate of pay prescribed by this Agreement for the class of work which the employee is performing, as follows:

Employee's Assessed Capacity	Percentage of Agreement rate
10%	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

16.3.2 An employer must pay each employee a minimum of $73.00 per week.

16.3.3 If an employee's assessed capacity is 10%, the employer must provide him or her with a high degree of assistance and support.

16.4 Assessment of Capacity

16.4.1 In order to determine the percentage of the Agreement rate to be paid to an employee under this clause, the productive capacity of the employee must be assessed in accordance with the supported wage system. This must be done by either:

16.4.1(a) the employer and the Union, in consultation with the employee; or

16.4.1(b) if it is desired by the employer, the Union or the employee, it must be done by the employer and an accredited assessor from a panel which is agreed to by the employer, the Union and the employee.

16.4.2 The outcome of the assessment must be documented in an assessment instrument.

16.5 Lodgement of Assessment Instrument

16.5.1 The parties to an assessment instrument must sign the assessment instrument.

16.5.2 An assessment instrument must stipulate the percentage of the Agreement rate which will be payable to the employee.

16.5.3 An employer must lodge assessment instruments with the Registrar of the Commission.

16.5.4 If the Union is not a party to the assessment instrument, the employer must send the Union a copy of the assessment instrument by certified mail at the same time the employer lodges the assessment instrument with the Registrar of the Commission. If the Union objects to the assessment instrument, it must notify the Registrar of that objection within ten (10) working days.

16.6 Review of Assessment

16.6.1 The parties to an assessment instrument should review the percentage of the Agreement rate payable to the employee annually. If a party to an assessment instrument makes a reasonable request for an earlier review, the parties should comply with that request.

16.6.2 The parties must undertake the review process in accordance with the procedures for assessing capacity under the supported wage system.

16.7 Other Terms and Conditions of Employment

16.7.1 The percentage of the Agreement rate stipulated in an assessment instrument only applies to the Agreement rate. Employees covered by this clause are entitled to the same terms and conditions of employment as all other employees covered by this Agreement, but on a proportionate basis according to the actual hours that they work.

16.8 Workplace Adjustment

16.8.1 An employer who wishes to employ a person under the provisions of this clause must make changes in the workplace to enhance the employee's capacity to do the job. These changes may involve the re-design of job duties, working time arrangements and work organisation.

16.8.2 Employers must consult other employees who work in the area about these changes.

16.9 Trial Period

16.9.1 An employer may employ a person under the provisions of this clause for a trial period. The following conditions apply:

16.9.1(a) The trial period must be necessary to make an adequate assessment of the employee's capacity.

16.9.1(b) The trial period must not be more than 12 weeks. An exception is that in some cases additional work adjustment time may be needed. Additional work adjustment time must not be more than four weeks.

16.9.1(c) During the trial period the employer must assess the employee's capacity in accordance with sub clause 16.4 of this Agreement. The parties must also determine the proposed rate of pay for a continuing employment relationship.

16.9.1(d) An employer must pay an employee a minimum of $73.00 per week during the trial period.

16.9.1(e) During the trial period an employer should provide induction or training which is appropriate to the job being trialed.

16.9.2 If the employer and the employee wish to establish a continuing employment relationship following completion of the trial period, the parties must make a new contract of employment based on the outcome of the assessment conducted in accordance with sub clause 16.4.

17 ALLOWANCES

17.1 Higher Duties Allowance

17.1.1 If an employee is called upon by the employer to perform the duties of another employee holding a higher job classification for three consecutive working days or more, the employee is entitled to payment at the first year rate of the higher classification after three (3) days of performing the higher duties.

17.1.2 If the first year rate of the higher classification is the same as the employee's current salary, the employee is entitled to payment at the first step of the higher classification which is above the employee's current salary.

17.2 Availability Allowance / Out of Hours Contact

17.2.1 **Availability** means a situation where an employer gives an employee written instructions to remain contactable outside the employee's normal working hours and to be available and in a fit state at all those times for recall to work. It is not necessary for the employee to be in immediate proximity to a telephone or paging system.

17.2.2 **Availability** does not include situations where employees carry paging devices, mobile phones or make their telephone numbers available for the only reason that they may be needed for casual work or recall work.

17.2.3 An employee who is on availability is entitled to an allowance of $3.93 per hour for the off duty hours.

17.2.4 If an employee who is on availability is recalled to work, they are not entitled to an availability allowance for the time spent on recall. Employees are entitled to payment for time spent on recall in accordance with sub clause 17.3

17.2.5 Where practical, an employer should allow employees not to be on availability from time to time.

17.3 Recall Allowance

17.3.1 Employees who are recalled to work overtime are entitled to payment at the following rates for each recall:

17.3.1(a) for the first two hours of recall work – at the rate of one and a half hours pay for each hour of work performed;

17.3.1(b) for recall work in excess of two hours – at the rate of two hours pay for each hour of work performed.

17.3.2 Employees who are recalled to work overtime are entitled to payment for a minimum time of three hours work at the appropriate rate specified in sub clause 0 each time they are recalled. This applies even if the work is completed in less than three hours.

17.3.3 If an employee is on availability, time spent travelling from the place they were on availability to work and back again counts as time spent on recall work.

17.3.4 Employees who are recalled to work overtime are entitled to a motor vehicle allowance in accordance with sub clause 0 if they are required to use their own private vehicle to travel between home and work. If the employee is required to pay any fares for travel between home and work, the employer must reimburse the employee for the cost of those fares.

17.4 Telephone Allowance

17.4.1 The following arrangements apply where an employer requires an employee to be on availability and the means of contacting the employee while they are on availability is by telephone:

17.4.1(a) If a telephone is not already installed in the employee's home, the employee is entitled to an allowance equal to the cost of telephone installation, payable upon installation of the telephone.

17.4.1(b) If the employee pays or contributes towards the payment of rent for a telephone in their home, the employee is entitled to an allowance equal to 1/52nd of the annual rent paid by the employee for each seven days or part of seven days where the employee is on availability. If a usual feature of the employee's duties requires the employee to be regularly on availability, the employee is entitled to an allowance equal to the full cost of the annual rent paid by the employee.

17.4.2 Employees are entitled to reimbursement for the cost of all telephone calls made on behalf of their employer as a result of being on availability or on recall work.

17.5 Bilingual Qualification Allowance

17.5.1 **Bilingual** means a recognised proficiency in English as well as any one of the Aboriginal or Torres Strait Islander languages.

17.5.2 An employee who is competently bilingual and who is required to use more than one language in the course of their employment is entitled to a bilingual qualification allowance. The amount of the allowance is:

Level 1 **$1,583 per year**

Level 1 is an elementary level. This level is appropriate for employees who are capable of using minimal knowledge of a language for the purpose of simple communication.

Level 2 **$3,168 per year**

Level 2 represents a level of ability for the ordinary purposes of general business, conversation, reading and writing.

17.6 First Aid Officer's Allowance

17.6.1 Employees are entitled to a first aid allowance of $10.42 per week provided that the following conditions are met:

17.6.1(a) The employer must appoint the employee as a first aid officer; and

17.6.1(b) The employee must have first aid qualifications from St John Ambulance or another similar organisation.

17.6.2 The first aid officer's allowance counts as wages for all purposes of this Agreement.

17.6.3 Employees are not entitled to payment for time spent giving aid to people outside the employee's regular working hours, unless:

17.6.3(a) the employee is on duty at the time; or

17.6.3(b) the employer gives the employee permission to accompany a patient to receive treatment.

17.7 First Aid Training Allowance

17.7.1 Employees are entitled to reimbursement for the cost of attending first aid training courses. The training courses must be approved by the employer in order for the employee to be entitled to reimbursement.

17.7.2 Employees are entitled to reimbursement for the cost of text books required as part of a first aid training course. The textbooks will belong to the employer once the employer has reimbursed the employee.

17.8 Motor Vehicle Allowance

17.8.1 Employees are not compelled or required to use their own private motor vehicles for work purposes.

17.8.2 Employees who agree to use their own private motor vehicles for work purposes are entitled to a motor vehicle allowance. The amount of the allowance is the per kilometre rate determined from time to time by the Australian Taxation Office.

17.8.3 If the amount of the motor vehicle allowance is reasonably ascertainable in advance, the employer must pay the allowance to the employee before the employee uses their motor vehicle for work purposes.

17.8.4 Employees are not entitled to a motor vehicle allowance if their employer provides and maintains a motor vehicle free of charge. In these cases, employees must not use the motor vehicle for private purposes unless their employer expressly authorises private use. Where the employer expressly allows an employee to use a work vehicle for non work purposes, the employee shall be responsible for any running costs incurred in such use and must abide by any terms and conditions imposed by the employer.

17.9 Travelling and Camping Allowance

17.9.1 Employees who are required to be away from home overnight on business approved by the employer are entitled to an allowance to compensate for expenditure on meals and accommodation.

17.9.2 The amount of the allowance is:

Where an employee is required to stay overnight on the Lands at a place that is away from the employee's normal place of residence.	$51.34 per night
Where an employee is required to stay overnight at a regional centre.	$132.02 per night
Where an employee is required to stay overnight at a capital city.	$175.99 per night

17.9.3 Employees who are required to operate from a mobile base camp on the Lands are not entitled to any allowance if the employer provides them with food free of charge. However, if the employer does not provide them with food free of charge, employees are entitled to an allowance of $48.21 per day instead of any of the allowances in sub clause 0.

17.9.4 If an employee's actual expenditure on meals and accommodation is higher than the allowance amounts specified in this sub clause, the employee is entitled to reimbursement for the reasonable cost of the meals and accommodation. The employee must provide satisfactory proof of the cost of the meals and accommodation if the employer so requests.

17.10 Tools and Equipment Allowance

17.10.1 Employees are not entitled to a tools and equipment allowance if their employer provides them with tools and equipment free of charge.

17.10.2 Where the employer requires an employee to use any tools or equipment in the conduct of their job, the employer must reimburse the employee for the cost of purchasing such tools or equipment.

17.10.3 Employees must provide proof of the cost of such tools and equipment if their employer so requests.

17.10.4 Tools and equipment provided by the employer remain the property of the employer. Employees will be responsible for retaining and maintaining the tools and equipment and the employer shall provide reasonable facilities for the safe- keeping of such tools and equipment

17.11 Uniforms and Protective Clothing Allowance

17.11.1 Employees are not entitled to a uniform or protective clothing allowance if their employer provides them with a uniform or protective clothing free of charge.

17.11.2 Where the employer requires an employee to purchase any protective clothing or uniform to wear at work, the employer must reimburse the employee for the cost of purchasing such protective clothing or uniform.

17.11.3 Employees must provide proof of the cost of the protective clothing or uniform if their employer so requests.

17.11.4 Uniforms and protective clothing: provided by the employer shall remain the property of the employer. Employees will be responsible for retaining and maintaining protective clothing/uniforms.

17.11.5 If (apart from normal wear and tear) employees lose or damage any uniform or protective clothing through their own negligence, they must either replace it or pay for it.

18 SUPERANNUATION

18.1 Definitions

18.1.1 **Fund** means either the Health Employees Superannuation Trust Australia or AMP Superannuation Fund or the Australian Superannuation Savings Employment Trust or the Superannuation Trust of Australia or the Australian Retirement Fund or any other fund which meets the requirements of the Commonwealth Government operational standards for occupational superannuation and which is nominated in accordance with the provisions of s.48B of the *Industrial Relations Act 1979.*

18.1.2 Ordinary time earnings includes:

18.1.2(a) the rate of pay for the employee's classification under this Agreement;

18.1.2(b) over-Agreement payments;

18.1.2(c) allowances which relate to an employee's work or conditions, including tools and equipment allowance, first aid officer's allowance, district allowance, bilingual qualification allowance, availability allowance, recall allowance, higher duties allowance and annual leave loading;

but does not include:

18.1.2(d) payments for overtime.

18.2 Employers and Employees must join a Fund

18.2.1 The Employer's legislative obligations in relation to superannuation shall be met by:

18.2.1(a) notifying employees of their entitlement to nominate a complying superannuation fund or scheme into which they wish to have their contributions paid; and

18.2.1(b) making the required contribution into the employee's nominated fund or scheme; or

18.2.1(c) making the required contribution into the AMP Superannuation Fund as the default fund if the employee does not exercise his or her option to nominate a preferred fund or scheme.

18.2.2 The Employer and employee are bound by the nomination made by the employee pursuant to sub-clause 18.2.1 unless they mutually agree to change the complying fund or scheme to which the contributions are to be made. The Employer will not unreasonably refuse a request by an employee to change the nominated complying superannuation fund or scheme.

18.3 Eligibility Date for Contributions

18.3.1 Employees are eligible for superannuation contributions from the commencement of their employment. This applies regardless of when the employer provided the employee with an application to join a fund or when the employee's application to join a fund is accepted.

18.4 Amount of Employer Superannuation Contributions

18.4.1 Employers must make superannuation contributions to a fund for each employee. The contribution must equal the amount required for the employer to comply with the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Guarantee Charge Act 1992* as amended from time to time. This rate is currently 9.25% of ordinary time earnings.

18.4.2 Employers are not required to make superannuation contributions for any period of unpaid leave, any unauthorised absence, or as part of termination payments, including payments for accrued, unused annual leave.

18.4.3 Employers must make superannuation contributions to a fund on a quarterly basis. An employer and the trustees of a fund may agree for an employer to make superannuation contributions other than on a quarterly basis. Any such agreement must be in writing.

18.5 Additional Voluntary Employee Contributions

18.5.1 Where the rules of a fund allow, employees may make superannuation contributions to a fund in addition to those made by their employer.

18.5.2 Employees who wish to make additional superannuation contributions must give their employer written authorisation to deduct a specified amount from their wages and to pay the amount into a fund in accordance with the fund's rules.

18.5.3 Additional employee superannuation contributions can only be in units of 1% of the employee's ordinary time earnings.

19 SCHOOL BASED APPRENTICES

19.1 A school-based apprentice is a person who is undertaking an apprenticeship in accordance with this clause while also undertaking a course of secondary education.

19.2 The hourly rates for full-time junior and adult apprentices as set out in this Agreement shall apply to school-based apprentices for total hours worked including time deemed to be spent in off-the-job training.

19.3 For the purposes of sub clause 0 above, where an apprentice is a full-time school student, the time spent in off-the-job training for which the apprentice is paid is deemed to be 25% of the actual hours each week worked on-the-job. The wages paid for training time may be averaged over a semester or year.

19.4 The school-based apprentice shall be allowed, over the duration of the apprenticeship, the same amount of time to attend off-the-job training as an equivalent full-time apprentice.

19.5 For the purposes of this clause, off-the-job training is structured training delivered by a Registered Training Organisation separate from normal work duties or general supervised practice undertaken on the job.

19.6 The duration of the apprenticeship shall be as specified in the training agreement or contract for each apprentice. The period so specified to which the apprentice wage rates apply shall not exceed six years.

19.7 School-based apprentices shall progress through the wage scale at the rate of 12 months progression for each two years of employment as an apprentice.

19.8 These rates are based on a standard full-time apprenticeship of four years. The rate of progression reflects the average rate of skill acquisition expected from the typical combination of work and training for a school-based apprentice undertaking the applicable apprenticeship.

19.9 Where an apprentice converts from school-based to full-time, all time spent as a full-time apprentice shall count for the purposes of progression through the wage scale. This progression shall apply in addition to the progression achieved as a school-based apprentice.

19.10 School-based apprentices shall be entitled pro rata to all of the conditions of employees under this Agreement.

20 HOURS OF WORK

20.1 Ordinary Hours of Work

20.1.1 Unless otherwise provided by this clause, ordinary hours for all employees are up to seven and a half hours per day and up to 37.5 hours per week, excluding breaks taken in accordance with clause 22.4.

20.1.2 The span of ordinary hours for all employees is 7.00am – 6.00pm, Monday to Friday.

20.1.3 The ordinary hours of work shall be continuous except that within each five-hour period an employee shall be entitled to an unpaid break of between thirty minutes and one hour

20.2 Alternative Ordinary Hours of Work

20.2.1 The employer and the majority of employees affected may agree to alter the arrangements for working ordinary hours prescribed by sub clause 20.1. Any such agreement must be genuine. The following conditions apply:

20.2.1(a) Ordinary hours must not exceed 37.5 hours per week, or an average of 37.5 hours per week over a period of no more than four weeks.

20.2.1(b) Employees are entitled to at least one clear day off per week.

20.2.1(c) Employees who work alternative ordinary hours of work in accordance with an 'alternative ordinary hours of work' agreement are entitled to payment of a loading in accordance with sub clause 0 of this Agreement.

20.2.1(d) The agreement must be in writing. The details that must be included in the agreement are specified in sub clause 0 of this Agreement.

20.2.1(e) The arrangements for working alternative ordinary hours of work must be specified in a roster. The conditions for making an 'alternative ordinary hours of work' roster are specified in sub clause 0.

20.2.1(f) An employer must give employees a reasonable opportunity to obtain advice from a representative of their choice before making an 'alternative ordinary hours of work' agreement.

20.2.2 'Alternative ordinary hours of work' agreements must be signed on behalf of the employer and by the majority of employees affected by the agreement. A signed 'alternative ordinary hours of work' agreement will be treated as if it is part of this Agreement.

20.2.3 The details that must be included in an 'alternative ordinary hours of work' agreement are as follows:

20.2.3(a) Employees covered by the agreement.

20.2.3(b) When the agreement starts.

20.2.3(c) When the agreement ends.

20.2.3(d) The alternative ordinary hours of work.

20.2.3(e) How the agreement can be terminated before it ends.

20.2.3(f) Any other terms and conditions that apply.

20.2.4 The conditions for making an 'alternative ordinary hours of work' roster are as follows:

20.2.4(a) An employer and the majority of employees affected must genuinely agree to any proposed roster system. The employer shall allow time so that a meeting of the employees affected can vote on any proposed roster system.

20.2.4(b) Employees may seek advice from a representative of their choice before voting on a proposed roster system.

20.2.4(c) The roster system must meet the workplace's needs. It must also have a reasonable regard for individual employee's preferences.

20.2.5 The roster must specify:

20.2.5(a) The period of time for which it will operate;

20.2.5(b) the shifts in the roster;

20.2.5(c) the starting time and finishing time of ordinary hours for each employee's shift.

20.2.6 An employer must display the roster at the workplace in a place or places that are accessible to employees who are covered by the roster.

20.2.7 An employer may change a roster by giving a minimum of 72 hours notice to the employee or employees who will be affected by the change. An employer and those employees may agree on a shorter period of notice.

20.2.8 Employees are allowed to exchange rostered shifts or rostered days off with each other. The following conditions apply:

20.2.8(a) The employees must get permission from their supervisor first; and

20.2.8(b) If an employee works overtime because of the exchange, he or she is not entitled to payment at overtime rates or to TOIL for the overtime.

20.2.9 Employees who work ordinary hours under an 'alternative ordinary hours of work' agreement in accordance with a roster system are entitled to an additional one day of annual leave for every five shifts that the employee works on Sundays or public holidays.

20.2.10 Alternative ordinary hours of work arrangements which already existed at the time this Agreement first came into force will be treated as if they were agreed to between the employer and the majority of employees at the workplace. The arrangements must still comply with the conditions set out in sub clause 0.

20.3 Loadings for Hours Worked Outside Ordinary Hours

20.3.1 Employees who work ordinary hours outside the span of hours in sub clause 0 are entitled to payment at the following rates

20.3.1(a) a loading of 20% for all hours that the employee works between the end of the span of hours prescribed by sub clause 0 and 12 midnight on Monday to Friday.

20.3.1(b) a loading of 35% for all hours that the employee works between 12 midnight and the start of their span of hours prescribed by sub clause 0 on any day between midnight on Sunday and the employee's normal starting time on Friday.

20.3.1(c) a loading of 75% for all hours that the employee works between midnight on Friday and midnight on Saturday.

20.3.1(d) a loading of 100% for all hours that the employee works between midnight on Saturday and midnight on Sunday.

20.4 **Meal Breaks**

20.4.1 All employees are entitled to an unpaid meal break of between 30 minutes and one hour after each five ordinary hours that the employee works.

21 OVERTIME

21.1 All time that an employee works in the following circumstances is overtime:

21.1.1 work done in excess of the ordinary daily hours prescribed by clause 20.1;

21.1.2 work done in excess of the ordinary weekly hours prescribed by clause 20.1;

21.1.3 work done outside the hours agreed to under an alternative ordinary hours of work agreement made in accordance with sub clause 0.

21.2 Requirement to Work Overtime

Employees are not required to work overtime except to maintain the delivery of essential goods and services or to accommodate the necessities of special work circumstances.

21.3 Permission before Working Overtime

Employees must get permission from the Executive Officer or another authorised senior officer before working overtime. An exception is that employees do not have to get prior permission if the urgency of the work means that the employee cannot get permission until after the work is done.

21.4 Payment for Overtime

21.4.1 Employees are entitled to payment for overtime at the following rates:

21.4.1(a) for the first two hours of overtime – at the rate of time and a half for each hour of work;

21.4.1(b) for overtime in excess of two hours – at the rate of double time for each hour of work.

21.4.2 Where an employee works hours which would entitle that employee to payment of more than one of the penalties or loadings payable in accordance with sub clause 0 – Loadings for Hours Worked Outside Ordinary Hours and sub clause 0 – Payment for Overtime, only the highest of such penalty or loading shall be payable.

21.4.3 In calculating overtime, each day must be considered separately.

21.4.4 Employees receiving a salary in excess of $84,499.00 and above will not qualify for the payment outlined in 21.4.1 but will qualify for time off in lieu of overtime at the rate of time off for time worked.

21.5 Time Off in Lieu of Overtime (TOIL)

21.5.1 Except for casual employees, an employer and individual employees may mutually agree for the employee to accrue time off in lieu of overtime (TOIL) instead of receiving payment for overtime at overtime rates. The following conditions apply:

21.5.1(a) TOIL accrues at the appropriate overtime rates:

21.5.1(b) for the first two hours of overtime– at the rate of one and a half hours TOIL for each hour of overtime worked;

21.5.1(c) for overtime in excess of two hours – at the rate of two hours TOIL for each hour of overtime worked.

21.5.2 TOIL must be recorded in the ordinary payroll system.

21.5.3 An employer and individual employees must mutually agree on a convenient time for the employee to take accrued TOIL.

21.5.4 By agreement, the maximum amount of TOIL that employees can accrue is 37.5 hours and this has to be taken within four weeks of its accrual.

21.5.5 An employer and individual employees may agree for the employee to accrue a further 37.5 hours of TOIL. The employee must take this further TOIL in conjunction with annual leave.

21.5.6 If an employee takes TOIL in conjunction with annual leave, the employee is not entitled to annual leave loading for the TOIL component.

21.5.7 Employees are entitled to payment of accrued unused TOIL on termination of employment.

21.6 Breaks during Overtime

21.6.1 If an employee is required to work overtime of more than two hours and the overtime directly follows the employee's ordinary finishing time, the employee is entitled to a paid 20-minute meal break before starting the overtime.

21.6.2 Employees who are working overtime are entitled to a paid tea break of at least 20 minutes after each four hours of overtime. An exception is that employees are not entitled to a paid tea break if they are not required to continue working overtime after the break.

21.7 Reasonable Overtime

21.7.1 Subject to sub clause 0 an employer may require an employee to work reasonable overtime at overtime rates.

21.7.2 An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

21.7.2(a) any risk to employee health and safety;

21.7.2(b) the employee's personal circumstances including any family responsibilities;

21.7.2(c) the needs of the workplace or enterprise;

21.7.2(d) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and

21.7.2(e) any other relevant matter.

22 FLEXITIME

22.1 Flexitime Arrangements

22.1.1 Flexitime is a system that allows employees to set their own patterns of attendance at work, subject to the requirements of the workplace and the conditions in this Agreement. The employer may offer an employee the ability to work flexible working hours (flexitime) prescribed herein. These provisions shall not apply to casual employees.

22.2 Flexitime Definitions

22.2.1 '**Carry over'** means the aggregate amount of flex credit and flex debit accumulated by an employee in a settlement period and then carried forward to the next settlement period in accordance with this clause.

22.2.2 **'Core time'** means the time between 9.30 am and 12 noon, and the time between 2.00 pm and 4.30 pm. An employer and the majority of employees in the workplace may agree for core time to be between different times than these.

22.2.3 '**Core time leave'** means leave taken by an employee during core time. It does not include leave which is otherwise provided for by this Agreement or any other leave which is approved by an employer.

22.2.4 **'Flex credit'** means the accumulated amount of time worked by an employee which is more than 10 standard days in a settlement period. Flex credit includes carry over but does not include overtime which has been compensated for by overtime rates of pay or TOIL in accordance with sub clauses 0 or 0 of this Agreement.

22.2.5 **'Flex debit'** is calculated by subtracting the aggregate amount of time worked by an employee in a settlement period from the sum of the standard days in the settlement period. In calculating flex debit:

22.2.5(a) any carry over must be taken into account; and

22.2.5(b) absence on paid leave which has been approved by the employer counts as time worked. An exception is that absence on core time leave does not count as time worked.

22.2.6 '**Settlement period'** means a fixed period of 10 working days aligned with the fortnightly pay period (or two, weekly pay periods) operating in the workplace.

22.2.7 **'Standard day'** means seven hours and 30 minutes per day.

22.3 Working Flexitime

The following arrangements apply to flexitime:

22.3.1 The employer and the individual employee must agree on a starting time and a finishing time for the employee's work each day.

22.3.2 Employees must be at work during core time unless they are on core time leave or other leave approved by the employer.

22.3.3 Employees will usually work ten (10) standard days in a settlement period.

22.3.4 Employees work each standard day in continuous shifts at any time between 7.00 am – 6.00 pm Monday to Friday, excluding public holidays.

22.3.5 Employees will only work outside a standard day if work is available. Employees must get permission from their employer before working outside a standard day. An employer may give general or specific permission for an employee to work outside a standard day.

22.3.6 If an employee does not comply with flexitime arrangements, the employer may require the employee to revert to working 37.5 hours per week or an average of 37.5 hours per week in accordance with sub clause 0 for a specified period of time.

22.4 Meal Breaks

22.4.1 Employees must take an unpaid meal break of between 30 minutes and one hour each day. An employer must allow employees to take a meal break no later than five hours after starting work.

22.4.2 An employer and employees should cooperate to ensure that workplace requirements are given priority when arranging meal breaks.

22.4.3 Employees are entitled to a paid 10-minute rest period between their starting time and their usual meal break time.

22.5 Core Time Leave

Employees are permitted to take core time leave. The following conditions apply:

22.5.1 Employees must get permission from their employer before taking core time leave.

22.5.2 The maximum amount of core time leave that employees may take in any one settlement period is an amount equal to the core time for one day. There is one exception, which is detailed in sub clause 0.

22.5.3 Employees are not permitted to take an amount of core time leave if it will result in the employee accumulating more than 10 hours flex debit by the end of the settlement period.

22.5.4 Employees may take core time leave in conjunction with other leave entitlements. Employees must get permission from their employer before doing so.

22.5.5 Employees may use core time leave for full-day absences or part-day absences.

22.6 Carry Over

Employees may accumulate flex credits and flex debits. The following conditions apply:

22.6.1 Employees may carry over a maximum of 10 hours flex credit from one settlement period into the next settlement period.

22.6.2 If an employee is likely to accumulate more than 10 hours flex credit in a settlement period, the employee must take enough core time leave for their flex credits to be within the 10 hour limit. The employer and the employee must agree on a time or times for the employee to take core time leave, which must be before the end of the next settlement period.

22.6.3 Employees may carry forward a maximum of 10 hours flex debit from one settlement period into the next settlement period.

22.6.4 If an employee accumulates more than 10 hours flex debit in a settlement period, the employee is not entitled to payment for the flex debit in excess of 10 hours.

23 EXCESS TRAVELLING TIME

23.1 Where an employee is required to work at a place away from their normal place of work, the employee is entitled to payment at his/her ordinary rate of pay for all reasonable time spent travelling to and from the different place of work.

23.2 If an employee is required to travel from their regular home base to attend work at a distant workplace, the employee is entitled to payment at his/her ordinary rate of pay for all reasonable periods of travel.

24 AMBULANCE DUTY

The following conditions apply where employees are required to accompany a patient:

24.1 All time spent travelling will count as time on duty.

24.2 Employees are entitled to payment at their normal rate of pay for the time spent travelling, including overtime or penalty rates if applicable.

25 SICK LEAVE

25.1 Full-time and part-time employees are entitled to paid sick leave if they are sick and unfit to work. Casual employees are not entitled to paid sick leave.

25.2 The amount of paid sick leave is:

Full-time employees	1.748 hours leave for each completed week of continuous service.
part-time employees	A fraction of 1.748 hours leave for each completed week of continuous service, based on the employee's weekly hours of work as a proportion of 37.5 hours.

25.3 The minimum amount of sick leave that an employee may take is one hour.

25.4 Unused sick leave accumulates from year to year.

25.5 Employees are not entitled to paid sick leave for any absence covered by workers compensation or sickness benefits.

25.6 If an employee takes two or more consecutive days of sick leave, the employer may require the employee to provide a medical certificate.

25.7 Employees who are sick and unfit to work must take all reasonable steps to tell their employer of this before their normal starting time. If that is not practicable, the employee must tell the employer as soon as possible.

25.8 Accrued unused sick leave is not payable on termination of employment.

26 ANNUAL LEAVE

26.1 Annual Leave Entitlement

26.1.1 Full-time employees and part-time employees are entitled to four weeks paid annual leave after every 12 months of continuous service.

26.1.2 Unused annual leave carries forward from year to year.

26.2 Time of Taking Annual Leave

26.2.1 Employees should take annual leave at a time that is mutually agreed between themselves and their employer.

26.2.2 Employees must take their annual leave no later than six (6) months after the date that the annual leave accrued. An employer and individual employees may agree for the employee to take annual leave at a later time. Any such agreement must be in writing.

26.2.3 Where the employer and the employee agree, annual leave may be taken in separate periods. An employee shall have the right to take the four (4) weeks consecutively. The employee shall also have the right to apply for periods of annual leave of less than one week.

26.3 Taking Annual Leave in Advance

An employer and individual employees may agree for the employee to take annual leave in advance. The following conditions apply:

26.3.1 The employee must apply to the employer in writing.

26.3.2 The employee must have completed at least one month's continuous service.

26.3.3 The employee is entitled to annual leave loading in accordance with sub clause 0 – Annual Leave Loading.

26.3.4 The amount of annual leave that the employee takes in advance will be deducted from the amount of annual leave that the employee otherwise becomes entitled to at the end of 12 months continuous service.

26.3.5 An employee may take annual leave in advance only if it is convenient for the employer. An employer must not unreasonably refuse to allow an employee to take annual leave in advance.

26.4 Annual Leave Loading

26.4.1 Full-time employees and part-time employees are entitled to annual leave loading of 17.5%, up to a maximum of:

For full-time employees	17.5% of an amount equal to 150 hours pay calculated on average male weekly earnings for the August quarter of the previous calendar year, as determined by the Australian Bureau of Statistics.
For part-time employees	An amount equivalent to that of full-time employees, calculated on a proportionate basis according to the actual hours that the employee works each week.

26.4.2 Employees are only entitled to annual leave loading for the four-week annual leave period provided in sub clause 0. Employees are not entitled to annual leave loading for any other form of additional annual leave that is provided for elsewhere in this Agreement.

26.4.3 An employer and individual employees may agree for the employer to pay annual leave loading at a time or times other than when the employee is actually taking annual leave.

26.5 Public Holidays During Annual Leave

26.5.1 Public holidays do not count as annual leave. If a public holiday prescribed by this Agreement occurs while an employee is on annual leave and the public holiday is on a day that the employee would normally have worked if he or she were not on annual leave, the public holiday is added to the employee's annual leave period.

26.6 Sickness While on Annual Leave

26.6.1 If an employee is sick during annual leave for a period of at least five working days, the employee is entitled to additional annual leave. The amount of the additional annual leave is equivalent to either the duration of the employee's sickness or the amount of sick leave available to the employee, whichever is lower.

26.6.2 An employee must provide the employer with a medical certificate before the employee is entitled to additional annual leave due to sickness.

26.6.3 If an employee falls sick during annual leave and is entitled to additional annual leave due to sickness, that period must be recorded as sick leave. The employee must take the additional annual leave at a time that is mutually agreed between the employer and the employee.

26.7 Annual Leave must be Taken

26.7.1 An employer must not make payment in lieu of annual leave except on termination of employment.

26.7.2 Employees must not accept payment in lieu of annual leave except on termination of employment.

26.8 Payment of Proportionate Annual Leave on Termination of Employment

26.8.1 On termination of employment, employees are entitled to payment of accrued unused annual leave entitlements. The leave is payable on a proportionate basis for each completed week of continuous service.

26.8.2 Employees are not entitled to payment of annual leave loading on any annual leave paid upon termination of their employment.

27 ANNUAL LEAVE TRAVEL TIME

Full-time employees and part-time employees are entitled to two days paid annual leave travel time per year. The following conditions apply:

27.1 Employees are only entitled to paid annual leave travel time if they travel to a capital city while they are on annual leave and they travel there by motor vehicle.

27.2 Paid annual leave travel time is only available to employees who have completed at least two years continuous service.

27.3 Employees are not entitled to additional annual leave travel time if they take annual leave in more than one period.

27.4 Unused annual leave travel time does not accumulate from year to year.

27.5 Unused annual leave travel time is not payable on termination of employment.

2

28 FAMILY LEAVE

28.1 Use of Sick Leave

28.1.1 Employees are entitled to use any accrued sick leave entitlements to provide care and support to members of their immediate family or members of their household who are ill and who need the employee's care and support or who require care due to an unexpected emergency.

28.1.2 The following conditions apply:

28.1.2(a) The employee must be responsible for the care of the person concerned; and

28.1.2(b) The person concerned must be either a member of the employee's immediate family or a member of the employee's household.

28.1.3 The employee must, if required by the employer, provide a medical certificate, statutory declaration or other evidence that would satisfy a reasonable person to prove the illness of the person concerned and that the illness is such as to require care by another.

28.1.4 Wherever possible, employees must give their employer notice of the following things prior to their absence:

28.1.4(a) That the employee intends to take the leave.

28.1.4(b) The name of the person who requires care and their relationship to the employee.

28.1.4(c) The reasons for taking the leave.

28.1.4(d) The estimated length of the employee's absence.

28.1.5 If it is not practicable for the employee to give prior notice of their absence, the employee must notify their employer by telephone of their absence as soon as possible on the day of the absence.

28.2 Unpaid Leave for Family Purposes

28.2.1 If the employer consents, employees may take unpaid leave to provide care to a family member who is ill.

28.3 Use of Annual Leave

28.3.1 If the employer consents, employees may take annual leave to provide care to a family member who is ill.

28.4 Make-up Time

28.4.1 If the employer consents, employees may work make-up time. This means that employees take time off work during ordinary hours and work those hours at a later time, during the span of ordinary hours stipulated in sub clause 0.

28.5 Disputes About Family Leave

28.5.1 In the event that a dispute arises in connection with any part of this clause, the matter should be dealt with in accordance with the Dispute Settling Procedures in clause 9.

29 PUBLIC HOLIDAYS

29.1 Employees are entitled to the following public holidays:

29.1.1 New Year's Day

29.1.2 Good Friday

29.1.3 Easter Saturday

29.1.4 Easter Monday

29.1.5 Christmas Day

29.1.6 Boxing Day

29.1.7 Australia Day

29.1.8 Anzac Day

29.1.9 WA Day

29.1.10 Queen's Birthday

29.1.11 Labour Day

29.1.12 National Aboriginal Day as determined by the NAIDOC Committee.

29.2 Public holidays are paid holidays if the employee would normally work on that day. Casual employees are not entitled to payment for any public holidays on which they do not work.

29.3 Employees are entitled to any additional public holidays or substitute public holidays that are created by an act of parliament or by proclamation.

29.4 An employer and the majority of employees may agree to substitute another day for any of the public holidays that are set out in this clause. The following conditions apply:

29.4.1 The agreement must be in writing.

29.4.2 The employer must give a copy of the agreement to any employee on request by that employee.

29.5 An employer must give employees a reasonable opportunity to obtain advice from a representative of their choice before making an agreement about substitute public holidays.

30 PARENTAL LEAVE

30.1 Subject to the terms of this clause employees are entitled to maternity, paternity and adoption leave and to work part-time in connection with the birth or adoption of a child.

30.1.1 The provisions of this clause apply to full-time, part-time and eligible casual employees.

30.1.2 An 'eligible casual employee' means a casual employee:

30.1.2(a) employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months; and

30.1.2(b) who has, but for the pregnancy or the decision to adopt, a reasonable expectation of ongoing employment.

30.1.3 For the purposes of this clause, continuous service is work for an employer on a regular and systematic basis (including any period of authorised leave or absence).

30.1.4 An employer must not fail to re-engage a casual employee because:

30.1.4(a) the employee or employee's spouse is pregnant; or

30.1.4(b) the employee is or has been immediately absent on parental leave.

30.1.5 The rights of an employer in relation to engagement and re-engagement of casual employees are not affected, other than in accordance with this clause.

30.2 Definitions

30.2.1 For the purposes of this clause **child** means a child of the employee under school age or a person under school age who is placed with the employee for the purposes of adoption, other than a child or step-child of the employee or of the spouse of the employee or a child who has previously lived continuously with the employee for a period of six months or more.

30.2.2 Subject to 0, in this clause, **spouse** includes a de facto or former spouse.

30.2.3 In relation to 0, **spouse** includes a de facto spouse but does not include a former spouse.

30.2.4 **Adoption** includes relative adoption. Relative adoption occurs when a child is adopted by a grandparent, brother, sister, aunt or uncle (either of the whole blood or half blood or by marriage).

30.3 Basic entitlement

30.3.1 After twelve months continuous service, parents are entitled to a combined total of 52 weeks unpaid parental leave on a shared basis in relation to the birth or adoption of their child. For females, maternity leave may be taken and for males, paternity leave may be taken. Adoption leave may be taken in the case of adoption.

30.3.2 Subject to 0, parental leave is to be available to only one parent at a time, in a single unbroken period, except that both parents may simultaneously take:

30.3.2(a) for maternity and paternity leave, an unbroken period of up to one week at the time of the birth of the child;

30.3.2(b) for adoption leave, an unbroken period of up to three weeks at the time of placement of the child.

30.4 Variation of Parental Leave

30.4.1 Where employees take leave under clause 0 or 0, unless otherwise agreed between the employer and employee, employees may apply to their employer to change the period of parental leave on one occasion. Any such change is to be notified as soon as possible but no less than four weeks prior to the commencement of the changed arrangements. Nothing in this clause detracts from the basic entitlement in clause 0 or 0.

30.5 Right to Request

30.5.1 An employee entitled to parental leave pursuant to the provisions of clause 0 may request the employer to allow the employee:

30.5.1(a) to extend the period of simultaneous unpaid parental leave provided for in clauses 0 and 0 up to a maximum of eight weeks;

30.5.1(b) to extend the period of unpaid parental leave provided for in clause 0 by a further continuous period of leave not exceeding 12 months;

30.5.1(c) to return from a period of parental leave on a part-time basis until the child reaches school age;

30.5.1(d) to assist the employee in reconciling work and parental responsibilities.

30.5.2 The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service.

30.5.3 Employee's request and the employer's decision to be in writing

30.5.3(a) The employee's request and the employer's decision made under clauses 0 and 0 must be recorded in writing.

30.5.4 Request to return to work part-time

30.5.4(a) Where an employee wishes to make a request under clause 0, such a request must be made as soon as possible but no less than seven weeks prior to the date upon which the employee is due to return to work from parental leave.

30.6 Maternity Leave

30.6.1 An employee must provide notice to the employer in advance of the expected date of commencement of parental leave. The notice requirements are:

30.6.1(a) of the expected date of confinement (included in a certificate from a registered medical practitioner stating that the employee is pregnant) – at least ten weeks;

30.6.1(b) of the date on which the employee proposes to commence maternity leave and the period of leave to be taken - at least four weeks.

30.6.2 When the employee gives notice under 0 the employee must also provide a statutory declaration stating particulars of any period of paternity leave sought or taken by her spouse and that for the period of maternity leave she will not engage in any conduct inconsistent with her contract of employment.

30.6.3 An employee will not be in breach of this clause if failure to give the stipulated notice is occasioned by confinement occurring earlier than the presumed date.

30.6.4 Subject to 0 and unless agreed otherwise between the employer and employee, an employee may commence parental leave at any time within six weeks immediately prior to the expected date of birth.

30.6.5 Where an employee continues to work within the six week period immediately prior to the expected date of birth, or where the employee elects to return to work within six weeks after the birth of the child, an employer may require the employee to provide a medical certificate stating that she is fit to work on her normal duties.

30.6.6 Special Maternity Leave

30.6.6(a) Where the pregnancy of an employee not then on maternity leave terminates after 28 weeks other than by the birth of a living child, then the employee may take unpaid special maternity leave of such periods as a registered medical practitioner certifies as necessary.

30.6.6(b) Where an employee is suffering from an illness not related to the direct consequences of the confinement, an employee may take any paid sick leave to which she is entitled in lieu of, or in addition to, special maternity leave

30.6.6(c) Where an employee not then on maternity leave suffers illness related to her pregnancy, she may take any paid sick leave to which she is then entitled and such further unpaid special maternity leave as a registered medical practitioner certifies as necessary before her return to work. The aggregate of paid sick leave, special maternity leave and parental leave, including parental leave taken by a spouse, may not exceed 52 weeks.

30.6.7 Recommencement Date

30.6.7(a) Where leave is granted under 0, during the period of leave an employee may return to work at any time, as agreed between the employer and the employee provided that time does not exceed four weeks from the recommencement date desired by the employee.

30.7 Paternity Leave

30.7.1 An employee will provide to the employer at least ten weeks prior to each proposed period of paternity leave, with:

30.7.1(a) a certificate from a registered medical practitioner which names his spouse, states that she is pregnant and the expected dated of confinement, or states the date on which the birth took place; and

30.7.1(b) written notification of the dates on which he proposes to start and finish the period of paternity leave; and

30.7.1(c) except in relation to leave taken simultaneously with the child's mother under clauses 0, 0 and 0 a statutory declaration stating:

30.7.1(c)(i) he will take that period of paternity leave to become the primary care-giver of a child;

30.7.1(c)(ii) particulars of any period of maternity leave sought or taken by his spouse; and

30.7.1(c)(iii) that for the period of paternity leave he will not engage in any conduct inconsistent with his contract of employment.

30.7.2 The employee will not be in breach of sub clause 0(a) if the failure to give the required period of notice is because of the birth occurring earlier than expected, the death of the mother of the child, or other compelling circumstances.

30.8 Adoption Leave

30.8.1 The employee will notify the employer at least ten weeks in advance of the date of commencement of adoption leave and the period of leave to be taken. An employee may commence adoption leave prior to providing such notice, where through circumstances beyond the control of the employee, the adoption of a child takes place earlier.

30.8.2 Before commencing adoption leave, an employee will provide the employer with a statutory declaration stating:

30.8.2(a) the employee is seeking adoption leave to become the primary care-giver of the child;

30.8.2(b) particulars of any period of adoption leave sought or taken by the employee's spouse; and

30.8.2(c) that for the period of adoption leave the employee will not engage in any conduct inconsistent with their contract of employment.

30.8.3 An employer may require an employee to provide confirmation from the appropriate government authority of the placement.

30.8.4 Where the placement of a child for adoption with an employee does not proceed or continue, the employee will notify the employer immediately and the employer will nominate a time not exceeding four weeks from receipt of notification for the employee's return to work.

30.8.5 An employee will not be in breach of this clause as a consequence of failure to give the stipulated periods of notice if such failure results from a requirement of an adoption agency to accept earlier or later placement of a child, the death of a spouse, or other compelling circumstances.

30.8.6 An employee seeking to adopt a child is entitled to unpaid leave for the purpose of attending any compulsory interviews or examinations as are necessary as part of the adoption procedure. The employee and the employer should agree on the length of the unpaid leave. Where agreement cannot be reached, the employee is entitled to take up to two days unpaid leave. Where paid leave is available to the employee, the employer may require the employee to take such leave instead.

30.9 Variation of period of parental leave

30.9.1 Unless agreed otherwise between the employer and employee, an employee may apply to their employer to change the period of parental leave on one occasion. Any such change is to be notified at least four weeks prior to the commencement of the changed arrangements.

30.10 Parental leave and other entitlements

30.10.1 An employee may in lieu of or in conjunction with parental leave, access any annual leave or long service leave entitlements which they have accrued subject to the total amount of leave not exceeding 52 weeks or longer period as agreed under sub clause 0.

30.11 Transfer to a safe job

30.11.1 Where an employee is pregnant and, in the opinion of a registered medical practitioner, illness or risks arising out of the pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue at her present work, the employee will, if the employer deems it practicable, be transferred to a safe job at the rate and on the conditions attaching to that job until the commencement of maternity leave.

30.11.2 If the transfer to a safe job is not practicable, the employee may elect, or the employer may require the employee to commence parental leave for such period as is certified necessary by a registered medical practitioner.

30.12 Returning to work after a period of parental leave

30.12.1 An employee will notify the employer of their intention to return to work after a period of parental leave at least four weeks prior to the expiration of the leave.

30.12.2 An employee will be entitled to the position, which they held immediately before proceeding on parental leave. In the case of an employee transferred to a safe job pursuant to 0, the employee will be entitled to return to the position they held immediately before such transfer.

30.12.3 Where such position no longer exists but there are other positions available, which the employee is qualified for and is capable of performing, the employee will be entitled to a position as nearly comparable in status and pay to that of their former position.

30.13 Replacement employees

30.13.1 A replacement employee is an employee specifically engaged or temporarily promoted or transferred, as a result of an employee proceeding on parental leave.

30.13.2 Before an employer engages a replacement employee the employer must inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

30.14 Communication during parental leave

30.14.1 Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

30.14.1(a) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

30.14.1(b) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

30.14.2 The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to request to return to work on a part-time basis.

30.14.3 The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with 0.

31 FUNERAL LEAVE

31.1 Full-time and part-time employees are entitled to five days paid funeral leave upon the death of a person with whom the employee has a close family relationship. Casual employees are not entitled to paid funeral leave.

31.2 An employer has discretion to allow employees to take additional paid funeral leave.

31.3 If an organisation closes because of the funeral of a prominent Community member, the time that the organisation is closed will count as paid leave for full-time and part-time employees. The time that the organisation is closed counts towards the five-day funeral leave entitlement referred to in subclause 0.

32 CEREMONIAL LEAVE

32.1 Full-time and part-time employees are entitled to 10 days paid ceremonial leave per year.

32.2 The following conditions apply to ceremonial leave:

32.2.1 The employee must be legitimately required by Aboriginal custom or by traditional law to be absent from work to participate in ceremonial activities.

32.2.2 The leave may only be granted with the authority of the employer's senior Aboriginal management.

32.2.3 Unused ceremonial leave does not accumulate from year to year.

32.2.4 Unused ceremonial leave is not payable on termination of employment.

32.3 An employer may allow individual employees to extend ceremonial leave by taking other accrued paid leave entitlements or by taking unpaid leave. Any such extension to the leave must be legitimately required by Aboriginal custom or by traditional law.

33 SPECIAL AND EMERGENCY LEAVE

33.1 An employer may allow an employee to take paid leave or unpaid leave in exceptional circumstances resulting from a personal obligation beyond the control of the employee.

33.2 If an employer allows an employee to take special and emergency leave, the employer may impose whatever terms and conditions it sees fit.

34 JURY SERVICE

34.1 Employees who are required to attend for jury service during their regular working hours are entitled to payment at their normal rate of pay for ordinary hours.

34.2 If an employee receives any sitting fees for jury service, the employer will deduct an equal amount from the employee's pay.

34.3 Employees must notify their employer as soon as possible of the dates on which they are required to attend for jury service.

34.4 Employees must provide the following things if requested to do so by their employer:

34.4.1 Proof of their attendance at jury service.

34.4.2 Proof of the duration of their jury service.

34.4.3 Proof of the amount of money they received for jury service.

35 LONG SERVICE LEAVE

35.1 Subject to the conditions hereinafter prescribed all employees employed by Derbarl Yerrigan Health Service shall be entitled to;

35.1.1 13 weeks of long service leave after a period of 7 years' continuous service; and

35.1.2 13 weeks of long service leave after each further period of seven years' continuous service; and

35.1.3 Pro rata long service leave after a period of 5 years' continuous service provided that;

35.1.3(a) the employment of the employee has been ended by the employer for reasons other than serious misconduct; or

35.1.3(b) the employment is ended by their employer or at the instigation of the employee on account of incapacity due to old age, ill health or the result of an accident; or

35.1.3(c) the employee resigns for any other reason; or

35.1.3(d) the employee dies after having served continuously for not less than five years before their death.

35.2 The long service leave prescribed in this clause may, by consent between the employer, the employee and the employee's representative be taken in more than one portion provided that no portion shall be less than two consecutive weeks.

35.3 Long service leave shall be taken at a time convenient to the employer and employee.

35.4 Any public holiday occurring during an employee's absence on long service leave shall not be deemed to be a portion of the long service leave and extra days in lieu thereof shall be granted.

35.5 Where an employee, through personal ill health, is confined to their place of residence or a hospital for a continuous period of 2 days or more during any period of long service leave and such confinement is certified to by a duly qualified medical practitioner, such period shall be considered personal leave and the period during long service leave for which paid personal leave has been approved shall be given as additional long service at a time convenient to the employer and employee.

36 TRAINING LEAVE

36.1 Employees are entitled to payment for attending training courses, seminars and conferences that are held during the employee's regular working hours. Employees must obtain prior approval from their employer to attend a training course, seminar or conference in order to receive payment.

37 STUDY LEAVE

37.1 Employees may be granted up to five hours paid study leave per week, plus up to two weeks paid leave per year to study for exams and to attend residential school.

37.2 The following conditions apply to study leave:

37.2.1 The study must be directly relevant to the skills and/or knowledge that the employee requires to progress through the classification structure in this Agreement.

37.2.2 Employees must provide formal proof that they are undertaking this study if their employer requests them to.

37.2.3 The employer has discretion to approve or refuse an employee's request for study leave. An employer is not required to approve study leave if it will unreasonably affect its productive operations.

38 ENGLISH LANGUAGE STUDY LEAVE

Employees are entitled to a maximum of 100 hours paid leave per year to undertake English language training. The following conditions apply:

38.1 The employee must be from a non-English speaking background.

38.2 The employee must require the English language training in order to progress through the classification structure in this Agreement.

38.3 The English language training must be conducted by an authority that is approved by the employer.

39 FAMILY VIOLENCE LEAVE

39.1 The Employer recognises that Employees sometimes face situations of violence or abuse in their personal life that may affect their attendance or performance at work. Therefore, the Derbarl Yerrigan Health Services is committed to providing support to staff that experience domestic (family) violence.

39.2 An Employee experiencing domestic (family) violence may apply for approval to take personal leave, or any other leave accrued pursuant to this agreement, to attend to matters arising out of an incident of domestic (family) violence and the Employer shall not unreasonably withhold approval of such leave.

40 DELEGATE RIGHTS AND TRAINING LEAVE

40.1 Delegate's Rights

Accredited representatives shall have the rights set out in the following Delegates Charter:

40.1.1 the right to be treated with respect, fairness and to perform their role as a Union delegate/shop steward without any adverse effect upon their employment;

40.1.2 the right to formal recognition by the employer that endorsed Union delegate/shop steward speak on behalf of ASU members in the workplace;

40.1.3 the right to bargain collectively on behalf of those they represent, including access to reasonable paid time to prepare and participate in enterprise bargaining negotiations;

40.1.4 the right to consultation, and access to reasonable information about the workplace, the business and any proposed changes;

40.1.5 the right to reasonable time to represent the interests of members to the employer and Industrial Tribunals;

40.1.6 the right to reasonable paid time during normal working hours to consult with members and ASU officers/employees;

40.1.7 the right to reasonable paid time off to attend Union education / development;

40.1.8 the right to address new employees about the benefits of ASU membership during the formal induction process at the time that they commence employment;

40.1.9 the right to reasonable access to telephone, facsimile, photocopying, internet and e-mail facilities for the purpose of carrying out their role as a Union delegate/shop steward and communicating with their workplace colleagues and the ASU offices;

40.1.10 the right to place ASU information on a designated Union notice board in a prominent location within the workplace;

40.1.11 The right to take a paid secondment to work with the Union where this is agreed by the employer

40.2 Training Leave

A Union delegate/shop steward (or a recognised employee workplace representative) shall be entitled to, and the employer shall grant, up to five days' leave each year, non-cumulative, to attend courses conducted by an accredited training provider on the following conditions:

40.2.1 the scope, content and level of the courses are specifically directed at the enhancement of the operation of the dispute settlement procedure;

40.2.2 the employee must, if required by the employer, provide the employer (prior to the granting of any request for such leave) with the scope, content, level and duration of the course that the employee is requesting to attend;

40.2.3 reasonable notice (at least 30 days) is given by the Union delegate/shop steward or workplace representative

40.2.4 the granting of leave is subject to the operational requirements of the employer;

40.3 The Union delegate/shop steward or workplace representative taking such leave shall be paid all ordinary time earnings which normally become due and payable during the period of leave;

40.4 leave of absence granted pursuant to this clause shall count as service for all purposes of this Agreement.

40.5 employees granted leave under this clause must, upon request from the employer, provide to the employer, satisfactory proof of their attendance at the course and the number of days he or she was in attendance;

40.6 the employer is not required to pay the costs of travel, or travel time, to and from the place where the courses are conducted, nor for any accommodation and associated costs during such leave;

40.7 in any twelve month period, a maximum of two employees in any one organisation may attend a course.

Signatories to the Agreement

_____

On behalf of Derbal Yerrigan Health Service

_____

Date

_____

On behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees

_____

Date

_____

On behalf of the United Voice WA

_____

Date

SCHEDULE A – CLASSIFICATIONS

A1. LEVEL 1

A1.1. CHARACTERISTICS OF LEVEL 1

Employees at Level 1 will need to undertake induction and training. This may include information on the industry, organisation, conditions of employment, career path opportunities, planning and layout of work, procedures, occupational health and safety and equal opportunity.

A1.2. JOB REQUIREMENTS FOR LEVEL 1

A1.2.1. Level 1 is the base level of the classification structure. Employees at Level 1 do not require any previous work experience.

A1.2.2. Employees at Level 1 will be required to work towards completing structured, accredited on-the-job and / or off-the-job training, including safety training. Alternatively, they may be required to already possess appropriate and relevant experience in some or all of the following areas, which are indicative of the skills required at Level 1:

1) Basic oral and written literacy and numeracy skills.

2) Developing basic interpersonal skills.

3) Plant operation skills.

4) Use of hand tools and minor plant.

5) (Operator skill or experience in the low to medium range.

6) (Operation of single-function equipment.

7) Operator machine maintenance and set up which is of low to medium complexity.

8) Basic dimensional control on works other than those that are pre-set by plant.

A1.2.3. Examples of work that falls within Level 1 are:

1) Loader (yard) (borrow pit), chipper, roller (base course), cherrypicker (unconfined working space), tractors and mounted equipment.

2) Drivers of vehicles up to two axles.

3) Using measuring instruments and tools.

4) Basic horticultural and nursery work including gardening, tree pruning, potting, planting and other duties.

5) Store work, including inventory and store control.

6) Licensed operation of appropriate materials and handling equipment.

7) Basic keyboard skills and computer operation.

8) Preparing concrete, bitumen and pipe laying to line and grade from plans, drawings and instructions, including form work, levelling, screed, rendering and finishing.

A1.2.4. Employees at Level 1 will have a sound knowledge of the organisation's safety policy requirements as they relate to the job being undertaken.

A1.2.5. Employees at Level 1 may also:

1) Undertake routine activities of a clerical or support nature.

2) Undertake basic operation of keyboard equipment including data input and word processing at a basic level.

3) Provide routine information including general reception and telephonist duties.

4) Undertake routine office duties which involve filing, recording, checking and batching of accounts, invoices, orders, store requisitions and maintenance of an existing records system.

A1.3. RESPONSIBILITIES OF LEVEL 1

A1.3.1. Employees at Level 1:

1) Will contribute to the operational objectives of their work area.

2) Will work under supervision, either individually or in a team environment, on a range of projects.

3) Are responsible for the quality and completion of their own work, subject to direction.

4) Are responsible for materials, tools, equipment, vehicles, and plant in their use.

5) Are responsible for quality control and quality assurance procedures, including recognising quality deviations / faults.

A1.4. ORGANISATIONAL RELATIONSHIPS FOR LEVEL 1

A1.4.1. Employees at Level 1 work under direct supervision. Their work outcomes are closely monitored.

A1.4.2. Problems at this level are generally of a routine nature. An employee's freedom to act is limited by work practices relevant to the area and by specific instructions.

A1.4.3. Problems are of limited difficulty and assistance is readily available.

A1.4.4. Employees at Level 1 are required to make technical and operational decisions relating to their own safety and to the work and safety of other employees, clients and the public.

A1.4.5. There is no scope for interpretation at Level 1.

A2. LEVEL 2

A2.1. CHARACTERISTICS OF LEVEL 2

A2.1.1. Employees at Level 2 work under close direction and undertake routine activities that require the practical application of basic skills and techniques.

A2.1.2. Employees at Level 2 perform clearly defined activities with outcomes that are readily attainable and clearly defined. The duties of employees at Level 2 will be closely monitored, with instruction and assistance being readily available.

A2.1.3. Freedom to act is limited by standards and procedures. However, with experience, employees at this level may have sufficient freedom to exercise judgement in the planning of their own work within those confines.

A2.1.4. Level 2 positions will initially require extensive on the job training, including familiarisation with the goals and objectives of the work section.

A2.1.5. Level 2 employees will be responsible for the timeliness of their work. They will be required to use basic numeracy, written and verbal communication skills.

A2.1.6. Supervision of other staff is not a feature at Level 2.

A2.2. JOB REQUIREMENTS FOR LEVEL 2

A2.2.1. Formal qualifications may not be required at Level 2.

A2.2.2. Some or all of the following skills, knowledge, experience, qualifications and training are needed to perform work at Level 2:

1) A developing knowledge of the section / department's function, operation and the technical requirements of the job to be undertaken.
2) An adequate knowledge of work practices and policies in the relevant work area.
3) A basic knowledge of procedures and equipment that are relevant to the work area.
4) Basic numeracy, written and verbal communication skills that are relevant to the work area.

A2.2.3. No formal qualifications required.

OR

A2.2.4. An appropriate trade certificate, which is relevant to the work area.

OR

Appropriate and relevant equivalent experience together with a developed, sound knowledge of the technical requirements of the job to be undertaken.

This may include some or all of the following:

1) Horticulture and nursery techniques, including turf preparation and management.
2) Reticulation systems.
3) Basic materials, equipment and cost estimating and recording.
4) Basic to medium operator skill, operator machine maintenance and set-up complexity.

A2.2.5. Employers are expected to offer continued on-the-job training to employees at this level.

A2.2.6. It is desirable that employees at Level 2 undertake study for an appropriate certificate or that they undertake either internal or external training such as leadership skills training.

A2.3. RESPONSIBILITIES OF LEVEL 2

A2.3.1. Employees at Level 2 will contribute to the operational objectives of their work area. A position at this level may include some of the following inputs or those of a similar value:

1) Undertaking routine activities of a support nature.

   Undertaking straightforward operation of equipment, which is relevant to the organisation or section.
2) Exercising trade skills using various materials and / or specialised techniques.
3) Providing routine information to other sections and to the public.
4) Applying established practices and procedures, including those of a technical nature.
5) Performing elementary tasks within a community service program which require knowledge of established work practices and procedures that are relevant to the work area.
6) Preparing cash payment summaries, banking reports and bank statements.
7) Operating a computer and / or programs and peripheral equipment and initiating corrective action.
8) Operating a word processor and / or other business software where the employee is conversant with and proficient in the use of those systems.
9) Operating a desktop publisher.
10) Posting journals to ledger, etc.
11) Providing secretarial support which requires sound judgement, initiative, confidentiality and sensitivity.
12) Applying purchasing and inventory control methods.
13) Providing more than routine information.
14) Receiving and accounting for monies and providing assistance to clients.
15) Calculating and maintaining wage and salary records.
16) Assisting with administrative functions.

A2.4. ORGANISATIONAL RELATIONSHIPS FOR LEVEL 2

A2.4.1. Employees at Level 2 work under direct supervision.

A2.4.2. The extent of the authority for a Level 2 employee includes

1) Work outcomes are regularly monitored.
2) Freedom to act is limited by standards and procedures.
3) Solutions to problems can be found in established procedures and instructions. Assistance is readily available.

A3. LEVEL 3

A3.1. CHARACTERISTICS OF LEVEL 3

A3.1.1. Employees at Level 3 work under regular direction within clearly defined guidelines. They undertake a range of activities that require the application of acquired skills and knowledge.

A3.1.2. Employees at Level 3 perform functions that are defined by established routines, methods, standards and procedures, with limited scope to exercise initiative in applying work practices and procedures. Assistance will be readily available. Employees may be responsible for a minor function and / or may contribute specific knowledge and / or specific skills to the work of the organisation. In addition, employees may be required to assist senior officers with specific projects.

A3.1.3. Employees at Level 3 will be expected to have an understanding of work procedures that are relevant to their work area. They may provide assistance about established procedures to lower-classified employees. In addition, employees at this level may be required to assist in establishing procedures to meet the objectives of a minor function.

A3.1.4. Employees at Level 3 will be responsible for managing time and for planning and organising their own work. They may be required to oversee and / or guide the work of a limited number of lower-classified employees.

A3.1.5. Employees at Level 3 could be required to resolve minor work procedural issues in the relevant work area, within established constraints.

A3.1.6. Graduates who have a relevant three-year degree and who are required to undertake work related to that qualification will be appointed to Level 3, third year.

A3.2. JOB REQUIREMENTS FOR LEVEL 3

A3.2.1. Formal qualifications may not be required at Level 3.

A3.2.2. Some or all of the following skills, knowledge, experience, qualifications and training are needed to perform work at Level 3:

1) Developing skills in oral, written and interpersonal communication with clients and other members of the public.
2) Knowledge of established work practices and procedures that are relevant to the work area.
3) Knowledge of the policies, regulations and statutory requirements relating to the work area.
4) An understanding of clear but complex rules.
5) Application of techniques that are relevant to the work area.

A3.2.3. No formal qualifications required.

OR

A3.2.4. An appropriate post-trade certificate that is relevant to the work area.

OR

A3.2.5. Level 3 is the entry point for employees who have a three-year degree, an Associate Diploma or an appropriate certificate without experience.

OR

A3.2.6. An equivalent level of expertise and experience to undertake the range of activities required, which has been attained through previous appointments or service.

OR

A3.2.7. Appropriate on-the-job training and relevant experience.

A3.3. RESPONSIBILITIES OF LEVEL 3

A3.3.1. Employees at Level 3 contribute to the operational objectives of their work area. A position at Level 3 may include some of the following inputs or those of a similar value:

1) Undertaking a range of activities that require the application of established work procedures. Employees may exercise limited initiative and / or judgement within clearly established procedures and / or guidelines.
2) Achieving outcomes that are clearly defined.
3) Operating general workplace equipment and initiating corrective action at an elementary level.
4) Operating and being conversant with relevant workplace equipment. Employees at this level will utilise the functions of those systems and will be proficient in their use.
5) Providing support that requires the exercise of sound judgement, initiative, confidentiality and sensitivity in the performance of work.
6) Performing tasks of a sensitive nature including the provision of more than routine information, receiving and accounting for monies and providing assistance to clients.
7) Providing para-professional support to qualified officers.

8) Overseeing the work of unqualified staff and / or taking charge of a minor function within the organisation.

9) Undertaking routine inspection duties which involve the enforcement of general by-laws or regulations.

10) Assisting senior officers with special projects.

11) Exercising operational responsibility for a single-purpose complex.

12) Performing tasks which require knowledge of established work practices and procedures that are relevant to the work area.

A3.3.2. Where the employee's prime responsibility is to supervise outside employees, positions at Level 3 may include some of the following inputs or those of a similar value:

1) Planning and coordinating the activities of employees within a single works function of the organisation.

2) Supervising the day-to-day operation of a minor works project.

3) Being responsible for a minor works project or programme.

A3.3.3. Where the employee's prime responsibility lies in a technical field, positions at Level 3 may include some of the following inputs or those of a similar value:

1) Applying established practices and procedures in conducting a range of technical activities, including in the fields of construction, engineering, surveying and horticulture.

2) Being responsible for a minor project.

A3.4. ORGANISATIONAL RELATIONSHIPS FOR LEVEL 3

A3.4.1. Where relevant, employees at Level 3 will supervise minor works programmes or projects.

A3.4.2. Employees at Level 3 work under regular supervision.

A3.4.3. Employees at Level 3 will oversee and guide a limited number of lower-classified employees.

A3.4.4. The extent of the authority for a Level 3 employee includes

1) Work outcomes are monitored.

2) Employees have freedom to act within established guidelines.

3) Solutions to problems may require the exercise of limited judgement. Guidance will be found in procedures, precedents and guidelines. Assistance will be available when problems occur.

A4. LEVEL 4

A4.1. CHARACTERISTICS OF LEVEL 4

A4.1.1. Employees at Level 4 work under general direction. They will apply procedures, methods and guidelines that are well established.

A4.1.2. Graduates initially appointed to this level will be under the direct supervision of a senior employee.

A4.1.3. Employees at Level 4 will solve problems of limited difficulty using knowledge, judgement and work organisational skills that they have acquired through qualifications and / or previous work experience. Assistance is available from senior officers. Employees may receive instruction on the broader aspects of the work. Employees at Level 4 may also provide assistance to lower-classified employees.

A4.1.4. Level 4 positions allow employees scope for exercising initiative in the application of established work procedures.

A4.1.5. Level 4 employees may be required to supervise. Employees with supervisory responsibilities may undertake some complex operational work. They may also undertake planning and coordination of activities within the work area.

A4.1.6. Level 4 employees will be responsible for managing and planning their own work and that of subordinate staff. They may be required to deal with formal disciplinary issues within the work area.

A4.1.7. Supervisors should have a basic knowledge of human resource management principles and they should be able to assist subordinate staff with on-the-job training.

A4.1.8. Graduates who have a relevant four-year degree and who are required to undertake work related to that qualification will be appointed to Level 4.

A4.1.9. It is desirable that employees who have a three-year degree will progress to Level 4 after completing 12 months service at the top of Level 3, after obtaining relevant experience and a satisfactory degree of competence.

A4.1.10. Employees with certificate qualifications that are relevant to the work area may be promoted to Level 4 once they have obtained relevant satisfactory service and are required to undertake work related to the responsibilities under Level 4.

A4.2. JOB REQUIREMENTS FOR LEVEL 4

A4.2.1. Some or all of the following skills, knowledge, experience, qualifications and training are needed to perform work at Level 4:

1) A thorough knowledge of the work activities performed within the work area.
2) A sound knowledge of procedural / operational methods for the work area.
3) A working knowledge of statutory requirements that are relevant to the work area.
4) The ability to apply computing concepts.

A4.2.2. Employees may be required to utilise professional, specialised or technical knowledge.

A4.2.3. Level 4 is the entry level for employees who have a four-year degree in the relevant discipline.

OR

A4.2.4. Level 4 is the entry level for employees who have a three-year degree plus a Graduate Diploma in the relevant discipline.

OR

A4.2.5. Level 4 is the appropriate level for employees who have an Associate Diploma in the relevant discipline plus relevant experience.

OR

A4.2.6. Level 4 is the appropriate level for employees who have a three-year degree in the relevant discipline plus one year of relevant professional experience.

OR

A4.2.7. Level 4 is the appropriate level for employees who have an appropriate certificate with relevant experience.

OR

A4.2.8. Level 4 is the appropriate level for employees who, through previous appointments, service and / or study, have attained an equivalent level of expertise and experience to undertake the range of activities required.

A4.3. RESPONSIBILITIES OF LEVEL 4

A4.3.1. Employees at Level 4 contribute to the operational objectives of the work area. A position at this level may include some of the following inputs or those of a similar value:

1) Undertaking responsibility for various activities in a specialised area and / or components of the works programme.
2) Exercising responsibility for a function within the work area.
3) Assisting in a range of functions and / or contributing to the interpretation of matters for which there are no clearly established practices and procedures. This type of activity would not be the sole responsibility of a Level 4 employee.
4) Supervising the work of other para-professional staff.
5) Regularly undertaking general inspections to enforce compliance with various Acts, regulations, by-laws and policies.
6) Advising landholders, local authorities and government employees on eradication / control techniques and measures and informing them of their obligations under relevant legislation.
7) Providing advice on requirements for compliance with relevant Acts, codes, regulations, standards, by-laws and organisational policies.
8) Undertaking inspections.
9) Undertaking minor development assessment duties.
10) Exercising operational responsibility for a multi-purpose complex.
11) Coordinating elementary community service programmes or a single programme at a more complex level.
12) Planning and coordinating elementary community-based projects or programmes.
13) Performing moderately complex functions including social planning, demographic analysis, survey design and analysis.
14) Providing support which requires a high degree of judgement, initiative, confidentiality and sensitivity in the performance of work.
15) Proficiently operating equipment to enable modification, correction and / or identification of operational problems.

A4.3.2. Where the employee's prime responsibility lies in a professional field, employees at Level 4 will do at least some of the following:

1) Undertaking some minor phase of a broad or more complex assignment.
2) Providing assistance to senior officers.
3) Performing duties of a specialised nature.

A4.3.3. Where the employee's prime responsibility is to supervise the work of outside employees, that supervision may extend to several elements of the work, including:

1) planning and coordinating minor works.

2) exercising responsibility for a number of minor works and determining objectives for the functions under their control.

A4.3.4. Where the employee's prime responsibility lies in a technical field, employees at Level 4 will:

1) perform moderately complex functions in various fields including construction, engineering surveying and horticulture.

2) assist and review work done by subordinate employees.

A4.4. ORGANISATIONAL RELATIONSHIPS FOR LEVEL 4

A4.4.1. Graduates will work under direct supervision.

A4.4.2. Other employees will work under general supervision.

A4.4.3. Level 4 employees may supervise other employees.

A4.4.4. Level 4 employees operate as a member of a professional team.

A4.4.5. The extent of the authority for a Level 4 employee includes:

1) Employees may set outcomes or objectives for specific projects.

2) Graduates will receive instructions on the broader aspects of their work.

3) Employees have freedom to act within defined, established practices.

4) Problems can usually be solved by reference to procedures, documented methods and instructions. Assistance is available when problems occur.

A5. LEVEL 5

A5.1. CHARACTERISTICS OF LEVEL 5

A5.1.1. Employees at Level 5 work under general direction in functions that require the application of skills and knowledge that are appropriate to the work. Guidelines and work procedures are generally established.

A5.1.2. Employees at Level 5 will be required to apply knowledge and skills that have been gained through qualifications and / or previous experience in the discipline. Employees will be expected to contribute knowledge towards establishing procedures in the appropriate work-related field. Employees at this level may also be required to supervise various functions within a work area or activities of a complex nature.

A5.1.3. Level 5 positions may involve a range of work functions which could contain a substantial component of supervision or require employees to provide specialist expertise or advice in their relevant discipline.

A5.1.4. Work at Level 5 requires a sound knowledge of programme, activity, operational policy or service aspects of the work performed within a function or a number of work areas.

A5.1.5. Level 5 employees require skills in managing time, setting priorities, planning and organising their own work and that of subordinate staff (where supervision is part of the employee's position). Employees will be required to achieve specific objectives in line with the organisation's goals.

A5.1.6. Employees at Level 5 will be expected to set outcomes and to further develop work methods where general work procedures are not defined.

A5.2. JOB REQUIREMENTS FOR LEVEL 5

A5.2.1. Some or all of the following skills, knowledge, experience, qualifications and training are needed to perform work at Level 5:

1) Knowledge of statutory requirements that are relevant to the work area.

2) Knowledge of section procedures, policies and activities.

3) A sound knowledge of the discipline gained through previous experience, training or education.

4) Knowledge of the role of departments, sections and work areas within the organisation and / or service functions.

5) Specialists will require an understanding of the underlying principles in the relevant disciplines.

A5.2.2. A relevant four-year degree with two years of relevant experience, or a three-year degree with three years of relevant experience.

OR

A5.2.3. An Associate Diploma with relevant experience.

OR

A5.2.4. Lesser formal qualifications with substantial years of relevant experience.

OR

A5.2.5. An equivalent level of expertise and experience to undertake the range of activities required, which has been attained through previous appointments, service and / or study.

A5.3. RESPONSIBILITIES OF LEVEL 5

A5.3.1. Employees at Level 5 contribute to the operational objectives of their work area. A position at this level may include some of the following inputs or those of a similar value:

1) Undertaking activities that may require the exercise of judgement and / or the contribution of critical knowledge and skills where procedures are not clearly defined.
2) Exercising responsibility for various functions within the work area.
3) Identifying specific or desired performance outcomes.
4) Contributing to the interpretation and administration of matters for which there are no clearly established procedures.
5) Providing support of a complex nature to senior officers.
6) Ensuring that plans, permits and applications comply with appropriate legislation.
7) Managing a multi-purpose complex.
8) Undertaking a wide range of activities associated with programme, activity or service delivery.

A5.3.2. Where the employee's prime responsibility lies in a professional field, employees at Level 5 would undertake at least some of the following:

1) Liaising with other professionals at a technical level.
2) Discussing techniques, procedures and / or results with clients on straightforward matters.
3) Leading a team within a discipline-related project and / or a works programme.
4) Providing a reference, research, and / or technical information service including the facility to understand and develop technologically-based systems.
5) Carrying out a variety of activities that require initiative and judgement in the selection and application of established principles, techniques and methods.
6) Performing a range of planning functions and exercising knowledge of statutory and legal requirements.
7) Assisting senior officers with planning and coordinating a community programme of a complex nature.
8) Undertaking duties in the relevant disciplines and utilising knowledge of procedures and statutory requirements that are relevant to the work area.

A5.3.3. Where the employee's prime responsibility is to supervise the work of outside employees, employees at Level 5 will:

1) exercise responsibility for work groups, including the completion of work assignments, standards of work quality and / or compliance with regulations, codes and specifications;
2) assist senior officers with the establishment of work programmes of a complex nature;
3) be responsible for part of the works programme budget.

A5.3.4. Where the employee's prime responsibility lies in a technical field, employees at Level 5 will:

1) undertake projects which impact on the section, department and / or organisation's programmes;
2) carry out a variety of activities in the field of technical operation which require initiative and judgement in the selection and application of established principles, techniques and methods.

A5.4. ORGANISATIONAL RELATIONSHIPS FOR LEVEL 5

A5.4.1. Employees work under general direction.

A5.4.2. Employees supervise subordinate staff / contractors, or work in a specialised field.

A5.4.3. The extent of the authority for a Level 5 employee includes:

1) Employees are required to set outcomes within defined constraints.
2) Employees provide specialist technical professional advice.
3) Freedom to act is governed by clear objectives and / or budget constraints.
4) Solutions to problems are generally found in precedents, guidelines or instructions.
5) Assistance is usually available.

A6. LEVEL 6

A6.1.1. Employees at Level 6 work under limited direction. They usually manage the operations of an organisational element or undertake a management function or provide administrative, technical or professional support to a particular program or activity, across a range of administrative or operational tasks to achieve a result in line with the goals of the organisation.

A6.1.2. Employees at Level 6 would be expected to set and achieve priorities, monitor workflow and / or manage staffing resources to meet objectives.

A6.1.3. Employees at Level 6 may undertake a management function involving the administration of a program or activity within the organisation. This includes the provision of advice (including technical or professional advice) or undertaking tasks relating to management or administration of a program or activity, service delivery, including project work, policy, technical or professional advising, preparation or coordination of research papers, submissions on policy, technical or professional or program issues or administrative matters. Liaison with other elements of the organisation, government agencies, State and local authorities and other community organisations may be a feature of work at Level 6.

A6.1.4. Employees at Level 6 may represent the organisation at meetings, conferences and seminars.

A6.1.5. Supervision may involve the exercise of technical or professional skill or judgement or may be for administrative purposes only.

A7. LEVEL 7 MANAGEMENT BAND A

A7.1.1. Employees at Level 7 Management Band A work under broad direction. They will:

1) exercise managerial responsibility for the activities of a department, section or work area and / or operate as a specialist on work of a complex and / or conceptual nature.

2) be accountable for reviewing department / section performance, developing and implementing procedural changes, and recommending major policy modifications or initiatives within the parameters of any relevant statutes, regulations, professional or industry standards and departmental budgets.

3) develop departmental aims and objectives and implement appropriate strategies to achieve them within allocated resources. This will require the ability to prioritise and allocate resources in an environment of competitive, conflicting and political pressures. Employees at Level 7 may be responsible for the completion of work projects that commit the organisation to long-term plans.

4) require communication skills to prepare and / or present complex reports, professional advice or authoritative opinion, funding submissions and correspondence to senior management, the relevant committee of management, community members and groups as well as to external authorities and instrumentalities.

A7.1.2. Employees at Level 7 may be required to lead, motivate and develop a number of professional officers and support staff requiring considerable experience and a sound knowledge of employment relations issues, principles and practices.

A7.2. JOB REQUIREMENTS FOR LEVEL 7

A7.2.1. Employees at Level 7 may require an appropriate Degree combined with further professional development qualifications in a specialist field or in management, and / or extensive experience, expertise and competence at a level sufficient to perform the required duties.

A7.2.2. An integral part of progression within Level 7 will be the acquisition and use of skills. These skills will be gained from training course modules and may include the following skill categories if they are appropriate to the duties and responsibilities of the employee's position.

A7.2.3. Relevant and specific skills or knowledge that are related to specific tasks or positions.

A7.2.4. Performance management and development, recruitment / selection / interviewing, staff counselling skills, presentation skills, human resource management, time management, budget development and control, policy development and implementation, risk management and project planning.

1) Ongoing professional development.

A8. LEVEL 8 MANAGEMENT BAND B

A8.1.1. Employees at Level 8 Management Band B will be required to exercise managerial responsibility over diverse and / or highly specialised functions that have a significant strategic effect over the distribution of the organisation's total resources.

A8.1.2. Employees at Level 8 will be required to meet the classification requirements of Level 7. In addition, they must be able to demonstrate that:

1) additional knowledge and experience is required to undertake the duties of their position; and that

2) the nature and complexity of the decision making and reasoning required for the position is higher than for Level 7;

3) the magnitude of the communication and influence exercised are higher than for Level 7; and

4) the extent to which they are responsible and accountable for the functions that they undertake are higher than for Level 7.

A8.2. JOB REQUIREMENTS FOR LEVEL 8

A8.2.1. Employees at Level 8 may require an appropriate Degree combined with further professional development qualifications in a specialist field or in management, and / or extensive experience, expertise and competence at a level sufficient to perform the required duties.

A8.2.2. An integral part of progression within Level 8 is the acquisition and use of skills. These skills will be gained from training course modules and may include the following skill categories if they are appropriate to the duties and responsibilities of the employee's position.

A8.2.3. Relevant and specific skills or knowledge related to specific tasks or positions.

A8.2.4. Performance management and development, recruitment / selection / interviewing, staff counselling skills, presentation skills, human resource management, time management, budget development and control, policy development and implementation, risk management and project planning.

A8.2.5. Ongoing professional development.

A9. LEVEL 9 EXECUTIVE BAND A

A9.1.1. Appointment to Level 9 Executive Band A is at the discretion of the employer.

A9.1.2. Employees at Level 9 must meet the classification requirements of Level 8. In deciding whether employees should be classified at Level 9, an employer must consider the following things:

1) whether additional knowledge and experience are required to undertake the duties of the position;

2) the nature and complexity of the decision making and reasoning required;

3) the magnitude of the communication and influence exercised;

4) the size of the organisation as measured by revenue, number of employees, population, or any other relevant factors; and

5) the extent to which the employee is responsible and accountable for the functions undertaken.

A9.2. JOB REQUIREMENTS FOR LEVEL 9

A9.2.1. Employees at Level 9 may require formal tertiary qualifications that are appropriate to the professional needs of the organisation, together with management skill and experience acquired over extensive years in a senior management role.

A9.2.2. An integral part of progression within Level 9 is the acquisition and use of skills. These skills will be gained from training course modules and may include the following skill categories if they are appropriate to the duties and responsibilities of the employee's position:

A9.2.3. Relevant and specific skills or knowledge related to specific tasks or positions.

A9.2.4. Corporate planning and management, advanced financial planning and budget development, advanced negotiation and advocacy skills, human resource management, presentation / media liaison skills, project planning, economic development, and performance management and development.

A9.2.5. Ongoing professional development.

SCHEDULE B – SALARIES

	Rate of Pay per Annum from 1 July 2012	Rate of Pay per Fortnight from 1 July 2012	Rate of Pay per Annum from 1 July 2013 (+3%)	Rate of Pay per Fortnight from 1 July 2013 (+3%)	Rate of Pay per Annum from 1 July 2014 (+3%)	Rate of Pay per Fortnight from 1 July 2014 (+3%)	Rate of Pay per Annum from 1 July 2015 (+3%)	Rate of Pay per Fortnight from 1 July 2015 (+3%)
Level 1	35,452.00	1,363.54	36,515.56	1,404.44	37,611.03	1,446.58	38,739.36	1,489.98
Level 2	41,235.00	1,585.96	42,472.05	1,633.54	43,746.21	1,682.55	45,058.60	1,733.02
	45,044.00	1,732.46	46,395.32	1,784.44	47,787.18	1,837.97	49,220.80	1,893.11
Level 3	45,044.00	1,732.46	46,395.32	1,784.44	47,787.18	1,837.97	49,220.80	1,893.11
Level 4	49,638.00	1,909.15	51,127.14	1,966.43	52,660.95	2,025.42	54,240.78	2,086.18
Level 5	53,424.00	2,054.77	55,025.72	2,116.41	56,677.52	2,179.90	58,377.85	2,245.30
Level 6	58,518.00	2,250.69	60,273.54	2,318.21	62,081.75	2,387.76	63,944.20	2,459.39
Level 7	63,042.00	2,424.69	64,933.26	2,497.43	66,881.26	2,572.36	68,887.70	2,649.53
Level 8	68,590.00	2,638.08	70,647.70	2,717.22	72,767.13	2,798.74	74,950.14	2,882.70
Level 9	72,934.04	2,805.16	75,122.06	2,889.31	77,375.72	2,975.99	79,696.99	3,065.27
Level 10	88,741.00	3,413.12	91,403.23	3,515.51	94,145.33	3,620.97	96,969.69	3,729.60

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00120

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDJELKO BUDIMLICH
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 20 FEBRUARY 2014
FILE NO/S	B 63 OF 2013
CITATION NO.	2014 WAIRC 00120

Result	Further order issued for discovery and production of documents
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him Ms J Howard (of counsel)

Order

WHEREAS an order issued on 25 October 2013 ([2013] WAIRC 00910) for the production of documents;

AND WHEREAS on 4 November 2013 the applicant sought a further order for the production of variation sheets for each of the applicant's contracts;

AND WHEREAS during the hearing of the application on 12 February 2014 the applicant amended his application to the production of statements of final account;

AND WHERAS the respondent does not oppose the making of an order in the terms of the amendment;

AND HAVING HEARD Mr P Mullally for the applicant and Mr A Power (of counsel) and with him Ms J Howard (of counsel) for the respondent;

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

1. THAT within 14 days of the date of this order, the respondent produce for inspection by the applicant and his representative, Patrick Edward Mullally, at the respondent's premises at Squire Sanders, Level 21, 300 Murray Street, Perth for the period 26 April 2007 to 18 December 2012 electronic copies of each statement of final account issued to each client of the respondent procured by the applicant.
2. THAT the applicant and Patrick Edward Mullally at a time and on a date to be mutually agreed between the parties inspect the electronic copies of the discovered documents.
3. THAT the inspection be conducted in the presence of a representative of the respondent.
4. THAT Patrick Edward Mullally be permitted to make notes of the discovered documents during the inspection on the basis that those notes are:
   (a) used only for the purpose of this application;
   (b) not copied; and
   (c) provided to the solicitors for the respondent at the conclusion of the hearing of this application for destruction.
5. THAT the applicant and Patrick Edward Mullally will not directly or indirectly communicate any of the information obtained from the inspection of the discovered documents to any other person without further order of this Commission.

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

2014 WAIRC 00121

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HUGH SUTHERLAND ROGERS
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 20 FEBRUARY 2014
FILE NO/S	B 64 OF 2013
CITATION NO.	2014 WAIRC 00121

Result	Further order issued for discovery and production of documents
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him Ms J Howard (of counsel)

Order

WHEREAS an order issued on 25 October 2013 ([2013] WAIRC 00911) for the production of documents;

AND WHEREAS on 4 November 2013 the applicant sought a further order for the production of variation sheets for each of the applicant's contracts;

AND WHEREAS during the hearing of the application on 12 February 2014 the applicant amended his application to the production of statements of final account;

AND WHERAS the respondent does not oppose the making of an order in the terms of the amendment;

AND HAVING HEARD Mr P Mullally for the applicant and Mr A Power (of counsel) and with him Ms J Howard (of counsel) for the respondent;

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

1. THAT within 14 days of the date of this order, the respondent produce for inspection by the applicant and his representative, Patrick Edward Mullally, at the respondent's premises at Squire Sanders, Level 21, 300 Murray Street, Perth for the period 26 April 2007 to 18 December 2012 electronic copies of each statement of final account issued to each client of the respondent procured by the applicant.

2. THAT the applicant and Patrick Edward Mullally at a time and on a date to be mutually agreed between the parties inspect the electronic copies of the discovered documents.

3. THAT the inspection be conducted in the presence of a representative of the respondent.

4. THAT Patrick Edward Mullally be permitted to make notes of the discovered documents during the inspection on the basis that those notes are:

   (a) used only for the purpose of this application;

   (b) not copied; and

   (c) provided to the solicitors for the respondent at the conclusion of the hearing of this application for destruction.

5. THAT the applicant and Patrick Edward Mullally will not directly or indirectly communicate any of the information obtained from the inspection of the discovered documents to any other person without further order of this Commission.

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

2014 WAIRC 00122

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EXPEDIT (STAN) CARVALHO
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 20 FEBRUARY 2014
FILE NO/S	B 65 OF 2013
CITATION NO.	2014 WAIRC 00122

Result	Further order issued for discovery and production of documents
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him Ms J Howard (of counsel)

Order

WHEREAS an order issued on 25 October 2013 ([2013] WAIRC 00912) for the production of documents;

AND WHEREAS on 4 November 2013 the applicant sought a further order for the production of variation sheets for each of the applicant's contracts;

AND WHEREAS during the hearing of the application on 12 February 2014 the applicant amended his application to the production of statements of final account;

AND WHERAS the respondent does not oppose the making of an order in the terms of the amendment;

AND HAVING HEARD Mr P Mullally for the applicant and Mr A Power (of counsel) and with him Ms J Howard (of counsel) for the respondent;

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

1. THAT within 14 days of the date of this order, the respondent produce for inspection by the applicant and his representative, Patrick Edward Mullally, at the respondent's premises at Squire Sanders, Level 21, 300 Murray Street, Perth for the period 26 April 2007 to 18 December 2012 electronic copies of each statement of final account issued to each client of the respondent procured by the applicant.

2. THAT the applicant and Patrick Edward Mullally at a time and on a date to be mutually agreed between the parties inspect the electronic copies of the discovered documents.

3. THAT the inspection be conducted in the presence of a representative of the respondent.

4. THAT Patrick Edward Mullally be permitted to make notes of the discovered documents during the inspection on the basis that those notes are:

   (a) used only for the purpose of this application;

   (b) not copied; and

   (c) provided to the solicitors for the respondent at the conclusion of the hearing of this application for destruction.

5. THAT the applicant and Patrick Edward Mullally will not directly or indirectly communicate any of the information obtained from the inspection of the discovered documents to any other person without further order of this Commission.

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

2014 WAIRC 00181

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TROY PATRICK FRANSE
	APPLICANT
	-v-
	ALFRESCO CONCEPTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 10 MARCH 2014
FILE NO/S	B 166 OF 2013
CITATION NO.	2014 WAIRC 00181

Result	Directions issued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr P M Weston (of counsel)

Directions

THE COMMISSION has heard from the applicant and the respondent and in order to expedite the hearing and the parties have agreed to a number of directions. Accordingly, the Commission in accordance with the powers conferred on it under the *Industrial Relations Act 1979* hereby directs -

1. The matter will be listed for 9 June 2014 at 10:00 am and a hearing notice will be distributed by the Commission;
2. Discovery of documents is to be informal and is to occur with respect to all matters at issue and is to be concluded by close of business on 28 March 2014;
3. The parties are to draw up a statement of agreed facts. The agreed statement of facts is to be filed in the Commission by close of business 19 May 2014;
4. The applicant and respondent are to file an outline of their submissions by close of business 2 June 2014;
5. There is liberty to apply for either party at short notice in respect of these directions.

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

2012 WAIRC 00407

DISPUTE RE ROSTERING PRACTICES

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	THURSDAY, 28 JUNE 2012
FILE NO/S	C 29 OF 2012
CITATION NO.	2012 WAIRC 00407

Result	Recommendation issued
Representation	
Applicant	Mr C Fogliani
Respondent	Ms J Allen-Rana

Recommendation

WHEREAS by application filed on 25 May 2012 the applicant sought a compulsory conference under s 44 of the Act in relation to a dispute between the applicant and the respondent regarding rostering practices for Passenger Ticketing Assistants located on the respondent's Armadale line;

AND WHEREAS the Commission convened compulsory conferences on 14 and 21 June 2012 in an endeavour to resolve the dispute through conciliation. At the compulsory conferences the Commission was informed that the respondent proposes to implement changes to the Base Roster for Passenger Ticketing Assistants working on the Armadale Rail Line. The present Armadale Passenger Ticketing Assistant Base Roster contains ten lincs with three lincs being spare lincs. The respondent proposes what it considers minor variations to the Base Roster including, amongst others, changes to start times at Thornlie Station (Monday – Thursday) and an extension of rostered hours at the Kelmscott Station until 1600 hours on Friday to be worked in ordinary time. Such changes are proposed to be made to meet the respondent's operational requirements;

AND WHEREAS the roster representatives and delegates of the applicant have proposed alternative Base Rosters for consideration by the respondent. These alternative rosters reflect what the representatives consider to be better work life balance and more equitable earnings in comparison to other metropolitan rail lines. These alternative Base Rosters have been rejected by the respondent as either not meeting the respondent's customer service needs and/or involving significant net operational costs;

AND WHEREAS the Commission was informed that the parties are also in dispute in relation to access by rostering representatives and delegates to the respondent's Rostering and Payments System to assist rostering representatives and delegates in advising and resolving queries and concerns regarding the operation of the rosters;

AND WHEREAS the respondent informed the Commission that it has been in discussions with the applicant and its representatives on the Armadale line regarding the implementation of a revised Base Roster for approximately three months. It contends that the terms of cl 3.3.8 of the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011 have been fully complied with. The respondent, in proposing to implement a modified Base Roster has given at least three weeks' notice to the employees who would be affected by the change and has advised the Employee Committee Representatives on the Consultative Committee of the proposed changes;

AND WHEREAS the respondent has not accepted the Commission's suggestion that it defer the implementation of the revised Base Roster from 1 July 2012 for a period of time to enable further conciliation to resolve the issues in dispute. The applicant now seeks an interim order preventing the respondent from implementing the varied Base Roster until the determination of the matter by arbitration;

AND WHEREAS the Commission has considered the issues raised by the parties and the relevant provisions of the Agreement. The Commission notes that the Agreement does not require that modifications to a Base Roster only be introduced with majority support of the affected employees. Furthermore that to date there has been significant consultation between the respondent, the affected employees and the applicant, in relation to the proposed modification to the Base Roster;

AND WHEREAS a period of time over which the revised Base Roster is worked will enable the practical effects and consequences of such a revised working arrangement to be the subject of evidence in any subsequent arbitration;

AND WHEREAS as presently informed the Commission is not inclined to issue an interim order preventing the implementation of the revised Base Roster at the Armadale Line pending the hearing and determination of the dispute by arbitration but intends to make a recommendation;

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

THAT that the delegates of the applicant and rostering representatives on the Armadale line be given access to the respondent's Rostering and Payments System.

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

2014 WAIRC 00113

DISPUTE RE FUNDING RELIEF RE PERFORMANCE MANAGEMENT PROCESSES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 19 FEBRUARY 2014
FILE NO.	CR 33 OF 2011
CITATION NO.	2014 WAIRC 00113

Result Direction amended

Direction

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

WHEREAS on the 8th day of November 2013 the Commission issued a Direction [2013] WAIRC 00958 in preparation for the hearing of this matter; and

WHEREAS a variation to that Direction was issued on the 20th day of December 2013 [2013] WAIRC 01074; and

WHEREAS by email on the 14th day of February 2014 the respondent requested a further amendment to that Direction and advised that the applicant consented to such a request; and

WHEREAS the Commission is of the opinion that it is appropriate to amend the directions;

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

THAT Direction 2 of [2013] WAIRC 00958 be replaced by "THAT the parties file a Statement of Agreed Facts by the 28th day of February 2014."

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

2014 WAIRC 00150

DISPUTE RE FUNDING RELIEF RE PERFORMANCE MANAGEMENT PROCESSES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE FRIDAY, 28 FEBRUARY 2014

FILE NO. CR 33 OF 2011

CITATION NO. 2014 WAIRC 00150

Result Direction varied

Direction

WHEREAS a Direction was made in this matter on the 8th day of November 2013;

AND WHEREAS the parties have agreed to the following amendment being made;

AND HAVING HEARD by correspondence from Mr R Bathurst on behalf of the respondent;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent, hereby direct:

THAT Direction 2 of [2013] WAIRC 00958 be replaced by "THAT the parties file a Statement of Agreed Facts by the 21st day of March 2014."

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

2013 WAIRC 00279

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DEPARTMENT OF TRANSPORT
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	TUESDAY, 14 MAY 2013
FILE NO	PSAC 16 OF 2013
CITATION NO.	2013 WAIRC 00279

Result	Order issued
Representation	
Applicant	Mr S Barrett and Mr H Falconer
Respondent	Mr W Claydon of counsel and with him Ms M Sheehy and Mr M Finnegan

Order

WHEREAS the Department of Transport made an application for an urgent compulsory conference under s 44 of the Industrial Relations Act 1979 at 4:00pm on 13 May 2013;

AND WHEREAS the Arbitrator convened an urgent s 44 compulsory conference at 10.30am on 14 May 2013. At the conference the Arbitrator was informed that the parties are in dispute in relation to a trial partnership arrangement for driver assessments of Heavy Rigid and Heavy Combination Vehicles due to commence on 20 May 2013. The trial partnership arrangement will involve the provision of competency based Heavy Rigid and Heavy Combination training and assessment by external service providers who are Registered Training Organisations;

AND WHEREAS the trial is limited to the Bunbury region. The Department contends that it will not have any impact on the pay, classification or conditions of employment for Regional Driver Assessors employed by it. This is challenged by the Association;

AND WHEREAS the Department contended that it has consulted with Regional Driver Assessors in the Bunbury and Busselton offices and with the Association;

AND WHEREAS the Arbitrator was informed that the Association has on two previous occasions on 5 March and 30 April 2013 engaged in industrial action in opposition to the Department's trial partnership proposal which has caused significant disruption to its customer service by way of driver assessments;

AND WHEREAS the Arbitrator was informed that the Department became aware yesterday, 13 May 2013, of a further proposed stop work meeting to be held today involving driver assessors throughout the State. The Department contended that given the lateness of the notification, and the impact of the prior industrial action, any further industrial action will impact on its customer service delivery;

AND WHEREAS the Association opposed the orders sought. It contended that it has approached the issue of the trial partnership arrangement for Heavy Rigid And Heavy Combination Vehicles in a moderate and consultative fashion. The Association and its members have a genuine concern in relation to job security for Driver Assessors and the outcomes of the trial partnership process;

AND WHEREAS the Arbitrator, having regard to the urgency with which the present application has been made, the shortness of notice of the proposed industrial action and the impact of previous industrial action on the Department's operations, informed the parties that it was minded to make an order but not in the terms sought by the Department;

AND WHEREAS the Arbitrator is also of the view that the Association has raised legitimate issues of concern which issues should be the subject of fulsome consideration in accordance with the consultative and dispute resolution provisions of the relevant industrial instruments;

AND WHEREAS also in the Arbitrator's view, the Department should facilitate appropriate consultation and communication between the Association and its members in a timely manner which will cause as little disruption to service delivery as possible;

NOW THEREFORE the Arbitrator, to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to the powers vested in it by the Industrial Relations Act 1979, hereby orders –

(1) THAT the respondent by its officers and employees not undertake industrial action in the form of planned stop work meetings for today 14 May 2013 and that there be no disruption to driver assessments.

(2) THAT the respondent and each of its officers take all reasonable steps to ensure that there be no such industrial action in the terms of par (1) of this order including taking reasonable steps to immediately inform its members about the terms of this order and a direction to members to comply with its terms.

(3) THAT this order is to remain in force until midnight Tuesday 14 May 2013.

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

2014 WAIRC 00104

DISPUTE RE CLASSIFICATION LEVEL OF ADVANCED SCOPE PHYSIOTHERAPIST

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	MINISTER FOR HEALTH - THE MINISTER FOR HEALTH IS INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AND HAS DELEGATED ALL THE POWERS AND DUTIES AS SUCH TO THE DIRECTOR GENERAL OF HEALTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 FEBRUARY 2014
FILE NO.	PSACR 2 OF 2013
CITATION NO.	2014 WAIRC 00104

Result	Direction issued

Direction

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 28th day of October 2013 the Public Service Arbitrator (the Arbitrator) convened a conference for the purposes of conciliating between the parties; and

WHEREAS at that conference it was agreed that the application should be referred for hearing and determination; and

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

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

1. THAT the matter will be listed for 3 days' hearing in March 2014.
2. THAT all evidence-in-chief shall be adduced by way of witness statements.
3. THAT any further evidence-in-chief will be only by leave.
4. THAT a Statement of Agreed Facts and a book of agreed documents will be filed by the parties, to be initiated by the applicant, to be filed at the time of filing its witness statements.
5. THAT the applicant will file and serve any witness statements it intends to rely upon 21 days prior to the hearing.
6. THAT the respondent will file and serve any witness statements it intends to rely upon 14 days prior to the hearing.
7. THAT outlines of submissions will be filed by the applicant 21 days prior to the hearing and by the respondent 14 days prior to the hearing.
8. THAT there shall be liberty to apply.

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

2014 WAIRC 00160

DISPUTE RE CLASSIFICATION LEVEL OF ADVANCED SCOPE PHYSIOTHERAPIST

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	MINISTER FOR HEALTH - THE MINISTER FOR HEALTH IS INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AND HAS DELEGATED ALL THE POWERS AND DUTIES AS SUCH TO THE DIRECTOR GENERAL OF HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 MARCH 2014
FILE NO.	PSACR 2 OF 2013
CITATION NO.	2014 WAIRC 00160

Result Direction amended

Direction

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

WHEREAS on the 14th day of February 2014 the Public Service Arbitrator (the Arbitrator) issued a Direction [2014] WAIRC 00104 in preparation for the hearing of this matter; and

WHEREAS by email on the 27th day of February 2014 the applicant requested an amendment to that Direction and advised that the respondent consented to such a request; and

WHEREAS the Arbitrator is of the opinion that it is appropriate to amend the directions;

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

1. THAT Direction 5 of [2014] WAIRC 00104 be replaced by "THAT the applicant will file and serve any witness statements it intends to rely upon 14 days prior to the hearing".
2. THAT Direction 6 of [2014] WAIRC 00104 be replaced by "THAT the respondent will file and serve any witness statements it intends to rely upon 7 days prior to the hearing".
3. THAT Direction 7 of [2014] WAIRC 00104 be replaced by "THAT outlines of submissions will be filed by the applicant 14 days prior to the hearing and by the respondent 7 days prior to the hearing".

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

2014 WAIRC 00151

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORELLE BOURKE
	APPLICANT
	-v-
	CATHOLIC ARCHDIOCESE OF PERTH
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 28 FEBRUARY 2014
FILE NO.	U 26 OF 2014
CITATION NO.	2014 WAIRC 00151

Result Extension of time granted for respondent to file answering statement

Direction

WHEREAS an application was lodged in the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act, 1979* on 24 January 2014;

AND WHEREAS the applicant served the application on the respondent by post on 7 February 2014;

AND WHEREAS the respondent is required to file its Notice of Answer and Counter Proposal within 28 days of service of the Notice of Application;

AND WHERAS the respondent has requested an extension of time to file the Notice of Answer and Counter Proposal from 28 February 2014 to 14 March 2014;

AND WHEREAS the applicant does not object to this request;

AND WHEREAS the Commission considers it is appropriate in the circumstances to grant the request;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under Regulation 36 of the *Industrial Relations Commission Regulations 2005*, and by consent hereby direct –

THAT the respondent file and serve its Notice of Answer and Counter Proposal on or before 14 March 2014.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Health Medical Practitioners (Director General) AMA Industrial Agreement 2013 PSAAG 2/2014	27/02/2014	The Director General of Health	The Australian Medical Association (Western Australia) Incorporated	Commissioner S J Kenner	Agreement registered
Department of Health Medical Practitioners (Drug and Alcohol Office) AMA Industrial Agreement 2013 PSAAG 3/2014	27/02/2014	The Western Australian Alcohol and Drug Authority	The Australian Medical Association (Western Australia) Incorporated	Commissioner S J Kenner	Agreement registered
Department of Health Medical Practitioners (WA Country Health Service) AMA Industrial Agreement 2013 PSAAG 4/2014	27/02/2014	The Minister for Health incorporated as the WA Country Health Service, under s 7 of the Hospitals and Health Services Act 1927 (WA).	The Australian Medical Association (Western Australia) Incorporated	Commissioner S J Kenner	Agreement registered
Derbarl Yerrigan Health Services Enterprise Agreement 2013 AG 13/2013	19/11/2013	Derbarl Yerrigan Health Service Inc.	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Chief Commissioner A R Beech	Correction Order issued
Tranby College (Enterprise Bargaining) Agreement 2013 AG 12/2013	21/10/2013	The Independent Education Union of Western Australia, Union of Employees, Tranby College, United Voice WA	(Not applicable)	Chief Commissioner A R Beech	Agreement Registered
Waikiki Private Hospital Health Services Union (HSUWA) Enterprise Agreement 2014 AG 3/2014	5/03/2014	Health Services Union of Western Australia (Union of Workers), Waikiki Private Hospital	(Not applicable)	Chief Commissioner A R Beech	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00770

NOTICE OF APPEAL AGAINST THE DECISION OF THE RESPONDENT TO TAKE DISCIPLINARY ACTION TO IMPOSE A REPRIMAND - THE DECISION WAS GIVEN ON OR ABOUT 23 MARCH 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL SMITH
	APPELLANT
	-v-
	DIRECTOR GENERAL - DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G SUTHERLAND - BOARD MEMBER
	MR M COE - BOARD MEMBER
DATE	TUESDAY, 27 AUGUST 2013
FILE NO	PSAB 10 OF 2013
CITATION NO.	2013 WAIRC 00770

Result	Order issued
Representation	
Appellant	Ms K Hagan of counsel
Respondent	Mr S Barrett

Order

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

THAT the transcript of proceedings and documentary evidence in appeal PSAB 5 of 2012 be and is hereby taken to be evidence adduced in these proceedings as supplemented by any further evidence adduced by the parties.

(Sgd.) S J KENNER,
Commissioner.

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

2014 WAIRC 00134

NOTICE OF APPEAL AGAINST THE DECISION OF THE RESPONDENT TO TAKE DISCIPLINARY ACTION TO IMPOSE A REPRIMAND - THE DECISION WAS GIVEN ON OR ABOUT 23 MARCH 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00134
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER - CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MR M COE - BOARD MEMBER
HEARD	**:**	TUESDAY, 12 NOVEMBER 2013
DELIVERED	**:**	MONDAY, 24 FEBRUARY 2014
FILE NO.	**:**	PSAB 10 OF 2013
BETWEEN	**:**	PAUL SMITH Appellant AND DIRECTOR GENERAL - DEPARTMENT OF TRANSPORT Respondent

Catchwords	:	Industrial law – Appeal against a decision of the respondent to impose a reprimand and an improvement action, in the form of workplace training – Allegations of misconduct regarding inappropriate sexual and racial remarks – Investigation – Findings of breach of discipline and contravention of the *Public Sector Management Act 1994* (WA), Public Sector Code of Ethics and the respondent's Code of Conduct – Principles applied – Appellant not denied procedural fairness – Decision to discipline the appellant was not ultra vires – Appeal Board should not interfere with the decision – Appellant engaged in inappropriate conduct – Penalty not disproportionate – Appeal dismissed
Legislation	:	*Equal Opportunity Act 1984* (WA) ss 24, 49A, 49A(3) *Industrial Relations Act 1979* (WA) s 80I *Public Sector Management Act 1994* (WA) ss 9, 21(9), 21(10), 21(11), 80(b), 80(c), 81(1)(a), Pt 5
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr M Shipman and with him Ms S Van der Merwe
Respondent	:	Mr S Barrett and with him Ms D Davidson

Case(s) referred to in reasons:

Smith v Director General - Department of Transport (2012) 93 WAIG 61

Reasons for Decision

KENNER C AND MR COE:

Background

1 This appeal arises from conduct by the appellant Mr Smith which was the subject of allegations in appeal PSAB 5 of 2012. As a consequence of the decision of the Appeal Board on 11 December 2012, Mr Smith's appeal was dismissed because at the time of the institution of the appeal in those proceedings, no "decision" for the purposes of s 80I of the Industrial Relations Act 1979 had been made: *Smith v Director General - Department of Transport* (2012) 93 WAIG 61.

2 Following the decision of the Appeal Board in PSAB 5 of 2012, the Department made its decision. It modified the disciplinary action originally foreshadowed. It has not imposed the penalty of a three day fine. Instead, it has imposed the penalty of a reprimand and improvement action, in the form of training in the prevention of bullying, harassment and discrimination in the workplace.

Present appeal

3 Mr Smith was not satisfied with the employer's revised penalty. He now appeals again to the Appeal Board on a range of grounds. To expedite the hearing of this appeal, the Appeal Board made orders by consent, to adopt the transcript of proceedings and documentary evidence adduced in PSAB 5 of 2012 as evidence in this appeal. This was to be supplemented by any further evidence the parties may wish to lead. Mr Smith gave some additional evidence. The Department was content to rely on the oral and documentary evidence led in the earlier appeal proceedings.

4 In the reasons for decision of the Appeal Board in PSAB 5 of 2012 it was said at pars 2-3 as follows:

> 2 Mr Smith is a motor driver licence assessor employed by the Department of Transport at its Welshpool Driver and Vehicle Services Centre. Mr Smith has been an employee of the Department since June 2008. The events giving rise to these proceedings took place in the period August to September 2011 at the Welshpool premises. It was contended by the Department that Mr Smith, in concert with others, engaged in a series of acts of misconduct in the form of inappropriate remarks to a co-employee, Mr Vaisi. These inappropriate remarks were alleged to have had racial and sexual overtones. Mr Vaisi complained. An investigation took place under the terms of the Public Sector Management Act 1994 and the complaints were established. The Department, by letter of 23 February 2012, proposed to impose a penalty of a formal reprimand and a fine equal to three days' remuneration, in accordance with s 82A(3)(b)(i) of the PSM Act. An opportunity was given to Mr Smith to make a submission on that proposed course of action but this appeal was instituted prior to any action being taken.
>
> 3 A number of issues are raised by Mr Smith for consideration by the Appeal Board. They are:
>
> (a) That the Department's decision to commence disciplinary proceedings was unlawful because the Department did not follow its own policies and procedures and that Mr Smith's conduct could not reasonably be regarded as racial or sexual harassment for the purposes of the equal opportunity legislation in this State;
>
> (b) That, for a variety of reasons, the investigation conducted on behalf of the Department was flawed and procedurally unfair; and
>
> (c) In any event, the penalty imposed by the Department was disproportionate to the conduct found to have been engaged in by Mr Smith.

5 We adopt that background for the purposes of this appeal. Additionally, Mr Smith challenges the Department's decision to impose the revised penalty in March 2013, on the ground that it purported to apply retrospectively, its revised Code of Conduct, to the behaviour of Mr Smith complained about at the material times. In its closing submissions on this appeal, the

Department conceded this was an error and it could only rely on the former Code. It is therefore not necessary to deal with this issue any further.

Agreed facts

6 Helpfully, in PSAB 5 of 2012, the parties filed an agreed statement of facts. The agreed facts also set out the allegations against Mr Smith, contained in a letter from the Acting Director General of the Department dated 16 September 2011. The agreed statement is as follows:

STATEMENT OF AGREED FACTS

1. The Appellant has been employed as a motor driver licence assessor with the Department of Transport ('the Department') since 9 June 2008.
2. At the time of the alleged behaviour the subject of disciplinary proceedings the Appellant was working in his current role as a Driver Assessor at the Welshpool Driver & Vehicle Services Centre.
3. By letter dated 16 September 2011 the Respondent advised the Appellant that he may have committed a breach of discipline and that the Respondent had decided to deal with the matter by conducting a disciplinary process. The details of the alleged suspected breach were set out as follows:
    1. It is alleged that throughout the month of August and in early September 2011, you have repeatedly engaged in unacceptable behaviour by humiliating, belittling and degrading Mr Tony Vaisi in the workplace.

       By way of further clarification, it is alleged that:
        - You constantly taunted Mr Vaisi and ridiculed him in the presence of others. On numerous occasions during lunch breaks you made comments towards the food that Mr Vaisi eats, comparing it to "dog shit".
        - You joined in with another staff member to intentionally humiliate Mr Vaisi which caused him discomfort and stress.
    2. It is alleged that throughout the month of August and in early September 2011, you have repeatedly racially and sexually harassed Mr Tony Vaisi in the workplace.

       By way of further clarification, it is alleged that:
        - You made various derogatory remarks in relation to Mr Vaisi's ethnicity by
            - Calling Mr Vaisi a "terrorist", "camel driver", "camel rider" and "rug flyer"
            - Asking Mr Vaisi "Does the hangar behind you remind you of the tent you were living in back in your country?"
            - Asking Mr Vaisi "Tony, are you Persian?" to which Mr Vaisi said "yes". You then said "Persian carpet is from your country, so you are a rug flyer"
        - You made various sexually oriented remarks directed towards Mr Vaisi by
            - Calling Mr Vaisi "gay" and "homosexual"
            - You referred to the food that Mr Vaisi was eating as "something that comes out of my dick's forehead skin"
4. The Appellant was advised that Mr Joe Baskwell, an independent investigator, had been appointed to conduct a review of all relevant information in relation to the matter and that any response provided would be taken into consideration by him.
5. The letter of 16 September 2011 enclosed copies of the Department's Code of Conduct, Discipline Policy and Disciplinary Procedures, Commissioner's Instruction - Discipline - General, Sections 80 to 82 of the Public Sector Management Act (Discipline Matters) and an Employee Assistance Program Brochure.
6. The WA Public Sector Code of Ethics, on which the Respondent relies, provides:

   Relationships with others

   We treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare.
7. The Department of Transport's Code of Conduct on which the Respondent relies, provides:

   Employees must treat all colleagues courteously and fairly ...

   If behaviour is offensive or unwelcome to a colleague it is unacceptable behaviour and must be stopped. Unacceptable behaviour can include:

   …

   - *Excessive swearing*
   - *Offensive jokes and comments*
   - *Joking at the expense of others ...*

   …

   If unacceptable behaviour occurs at work, managers have a responsibility to identify the behaviour, direct the employee to the requirements of the Code and provide counselling. If the behaviour continues, disciplinary action may be necessary.
8. The Appellant requested an extension of time within with which to provide a response to the allegations and was granted that extension.

9. In a letter to the Respondent dated 13 October 2011 the Civil Service Association ('the CSA') provided a comprehensive response to the allegations levelled against their member, the Appellant.

10. The Respondent acknowledged receipt of the CSA's response by way of letter dated 18 October 2011. At this point Mr Baskwell had advised the Department of a conflict of interest which precluded him from conducting the investigation so the Respondent had appointed Ms Barbara Abbott to conduct the review. The letter concluded:

> *I consider the most appropriate action is to allow Ms Abbott to undertake her review, and for the Department to forward the Provisional Report to your office. In the event that any questions remain outstanding, further information will be provided at that time.*

11. Having interviewed the complainant, Mr Vaisi, issues were raised by Mr Vaisi which led the Respondent to appoint Mr Robert Neuzerling to conduct the review of the matter. The Respondent advised the Appellant of this decision, via the CSA, in a letter dated 21 November 2011.

12. During the course of his investigation Mr Neuzerling interviewed the following people:
    - Paul Smith
    - Ian Merigan
    - Christine Lewis
    - Kenneth Lloyd
    - Todd Wecker
    - Toni Vaisi

13. Mr Neuzerling did not interview:
    - David Barnes
    - Helen Bolin

14. In a letter dated 3 February 2012 the Respondent advised the Appellant of the findings of Mr Neuzerling's review. The Appellant was provided with the body of Mr Neuzerling's report and a copy of his transcript of interview. The Appellant was not provided with the transcripts of Mr Neuzerling's interviews with the other Departmental employees interviewed during the course of the review. In the letter of 3 February 2012 the Respondent invited the Appellant to provide any additional information that he deemed necessary for the Respondent to consider in determining what action might be taken.

15. By way letter dated 16 February 2012 the CSA provided a response to the findings of Mr Neuzerling, including: confirmation that the findings were disputed; additional information for the Respondent to consider in determining what action might be taken; a request for a copy of the full investigation report; and a delay in forwarding the Appellant's response until the additional information requested had been able to be considered.

16. In a letter to the Appellant dated 23 February 2012 the Respondent advised that:

> "In accordance with Commissioner's Instruction Discipline - General section 1.7 and section 82A(3)(b)(i) of the *Public Sector Management Act 1994* (the Act) I have determined that the proposed action I intend to take is to formally reprimand you and to impose a fine equal to three days' remuneration.
>
> Improvement action will also be taken, as per section 3 of the Act. The improvement action will be in the form of training in the prevention of bullying, harassment and discrimination in the workplace.
>
> Prior to imposing the above action against you, I am providing you with an opportunity to make a written representation to me on the proposed course of action."

17. On 9 March 2012 the Respondent received the Appellant's Notice of Appeal in this matter.

Investigation

7 A copy of the Investigation Report was tendered in evidence. In it, the Investigator, Mr Neuzerling concluded that the allegations of racial and sexual harassment, as alleged, were generally made out and supported findings of a breach of discipline and a contravention of ss 9 and 80(b) and (c) of the Public Sector Management Act 1994. The Investigator recommended to the Department that Mr Smith be reprimanded and that he receive training in relation to sexual and racial harassment. Importantly, the Investigator in his summary at p 12 of the Investigation Report noted that the complainant, Mr Vaisi, freely participated in the "office banter". Additionally, the Investigator noted that this participation may have contributed to the incidents complained of. However, the Investigator ultimately concluded that Mr Smith's conduct, nonetheless, did contravene the principles set out in the Public Sector Code of Ethics and also the Department's Code of Conduct.

8 Also, in his summary, the Investigator noted a number of mitigating factors in support of Mr Smith. First, the investigator did have regard to the assertions of Mr Smith and others in relation to Mr Vaisi's participation in and reciprocation of inappropriate comments in the workplace. Secondly, the Investigator also observed that there was nothing to suggest that Mr Smith's conduct and behaviour was intended to be other than "mirth-provoking" and in good humour. Thirdly, the Investigator noted Mr Smith's sincere remorse for any upset caused to Mr Vaisi, by his comments and conduct in the workplace.

9 Importantly for the purposes of this appeal, the Investigator, under the heading "Further information" made the following observation:

> It has been highlighted by all parties involved in this process that there is a culture within the assessor's office which encourages inappropriate behaviour and comments. Accordingly I recommend that management reinforce the standards and principles outlined in the Public Sector Code of Ethics and the DoT Code of Conduct to those employees.

10 We pause to note at this point, that despite the recommendations of the Investigator, the Department initially proposed imposing an additional penalty of a three day fine. As a consequence of a review of the matter further, and the evidence led in PSAB 5 of 2012, the Department ultimately accepted the Investigator's recommendations.

11 Whilst there were a number of criticisms of the Investigator's approach to the investigation and the Investigation Report, from a consideration of the material in their totality, we are not of the view that Mr Smith was denied procedural fairness or that the Investigation Report was fundamentally flawed or tainted by any improper considerations. Whilst Mr Smith was critical of the Investigator's conclusions as to racial and sexual harassment, the references in the Investigation Report are clearly not to racial and sexual harassment for the purposes of the Equal Opportunity Act 1984. At p 2 of the Investigation Report, under the heading "Other legislation", the Investigator expressly disavows application of this legislation, because the complainant did not assert discrimination, and the evidence did not support any disadvantage in the workplace as a consequence of Mr Smith's conduct.

12 The reference to "sexual or racial harassment", for the purposes of the Investigation Report, is noted to refer expressly to "the acts of misconduct of abusive, insulting and/or obscene language which has sexual or racial connotations or undertones." There is no merit to Mr Smith's submission that the Investigator misapplied the EO Act in this respect. Further, as to the submission that the Investigator failed to acknowledge that Mr Vaisi was a participant in the office banter, this is not supported, by reason of the reference to the summary that I have noted above. It is open to conclude, from a full reading of the Investigation Report, that the Investigator did acknowledge that Mr Vaisi was not an entirely innocent party. However, the Investigator focussed on the essential proposition that the misconduct into which he was inquiring was the conduct of Mr Smith. Any alleged misconduct of Mr Vaisi, would have to be regarded as a separate issue.

13 As to the disregarding or failing to place sufficient weight on the statements of Mr Barnes and Ms Bolin, there is some merit in Mr Smith's submission that the Investigator was in error in concluding that they were "character" witnesses for Mr Smith. They were not just that. However, given the other evidence before the Investigator, and the content of the statements of Mr Barnes and Ms Bolin, as to the incidence of "office banter" and that Mr Vaisi participated in it, it is difficult to see how ultimately, even if accepted in their totality, those statements would have materially affected the conclusions reached by the Investigator. This is because, as we have just mentioned in par 12 above, the Investigator did accept that Mr Vaisi took part in at least some of the conduct complained of.

14 There was also a complaint by Mr Smith that a change of investigator, from Ms Abbott to Mr Neuzerling, was unfair and unjust. It was contended that Mr Vaisi was manipulating the process of the investigation for his own advantage. Whilst it was no doubt disruptive for there to be a change in Investigator, we are not persuaded that this tainted the process. The change took place because of a perception of bias. The investigation recommenced afresh. Mr Smith was not materially disadvantaged in any way. In any event, as these appeal proceedings are in the nature of a hearing de novo, any defect in the procedural aspects of the investigation, can be cured by the Appeal Board.

Admissions and concessions

15 In addition to the agreed statement of facts, in Mr Smith's response of 13 October 2011, to the original allegations of misconduct against him set out in the Department's letter of 16 September 2011, some admissions and concessions were made. The admissions and concessions were set out in the Department's written outline of submissions in PSAB 5 of 2012 at par 12. These were not challenged by Mr Smith. It is convenient to set out those admissions and concessions now, to place the evidence to be considered by the Appeal Board in context. The admissions and concessions of Mr Smith arise from his response of 13 October 2011, his transcript of interview dated 20 December 2011 with the Investigator and Mr Smith's witness statement in Appeal PSAB 5 of 2012 filed on 11 July 2012. Paragraph 12 of the Department's written outline of submissions is as follows:

> 12. The Respondent submits that in the Appellant's response and Table of Explanation, the Appellant's witness statement, and the Appellant's transcript of Interview with Investigator Robert Neuzerling, the Appellant made admissions or concessions to some of the allegations, as set out in the letter dated 16 September 2011, which alone warrant a finding of misconduct. In particular:
>
> (a) Allegation: On numerous occasions during lunch breaks you made comments towards the food that Mr Vaisi eats, comparing it to "dog shit"
>
> (i) From Paul Smith Response and Table of Explanation provided to the Department under cover of letter from the CSA dated 13 October 2011 ('Table of Explanation') at page 2:
>
> "On occasion Mr Vaisi had a cooked meal for morning tea some of which had quite a strong aroma. I am of the belief that this would be the meal that he has stated that I called "*dog shit*" which is not quite correct. His meal had been pointed out to me and it was suggested it looked like "*camel dung*". I had said, "*no, camel dung is much larger than that, this is more the size of a dogs*"."
>
> (ii) From Paul Smith's Transcript of Interview with Investigator Robert Neuzerling on 20 December 2011 ('Transcript of Interview') at page 6:
>
> " ... with regards to that umm I had walked into the breakfast, not the breakfast, the morning tea break umm I walked in and asked what smelt good and I was told it was what Tony was having for morning tea; I was told that it looked a bit like camel dung, I went over to see what he was having and asked what he was having to see what it was called; I asked him if it was a traditional dish or whether it was something else and he said yes. We had a conversation about someone saying it was camel dung and I said no, it's more the size of a dog's."
>
> (iii) From Paul Smith's witness statement filed 11 July 2012 ('witness statement') at paragraph 53:

> " ... Mr Vaisi had a cooked meal for morning tea. There was a strong aroma coming from his plate. I believe that this would be the meal that he has stated that I called "*dog shit*". This claim is not quite correct. His meal had been pointed out to me and it was suggested it looked like "*camel dung*". I had said "*no, camel dung is much larger than that, this is more the size of a dogs*"."

(b) Allegation: You made various derogatory remarks in relation to Mr Vaisi's ethnicity including calling him a "terrorist"

(i) From the Table of Explanation at pages 4 and 5:

> "Tony had referred to himself as being a terrorist many times. I had believed this to be in relation to the ongoing "*Achmed*" jokes. If I have called Tony a terrorist it would most certainly be in relation to this."

(ii) From the witness statement at paragraph 89:

> "Mr Vaisi referred to himself as being a terrorist many times, and I believed this to be in relation to the ongoing "*Achmed*" jokes. If I have called Mr Vaisi a terrorist it would most certainly only be in relation to this."

(c) Allegation: You made various derogatory remarks in relation to Mr Vaisi's ethnicity including asking him "Does the hangar behind you remind you of the tent you were living in back in your country?"

(i) From the Table of Explanation at page 6:

> "In the same conversation I admit that I did ask Tony when he was sitting in the corner with the coat rack behind him and some of the jackets draped almost over him "*does that cloak rack remind you of home? It looks like a Bedouin camp*. ""

(ii) From the Transcript of Interview at page 4:

> "Well I pretty much said "Does that remind you of the Bedouin tent in your country.""

(iii) From the witness statement at paragraph 97:

> "In the same conversation I asked Mr Vaisi when he was sitting in the corner with the coat rack behind him and some of the jackets draped almost over him "*does that cloak rack remind you of home? It looks like a bedouin camp.* ""

(d) Allegation: You referred to the food that Mr Vaisi was eating as "something that comes out of my dick's forehead skin"

(i) From the Table of Explanation at page 8:

> "This was taken out of context, and the discussion on dick cheese was initiated by Mr Vaisi."

(ii) From the Transcript of Interview at page 3:

> "I did say to him, I explained why I could not eat the food and said "and why would I eat food that looked like it came from my dick's foreskin.""

(iii) From the witness statement at paragraph 104:

> *" ... and besides, why would I want something that looks like it has come from under my foreskin?"*

16 In Mr Smith's submissions, he contends that some of these admissions and concessions need to be considered in their context. We will return to this issue later in these reasons.

The evidence

17 Mr Vaisi, the complainant, in his evidence in chief, adopted the content of his interview with Mr Neuzerling in the investigation. In the investigation interview, Mr Vaisi said that the offending behaviour took place mainly in late August and early September 2011. Mr Smith often called him a terrorist. This was in conjunction with another MDL Assessor, Mr Merigan. Mr Vaisi said this was common and they did it as a joke. Mr Vaisi said that Mr Smith would refer to the "Achmed the Dead Terrorist" video clip and leave notes on his desk saying things like "I kill you". This was a part of the joking between Mr Smith and Mr Merigan. Mr Vaisi said that another assessor "Chris" wanted to see the video clip and Mr Vaisi said he could download it and bring it in on a USB. He did so but did not think that it would be used against him to ridicule him.

18 Mr Vaisi also said that Mr Smith used other words such as "camel driver, camel rider and rug flyer" to him. Mr Smith never however, called Mr Vaisi a homosexual or made sexual references to him, apart from one occasion in relation to his food. Mr Vaisi said that Mr Smith joined in and laughed when Mr Merigan made sexual references towards Mr Vaisi. In relation to calling Mr Vaisi a "rug flyer", Mr Vaisi said that he had a conversation with Mr Smith about whether Mr Vaisi was Persian. Mr Vaisi said he was, and Mr Smith then asked "is Persian carpet from your country?" Mr Vaisi said it was, and Mr Smith responded in words to the effect "so, you are a rug flyer then". Mr Vaisi said both Mr Smith and another assessor "Ken" started laughing at him.

19 On another occasion Mr Vaisi said he was having his breakfast at the morning tea break. He was eating cheese, bread and drinking tea. Mr Smith made a comment to him. As he started eating his breakfast, Mr Vaisi said that Mr Smith came over to him, together with Mr Merigan and asked Mr Vaisi what he was eating. Mr Vaisi said he told them he was eating feta cheese, tea and bread. Mr Vaisi said that Mr Smith then told him that he was sorry to say this but "it looks like the stuff coming from my forehead dick." Mr Vaisi said he felt "shocked because I never expect the things that come from this person; I had no joke with this person." Mr Vaisi then told the Investigator that Mr Smith started laughing. Mr Vaisi then threw his food in the

rubbish bin because he felt disgusted. Mr Vaisi did say that this was the first and only occasion that a joke with a sexual reference came from Mr Smith.

20 A further incident occurred not long after Mr Vaisi had told another assessor, and union representative, Mr Wecker, that he had enough of the comments and wanted them to stop. Mr Vaisi had been under the impression that Mr Wecker had told both Mr Smith and Mr Merigan to stop making comments and to leave Mr Vaisi alone. Mr Vaisi had shifted his location in the office and went to sit next to Mr Wecker in the office. On this particular occasion, Mr Vaisi was sitting in front of a coat stand with a hanger on it. He said Mr Smith came up to him and asked "does that hanger behind you remind you of the tent you were living in in your country?" Mr Vaisi said Mr Smith then started laughing. This comment came out of the blue with no prior discussion. Mr Vaisi said he told Mr Smith that it did not remind him of anything and that he did not live in a tent in his home country.

21 Finally, Mr Vaisi made reference to another occasion when he was speaking to the Welshpool manager, Ms Torres, in front of her office. Both Mr Merigan and Mr Smith walked past and called out to him words to the effect "see you tomorrow terrorist" or "see you next week terrorist" in a joking manner. Mr Vaisi said that he responded in words to the effect "OK see you tomorrow infidels". Mr Vaisi said both exchanges took place in a joking fashion. Generally in relation to Mr Smith, whilst apart from the reference to food, Mr Smith did not make comments of a sexual nature. However, he joined in with Mr Merigan's remarks to him, by laughing at Mr Merigan's jokes.

22 Mr Vaisi also referred to complaining to the manager Ms Torres about these events. He said that he saw her twice on 1 September 2011 to complain. He said that he was upset and angry. Mr Vaisi said that when he reported these matters to Ms Torres she responded in words to the effect that "this was a group of boys getting together and sometimes they do these things". Mr Vaisi felt that Ms Torres was trying to normalise their behaviour. He did not consider it was normal. She asked Mr Vaisi what he wished to do and whether he wished to speak with Mr Smith and Mr Merigan in her presence. This was arranged. However, over the ensuing weekend Mr Vaisi said that he had changed his mind and was not comfortable doing this and wished to take the matter up formally. On the following Monday Mr Vaisi had the impression that both Mr Smith and Mr Merigan had become aware of his complaints as nothing further happened and they "may have got the point".

23 In cross-examination, Mr Vaisi accepted that he may have used some of the comments alleged after bringing in the "Achmed the Dead Terrorist" video into the office. He denied he made such comments often. Mr Vaisi testified that he brought a copy of the video clip in because Ms Lewis, another MDL Assessor, asked him to. He agreed that he found the video funny. His complaint about the comments from Mr Smith and Mr Merigan was that they kept making them. One-off jokes he could accept but not continuous comments. Mr Vaisi said after a while he tried to ignore the behaviour of the others. The jokes and comments, according to Mr Vaisi, were part of the clique or separate group at the workplace. He was not part of the same group as Mr Smith and Mr Merigan. Mr Vaisi also accepted that in response to Mr Merigan and Mr Smith, he did sometimes say that they were "gay".

24 In relation to the suggestion that Mr Vaisi was attempting to move to another licensing centre, this was denied. Mr Vaisi also denied making derogatory remarks about his girlfriend.

25 Mr Smith testified that he felt aggrieved by the disciplinary process and its outcome. He considered that if there was any blameworthy behaviour in the incidents, then Mr Vaisi, the complainant, was also involved as a willing participant. In this respect, Mr Smith referred to a letter from the Director General of the Department to Mr Vaisi dated 23 February 2012, which referred to the findings of the Investigator, identifying that at least on one occasion, Mr Vaisi participated in the inappropriate workplace exchanges. In the same letter, Mr Smith also referred to the finding of the Investigator that there was a "permissive culture" within the workplace at the Welshpool Licencing Centre, where inappropriate exchanges between employees appeared to have become part of normal interactions between them.

26 Overall, in relation to the events which took place in August and September 2011, Mr Smith testified that Mr Vaisi had taken his comments out of context and used them for his own purposes. Mr Smith said the comments that he made, and comments made by others, were in the course of office banter which has been a norm at the Department for the four years he had been an employee.

27 In the early stage of Mr Vaisi's employment, Mr Smith said that he gave Mr Vaisi some assistance in dealing with various matters. He also told him about the existence of "light hearted banter" and that any comments made "shouldn't be taken to heart or out of context." Mr Smith testified that he also told Mr Vaisi that if Mr Vaisi got involved in this sort of workplace banter, he would need to be prepared to receive what he gave out. Mr Smith also said he told Mr Vaisi to let the others know if anything said was offensive.

28 According to Mr Smith, Mr Vaisi expressed a desire early on to transfer from the Welshpool Licencing Centre to the Joondalup Licencing Centre because it was closer to his home. Mr Smith said that Mr Vaisi suggested that he would "do whatever it takes to go to Joondalup". As to this point, we do not accept that this was the motivation for the complaints from Mr Vaisi. Ms Torres, the manager of the centre, said a shift to another centre would be available to an employee if they asked for it.

29 In relation to Mr Vaisi's food, Mr Smith testified that prior to the specific incidents complained of, there was an occasion where Mr Vaisi had prepared a meal for his morning tea. There was a strong aroma coming from the food. Mr Smith said that he considered that this may have been the meal that Mr Vaisi alleged Mr Smith called "dog shit". Mr Smith challenged this. Mr Smith testified that it had been suggested that Mr Vaisi's meal looked like "camel dung". Mr Smith said no it didn't and it was "more the size of dogs". According to Mr Smith, Mr Vaisi found this funny and laughed and agreed. Mr Smith said there was then some discussion about food and Mr Smith's interest in Indonesian cuisine and his familiarity with it.

30 Mr Smith also referred to what he regarded a standing joke in relation to his interest in Harley Davidson motor cycles. According to Mr Smith, whenever there was any reference in the media about outlaw motor cycle gangs, there would be some joke made of it and an attempt to associate Mr Smith with it. Mr Smith testified that Mr Vaisi willingly participated in these sorts of conversations.

31 Additionally, Mr Smith said that references to "terrorists" and phrases such as "I keel you" were common around the office in particular between Mr Merigan and Mr Vaisi. Mr Smith testified that they often used these phrases, from the "Achmed the Dead Terrorist" video clip. Mr Smith said he participated in this banter, to a lesser extent. In around mid to late August 2011, Mr Smith said that Mr Vaisi arrived at work with a set of speakers and a USB drive to play the Achmed video on a work computer. According to Mr Smith, Mr Vaisi encouraged others in the office to sit and watch the video. It seemed to Mr Smith, that Mr Vaisi was enjoying this event and it was common for Mr Vaisi to refer to Achmed the Dead Terrorist and call others "infidels".

32 According to Mr Smith, Mr Vaisi's comments were not limited to co-employees. He also made comments about applicants for drivers' licences, and referred to them in terms such as "they are not riding camels or donkeys anymore they are driving a car in Australia". According to Mr Smith, Mr Vaisi was counselled against making remarks of this kind, to which he responded in words to the effect that he "could not get into trouble because I'm Iranian, I'm just like them, I rode camels too".

33 In terms of comments in the workplace about references to sexual orientation, Mr Smith testified that on many occasions, he heard Mr Vaisi direct comments to Mr Merigan as being "gay" and alleging that Mr Smith was Mr Merigan's "boyfriend". Mr Smith testified that these comments were made regularly with reference to both he and Mr Merigan as "gay, fags and homos". Other less savoury remarks were also said to have been made by Mr Vaisi in a similar vein.

34 As to the allegations against Mr Smith that he referred to Mr Vaisi as a "terrorist", it was only as a part of the ongoing standing jokes arising out of the "Achmed the Dead Terrorist" video. In relation to remarks with a sexual overtone, Mr Smith testified that Mr Vaisi also made derogatory remarks about his relationship with his young girlfriend.

35 Mr Smith referred to the specific allegation in relation to the "rug flyer" and similar comments. Mr Smith said that he was talking to Mr Vaisi about the difference between people describing themselves as Persian and not Iranian. Mr Smith asked Mr Vaisi whether he was from Persia and Mr Vaisi replied that he was. Mr Smith said he then asked whether that is where Persian carpets come from to which Mr Vaisi said "yes." Mr Smith said he then commented to Mr Vaisi that he did not understand why Turkish people are referred to as "rug merchants" and asked "do they make carpets or rugs and are they part of the old Persian empire?" Mr Smith said that it was at this point, that another assessor, Mr Barnes, said words to the effect "that's why I call him (Mr Vaisi) the carpet flyer". Mr Smith said he did not use those words. Mr Barnes admitted that he made reference to "Abdul flying a magic carpet" in his statement given to the Investigator, but he was not interviewed.

36 As to the Bedouin tent allegation, Mr Smith said that as a part of the same conversation about Persia, when Mr Vaisi was sitting in the corner of the office there was a coat rack behind him with some jackets over it. Mr Smith testified that he said to Mr Vaisi words to the effect "does that coat rack remind you of home? It looks like a Bedouin camp". According to Mr Smith, Mr Vaisi laughed at this remark and said words to the effect "yes, it is just like my house in Iran". There was then some reference made by Mr Smith to him being wrong, as he thought that Bedouin camps were only in Egypt and not in Iran. According to Mr Smith, Mr Vaisi did not indicate any objection or offence during the course of these conversations.

37 Mr Smith also referred to Mr Vaisi often referring to himself as a "camel rider and donkey rider". On one occasion when Mr Smith was referring to this he said that Mr Wecker intervened and stopped him.

38 In relation to the food incident, Mr Smith testified that on the occasion in question he walked into the meals area where he saw Mr Vaisi and Mr Merigan. According to Mr Smith, Mr Vaisi offered Mr Smith some cheese and at the time said words to the effect "I know it looks like it has come from somewhere bad but try it". According to Mr Smith, Mr Vaisi had a smirk on his face at the time. Mr Smith declined the offer and told Mr Vaisi that he didn't eat cheese as he was lactose intolerant and also said words to the effect "besides, why would I want something that looks like it has come from under my foreskin?" Mr Vaisi is said to have laughed at this comment, agreed with it, but said the cheese was good.

39 After these events, Mr Smith said that on Thursday 1 September 2011, both he, Mr Merigan and Ms Lewis were approached by Mr Wecker. He told them to "back off Tony". Mr Smith said he was surprised by this comment and Mr Wecker simply replied by repeating the request to leave Mr Vaisi alone. Mr Smith then became aware that a formal complaint had been made by Mr Vaisi and he received an email from management in relation to the allegations.

40 In relation to the investigation, Mr Smith complained that the Investigator had introduced the allegation that Mr Smith laughed at Mr Merigan's sexually related comments, at the last moment. As to this complaint, it is to be noted that in the Department's letter of 16 September 2011, reference is made to Mr Smith "joining in with another staff member to intentionally humiliate Mr Vaisi which caused him discomfort and stress". Whilst it may have been better to refer to Mr Merigan specifically, we are not persuaded that Mr Smith could be taken by complete surprise by this issue. Furthermore, Mr Smith cast aspersions on Mr Wecker's motives for becoming involved, due to a clash between Mr Wecker and Ms Lewis. Mr Smith's evidence was that Mr Wecker's assertion that there existed two factions or cliques in the Welshpool Licencing Centre, which picked on other employees, was untrue.

41 Overall, the tenor of Mr Smith's evidence was that there was ongoing commentary and banter amongst staff at the Welshpool Licencing Centre. Mr Vaisi took part and participated in this banter and often initiated some of the comments himself.

42 Ms Christine Lewis has been employed by the Department for some 36 years and over the last 22 years or so, has been a MDL Assessor mainly based at the Welshpool Licencing Centre. Ms Lewis referred to the workplace at Welshpool as a multi-cultural workforce, and characterised employee relations as overall being very positive. From her observations, Mr Smith fitted in well into the work group at Welshpool. She testified that she has never seen Mr Smith making insensitive or malicious remarks to employees or applicants for licences, with racial or sexual overtones.

43 Ms Lewis testified that in relation to Mr Wecker's assertions of a faction or clique at the Welshpool Licencing Centre, this was untrue. She denied that she was the leader of any faction and suggested it was more to do with Mr Wecker's personal campaign against her.

44 In relation to the various allegations against Mr Smith, Ms Lewis said that on becoming aware of the complaints against Mr Smith and Mr Merigan she found them to be both disturbing and puzzling. She found them puzzling because Mr Vaisi, in her observations, had been a willing participant in much of the "office banter" between staff. In particular, Ms Lewis referred

to the last week or two of August 2011, when Mr Vaisi brought to work a USB and pair of speakers to play the "Achmed the Dead Terrorist" video clip. Ms Lewis said she was not aware as to why Mr Vaisi brought this into work, but he showed it to a number of people in the office at the time and seemed to find the video very funny. She did not ask him to bring it in. From that time on, Ms Lewis testified that there seemed to be an ongoing banter between various staff members including Mr Vaisi, Mr Smith and Mr Merigan, with each referring to phrases such as "silence - I kill you" and others, by way of greetings and other commentary. Ms Lewis said that it was so frequent it seemed to be used in a friendly mocking way as if they were all "in on" a joke.

45 Ms Lewis said she never observed any animosity or objection to this sort of conversation between them. Additionally, Ms Lewis testified that she herself never heard either Mr Smith or Mr Merigan, call or refer to Mr Vaisi as a "rug flyer" or a "rug pilot". However, she did recall another staff member using such a term in Mr Vaisi's presence. Additionally, Ms Lewis said that she often overheard Mr Vaisi call Mr Smith and Mr Merigan "infidels" in the same vein.

46 In terms of comments with a sexual overtone, Ms Lewis said she heard Mr Vaisi refer to both Mr Merigan and Mr Smith as being "gay" and other remarks, of a less savoury nature, with a similar sentiment. Overall, it was Ms Lewis' evidence that there was never any suggestion that any such remarks that she overheard, or how she perceived the working relationships, was other than good natured office banter between work colleagues. As with Mr Smith, Ms Lewis testified that she from time to time heard Mr Vaisi speaking in derogatory terms of applicants for drivers' licences and she challenged Mr Vaisi and counselled him against it.

47 As far as she was aware, Ms Lewis said that Mr Wecker was absent from the workplace on sick leave and annual leave between 21 July and 26 August 2011. He came back to work on 29 August. Between 29 August and 1 September, Mr Vaisi must have spoken to Mr Wecker in relation to his allegations. Mr Wecker approached herself, Mr Smith and Mr Merigan on the afternoon of 1 September and asked them to "take it easy" on Mr Vaisi as he was getting upset with things that were said. According to Ms Lewis, both Mr Smith and Mr Merigan said they would stop. From that time, Ms Lewis said there was nothing said or done that she was aware of that was the subject of Mr Vaisi's complaints. Mr Vaisi then moved to the Joondalup Licencing Centre on 7 September 2011.

48 When she became aware of the complaints, Ms Lewis said she testified that she was "blind-sided by it", because from all she had seen, Mr Vaisi was a willing participant in what was being said at work and there was nothing to suggest that anyone took any offence from the remarks.

49 Mr Merigan is a MDL Assessor and has been employed in that position since July 2010. Mr Merigan said that when Mr Vaisi first commenced employment at Welshpool, he referred to Mr Smith telling Mr Vaisi that the employees at Welshpool got on well together and enjoyed some jokes in the workplace as office banter. He was told that if any of this upset him he should say something. Whilst Mr Vaisi complained that the offending conduct occurred in about mid-August 2011, according to Mr Merigan, the banter between them started shortly after Mr Vaisi commenced employment in July.

50 Mr Merigan in particular recalled Mr Vaisi bringing the "Achmed the Dead Terrorist" video into the office in about mid-August 2011. He did this of his own initiative and also brought some external speakers so the video could be played. According to Mr Merigan, a number of staff members were present and viewed the video clip, and Mr Vaisi laughed at the performance and enjoyed it very much. After that, Mr Merigan testified that Mr Vaisi would often refer to the video clip and use phrases such as "silence" or "I will kill you" to which both he and Mr Smith would reply in similar terms. Mr Vaisi also came into the office and regularly referred to Mr Merigan and Mr Smith as "infidels". Mr Merigan would ask Mr Vaisi in jest "are you a terrorist like Achmed?" and Mr Vaisi would respond laughing by saying words to the effect "no because I am still alive but he is dead".

51 Additionally, Mr Merigan testified that Mr Vaisi often told jokes about Middle Eastern men engaging in sexual behaviour with animals and that "Jesus Christ could not have been American because they could not find an American virgin". According to Mr Merigan, he was aware of at least one member of staff who was offended by jokes of this kind. As with Mr Smith and Ms Lewis, Mr Merigan referred to several occasions on which Mr Vaisi made disparaging remarks about applicants after a driving assessment. He made reference to them "not driving camels or goats in their country but driving cars in Australia. They need to learn the difference". Mr Merigan said he responded in jest and said words to the effect "but aren't you a camel driver too?" Mr Vaisi was said to have responded by laughing and saying words to the effect "yes but now I know how to drive a car". According to Mr Merigan, there were other witnesses to these exchanges.

52 In relation to "rug flyer" allegation, Mr Merigan said he never used such a phrase towards Mr Vaisi. He did hear another staff member refer to Mr Vaisi as a "rug flyer" to which he added, "he is a pilot and can fly anything". According to Mr Merigan, this comment was directed to the other person and not to Mr Vaisi. It was also said in a light hearted manner. It was common knowledge that Mr Vaisi was a qualified pilot.

53 On one occasion, Mr Merigan agreed that whilst in the lunch room, he did say to Mr Vaisi that what he was eating looked like "dog shit", but immediately followed up by saying that the food smelt good. Mr Vaisi offered Mr Merigan some of his food but he declined.

54 In relation to the comments about being gay or homosexual, Mr Merigan testified that Mr Vaisi would often flex his muscles in the workplace like a body builder. Mr Merigan said that he referred to him as being "gay", in the context of him being showy and silly. According to Mr Merigan, Mr Vaisi regularly referred to both himself and Mr Smith as being "boyfriends" and being "gay and homosexual". Mr Vaisi also referred to his young girlfriend in derogatory terms, according to Mr Merigan. Overall, Mr Merigan said that all of these comments were made and received in good humour. No-one intended any offence to be taken and as far as he was aware, none was taken.

55 Mr Wecker has been employed as a MDL Assessor since July 2007. He was based at the Welshpool Licencing Centre until January 2012. At the time of the hearing of the appeal in PSAB 5 of 2012, Mr Wecker was based at the Rockingham Licencing Centre. Mr Wecker testified that he was absent between 21 July and 26 August 2011. On his return to the workplace in late August, Mr Wecker testified that he was approached by Mr Vaisi and asked by him "to tell both Mr Smith

and Mr Merigan to stop what they were doing and leave him alone as he felt they were harassing him." Mr Vaisi informed Mr Wecker at the time that he was going to lodge a formal complaint in relation to these matters.

56 Mr Wecker testified that he recalled two incidents involving Mr Smith and Mr Vaisi. The first incident occurred in about late August 2011, when he overheard Mr Smith asking Mr Vaisi if he was from Persia. When Mr Vaisi responded that he was, Mr Wecker heard Mr Smith say that Mr Vaisi must have been a "rug flyer". The second incident occurred shortly after in early September when Mr Wecker observed Mr Vaisi sitting in front of a coat stand. Mr Smith told Mr Vaisi that it looked like a Bedouin tent.

57 Mr Wecker said he was interviewed by both Ms Abbott the initial Investigator, and subsequently, Mr Neuzerling in connection with Mr Vaisi's complaints. Mr Wecker referred to a statement he gave to Ms Abbott which was confirmed by him. Mr Wecker said he gave a copy of the statement to Mr Neuzerling at his interview with him.

58 Mr Wecker was certainly of the view that there were two "camps" at the Welshpool Licencing Centre. Ms Lewis, Mr Smith and Mr Merigan were part of a group and he described Ms Lewis as the ringleader. Mr Wecker's evidence was that from his impression, Ms Lewis did not like Mr Vaisi and either expressly or implicitly, that message was received by Mr Smith and Mr Merigan, and therefore they felt free to harass Mr Vaisi. Mr Wecker was certain that Mr Smith called Mr Vaisi a "rug flyer", as he was present at the workplace at the time of this incident and he witnessed it. The same applied to the incident in relation to the clothes hanger and the "Bedouin tent" comment. Furthermore, Mr Wecker testified that he had previously been on the receiving end of inappropriate sexual remarks from Mr Merigan himself. He also was present at the time of Mr Merigan's "spit roast" comment to Mr Vaisi, in relation to Mr Vaisi's young girlfriend, which Mr Wecker said he found particularly disturbing.

59 Management representatives involved in the disciplinary process concerning Mr Smith included Ms Lamiri and Ms Knobel. Ms Lamiri is a Senior Human Resource Consultant at the Department. In her evidence, Ms Lamiri outlined the procedural steps that were followed in relation to the disciplinary action taken against Mr Smith arising out of Mr Vaisi's allegations.

60 Ms Knobel is the Executive Director, People and Organisational Development at the Department. She testified that when Mr Vaisi's complaints came to her attention she regarded the matters as serious and they required prompt attention. Ms Knobel referred to the Investigation Report provided to the Department, which made findings of a breach of discipline for the purposes of the PSM Act. Ms Knobel expressed the view that in accordance with the PSM Act, the Department was bound by the findings of the Investigator. This is incorrect. This was the case under the PSM Act prior to amendments made in 2010, in relation to disciplinary proceedings. However, the legislation no longer expressly requires an employer to accept recommendations of an Investigator.

61 In relation to the appropriate response to the Investigation Report, Ms Knobel said that the Department considered the actions of Mr Smith to be serious enough to warrant disciplinary action, but falling short of dismissal or a reduction in classification. The view of senior management was that the nature of the issues, involving racial and sexual harassment, was significant enough, to impact negatively on the Department and its employees. In Ms Knobel's view, given the findings of the Investigator, a strong message needed to be sent to reflect the Department's commitment to a workplace free of bullying, harassment and discrimination.

62 Whilst Ms Knobel also referred to the finding of the Investigator that there existed in the Welshpool office a permissive culture of workplace banter within the Driver Assessor Unit, Ms Knobel did not seem to be convinced of this. Regardless, she said that the suggestion of such a culture needed to be taken seriously.

63 In relation to the Union's allegations during the disciplinary process that there was a lack of a formal training in the areas of bullying, harassment and discrimination, Ms Knobel said that in the Department's view, this was not an excuse for Mr Smith's conduct. It is a fundamental expectation that employees treat each other with respect and courtesy. However, since the incidents involving Mr Smith and others, the Department has introduced formal training in the areas of bullying, harassment and discrimination in the workplace.

Consideration

64 As noted at the outset of these reasons, following the earlier appeal proceedings in PSAB 5 of 2012, the Department has maintained its view that Mr Smith committed breaches of discipline under Part 5 of the PSM Act. However, in view of the evidence led in the earlier appeal, the Department has revised the penalty imposed on Mr Smith. The fine of three days' pay was not proceeded with. Mr Smith has been reprimanded and has been required to undergo training in discrimination and harassment. For the following reasons, it was not, in all of the circumstances of this case, unreasonable for the Department to come to the conclusions that it did. We are not persuaded that the Appeal Board should interfere with the Department's decision.

65 Much attention was placed by both Mr Smith and the Department on the terms of the Department's various policies and the Western Australian Public Sector Code of Ethics. By ss 21(9) and (10) of the PSM Act, the Code of Ethics has the status of delegated legislation. Under s 21(11), any conflict between the Code of Ethics and an employer's Code of Conduct, is to be resolved in favour of the former. The Code of Ethics refers to "Relationships with others" in the following terms:

> We treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare

66 The Department also has its own Code of Conduct. In section 4 it deals with "Equity in the Workplace". This includes an obligation on staff to "maintain a work environment free from harassment, discrimination and bullying by refusing to participate in, or condone, behaviour that may discriminate against others". Reference is then made to the EO Act 1984 and unlawful conduct, based on amongst other things, racial harassment and sexual harassment. This section of the Code provides that the Department will investigate allegations of harassment and/or discrimination and may take appropriate disciplinary action where necessary.

67 The terms of section 5 of the Department's Code, deals with "Personal Behaviour". It refers to s 9 of the PSM Act, and obligations under it relevantly, for employees to exercise proper courtesy, consideration and sensitivity in dealings with the public and employees; to treat colleagues and customers with respect and dignity, and to act professionally at all times.

68 This section of the Code extends to "Appropriate behaviour with colleagues". That precludes "unacceptable behaviour", which can include "Bullying and intimidation … offensive jokes and comments … and joking at the expense of others". The Code goes on to provide that if unacceptable behaviour occurs at work, managers must identify the behaviour, bring the Code to the attention of employee/s, and counsel them. It further provides "If the behaviour continues, disciplinary action may be necessary".

69 This latter sentence was the subject of considerable submissions from the parties. Mr Smith submitted that by proceeding to the disciplinary process, the Department was in breach of the Code. It was a breach, as the submission went, because the Department, as well as employees, was obliged by s 9 of the PSM Act, to comply with the Code. It was contended that as Mr Smith ceased the behaviour once spoken to by Mr Wecker, then the Code terms were met. For the Department to proceed to discipline Mr Smith, despite the behaviour ceasing, was ultra vires. On this basis alone, Mr Smith submitted that the appeal should be upheld and the decision of the Department quashed.

70 This issue is not as clear cut as contended by Mr Smith. It is necessary to examine the evidence as to what occurred in or around early September 2011. On 1 September 2011, Mr Vaisi went to see the manager, Ms Torres. He complained to her that he had been racially and sexually harassed by Messrs Merigan and Smith. He outlined to her the conduct complained of. A further meeting took place later on the same day between Mr Vaisi and Ms Torres. Mr Vaisi repeated the allegations. He set them out in an email to Ms Torres of 3 September 2011. On 6 September 2011, Mr Vaisi requested Ms Torres to escalate the matter formally. By a memorandum of the same date, Ms Torres wrote to Ms Knobel setting out Mr Vaisi's allegations. The memo referred to "suspect [sic] racial and sexual harassment". This step was taken in accordance with par 3.1 of the Department's Discipline Procedures. This provides for the Department, on becoming aware of allegations of a breach of discipline, to gather information, and for the relevant matters to be brought to the attention of the Executive Director, People and Organisational Development Directorate.

71 The evidence before the Appeal Board was that senior management considered the allegations to be serious and not trivial. It is important to note the Department's obligations under State legislation in relation to equal opportunity and occupational health and safety. In relation to equal opportunity, we particularly note the terms of ss 24 and 49A of the EO Act 1984. The allegations therefore raise not just issues of policy or potential breaches of the Code of Conduct. Prima facie, the allegations raised the issue of conduct in breach of section 4 of the Department's Code, in relation to possible racial harassment and sexual harassment in the workplace. There was no requirement to cease the process, once the conduct complained of stopped, under this part of the Code. The allegations on their face went beyond a contravention of the "Personal Behaviour" provisions of the Department's Code. The conduct complained of also raised issues of a breach of the Public Sector Code of Ethics. It is also to be noted, that by this time, Mr Vaisi also had made complaints to the Equal Opportunity Commission, in relation to these same matters.

72 In our view, faced with those serious allegations, the Department was obliged to respond promptly and to take the matters seriously. We are not persuaded that the Department acted ultra vires, by its decision, in its letter of 16 September 2011, to treat the issue as a disciplinary matter under s 81(1)(a) of the PSM Act. On the contrary, the Department may well have been open to criticism, if it had not done so.

73 In the course of November and December 2011, the allegations were the subject of an investigation by the Investigator. Interviews took place with Mr Vaisi, Ms Torres, Mr Wecker, Ms Lewis, Mr Lloyd, and Mr Smith. The Investigator found the allegations to be sustained on the evidence. Mr Smith criticised the Investigator for not interviewing Mr Barnes and Ms Bolin, who provided statements. Their statements were subsequently referred to by the Investigator, as "character references" for Mr Smith. This was an error. The statements from Mr Barnes and Ms Bolin also refer to the existence of office banter, Mr Vaisi's participation in some of it, and a reference by Mr Barnes to comments he made in the workplace to the effect "Abdul flying a magic carpet". This was seemingly a reference to the allegation that Mr Smith called Mr Vaisi a "rug flyer" which Mr Smith denied. However, as we have already noted earlier in these reasons, the content of these statements would not have affected the outcome of the investigation.

74 On the issue of the "rug flyer" allegation, importantly, was the evidence of Mr Wecker, both before the Investigator and in these proceedings on this appeal. Neither Mr Barnes nor Ms Bolin was called to testify in this appeal. Mr Wecker was and he was subject to cross-examination. He was firm in his evidence that he witnessed the incident regarding Mr Smith discussing Persian rugs with Mr Vaisi and heard Mr Smith refer to Mr Vaisi as a "rug flyer". The fact that this may have also been a comment expressed in similar terms, by another MDL Assessor, is referred to by the Investigator at p 10 in his report when referring to his interview with Ms Lewis. Mr Smith's denial of this allegation was acknowledged by the Investigator, but he considered, in view of all of the material, that on balance it had occurred. On the basis of the evidence in these proceedings, that conclusion was fairly open in our view.

75 It was also submitted by Mr Smith that the Investigator was in error in failing to acknowledge that Mr Vaisi also took part in the exchanges in the workplace. However, a review of the Investigation Report shows that the Investigator was alive to this and made reference to it. At p 12 of the Investigation Report, under the heading "Summary", appears the following:

> The reviewing officer reached his finding taking into account all of the evidence including the initial claims, responses and surrounding circumstances.
>
> Notwithstanding evidence that the complainant freely participated in "office banter" which apparently included numerous inappropriate sexual comments and which may have contributed to the incidents complained of, the fact remains that the respondent did contravene the principles of the Public Sector Code of Ethics and also the DoT Code of Conduct.

76 This same matter was also referred to in the section of the Investigation Report headed "Mitigation". Where the following appears:

> The reviewing officer considered the evidence of the respondent, Lewis, and Merigan concerning the conduct of the complainant. Their evidence concerned the apparent participation of the complainant in reciprocal inappropriate

> comments and further that he initially instigated some of the comments under review. Whilst it can be considered that their evidence may lack some credence in respect to assertions that they were a clique and had collaborated, their evidence was very consistent and may contain an element of truth.
>
> Further there appeared insufficient evidence to support that the respondent's conduct was meant to be anything but mirth-provoking and the complainant always maintained that any acts and comments were carried out in a jovial manner.
>
> The mitigating circumstances outlined, as well as the obvious deep remorse displayed by the respondent that he had upset the complainant by his demeanour has been taken into account in respect to the recommendation.

77 Therefore, having regard to this, we are not persuaded by Mr Smith's submissions, that the Investigator failed to have regard to the fact that Mr Vaisi may have been a participant in some of the exchanges in the workplace.

78 Generally speaking, the same observations may be made as to the evidence led in these proceedings. Additionally, it is open to accept and we do accept, that on the evidence in this appeal, and as found by the Investigator, there did exist a "permissive culture" of inappropriate comments between co-workers in the Welshpool Licencing Centre. That is, prior to and in the course of the employment of Mr Vaisi, employees did engage in office banter which was characterised by offensive and inappropriate jokes, comments and "ribbing". This was brought to light by the incidents involving Mr Vaisi, Mr Smith and Mr Merigan, in particular. This sort of conduct is plainly inappropriate in the workplace. One person's joke is another's insult. There can be a fine line sometimes between relatively harmless light hearted commentary on the one hand, and bullying and harassment, on the other.

79 Whilst the general right to freedom of expression means people should be able to express themselves freely in the general community, subject to the laws of defamation, the workplace involves different considerations. Persons entering employment do so under a contract, with express and implied terms. Contracts of employment are also subject to, and often incorporate, policies and standards of behaviour, often reflecting obligations imposed by statute, for example, in relation to equal opportunity and occupational health and safety. This applies equally to private and public sector employment. Thus, persons who accept offers of employment must do so on the basis that some of the freedoms of expression they may enjoy in their private lives, do not exist in the workplace.

80 Furthermore, as to the submission that none of the allegations or findings made by the Investigator could support contraventions of the EO Act, that is far from clear in our view. For the purposes of s 49A(3) of that legislation, an employee can be held to racially harass another employee, by insults or taunts based on race. It will constitute unlawful harassment, if the person harassed "has reasonable grounds for believing that objecting to the relevant threats, abuse, insults or taunts would disadvantage the other person in any way in connection with the employment or work …" The concept of "disadvantage" is very broad. It can include any "unfavourable condition" (see Sykes JB, *The Concise Oxford Dictionary of Current English* (7th ed revised, 1982) 272).

81 Taking the conduct of Mr Smith overall, on any view of it, even in context as he contended, it did constitute non-compliance with the Department's Code of Conduct, and certainly the Public Sector Code of Ethics. The conduct did, in our view, involve offensive jokes and comments; joking at the expense of others; and in supporting the comments and conduct of Mr Merigan, did also constitute conduct that failed to treat colleagues with courtesy and respect. In our view, the Department was correct in its assessment that even based on the admissions and concessions by Mr Smith, his conduct was inappropriate for the workplace and contravened the Code of Conduct and the Code of Ethics.

82 Whilst it is accepted by the Appeal Board, that on the evidence, and based on the conclusions of the Investigator, Mr Vaisi did, at least to some extent, reciprocate in the impugned conduct of Mr Smith and Mr Merigan, that of itself, cannot be a justification for the behaviour of Mr Smith or Mr Merigan for that matter. Appropriate conduct and behaviour in the workplace is an individual obligation. It is a term of employment in the Public Sector, and in employment generally, that employees behave in a reasonable manner towards each other. The requirements of s 9 of the PSM Act, and the Department's Code of Conduct, make this plain. The sense of grievance experienced by Mr Smith that Mr Vaisi also engaged in some of this behaviour is understandable. It may also be open to question why Mr Vaisi was also not subject to disciplinary action. However, it is significant to note that Mr Vaisi's participation in at least some of the offending behaviour was taken into account by the Investigator in his recommendations as to the penalty that should be imposed. This was in addition to Mr Smith's remorse.

83 Finally, as to the penalty imposed, Mr Smith's submissions in appeal PSAB 5 of 2012 contended that the Department ignored the Investigator's recommendation for leniency, in imposing the additional penalty of a fine of three day's pay. As noted at the outset of these reasons, since the earlier appeal, the Department has reconsidered the proposed decision. In view of the evidence led in the earlier appeal, the Department has accepted that the Investigator's initial recommendation of a reprimand and a requirement for Mr Smith to undergo training in the workplace was appropriate. These penalties are at the lower end of the scale. In our view, they take into account the circumstances of Mr Vaisi's participation in some of the conduct; that there was a permissive culture as to inappropriate conduct in the workplace, and Mr Smith's clear remorse. We do not consider the penalty imposed was disproportionate to the conduct involved.

Conclusion

84 For the foregoing reasons, there is no warrant for the Appeal Board to interfere. We would dismiss the appeal.

MR SUTHERLAND:

85 I find that the penalty imposed by the Department was disproportionate to the conduct due there being as the investigator has found a "permissive culture" of inappropriate comments between co-workers in the Welshpool Licencing Centre. Whilst Mr Barrett did not believe this to be the case, he offered nothing to support his assertion. Having that there would seem to be a cultural aptitude for inappropriate comments and behaviour at the Welshpool Licencing Centre I find that remedial action should have encompassed all employees and that singling out two employees because complaints were made against them would to me be disproportionate, not in it severalty but due to its inequitable application. Also the complainant had engaged in

inappropriate behaviour to which the Department has taken no action against that employee is inconsistent with the application of the Department's own Code of Conduct.

86 I would therefore uphold the appeal and quash the decision of the Department.

2014 WAIRC 00126

NOTICE OF APPEAL AGAINST THE DECISION OF THE RESPONDENT TO TAKE DISCIPLINARY ACTION TO IMPOSE A REPRIMAND - THE DECISION WAS GIVEN ON OR ABOUT 23 MARCH 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL SMITH
	APPELLANT
	-v-
	DIRECTOR GENERAL - DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G SUTHERLAND - BOARD MEMBER
	MR M COE - BOARD MEMBER
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO	PSAB 10 OF 2013
CITATION NO.	2014 WAIRC 00126

Result	Appeal dismissed
Representation	
Appellant	Mr M Shipman and with him Ms S Van der Merwe
Respondent	Mr S Barrett and with him Ms D Davidson

Order

HAVING heard Mr M Shipman and with him Ms S Van der Merwe on behalf of the appellant and Mr S Barrett and with him Ms D Davidson on behalf of the respondent the Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

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

RECLASSIFICATION APPEALS—

2014 WAIRC 00137

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRONWYN JANELLE CANT
	APPLICANT
	-v-
	DEPARTMENT OF LOCAL GOVERNMENT AND COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO	PSA 89 OF 2013
CITATION NO.	2014 WAIRC 00137

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 6th day of August 2013 the Public Service Arbitrator convened a conference for the purpose of conciliation between the parties; and

WHEREAS on the 18th day of February 2014 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 appeal be, and is hereby dismissed.

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

2014 WAIRC 00136

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELLI GOUGOULIS
	APPLICANT
	-v-
	DEPARTMENT OF LOCAL GOVERNMENT AND COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO	PSA 88 OF 2013
CITATION NO.	2014 WAIRC 00136

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 6th day of August 2013 the Public Service Arbitrator convened a conference for the purpose of conciliation between the parties; and

WHEREAS on the 18th day of February 2014 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 appeal be, and is hereby dismissed.

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

2014 WAIRC 00138

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ZOE (YU QING) HUANG
	APPLICANT
	-v-
	DEPARTMENT OF LOCAL GOVERNMENT AND COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 24 FEBRUARY 2014
FILE NO	PSA 90 OF 2013
CITATION NO.	2014 WAIRC 00138

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 6th day of August 2013 the Public Service Arbitrator convened a conference for the purpose of conciliation between the parties; and

WHEREAS on the 18th day of February 2014 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 appeal be, and is hereby dismissed.

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 1/2011	Cheryl Hamill	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	Harrison C	Appeal granted	26/02/2014