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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 00263

APPEAL AGAINST THE DECISION GIVEN ON 29 NOVEMBER 2013 IN MATTER PSAB 12 OF 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2014 WAIRC 00263
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 COMMISSIONER J L HARRISON
 COMMISSIONER S M MAYMAN
HEARD : FRIDAY, 21 MARCH 2014
DELIVERED : WEDNESDAY, 2 APRIL 2014
FILE NO. : FBA 20 OF 2013
BETWEEN : HENRYK TURLINSKI
 Appellant
 AND
 NORMAN BAKER, MANAGING DIRECTOR, PILBARA INSTITUTE
 Respondent

ON APPEAL FROM:

Jurisdiction : **Public Service Appeal Board**
Coram : **Acting Senior Commissioner P E Scott – Chairman**
Mr G Sutherland – Board Member
Ms G Husk – Board Member
Citation : **[2013] WAIRC 01012; (2013) 93 WAIG 1865**
File No. : **PSAB 12 of 2013**

CatchWords : Industrial Law (WA) - Appeal sought to be instituted against decision of Public Service Appeal Board - No jurisdiction of Full Bench to hear appeals from Public Service Appeal Board - Appeal dismissed.

Legislation : *Industrial Relations Act 1979* (WA) s 49, s 49(1), s 49(2)

Result : Appeal dismissed

Representation:

Appellant : In person

Respondent : Mr D Anderson (of counsel) and Ms V Tomlin

Solicitors:

Respondent : State Solicitor for Western Australia

Case(s) referred to in reasons:

Hill v Commissioner, Corrective Services, Dept. of Corrective Services [2009] WAIRC 00166; (2009) 89 WAIG 417

State Government Insurance Commission v Johnson (1996) 76 WAIG 4142

Reasons for Decision

FULL BENCH:

- 1 By a notice of appeal filed on 9 December 2013, Henryk Turlinski seeks to appeal against a decision of the Public Service Appeal Board (the PSAB) made on 29 November 2013.
- 2 After the filing of the notice of appeal, the appeal was not progressed in the ordinary way by the filing of appeal books. A question arose as to whether Mr Turlinski could appeal against the decision of the PSAB. That is, whether the Full Bench has jurisdiction to hear such an appeal.
- 3 On 11 December 2013, the records of the Commission record that:
 - (a) Mr Turlinski attended the registry of the Commission and copies of decisions made by the Full Bench in *State Government Insurance Commission v Johnson* (1996) 76 WAIG 4142 and *Hill v Commissioner, Corrective Services, Dept of Corrective Services* [2009] WAIRC 00166; (2009) 89 WAIG 417 were provided to Mr Turlinski;
 - (b) an officer of the registry suggested to Mr Turlinski that he read the decisions and seek some independent advice so that he could make an informed decision about whether or not to proceed with the appeal.
- 4 On 17 December 2013, Mr Turlinski advised the Commission that he wished to proceed with the appeal.
- 5 On 5 March 2014, the appeal was listed for hearing for mention to show cause why the appeal should not be struck out on grounds of no jurisdiction. The matter was listed for mention before the Full Bench for this purpose on 21 March 2014.
- 6 At the hearing on 21 March 2014, after hearing from Mr Turlinski, the Full Bench informed Mr Turlinski that an order would be made to dismiss his appeal.
- 7 The reason why the Full Bench formed this opinion is because the decisions in *Johnson* and *Hill* make it clear that no appeal lies to the Full Bench against a decision of the PSAB under s 49 of the *Industrial Relations Act 1979* (WA) (the Act). Pursuant to s 49(2) of the Act, an appeal only lies to the Full Bench in the manner prescribed from any decision of the Commission. The Commission is defined in s 49(1) of the Act to mean the Commission constituted by a Commissioner. The decisions in *Johnson* and *Hill* make it plain that a decision of the PSAB is not a decision of 'the Commission constituted by a Commissioner' within the meaning of s 49(1) of the Act.
- 8 For this reason, the appeal does not lie and an order will be made to dismiss the appeal.

2014 WAIRC 00264

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	HENRYK TURLINSKI	APPELLANT
	-and-	
	NORMAN BAKER, MANAGING DIRECTOR, PILBARA INSTITUTE	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	COMMISSIONER J L HARRISON	
	COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO.	FBA 20 OF 2013	
CITATION NO.	2014 WAIRC 00264	

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr D Anderson (of counsel) and Ms V Tomlin

Order

This appeal having come on for hearing before the Full Bench on 21 March 2014, and having heard Mr H Turlinski on his own behalf as appellant, and Mr D Anderson (of counsel) and Ms V Tomlin on behalf of the respondent, and reasons for decision having been delivered on 2 April 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.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2014 WAIRC 00271

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION VINCENZO SALVATORE TODARO	APPELLANT
	-and- FAIR WORK OMBUDSMAN	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 3 APRIL 2014	
FILE NO.	FBA 16 OF 2013	
CITATION NO.	2014 WAIRC 00271	

Result	Appeal dismissed
Appearances	
Appellant	No appearance
Respondent	Ms K Thomson (of counsel) by teleconference

Order

WHEREAS on 7 October 2013, the appellant's solicitors filed a Notice of appeal seeking to appeal part of the reasons for decision of the Industrial Magistrate's Court given on 16 September 2013 in matter M 43 of 2011;

AND WHEREAS matter M 43 of 2011 was an application made by the respondent pursuant to s 719 of the *Workplace Relations Act 1996* (Cth);

AND WHEREAS the records of the Commission record that on 20 December 2013, the appellant's solicitor informed the Associate to the President, Ms Kathryn Edwards, that the appellant wishes to discontinue the appeal;

AND WHEREAS on 28 January 2014, the Registry received an application made pursuant to reg 61(1) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA) in which an order was sought that the appellant have leave to discontinue the appeal;

AND WHEREAS the records of the Commission record:

- (a) the application received on 28 January 2014 was not accepted for filing by the Registrar; and
- (b) on 28 January 2014, an officer of the Registry, Ms Maria Louca, requested the appellant's solicitor to file the correct form to discontinue the appeal (Form 1);

AND WHEREAS by 5 March 2014 no further correspondence had been received by the Commission and no application in the form of Form 1 had been filed on behalf of the appellant;

AND WHEREAS on 5 March 2014 the Full Bench listed the appeal on its own motion for the appellant to show cause on 2 April 2014 why the appeal should not be struck out;

AND WHEREAS on 2 April 2014 there was no appearance on behalf of the appellant before the Full Bench when the matter was called on;

NOW THEREFORE, 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.]

FULL BENCH—Unions—Declarations made under Section 71—

2014 WAIRC 00238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

CORAM

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT
CHIEF COMMISSIONER A R BEECH
COMMISSIONER S J KENNER

DATE

TUESDAY, 25 MARCH 2014

FILE NOS

FBM 6 OF 2013, FBM 7 OF 2013

CITATION NO.

2014 WAIRC 00238

Result

Matters adjourned sine die

Appearances

Applicant

Mr P Laskaris (of counsel)

Order

These matters having come on for hearing before the Full Bench on 25 March 2014, and having heard Mr P Laskaris (of counsel) on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT FBM 6 of 2013 and FBM 7 of 2013 be adjourned sine die.

By the Full Bench
(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2014 WAIRC 00179

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

MONDAY, 10 MARCH 2014

FILE NO/S

APPL 3 OF 2014

CITATION NO.

2014 WAIRC 00179

Result	Award varied
Representation	
Applicant	Mr R Raven and with him Mr P Robinson
Respondent	Ms J Allen-Rana

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 Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 be varied in accordance with the following schedule and that such variation shall have effect on or from 29 January 2014.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

SCHEDULE

1. **Clause 3.3. - Meal and Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:**
 - (b) The employer shall provide such employee a meal allowance of \$12.20 to cover the cost associated with the purchase of foods associated with the taking of a second crib.
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.
2. **Clause 4.3. - Suburban Electric Railcar Allowance: Delete paragraph (a) of subclause 4.3.1 of this clause and insert the following in lieu thereof:**
 - 4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

	Rate per week
(1) First Year	\$38.20
(2) Thereafter	\$38.50
(3) Special Case	\$39.10
3. **Clause 5.1 – Shift Work: Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:**
 - 5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions:
 - (a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of \$2.58 an hour on all time paid at ordinary rate.
 - (b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of \$3.00 an hour on all time paid at ordinary rate.
 - (c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of \$2.58 an hour on all time paid at ordinary rate.
 - (d) In addition to the hourly shift work allowance, an employee will be paid an allowance of \$3.00 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
 - (e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.
 - (f) 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 5.2. - Temporary Transfer Allowance: Delete subclause 5.2.1 of this clause and insert the following in lieu thereof:**
 - (a) When the distance the employee is required to travel from the employee's 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 his usual place of residence to the employee's 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 to be travelled.
The rate referred to above will be adjusted from time to time in accordance with the Department of Transport Taxi Industry Board (as renamed or superseded) metropolitan weekday daytime taxi fare distance rate per km.
 - (b) When the period of relief is for one week or less the allowance of \$6.95 per shift shall be paid in recognition of the disruption to the employee's normal roster.

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 5.3. - On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of \$3.84 per hour for all time on call.

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).

2014 WAIRC 00180

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

MONDAY, 10 MARCH 2014

FILE NO/S

APPL 4 OF 2014

CITATION NO.

2014 WAIRC 00180

Result Award varied

Representation

Applicant Mr R Raven and with him Mr P Robinson

Respondent Ms J Allen-Rana

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 Public Transport Authority (Transwa) Award 2006 be varied in accordance with the following schedule and that such variation shall have effect on or from 29 January 2014.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 5.1 - Shift Work: Delete this clause and insert the following in lieu thereof:

5.1 - SHIFT WORK

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

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

5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of \$2.52 an hour on all time paid at ordinary rate.

5.1.4 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.

5.1.5 In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

5.1.6 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 5.2 - Temporary Transfer Allowance: Delete paragraphs (a) and (b) of subclause 5.2.1 of this clause and insert the following in lieu thereof:**
- 5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:
- (a) When the distance the employee is required to travel from the employee's 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 his usual place of residence to the employee's 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 to be travelled, and in addition:
- (b) When the period of relief is for one week or less the allowance of \$6.95 per shift shall be paid in recognition of the disruption to the employee's normal roster.
- 3. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:**
- 5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of \$4.17 per hour for all time on call.
- That 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).
- 4. Clause 5.5 - Away From Home And Meal Allowances: Delete subclause 5.5.2 of this clause and insert the following in lieu thereof:**
- 5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of \$27.55 for each 8 hour period and, where less than 8 hours is worked, at the rate of \$6.85 for each 2 hour period or part thereof worked.

INDUSTRIAL MAGISTRATE—Claims before—

2014 WAIRC 00210

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2014 WAIRC 00210
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 5 MARCH 2014
DELIVERED : THURSDAY, 20 MARCH 2014
FILE NO. : M 115 OF 2013
BETWEEN : RICHARD JOUAULT

CLAIMANT

AND

DOF SUBSEA AUSTRALIA PTY LTD

RESPONDENT

Catchwords : Claim in the amount of \$8938.77 for three weeks' gross pay allegedly owed; election made to use small claims procedure as provided by section 548 of the *Fair Work Act 2009*; alleged failure to comply with section 117 of the *Fair Work Act 2009*; employer's alleged termination of employment during the period of employee's notice of termination; whether the contract of employment was consensually varied to enable the taking of leave during the period of notice; whether annual leave was taken during the period of notice.

Legislation : *Fair Work Act 2009*

Case(s) referred to in Judgment : *Currie v Dempsey and Others* (1967) 69 SR (NSW) 116
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Anor v Silcar Pty Ltd [2013] FWC 856

Result : Claim is dismissed

Representation :

Claimant : Claimant appeared in person

Respondent : Ms E Hardwick (In House Counsel) appeared for the Respondent

REASONS FOR DECISION

The Claim

- 1 Mr Richard Jouault claims that his former employer DOF Subsea Australia Pty Ltd (DOF Subsea) terminated his employment during the currency of the notice of termination of employment he had given it. He says he is owed three weeks' gross pay in the sum of \$8938.77 for the period that he was not permitted to work. Mr Jouault contends that in not paying him his entitlement, DOF Subsea has failed to comply with section 117 of the *Fair Work Act 2009* (the FW Act). In bringing this Claim Mr Jouault has elected to use the Small Claims procedure as provided by section 548 of the FW Act.

Overview

- 2 From 6 June 2008 until 4 January 2013 DOF Subsea employed Mr Jouault as a Senior Project Engineer.
- 3 On 7 December 2012 Mr Jouault resigned from his employment by giving DOF Subsea four weeks' notice of the termination of his employment. He informed DOF Subsea that his last day of employment would be 4 January 2013.
- 4 Prior to submitting his letter of resignation Mr Jouault had applied for, and had been granted permission to take annual leave from 17 December 2012 to 4 January 2013 (inclusive). Mr Jouault says that he withdrew his application for annual leave in order to work out the entire period of his notice of termination. DOF Subsea says that Mr Jouault did not withdraw his leave application, but rather insisted on taking his annual leave during the period of his notice.
- 5 It is common ground that Mr Jouault ceased working for DOF Subsea on 14 December 2012. Mr Jouault alleges that DOF Subsea elected to pay him in lieu of notice for that part of the notice period commencing 17 December 2012 and concluding 4 January 2013. DOF Subsea on the other hand contends that, with its consent, Mr Jouault took annual leave from 17 December 2012 until 4 January 2013 (inclusive).
- 6 Mr Jouault alleges that he is owed three weeks' pay in lieu of notice whilst DOF Subsea contends that Mr Jouault has been paid all his entitlements, including those for annual leave taken between 17 December 2012 and 4 January 2013.

Issue

- 7 The pivotal issue to be determined is whether Mr Jouault withdrew his application for leave and agreed to work his notice period.

Determination

- 8 It is not in dispute that the parties were bound by the terms of a written contract of employment which provided at Clause 12 - Termination of your Employment:

“Following your probationary period of employment, your employment may be terminated by either party giving to the other, one (1) calendar months’ notice in writing unless mutually agreed otherwise. The Company may elect to pay in lieu for all or part of the notice period. A period of notice shall not include any period of leave or absence from work by the Employee.”

- 9 I observe that the provision requires the giving of one months' notice rather than the four weeks' notice as was given by Mr Jouault. DOF Subsea has, however, not taken issue with that. Further, the provisions of Clause 12 of the contract of employment do not enable the employee's absence or the taking of leave during the period of notice. Consequently, despite having given notice of his intention to take annual leave and that having been approved, the reality was that Mr Jouault could not take such leave during the period of his notice. The taking of leave during that period could only occur with the consent of his employer and at the discretion of his employer.

Onus of Proof

- 10 Mr Jouault has the burden of proving the essential elements of his cause of action. Once that has occurred the burden shifts to DOF Subsea because its defence is not a denial of an essential ingredient in the cause of action but rather one which, if established, will constitute a good defence, that is an “avoidance” of the Claim which, prima facie, Mr Jouault has (see *Currie v Dempsey and Others* (1967) 69 SR (NSW) 116 at page 125).
- 11 DOF Subsea is avoiding the Claim by alleging that there was an agreement that Mr Jouault would take his annual leave during the notice period. The onus is on DOF Subsea to establish that, on the balance of probabilities. Whether there was such an agreement is a question of fact to be determined from the available evidence.

Evidence

Richard Jouault and Claire Forrest

- 12 On Friday, 7 December 2012 Mr Jouault sent to his managers, Mr Darren O'Leary and Mr Peter Rush an email which attached his letter of resignation. Mr Jouault says the same morning his manager Darren O'Leary and others met with him in an unsuccessful attempt to persuade him to withdraw his resignation. He says that on the same afternoon he was contacted by Ms Claire Forrest, DOF Subsea's Human Resources Manager, who asked him to go to her office which he did. She too attempted to dissuade him from resigning. Further, she attempted to ascertain the name of his new employer. She was unsuccessful on both counts. Mr Jouault alleges that after having realised that he would not be withdrawing his resignation Ms Forrest became threatening and intimidating. She told him that he would be required to work out the whole notice period, exclusive of holidays, and that if he wanted to take annual leave he would need to extend his termination date. Ms Forrest denies that meeting and the alleged conversation.
- 13 Mr Jouault alleges that the following Monday (10 December 2012), he attended Ms Forrest's office and informed her that he was withdrawing his annual leave application and that he would work his full notice period. His termination date would remain

4 January 2013. He told her that he would complete all of his deliverables in relation to the tender he was working on and would hand over to his replacement. Ms Forrest denies that meeting and conversation.

- 14 Mr Jouault alleges that on Tuesday, 11 December 2012 he received a telephone call from Ms Forrest who said words to the effect:

“Senior management have decided that your last day will be Friday, 14 December 2012. Do you have a problem with this?”

- 15 He assumed that his employer was exercising its rights by electing to pay him in lieu for three weeks of his notice period. On that basis he told Ms Forrest that he did not take issue with the decision and agreed to cease work on 14 December 2012. Ms Forrest does not recall that conversation.

- 16 Ms Forrest’s evidence is that she only became aware of Mr Jouault’s resignation on 12 December 2012. She said that she received an email from Mr Jouault’s manager indicating that Mr Jouault would be leaving on 14 December 2012. She accordingly, late on the afternoon of 12 December 2012, unsuccessfully attempted to contact Mr Jouault and left a telephone message at his workstation. She was intending to clarify with him whether his employment would cease on 14 December 2012 or alternatively on 4 January 2013. On the morning of Thursday, 13 December 2012, Mr Jouault sent an email to Ms Forrest in which he said:

“Apologies for missing your call yesterday evening. After discussions with Darren and Martin I can confirm that tomorrow Friday the 14th of December will be my last day in the office. I will be on leave until the 4th January 2013 which will conclude my notice period.”

- 17 Ms Forrest testified that later the same day (13 December 2012), Mr Jouault attended her office during which they had a discussion with respect to his termination. During the discussion the issue of whether or not he was entitled to take annual leave during the notice period was addressed. She says that Mr Jouault became somewhat heated in maintaining that he was. Ms Forrest’s evidence is that Mr Jouault was insistent on taking that annual leave. She said that she could not recall any conversation or correspondence which indicated that he had withdrawn his leave application. Consequently, advice was sought from the Chamber of Commerce and Industry of Western Australia (Inc.) to ascertain whether there was anything prohibiting an employee accessing leave during a notice period.

- 18 Mr Jouault completed his last day in the office on 14 December 2012. On 17 December 2012 he received his final pay and pay advice (Exhibit 1) from DOF Subsea. There were various errors in calculations resulting in a shortfall in payment. He noted that DOF Subsea had failed to pay him three weeks’ pay in lieu of notice.

- 19 After the receipt of that first pay advice, Mr Jouault and DOF Subsea have been engaged in protracted email correspondence concerning the alleged underpayment. Mr Jouault received further payment and payment advice on or about 20 December 2012. The further money received rectified all underpayments, with the exception of the three weeks’ pay in lieu of notice.

Darren O’Leary

- 20 The only other witness called was Mr Jouault’s former manager Mr Darren O’Leary. Mr O’Leary’s evidence in chief was that after having received Mr Jouault’s resignation on Friday, 7 December 2012 he did not act upon it immediately, but rather, waited until Monday, 10 December 2012 at which time he tried to convince Mr Jouault not to resign. He was unsuccessful in that regard. Thereafter he set about enabling Mr Jouault’s departure by 14 December 2012, which he knew was to be Mr Jouault’s last day of work prior to taking leave.

- 21 Mr O’Leary’s recollection is that he waited until Wednesday, 12 December 2012, before informing Ms Forrest of the arrangements concerning the ending of Mr Jouault’s work. That contention is supported by documentary evidence (Exhibit 5). Mr O’Leary does not recall any discussion with Mr Jouault about the withdrawal of Mr Jouault’s leave application.

- 22 When challenged under cross-examination about his recollection concerning the initial discussions surrounding Mr Jouault’s resignation, Mr O’Leary agreed that his attempt to dissuade Mr Jouault from resigning may well have occurred on Friday, 7 December 2012, rather than Monday, 10 December 2012.

- 23 Mr O’Leary’s evidence supports DOF Subsea’s contention that Mr Jouault never withdrew his leave application. It is obvious that Mr O’Leary proceeded throughout on the basis that Mr Jouault would finish up on 14 December 2012, in order to take leave before commencing his new job.

Conclusion

- 24 The pivotal factual issue to be determined is whether Mr Jouault’s application for leave was withdrawn so that he could work out his entire notice period.

- 25 As indicated earlier, because DOF Subsea is avoiding the Claim it bears the onus of establishing on the balance of probabilities that Mr Jouault insisted on taking his leave, and that his application for leave was never withdrawn.

Assessment of Evidence

- 26 Mr Jouault’s evidence and that of Ms Forrest are diametrically opposed with respect to the pivotal factual issues. Both gave evidence in an acceptable manner and stood firm under challenge. There is no particular reason to find that one was truthful and the other not. Notwithstanding that, Mr Jouault came across as being a better historian. His evidence was more detailed as to time, place and circumstance. He appeared to be meticulous in his approach. Ms Forrest, on the other hand, did not appear to be as thorough in her testimony. In many respects she could not recall events or the sequence of events.

- 27 Mr O’Leary’s evidence is supportive of Ms Forrest’s position. Indeed, it is the case that Mr O’Leary acted in such a way that reflected his belief that Mr Jouault would be ceasing work to take up leave before starting his new job. I recognise however that Mr O’Leary’s evidence is not determinative because he was not privy to the alleged conversation or conversations had between Mr Jouault and Ms Forrest.

- 28 It is not the conflicting *viva voce* evidence but rather the documentary evidence which assists the Court in resolving the issues. In that regard, the crucial piece of documentary evidence is the email (referred to above) from Mr Jouault to Ms Forrest, which was copied to Mr O'Leary and sent at 7.53am on Thursday, 13 December 2012 (page 22, Exhibit 5). Mr Jouault does not concede that he sent that email but I find that he did. I accept that the email which is part of the Respondent's business records is a genuine document. There has not been any suggestion that it has been fabricated or has otherwise been brought into existence for an improper purpose. Indeed, the fact that it was sent is consistent with Mr Jouault's own evidence concerning the missed telephone call of the previous evening and his response to it.
- 29 What Mr Jouault said in that email is unequivocal. In the second sentence of his email he said:
- "After discussions with Darren and Martin I can confirm that tomorrow Friday the 14th of December will be my last day in the office."*
- 30 I observe that, had the termination of his employment occurred in the manner that he suggests, it would be highly unlikely that the end date of his employment would have been the subject of discussion between him, Darren and Martin. On Mr Jouault's evidence, Ms Forrest had told him that the decision to pay him in lieu of notice had already been made by "senior management".
- 31 In the third sentence of that same email he said:
- "I will be on leave until the 4th January 2013 which will conclude my notice period."*
- 32 Mr Jouault appears to be very careful and meticulous in approach. He also seems to be a good historian and record-keeper. Given his attributes it is of particular significance that he said in the email that he was, "on leave" until 4 January 2013. If DOF Subsea had brought his contract of employment to an end by agreeing to pay out his notice period as at 14 December 2012, then his employment would have ceased on that date. The notion of leave would not have been within contemplation. His email confirms his actual situation, that is, that he was on leave until 4 January 2013. That is also supported by mention in his email that his notice period was to conclude on 4 January 2013. His notice continued until that time. That could not and would not have been the case if his employment had been terminated as he says it was.
- 33 Mr Jouault's contentions are contradicted by the express terms of his own email. Indeed, his email supports DOF Subsea's position. If the situation was as Mr Jouault says it was, it would have been just as easy for him to have confirmed that he was to be paid out the balance of his notice period and that Friday, 14 December 2012 would be his last day in the office. Given Mr Jouault's meticulous nature, as is demonstrated by the way in which he gave his evidence and by the documentary evidence he has produced, it is most probable that had there been a decision made to curtail his notice period and pay him out, that he would have said so.
- 34 Mr Jouault suggests that the fact that he has been paid out his holiday entitlements as at 14 December 2012 supports his contention that his employment was terminated during his notice period. Whilst that may be so, it is just as consistent with DOF Subsea falling into error in calculating his termination pay as it undoubtedly did when it made its first payment to him and gave him his first pay advice (Exhibit 1). He also places reliance upon the terminology used in an email sent to him by Ms Forrest's assistant, Ms Vikki McKeown, on 27 December 2012 (Exhibit 3). In her email, Ms McKeown repeatedly refers to "termination". Mr Jouault says that this supports his contention that his employment was terminated during a notice period. With respect, I do not agree. Within that same email Ms McKeown expresses a view that Mr Jouault's termination date was 4 January 2013, which is consistent with DOF Subsea's contention.
- 35 Before concluding, it is important to mention the decision of *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Anor v Silcar Pty Ltd* [2013] FWC 856 which was raised by Mr Jouault. That decision is to be distinguished on its facts. In that case the employer forced the employee to take leave during the notice period. That of course could not be done. It is not suggested here that Mr Jouault was forced to take leave during his notice period.
- 36 At [46] Commissioner Gooley concluded that:
- "...the right to notice and the right to annual leave are independent and cannot be used to cancel out the other right."*
- 37 An employee has the right to notice when the employer terminates the employee's employment. However, when it is the employee who chooses to terminate the employment relationship, it is the employer who has that right to notice. Once Mr Jouault gave notice of his resignation to DOF Subsea, it had the right to that relevant notice period. DOF Subsea waived that right and permitted Mr Jouault to take his planned annual leave. The taking of annual leave was as a result of an agreement reached between the parties as is reflected in the conduct of the parties, and confirmed in Mr Jouault's email of 13 December 2012.

Result

- 38 On the available evidence I am satisfied on the balance of probabilities that Mr Jouault took annual leave during his notice period, which ended on 4 January 2013. In the circumstances, Mr Jouault is not entitled to any further payment for the period 17 December 2012 to 4 January 2013 (inclusive).

G CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2014 WAIRC 00226

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES EMANUEL AMRITA **APPLICANT**

-v-

NEIL GUARD, EXECUTIVE DIRECTOR DRUG AND ALCOHOL OFFICE **RESPONDENT**

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 24 MARCH 2014

FILE NO/S U 198 OF 2013

CITATION NO. 2014 WAIRC 00226

Result Application discontinued

Representation

Applicant Mr E Amrita

Respondent Mr M Aulfrey

Order

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

AND WHEREAS on 8, 21 and 31 January 2014 conferences between the parties were convened;

AND WHEREAS at the conclusion of the conference held on 31 January 2014 agreement was reached between the parties;

AND WHEREAS on 24 March 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DAVID BIRD **APPLICANT**

-v-

PACT CONSTRUCTION **RESPONDENT**

CORAM COMMISSIONER S J KENNER

DATE TUESDAY, 25 MARCH 2014

FILE NO/S U 40 OF 2014

CITATION NO. 2014 WAIRC 00239

Result Discontinued by leave

Representation

Applicant Mr D Bird

Respondent Mr M Vallence

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00237

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	STEPHEN BOOTH	APPLICANT
	-v-	
	DAS FURNITURE PRODUCTS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	TUESDAY, 25 MARCH 2014	
FILE NO/S	B 202 OF 2013	
CITATION NO.	2014 WAIRC 00237	

Result Application discontinued

Representation

Applicant Mr S Booth

Respondent Mr D Chiappalone

Order

WHEREAS an application was filed in the Commission pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS on 15 January 2014, 5 February 2014 and 19 March 2014 conferences between the parties were convened;
AND WHEREAS at the conclusion of the conference on 19 March 2014 an agreement was reached between the parties;
AND WHEREAS on 19 March 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00287

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	PAUL COOK	APPLICANT
	-v-	
	MARK HORWOOD - MPH UNIT TRUST	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 7 APRIL 2014	
FILE NO/S	U 34 OF 2014	
CITATION NO.	2014 WAIRC 00287	

Result Application dismissed

Order

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

WHEREAS on the 17th day of March 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on the 28th day of March 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.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00204

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00204
CORAM	:	COMMISSIONER J L HARRISON
HEARD	:	TUESDAY, 22 OCTOBER 2013
WRITTEN SUBMISSIONS	:	TUESDAY, 29 OCTOBER 2013, FRIDAY, 5 DECEMBER 2013
DELIVERED	:	MONDAY, 17 MARCH 2014
FILE NO.	:	B 162 OF 2008
BETWEEN	:	GREVILLE BLAKE GRIFFIN
		Applicant
		AND
		ROBERT ROBSON
		Respondent

Catchwords	:	Contractual benefits claim - Entitlements under contract of employment - Claim for payment of annual leave and loading, pay in lieu of notice and wages - Application upheld in part - Order issued - Counterclaim for payment of outstanding invoices - Counterclaim dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> s 7, s 27(1) and s 29(1)(b)(ii)
Result	:	Order issued; Counterclaim dismissed
Representation:		
Applicant	:	In person
Respondent	:	Mr R Gifford (as agent)

Case(s) referred to in reasons:

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

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Belo Fisheries v Froggett (1983) 63 WAIG 2394

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

Chris Toncich v People Who Care Incorporated (2003) 84 WAIG 401

Hotcopper Australia Ltd v David Saab (2001) 81 WAIG 2704

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

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

Rai v Dogrin Pty Ltd [2000] 80 WAIG 1375

Steven John Gallaher v Isabella's Hydroponic Nursery & Garden Centre (2005) 85 WAIG 926

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

- 1 On 24 November 2008 Greville Blake Griffin (the applicant) lodged this application claiming that he was denied a number of benefits due to him under his contract of employment with Robert Robson. The respondent disputes that the applicant is due all of the benefits he is seeking.

Name of the respondent

- 2 During the proceedings it became apparent that the respondent had been incorrectly named. Given the Commission's powers under s 27(1) of the *Industrial Relations Act 1979* (the Act) and as I am of the view that it is appropriate for the respondent to be correctly named, I will issue an order that Robert Robson be deleted as the named respondent in this application and be substituted with The Robson Group Pty Ltd as trustee for the Robson Family Trust trading as Robson Brothers 4WD Service and Repairs (the respondent) (see *Rai v Dogrin Pty Ltd* [2000] 80 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* [1991] 173 CLR 231).

- 3 The applicant is seeking the following payments:

- (1) Two weeks' pay in lieu of notice in the amount of \$2,730.76 if the Commission finds that the applicant was terminated;
- (2) payment for two or four hours worked on 18 July 2008 at \$30.34 per hour;
- (3) annual leave in the amount of \$4,733.31 or \$4,724.28 depending on whether the applicant worked two or four hours on 18 July 2008;
- (4) annual leave loading of \$590.69; and
- (5) one day's pay being \$273.60 for working 17 July 2008, which was conceded by the respondent as being owed to the applicant.

- 4 The respondent counterclaims with payments the applicant did not make to it in return for goods ordered for him by the respondent at the applicant's request. Eight invoices were tendered for these goods which were purchased on his behalf by the respondent (\$1802.39). Following the hearing the respondent undertook further investigation into the payment of these invoices and it maintained that only two payments were possibly made by the applicant (\$74.20 and \$253) leaving a counterclaim of \$1,475.19.

- 5 The following people gave evidence in these proceedings:

- The applicant, who was employed as the respondent's service manager;
- Ms Sarah Steenson, the respondent's accounts and payroll person; and
- Mr Robert Robson, who is the respondent's general manager.

Background

- 6 The applicant commenced employment with the respondent, which services four-wheel drive vehicles, on 27 March 2006. His last day of work was 18 July 2008. The applicant worked 45 hours per week and his annual salary was \$71,000. The applicant's partner Ms Shirley Griffin was employed as the respondent's office manager undertaking administration and payroll duties until 18 July 2008. Ms Griffin ceased working for the respondent on that date when the respondent accused her of stealing money from the respondent.

Consideration

- 7 The claims before the Commission are for an alleged denial of contractual benefits. The law as to these matters is well settled. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to industrial matters pursuant to s 7 of the Act and the claimant must be an employee, the claimed benefits must be contractual benefits that being a benefit to which there is an entitlement under the applicant's contract of service, the relevant contract must be a contract of service, the benefits claimed must not arise under an award or order of this Commission and the benefits must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867. The meaning of 'benefit' has been interpreted widely in this jurisdiction: *Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.
- 8 In determining whether a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claim is a benefit to which he is entitled under his contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts*).
- 9 There is no issue in this matter and I find that at all material times the applicant was an employee of the respondent and he was employed under a contract of service. I find that his claims are industrial matters for the purposes of s 7 of the Act as they relate to payments the applicant claims are due to him arising out of his employment with the respondent. It is also common ground that the benefits that the applicant is claiming do not arise under an award or order of this Commission. The issue to be determined therefore is what were the terms of the applicant's contract of employment with the respondent and whether it was a term of the contract of employment that the applicant is entitled to the payments he is seeking.

(1) Claim for two weeks' pay in lieu of notice

- 10 The applicant's written contract of employment states that his 'appointment' may be terminated by two weeks' notice (Exhibit A1.2). The applicant claims that as he was terminated he should have been paid notice. The respondent disputes that the applicant was terminated.
- 11 I find that the applicant was denied this benefit on the basis that he was terminated by Mr Robson. The applicant is therefore due two weeks' pay in lieu of notice in the amount of \$2,730.76 gross.
- 12 A termination is predicated on an employer's actions resulting in the cessation of the employment relationship. In *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 (205), the Full Court of the Industrial Relations Court of Australia said:

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

(See 'Law of Employment' Macken, O'Grady, Sappideen and Warburton 5th Edition page 326)

- 13 In *Chris Toncich v People Who Care Incorporated* (2003) 84 WAIG 401 Kenner C said the following about a constructive dismissal:

The question of a resignation, truly voluntary, or a dismissal, is a jurisdictional fact necessary to be found by the Commission in order to ground jurisdiction in matters of this kind. It is well settled that to attract the Commission's jurisdiction in claims of this kind, an employee must be "dismissed": *Gallotti v Argyle Diamond Mines Pty Ltd* (2003) 83 WAIG 353 (IAC); (2003) 83 WAIG 919 (FB). It is also the case, that in circumstances of a "resignation", apparently tendered by an employee, those circumstances may be a dismissal for the purposes of the Act, if the contract of employment is not terminated truly voluntarily by the employee: *Attorney - General v WA Prison Officers Union* (1995) 75 WAIG 3156. Furthermore, an employee may be "constructively dismissed", in the event that the employer conducts itself by way of a breach of the contract of employment, going to its root, so as to justify its acceptance by the employee: *Western Excavating (EEC) Ltd v Sharp* [1978] QB 761 per Denning MR at 769 (403).

- 14 On 18 July 2008 the applicant commenced work at his usual time, which was around 7.10 am. The applicant claimed Mr Robson had a meeting with Ms Griffin that morning which commenced around 9.30 am. After this meeting Mr Robson told the applicant about accusations concerning Ms Griffin's conduct. The applicant gave evidence that during this discussion he told Mr Robson that he wanted to continue working with the respondent and Mr Robson agreed to him doing so. He then claimed he left with Ms Griffin to comfort her soon after her meeting with Mr Robson ended at approximately 11.30 am.
- 15 The applicant gave evidence that he arranged to meet Mr Robson the following day. At this meeting the applicant claims that he again told Mr Robson that he wanted to continue working with the respondent and in response Mr Robson told him that his position with the respondent was untenable given the accusations against Ms Griffin. The applicant told Mr Robson that this was his decision. When Mr Robson reiterated that his position was untenable the applicant told Mr Robson that it was his call. The applicant then offered to return his keys and he was told that was unnecessary because the respondent's locks had been changed. The applicant said he was not happy about leaving his job and if he was going to resign he would have done so in writing.
- 16 Mr Robson claims that when he met the applicant on 19 July 2008 he told him that things would be nasty and police were going to be involved. He recalled the applicant agreeing that his ongoing employment with the respondent was untenable and he claimed that he and the applicant reached a mutual agreement that the applicant would no longer continue working with the respondent. This agreement was confirmed by the applicant nodding his head and saying 'yes' when he mentioned the applicant would not continue working with the respondent. Mr Robson could not recall the applicant telling him that him leaving the respondent was Mr Robson's decision. Nor could he recall any discussion about changing the locks on the respondent's premises but he conceded that this could have taken place to stop Ms Griffin from attending the respondent's office.
- 17 In my view the applicant gave his evidence in a forthright manner and he was very clear about his recollection of the events of 18 and 19 July 2008. Even though Mr Robson gave detailed evidence about his discussions with Ms Griffin on 18 July 2008 I find that he was vague when recalling his discussions with the applicant about the applicant ceasing his employment with the respondent as at 19 July 2008. I find that as the applicant gave more detailed and forthright evidence than Mr Robson about their discussions on 18 and 19 July 2008 that the applicant's evidence with respect to whether he was terminated should be preferred to that of Mr Robson.
- 18 I find that the applicant had no intention of ceasing employment with the respondent notwithstanding the serious claims made about Ms Griffin's conduct. I find that the applicant indicated to Mr Robson on 18 July 2008 that he wished to continue his employment with the respondent and Mr Robson agreed to this occurring. I find that on 19 July 2008 Mr Robson told the applicant that it was untenable for him to continue his employment with the respondent and as a result would not allow the applicant to continue working with the respondent. I therefore find that the applicant was terminated at the respondent's initiative and is due two weeks' pay in lieu of notice.

(2) Payment for hours worked on 18 July 2008

- 19 There was a dispute in the evidence about the time the applicant left the respondent's premises on 18 July 2008. The applicant claims he commenced work at 7.10 am and left the respondent's premises around 11.30 am and Mr Robson did not contest that the applicant commenced work around 7.10 am and he gave evidence that the applicant left the respondent's premises around

9.30 am. Ms Steenson gave evidence that Mr Robson's meeting with Ms Griffin commenced around 9.00 am that day and lasted for approximately 20 minutes and the applicant's meeting with Mr Robson finished around 9.30 am but by 10.00 am at the latest. During the proceedings the respondent conceded that the applicant worked more than two hours that morning but not four hours. When taking into account the evidence given by each witness in these proceedings I find that the applicant worked approximately three hours on the morning of 18 July 2008 and in all probability left the respondent's premises around 10.00 am. I will therefore order that the applicant be paid wages for working three hours that day (3 hours x \$30.34 = \$91.02 gross).

(3) Annual leave

- 20 There was no dispute that the applicant is owed the annual leave he is claiming. The only issue in dispute was the amount of accrual owing for the hours the applicant worked on Friday 18 July 2008. I have found that the applicant worked three hours on 18 January 2008. I will therefore order that the applicant be paid \$4,733.31 gross, which takes into account these hours.

(4) Annual leave loading

- 21 The applicant claims that he is entitled to leave loading on his outstanding annual leave. The respondent argues that under the applicant's contract of employment leave loading is not payable on a pro rata basis for annual leave accrual periods of less than twelve months.

- 22 The relevant section of the applicant's contract of employment under the heading 'Leave' reads as follows:

(a) Annual Leave

For full time employees, annual leave will be paid at the rate of 3.077 hours for each completed week of service. Your leave may be taken at a time mutually agreeable to you and the General Manger.

Leave Loading is applicable at the rate of 17.5% of your leave entitlement taken after 12 months continuous service. It is not payable on a pro rata basis for any period less than twelve months.

The amount of annual leave owed to the applicant is less than an accrual period of 12 months. Under the terms of this clause the applicant is therefore not entitled to the leave loading on the accrued annual leave that he is claiming. This claim is rejected.

(5) Payment for working 17 July 2008

- 23 It was not in dispute that the applicant was not paid for working on 17 July 2008 and that he is owed wages for working on that date. An order will therefore issue that the applicant be paid \$273.60 gross.

Counterclaim by the respondent for goods supplied to the applicant and not paid for (\$1,475.19)

- 24 In *Steven John Gallaher v Isabella's Hydroponic Nursery & Garden Centre* (2005) 85 WAIG 926 Smith C set out the relevant law with respect to a counterclaim of this nature:

In written submissions the Respondent contends that the Applicant owes the business \$2,908.55 for unpaid goods. For the reasons set out above, I do not accept this contention as no documentary evidence was produced to support this contention. The Applicant does, however, agree that he owes the Respondent an amount of \$1,100. The Commission does not have jurisdiction to set off claims made by a Respondent. However, that the Commission is empowered in some cases to exercise its discretion not to allow a claim in full, where it is established that a Respondent is entitled to a sum of money from an employee. This power is, however, qualified. In *BGC (Australia) Pty Ltd v Phippard* (2002) 82 WAIG 2013 Hasluck J with whom Anderson and Parker JJ agreed observed at [39], [40] and [41]:

'It is true that by s 26(1)(a) of the *Industrial Relations Act* the Commission, in the exercise of its jurisdiction, shall act according to equity, good conscience, and the substantial merits of the case without regard to the technicalities or legal forms. This might suggest that in some general sense the Commission should not provide for a payment to be made to the employee in respect of accrued leave without bringing to account other matters in issue between the parties. However, in strict analysis, the position will usually be, having regard to the provisions of the *Minimum Conditions of Employment Act*, that the employer is obliged to make the payment in respect of accrued leave without deduction. This will mean that all industrial matters in issue between the parties have been resolved with the result that the Commission does not have any continuing jurisdiction to resolve other matters and is therefore not at liberty to embark upon any further inquiry as to whether the employee is indebted to the employer pursuant to some transaction lying outside the contract of employment.

Reasoning of this kind is consistent with the view of the Full Bench in *Conti Sheffield Real Estate v Brailey* (*supra*), being a decision relied upon by Commissioner Kenner and the Full Bench in the present case to refuse relief to BGC. Further, in *HotCopper Australia Ltd v Saab* [2002] WASCA 190, being a decision to be handed down in conjunction with this decision, the Industrial Appeal Court has affirmed that a private claim of a commercial nature which lacks any ingredient or complexion of industrial relations cannot be characterised as an industrial matter, with the result that the Commission lacks jurisdiction to deal with such a claim. Claims of that kind concerning the enforcement of existing legal rights require the exercise of judicial power and are to be dealt with in the Courts.

In the present case, however, in dealing with grounds 2 and 3 of the appeal and the question of whether the BGC claim for \$29,576.90 should be remitted to the Commission for further consideration, I am conscious that there is an additional layer of complexity. The Industrial Appeal Court must not accede too readily to the notion that the position reflected in *Conti* (*supra*) and *HotCopper* (*supra*) is applicable to the present case, for I noted earlier that by s 17D(1)(b) of the *Minimum Conditions of Employment Act* an employer is authorised to deduct from the employee's pay an amount authorised by the contract of employment. If, after a careful consideration of the salary sacrifice arrangement and related events, it emerges that the amount being claimed by BGC is a deduction or payment

authorised by the contract of employment then a basis may exist for remitting the issue to the Commission in the manner contended for by BGC.'

It is my opinion that an employee's account to purchase goods and equipment lacks an ingredient or complexion of industrial relations to be characterised as an "industrial matter" as there is no evidence that the Respondent is authorised by the terms of the Applicant's employment to deduct such payments. Consequently, the Respondent's submission that the Commission should exercise its discretion not to order the Respondent to pay a sum of money to the Applicant fails [116] – [117].

- 25 As there was no evidence that it was a term of the applicant's contract of employment that the respondent was authorised to deduct the monies it claims the applicant owes it in return for goods purchased by the respondent on behalf of the applicant this counterclaim fails.
- 26 If I am wrong in reaching this conclusion, which I do not concede, I find that the respondent has demonstrated that the amount it is claiming by way of a counterclaim has not been paid by the applicant.
- 27 There is no dispute that the amount the respondent is claiming the applicant owes it was for goods received by the applicant. There was also no dispute that the applicant agreed to pay the respondent for the cost of buying these goods on his behalf. The applicant understood that all of the goods that he had been supplied and invoiced for during his employment with the respondent had been paid for by Ms Griffin. The applicant did not see Ms Griffin putting money into the respondent's account, nor did he have receipts for these payments. The applicant gave evidence that he received regular statements showing the amounts he owed to the respondent were reducing or that the invoices setting out how much he owed to the respondent had been fully paid. Additionally, no issue was raised with him by the respondent about the non-payment of goods prior to his termination.
- 28 Mr Robson said that employees generally paid invoices for goods purchased for them at the end of each month and occasionally payment over time was allowed if a big purchase was made. Generally employees made these payments by credit card or cash to Ms Griffin. Ms Steenson conducted a review of the respondent's accounting system and its records between 2006 and 2008. Her review of the accounts for this period show that the invoices for the goods given to the applicant had not been paid. Payments the applicant understood Ms Griffin made on his behalf did not show up in the respondent's bank records for these invoices and even though all but one of the relevant invoices were put through the system as being paid by EFTPOS the money was not in the receipts or bank statements for that particular day.
- 29 After the hearing the respondent provided documents confirming that \$1,475.19, which the applicant claimed was paid on his behalf by Ms Griffin for the goods he received, was not paid into the respondent's bank account and the applicant was unable to provide confirmation that these amounts were withdrawn from his bank account on the dates stated on the invoices or that they were paid by cash.
- 30 An order will issue that the applicant be paid \$7,828.69 gross made up of the following amounts:
- (1) two weeks' pay in lieu of notice in the amount of \$2,730.76 gross;
 - (2) three hours' pay in the amount of \$91.02 gross for working on 18 July 2008;
 - (3) annual leave in the amount of \$4,733.31 gross; and
 - (4) one day's pay of \$273.60 gross for working 17 July 2008.

2014 WAIRC 00213

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GREVILLE BLAKE GRIFFIN

APPLICANT

-v-

THE ROBSON GROUP PTY LTD AS TRUSTEE FOR THE ROBSON FAMILY TRUST
TRADING AS ROBSON BROTHERS 4WD SERVICE AND REPAIRS

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 20 MARCH 2014

FILE NO/S B 162 OF 2008

CITATION NO. 2014 WAIRC 00213

Result Order issued; Counterclaim dismissed

Representation

Applicant In person

Respondent Mr R Gifford (as agent)

Order

HAVING HEARD the applicant on his own behalf and Mr R Gifford as agent on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS that the name of the respondent be deleted and that The Robson Group Pty Ltd as trustee for the Robson Family Trust Trading as Robson Brothers 4WD Service and Repairs be substituted in lieu thereof.
2. DECLARES that the respondent denied the applicant benefits under his contract of employment.
3. ORDERS that the respondent pay the applicant \$7,828.69 gross, less applicable taxation, within 21 days of the date of this order.
4. ORDERS that the respondent's counterclaim be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2014 WAIRC 00242

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2014 WAIRC 00242
CORAM : COMMISSIONER J L HARRISON
HEARD : TUESDAY, 21 JANUARY 2014
DELIVERED : FRIDAY, 28 MARCH 2014
FILE NO. : U 128 OF 2013
BETWEEN : BRIANNA HICKS
 Applicant
 AND
 RUSSELL DUNCAN, RUST HAIR CARE
 Respondent

Catchwords : Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles applied - Commission satisfied applying principles that discretion should not be exercised - Acceptance of referral out of time not granted - Application dismissed

Legislation : *Industrial Relations Act 1979* s 26(1)(a), s 27(1), s 29(1)(b)(i), s 29(2) and s 29(3)

Result : Dismissed

Representation:

Applicant : In person

Respondent : Mr R Duncan

Case(s) referred to in reasons:

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

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

Byrne v Australian Airlines (1995) 61 IR 32

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

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

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

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

Shire of Esperance v Mouritz (1991) 71 WAIG 891

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

Reasons for Decision

- 1 Brianna Hicks (the applicant) claims that she was unfairly dismissed by Russell Duncan Rust Hair Care (the respondent) on 25 February 2013. The respondent disputes that the applicant was unfairly dismissed. The Commission heard evidence and submissions from the parties as to whether time should be extended to accept this application and whether the applicant was unfairly terminated.

Name of the respondent

- 2 During the proceedings it became apparent that the respondent had been incorrectly named. Given the Commission's powers under s 27(1) of the Act and having formed the view that it is appropriate for the respondent to be correctly named, I will issue an order that Russell Duncan Rust Hair Care be deleted as the named respondent in this application and be substituted with R & B Duncan trading as Rust Hair Care (see *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* [1991] 173 CLR 231).

Background

- 3 The applicant is a qualified hairdresser. She commenced employment with the respondent on a part time basis in June 2007 and she was working 38 hours per week when she was terminated. The applicant was terminated by Mr Russell Duncan by telephone on 25 February 2013. During this brief conversation Mr Duncan told her that she was terminated, she would not be paid notice and she was not to return to work. In the two week period prior to this date the applicant was managing the respondent's salon as Mr Duncan was on leave and she worked with another employee, a mature age apprentice, Ms Sarah McPherson. When Mr Duncan returned from leave on 24 February 2013 he received a text message from Ms McPherson stating that her doctor had given her one week's sick leave for the following week. When he spoke to her about this leave he claimed she told him that she required the leave due to stress caused by the applicant when he was away. This included the applicant opening up the salon late on several occasions, the applicant wanting Ms McPherson to have a key cut to open the salon and Ms McPherson being required to block out half an hour so that both of them could mop the floor on Saturday 23 February 2013.

Evidence**Applicant**

- 4 The applicant gave evidence that throughout her employment with the respondent she was not given any warnings about her conduct or behaviour.
- 5 The applicant went out on the evening of Friday 8 February 2013 and she was assaulted. Many months later a woman was found guilty of this assault. As the applicant suffered concussion and an eye injury during this assault she sent a text to Ms McPherson to tell her what had happened. Even though she was not feeling well she went to work the following day and undertook her normal duties. At lunchtime she left the salon to visit the police station to discuss the assault and after work that day she returned to the police station to give a statement about the assault.
- 6 The applicant gave evidence about issues raised about her conduct by Mr Duncan after she was terminated. The applicant stated that she could not recall refusing to book in a regular client Mrs Gerard for an appointment on 23 February 2013 and she said that she did not take the telephone call from her when she rang to make an appointment. She was a regular client and she would have fitted her in if she spoke to her. She was not late opening the salon during Mr Duncan's absence and she could not recall asking Ms McPherson to have a key cut to open the salon. The applicant disputed that Ms McPherson had to take one week of sick leave due to her conduct. Ms McPherson told the applicant before Mr Duncan went on leave that she would possibly be taking this leave due to suffering stress related to dealing with child care issues given the hours she was required to work in the salon and Ms McPherson confirmed this when she rang the applicant the day after she was terminated. Cleaning the salon was fairly shared between the applicant and Ms McPherson during Mr Duncan's absence and the applicant claimed Ms McPherson blocked half an hour out on the respondent's booking sheet for cleaning on 23 February 2013, after completing the cleaning, as nothing else was booked in for this time.
- 7 The applicant stated that when Mr Duncan terminated her on 25 February 2013 their conversation went for approximately two minutes. He told her she was unemployed as of that moment and when she asked why he told her that a few things had happened and he mentioned he had seen things about her on Facebook which concerned him. The applicant visited the salon the following day with her mother to collect personal items and asked Mr Duncan why she had been terminated. Mr Duncan again told her that she had put some items on Facebook and he mentioned the applicant not helping to mop up the salon. The applicant said that at the time she was not given any opportunity to discuss the reasons for her termination.
- 8 The applicant understood that because she was involved with the assault which occurred on 8 February 2013 and she left the salon to lodge a complaint with police during work time this contributed to her termination. The applicant also believed that the court case to deal with the assault had to be finalised before she could contest her termination. When her mother told her that she should make her application claiming unfair dismissal in early August 2013 she lodged this application on 14 August 2013.
- 9 After the applicant was terminated she was unemployed for approximately four weeks. She looked for work in other salons and in a clothing shop and she eventually found employment working part time as a barmaid for two weeks. In the second week of May 2013 she started working in another salon but in June 2013 she had a car accident and had two months off work. After this accident the applicant then commenced full time employment as a hairdresser in the second week of September 2013. She had another accident and has not worked since December 2013.
- 10 Under cross-examination the applicant stated that she visited the Department of Commerce after she was terminated and she discussed her options with respect to her dismissal but she was not given any information about time limits for lodging a claim for unfair dismissal. The applicant denied that she asked Ms McPherson to have a key cut so that she could open the salon if

she was late for work and the applicant stated that no record was kept of the details of a client who attended the salon on 23 February 2013 because she was passing through Kalgoorlie. The applicant also recalled recording the money this client paid in the respondent's computer.

Respondent

- 11 Mr Duncan contacted Ms McPherson on 25 February 2013 when he received a text from her about taking a week of sick leave. Ms McPherson told him that when he was on leave she received texts from the applicant asking Ms McPherson to remind her to attend work a couple of times. Ms McPherson had to book a time for cleaning on 23 February 2013 as the applicant was not helping to clean up the salon and the applicant was spending work time on Facebook. Ms McPherson told him the applicant asked her to have a key cut to open the salon and the applicant was fighting with her boyfriend and she left the salon to talk to him. The applicant was late opening the salon a couple of times but she did not tell him when this happened. Ms McPherson told him that she did not think she could work with the applicant any longer and this was the reason for taking sick leave. However, after she returned from sick leave she told Mr Duncan that the reason for taking sick leave was because of vertigo.
- 12 Before terminating the applicant Mr Duncan contacted the Department of Commerce and he was told that the applicant's behaviour constituted misconduct and he had the right to terminate her without giving the four weeks' notice due to her. Mr Duncan rang the applicant on 25 February 2013 and he told her she was terminated. When she asked why he mentioned not allowing Mrs Gerard to make an appointment on Saturday 23 February 2013 and blocking out time to mop the floor that day. Mr Duncan confirmed that his conversation with the applicant was not lengthy. Mr Duncan stated that he did not investigate or verify the substance of the issues he relied on to terminate the applicant.
- 13 Mr Duncan stated that he was told by one of the persons he was travelling with when on leave that the applicant had put a message on Facebook that 'she was extremely hung over' (ts27). Mr Duncan was aware that Ms McPherson had childcare issues and that the hours she was required to work at the salon to complete her apprenticeship presented issues for her. Under cross-examination Mr Duncan confirmed that he had no evidence to support his claim that the applicant took time off from work to speak to her boyfriend and he stated that he did not see the applicant's Facebook entry that referred to her being 'hung over'.
- 14 Mr Duncan believed that the applicant was aware of the 28 day timeframe for lodging this application given a conversation he had with the Department of Commerce.

Submissions

Applicant

- 15 The applicant claimed that she did not lodge this application until August 2013 because she believed the case where she was assaulted had to be settled before this claim could be progressed. The applicant said that she would be disadvantaged if this application is not accepted as she had a lengthy and successful period of employment with the respondent, there was no basis for her termination and she wanted to clear her name. Her termination has had long term ramifications for her ongoing employment in hairdressing and the respondent had no proof confirming the substance of the allegations it relied on to terminate her.

Respondent

- 16 The respondent submits that the delay in lodging this claim has been lengthy and the applicant was aware of the timeframe for lodging this application. The respondent submits that as he had good reason to terminate the applicant's employment for misconduct her dismissal was not unfair. The applicant had access to legal advice after her termination as she was involved in the assault case and the first time the respondent was aware that the applicant was contesting her termination was when it received this application on or about 22 August 2013.

Considerations

Should time be extended to accept this application?

- 17 This application was received in the Commission on 14 August 2013. The applicant was terminated on 25 February 2013 so this application is 142 days outside of the required timeframe.
- 18 Section 29(2) of the Act requires that applications pursuant to s 29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated.
- 19 Section 29(3) of the Act reads as follows:
 - (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.
- 20 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the factors outlined in the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 (*Malik*) as follows:
 1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.

5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion [26].'
- 21 When considering the issue of fairness, Heenan J also observed the following in *Malik*:
- I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims [74].
- 22 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.
 - 23 In my view the applicant has not demonstrated that she had an acceptable reason for the extremely lengthy delay of 142 days in lodging this application. Whilst the applicant may have had a genuine belief that she could not lodge this application until the court proceedings related to her assault on 8 February 2013 were finalised she gave no basis for reaching this conclusion. There was also no evidence that Mr Duncan was aware that she had visited the police station on 9 February 2013 during work time and there was no evidence that this issue was relevant to her termination. She had contact with the Department of Commerce about her termination and she sought legal advice about other matters which were opportunities for her to seek feedback about how she could contest her termination.
 - 24 I have had the benefit of hearing all of the evidence with respect to the applicant's claim that she was unfairly terminated and determined that the applicant was unfairly dismissed. I therefore find that when considering the issue of merit as a factor to extend time to file this application there is sufficient evidence to establish that the applicant has an arguable case that she was unfairly dismissed.
 - 25 I find that the prejudice suffered by the respondent would be greater than that suffered by the applicant if this application is accepted. Even though the applicant would not have the opportunity to prosecute her claim, which has some merit, and no specific disadvantage was highlighted by the respondent in meeting this application because of the delay in lodging it I find that it is unfair for an employer to meet a claim alleging unfair termination approximately six months after the employee was terminated particularly when the reason for doing so lacked substance. It was also the case that the respondent was unaware that the applicant would be contesting her termination prior to receiving this application six months after her termination.
 - 26 When taking into account the above findings and the relevant factors to consider with respect to an application of this nature and the issue of fairness to both parties, I find that it would be unfair for the Commission to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application is not granted.
- Was the applicant unfairly dismissed?
- 27 The applicant claims that she was unfairly dismissed and that she did not misconduct herself at all or in any manner sufficient to warrant termination.
 - 28 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (see *Shire of Esperance v Mouritz* (1991) 71 WAIG 891 and *Byrne v Australian Airlines* (1995) 61 IR 32). In *Shire of Esperance v Mouritz*, Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.
 - 29 There was no dispute and I find that on the day the applicant was terminated she was required to cease her employment that day and she was not given any payment in lieu of notice at the time. As the dismissal was summary the onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677, 679). The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree (*Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813, 919). In most cases the employee should be given an opportunity to defend allegations made against them.
 - 30 In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224, 229 the Full Bench of the South Australian Commission stated that the following factors were relevant when dealing with a summary dismissal. The employer will satisfy the evidentiary onus on it to demonstrate that before dismissing the employee it conducted a full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances. The employer must also give the employee every reasonable opportunity and sufficient time to answer all allegations. If the employer then believes and has reasonable grounds for deciding that the employee was guilty of the misconduct alleged and after taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, it may decide whether such misconduct justifies dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

- 31 On the facts as I find them I am satisfied, at least on balance that the respondent has not demonstrated that the applicant was guilty of gross misconduct justifying summary dismissal or dismissal on notice. Further, I am satisfied that the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself with respect to the reasons relied upon by the respondent to effect her termination. She was not afforded 'a fair go all round' (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*).
- 32 In my view the applicant gave her evidence in a clear and considered manner and I find that she gave her evidence honestly and to the best of her recollection. I therefore accept her evidence.
- 33 I find that the respondent has not demonstrated that the applicant misconducted herself with respect to the issues it relied on to terminate the applicant. I also find that the respondent did not conduct an investigation into these incidents and I find that the applicant was denied procedural fairness given the manner of her termination.
- 34 The applicant gave evidence denying that she inappropriately used her Facebook account or that her use of Facebook interfered with her work during the period Mr Duncan was absent and there was no evidence confirming the substance of these inappropriate entries. No evidence was presented during the hearing in support of the respondent's claim that she spent time using Facebook or talking to her boyfriend when she should have been working. I am unable to conclude that the applicant's actions caused Ms McPherson to take one week of sick leave. Mr Duncan conceded that Ms McPherson took sick leave due to vertigo and the applicant gave evidence that Ms McPherson told her she was stressed about the hours she had to work interfering with her child care commitments. Ms McPherson blocked out time to undertake cleaning on Saturday 23 February 2013 but there was no evidence that this was at the applicant's initiative or that it was blocked out to ensure the applicant undertook cleaning duties at the salon. The applicant gave evidence, which I accept, that she undertook cleaning duties at the salon as normal, she did not ask Ms McPherson to have a key cut to open the salon, she did not send a text/s to Ms McPherson to remind the applicant to attend work, she did not open the salon late during Mr Duncan's absence and she did not refuse a request by a regular customer for an appointment. In the circumstances I find that the respondent has not demonstrated that the applicant committed misconduct sufficient to warrant summary termination or termination on notice.
- 35 I have concerns about the process adopted by the respondent when effecting the applicant's termination. The applicant was unaware of the details of the issues the respondent relied upon to effect her termination and the applicant therefore had no opportunity to respond to the respondent's claims or contest her termination. Mr Duncan also conceded that he did not investigate whether the issues he relied on to terminate the applicant had substance. In my view this contributed to the applicant being unfairly terminated.
- 36 As I have found that it would be unfair for the Commission to exercise its discretion to grant an extension of time within which to file this application an order will issue dismissing this application.

2014 WAIRC 00277

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRIANNA HICKS

APPLICANT

-v-

R & B DUNCAN TRADING AS RUST HAIR CARE

RESPONDENT**CORAM**

COMMISSIONER J L HARRISON

DATE

FRIDAY, 4 APRIL 2014

FILE NO/S

U 128 OF 2013

CITATION NO.

2014 WAIRC 00277

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr R Duncan

Order

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

1. THAT the name of the respondent be deleted and that R & B Duncan trading as Rust Hair Care be substituted in lieu thereof.
2. THAT the application otherwise be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2014 WAIRC 00058

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TREVOR DAVID HOFFMAN	APPLICANT
	-v-	
	PERTH MOBILE GP SERVICES LTD ACN 129 336 803	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 3 FEBRUARY 2014	
FILE NO/S	U 93 OF 2012, B 93 OF 2012	
CITATION NO.	2014 WAIRC 00058	
Result	Application dismissed	

Order

WHEREAS these are applications pursuant to section 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on Thursday the 28th day of November 2013 and Friday the 31st day of January 2014 the Commission convened conferences between the parties for the purpose of conciliation; and
 WHEREAS during the course of the latter conference the parties reached agreement on the terms for resolution of the applications and agreed that the Commission issue declarations and orders setting out the terms of that agreement;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and by consent, hereby:

Declares:

1. THAT the respondent's dismissal of the applicant on 19 April 2012 was harsh, oppressive and unfair in the circumstances of the dismissal.
2. THAT there be no award of reinstatement or compensation.

Orders:

1. THAT the respondent, Perth Mobile GP Services Ltd, establish a Medical Advisory Committee (Committee):
 - (a) Within 14 days of the date of this Order, the respondent will write to the Australian Medical Association and the Chief Medical Officer inviting their participating in the Committee, and nominating a date for the first meeting to be within 3 months of the date of this Order.
 - (b) The Committee:
 - (i) Will be made up of a nominee of each of the Australian Medical Association, the Chief Medical Officer and the respondent, subject to the Australian Medical Association and the Chief Medical Officer agreeing to participate in the Committee;
 - (ii) Will have as its sole purpose the task of reviewing and advising the respondent on the respondent's policy relating to prescribing drugs of dependency;
 - (iii) Will meet no more than twice per year, subject to the availability of its members, on dates to be agreed by the Committee;
 - (iv) Will determine who is to be the Chairman of the Committee;
 - (v) Will operate for a period of three years subject to either the Australian Medical Association or the Chief Medical Officer withdrawing or giving notice of intention to withdraw;
 - (vi) May co-opt any person or seek expert advice on any matter relating to its purpose;
 - (vii) Will prepare minutes of its meetings and provide those, together with any recommendations, to the Board of the respondent following each meeting.
2. THAT the respondent pay to the applicant the amount of \$2,400 gross, less tax, in respect of the claim for denied contractual benefits, within 21 days of the date of this Order.
3. THAT the respondent pay to the applicant the amount of \$500 towards costs and disbursements within 21 days of the date of this Order.
4. THAT the applications be otherwise dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00208

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2014 WAIRC 00208
CORAM : COMMISSIONER S M MAYMAN
HEARD : FRIDAY, 6 DECEMBER 2013, MONDAY, 25 NOVEMBER 2013
DELIVERED : MONDAY, 17 MARCH 2014
FILE NO. : U 99 OF 2013
BETWEEN : LIAM CHRISTOPHER PORTER
 Applicant
 AND
 MR CESARE VIOLANTI AND MRS SOMSI VIOLANTI TRADING AS KWINANA
 PIZZA
 Respondent

CatchWords : Industrial Law
Legislation : Industrial Relations Act, 1979 (WA)
Result : Order issued
Representation:
Applicant : Ms S Porter (as agent)
Respondent : No submission

Supplementary Reasons for Decision

1 The reasons for decision issued in the aforementioned matter on Friday, 7 March 2014 together with an Order. That Order did not include the time the respondent had in which to make the payment. On that issue the Commission sought further submissions from Liam Christopher Porter (the applicant) and Mr Cesare Violanti and Mrs Soms Violanti trading as Kwinana Pizza (the respondent) on:

- **the number of days required for the respondent to make payment to the applicant on U 99/2013.**

Applicant

2 Ms Porter submitted on behalf of the applicant that the respondent should be given 10 days from the day the order issues to make good the payment. It was submitted that 10 working days is a fair and reasonable amount of time. The respondent has stated many times that he has sold his business including a statement under oath during the hearing of the application. The applicant is concerned that if the respondent is given too great a length of time to pay that he may avoid paying the applicant altogether. The respondent has informed the applicant a number of times that he plans to travel to Thailand upon the sale of his business. It was submitted by the applicant that the business undertakings of the respondent are some several thousand dollars a week so the respondent should have the funds available.

3 Ms Porter in the submission of the applicant requested the money be paid into the bank account of the applicant.

Respondent

4 No response was received from the respondent. The Commission's Associate made a telephone call to the office of Mountain Lawyers on Monday, 17 March 2014, some two working days after submissions were due.

Conclusion

5 Having considered the submission of the applicant and having regard for fairness, equity and the substantial merits of the case the Commission has taken into consideration that some 10 days has already lapsed since the reasons for decision issued and six days since the order issued. Therefore the Commission is of the view that the respondent should be given seven working days from the day the minute issues in the form of an order to make good the payment.

2014 WAIRC 00214

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 : THURSDAY, 20 MARCH 2014
FILE NO/S : U 99 OF 2013
CITATION NO. : 2014 WAIRC 00214

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 receiving no submission 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 respondent pay compensation as ordered to Liam Christopher Porter (the applicant) the sum of \$5,400 gross within seven working days from the date the Order issues.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00255

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00255
CORAM	:	COMMISSIONER J L HARRISON
HEARD	:	THURSDAY, 30 JANUARY 2014
DELIVERED	:	WEDNESDAY, 2 APRIL 2014
FILE NO.	:	U 154 OF 2013
BETWEEN	:	NICOLA JAYNE TE AMO
		Applicant
		AND
		SONNY MANAGER
		ZAPPA'S LUNCH BAR & CATERING SERVICE
		Respondent

Catchwords	:	Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Whether applicant a casual employee - Applicant was not a casual employee - Respondent had good reason to terminate applicant - Termination on notice fair - Order issued
Legislation	:	<i>Industrial Relations Act 1979</i> s 27(1) and s 29(1)(b)(i)
Result	:	Order issued
Representation:		
Applicant	:	In person
Respondent	:	Mr Q Phung

Case(s) referred to in reasons:

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

Byrne v Australian Airlines (1995) 61 IR 32

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Serco (Australia) Pty Limited v Moreno (1996) 76 WAIG 937

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Tarozzi v WA Italian Club (Inc) (1991) 71 WAIG 2499

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

Reasons for Decision

- 1 Nicola Jayne Te Amo (the applicant) claims that she was unfairly dismissed by Sonny, Manager Zappa's Lunch Bar & Catering Service (the respondent) on 4 September 2013. The respondent disputes that the applicant was unfairly dismissed.

Name of the respondent

- 2 During the proceedings it became apparent that the respondent had been incorrectly named. Given the Commission's powers under s 27(1) of *Industrial Relations Act 1979* (the Act) and having formed the view that it is appropriate for the respondent to be correctly named, I will issue an order that Sonny Manager Zappa's Lunch Bar & Catering Service be deleted as the named respondent in this application and be substituted with Zappa's Lunch Bar (see *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* [1991] 173 CLR 231).

Background

- 3 The applicant commenced employment with the respondent on 25 February 2013 as a lunch truck delivery driver. The respondent operates a lunch bar, it undertakes catering services and delivers food to sites and clients. The applicant was terminated by text message on 4 September 2013 and no notice was given or paid to the applicant when she was terminated. The applicant worked 37.5 hours per week from 6.30 am to 2.00 pm each day and was paid \$20.00 per hour. The respondent regarded the applicant as a casual employee and paid her on this basis. The applicant was terminated because she frequently missed work which caused difficulties for the respondent. The respondent's owner Mr Phung was the only other person who could drive the respondent's lunch truck and he had other duties to perform for the respondent. The applicant always notified Mr Phung of an impending absence by phone or text message and Mr Phung did not require the applicant to produce medical certificates when she did not work due to illness.
- 4 Following is a summary of days the applicant did not work during her employment with the respondent (see Exhibits R1 and R2).

Weeks worked	-	26 weeks and 2 days																						
Days off due to illness	-	7 days*																						
*the applicant worked one hour on one of these days																								
Other days off (including attendance at funerals and dentist)	-	<table border="1"> <thead> <tr> <th>Date</th> <th>Hours not worked</th> </tr> </thead> <tbody> <tr><td>15/04/13</td><td>4</td></tr> <tr><td>26/04/13</td><td>7.5</td></tr> <tr><td>29/04/13</td><td>3.5</td></tr> <tr><td>28/05/13</td><td>5.5</td></tr> <tr><td>30/05/13</td><td>3.5</td></tr> <tr><td>21/06/13</td><td>7.5</td></tr> <tr><td>29/07/13</td><td>2</td></tr> <tr><td>13/08/13</td><td>3</td></tr> <tr><td>28/08/13</td><td>7.5</td></tr> <tr><td>03/09/13</td><td>3.5</td></tr> </tbody> </table>	Date	Hours not worked	15/04/13	4	26/04/13	7.5	29/04/13	3.5	28/05/13	5.5	30/05/13	3.5	21/06/13	7.5	29/07/13	2	13/08/13	3	28/08/13	7.5	03/09/13	3.5
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Total hours not worked (equates to 6 days and 2.5 hours)		47.5 hours																						
Total: 13 days off + 1.5 hours																								
Public Holidays not worked	-	5 days																						

Evidence**Applicant**

- 5 The applicant conceded that Mr Phung's summaries of the days she had off during the period she was employed by the respondent were correct (see Exhibits R1 and R2). The applicant was absent from work on some occasions because she was unwell and sometimes she went to see her doctor and was given documentation confirming these consultations. The applicant had difficulties with her teeth and as a result she had to attend a number of dental appointments. On one or two occasions she attended a funeral.
- 6 The applicant claimed that even though she was heavily medicated at times because of medical treatment she was receiving she still continued to work. On some days she could only work part of the day but she tried hard to attend work as often as possible. The applicant maintained that she was not warned that her job was at risk because of her absences.
- 7 The applicant gave evidence that the day before she was terminated she went home early because she was unwell and she told Mr Phung that she may not come to work the following day. She was aware that Mr Phung had a catering contract which needed to be completed and he needed her to attend the next day but she was too sick to go to work. After she told Mr Phung by text message that she would not be at work the following day he sent a text message in response terminating her (Exhibit A1).
- 8 After the applicant was terminated she assiduously looked for other work and on 13 November 2013 she obtained casual work at a café working 20 to 30 hours a week. The applicant left this position because she has relocated her home to a different suburb.

Respondent

- 9 Mr Phung stated that he had a good relationship with the applicant when she was at work and she was a good worker but his business could not function or operate effectively without someone completing the lunch truck deliveries. Mr Phung gave evidence that towards the end of July 2013 he spoke to the applicant and told her of his concern about her regular absences from work and he told the applicant that if she continued to take days off due to being sick he would not keep her job open for her.

SubmissionsApplicant

- 10 The applicant submitted that during the conversation she had with Mr Phung at the end of July 2013 he did not warn her that her job was in jeopardy but he did tell her she could not keep having days off. The applicant maintained that the days she had off were because of genuine illness or she had good reason to have the time off. Mr Phung took issue with the applicant being unwell on the day before she was terminated because he believed the applicant left early to pick up her partner at the airport but this was incorrect. The applicant maintained that she tried very hard to work as many hours as she could for the respondent and the respondent had coped when she took leave for a week early on in her employment. The applicant loved her job and she wanted to continue working with the respondent.

Respondent

- 11 The respondent is a small business and the applicant was required to make lunch deliveries to site and when the applicant did not turn up to work Mr Phung had to drive the truck. As a result he could not undertake other duties including food preparation, catering and liaising with clients. Mr Phung said it was stressful when the applicant was not at work and her frequent absences were having a negative impact on him and his other two employees. The applicant was given opportunities to address the situation of her frequent absences but she failed to do so and it was a difficult decision to terminate the applicant but it had to be taken.

ConsiderationWitness Credit

- 12 In my view the applicant and Mr Phung gave their evidence in a clear and considered manner and I find that they gave their evidence honestly and to the best of their recollection. Even though there was one minor inconsistency in the evidence about whether the applicant was warned about her ongoing absences in July 2013 I accept their evidence.

Was the applicant a casual employee who could be terminated without notice?

- 13 In *Serco (Australia) Pty Limited v Moreno* (1996) 76 WAIG 937 Sharkey P observed the following in relation to the nature of casual employment:

‘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.’

(See *Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World* (op cit) at page 1835 per Fielding C and *Stewart v Port Noarlunga Hotel Ltd* (1980) 47 SAIR 406 at 420).

The parties, of course, cannot by use of a label render the nature of a contractual relationship something different to what it is (see *Stewart v Port Noarlunga Hotel Ltd* (op cit) per Haese DPP at pages 5-6).

Certain indicia may be indicative of the nature of the contract, but they are not determinative, taken alone. These may include the classifying name given to a worker and initially accepted by the parties, the provisions of the relevant award, the reasonable expectation that work would be available to him, the number of hours worked per week, whether his employment was regular, whether the employee worked in accordance with a roster published in advance, whether there was reasonable mutual expectation of continuity of employment, whether the notice is required by an employee prior to the employee being absent on leave, whether the employer reasonably expected that work would be available, whether the employee had a consistent starting time and set finishing time, and there may be other indicia (939).

- 14 When applying the relevant legal principals I find that the applicant was not a casual employee. The applicant was required to work each day, she had an ongoing expectation of work with a set start and finish time and her roster did not change. Furthermore the applicant was terminated because she took time off which is not indicative of a true casual relationship. Even though it appears both parties accepted that the applicant was paid a casual rate of pay and that she was employed on a casual basis this cannot make her a casual employee.

Was the applicant unfairly dismissed?

- 15 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (see *Shire of Esperance v Mouritz* (1991) 71 WAIG 891 and *Byrne v Australian Airlines* (1995) 61 IR 32). In *Shire of Esperance v Mouritz*, Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

- 16 I find that the applicant's frequent absences from work had a negative impact on the respondent's operations. The uncontested evidence before the Commission confirmed that the applicant was absent on average for half a day each week during her employment with the respondent due to illness, medical, dental and personal commitments. As a result, I accept that it was very difficult for the respondent to continue to conduct its business in a productive and cost effective manner whilst the applicant remained employed by the respondent. Furthermore, the applicant had documentation confirming that she sought medical and/or dental treatment on only four of the occasions when she was absent from work.
- 17 It was not in contest that at the end of July 2013 Mr Phung indicated to the applicant that he was concerned about her frequent absences and he told her about the problems this caused the respondent and that her absences were negatively impacting on the respondent's operations. The applicant was therefore on notice that her frequent absences were a concern to the respondent. Given the applicant's regular non-attendance at work and the negative impact this had on the respondent's operations and the fact that the applicant was on notice that this was a concern for the respondent I find that in all of the circumstances the respondent had good reason to terminate the applicant, however she should have been given notice of her termination. To that extent I find that the applicant was unfairly dismissed. In reaching this conclusion I have also taken into account the duty on the Commission to have regard to equity, good conscience and substantial merit.
- 18 It was not in dispute that the applicant was not given any notice of her termination, nor was she paid notice as both the respondent and the applicant incorrectly believed that the applicant was a casual employee not subject to any period of notice. When taking into account the criteria set out in *Tarozzi v WA Italian Club (Inc)* (1991) 71 WAIG 2499 I assess reasonable notice which should have been given to the applicant by the respondent at termination to be a period of one week. I have reached this conclusion taking into account the applicant's length of service with the respondent, which was not long, the applicant's age and the fact that the applicant was a valued employee when she attended work.
- 19 The applicant was paid \$750 gross per week (37.5 hours x \$20 per hour). An order will issue that the applicant be paid \$750 gross, less applicable taxation, as compensation for her unfair dismissal.

2014 WAIRC 00280

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NICOLA JAYNE TE AMO

APPLICANT

-v-

ZAPPA'S LUNCH BAR

RESPONDENT**CORAM**

COMMISSIONER J L HARRISON

DATE

MONDAY, 7 APRIL 2014

FILE NO/S

U 154 OF 2013

CITATION NO.

2014 WAIRC 00280

Result Order issued**Representation****Applicant** In person**Respondent** Mr Q Phung*Order*

HAVING HEARD the applicant on her own behalf and Mr Q Phung on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby –

1. ORDERS THAT the name of the respondent be deleted and that Zappa's Lunch Bar be substituted in lieu thereof.
2. DECLARES THAT the dismissal of the applicant was unfair.
3. ORDERS THAT the respondent pay the applicant \$750 gross, less applicable taxation, within 21 days of the date of this order.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2014 WAIRC 00241

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION OLGA TROCHTOVA	APPLICANT
	-v- CENTRAL INSTITUTE OF TECHNOLOGY - NORTHBRIDGE ESL PORTFOLIO	
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	RESPONDENT
DATE	FRIDAY, 28 MARCH 2014	
FILE NO/S	U 76 OF 2013	
CITATION NO.	2014 WAIRC 00241	

Result	Application dismissed
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Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS by a Notice of Hearing dated the 12th day of March 2014, the Commission advised that a hearing would be convened on the 28th day of March 2014 at 9.15 am for mention; and
 WHEREAS at the hearing on the 28th day of March 2014 there was no appearance for or by the applicant; and
 WHEREAS the Commission took account of the history of the application and other matters and decided to dismiss 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.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00284

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JACOBUS ARNOLDUS VAN EEDEN	APPLICANT
	-v- CATHOLIC AGRICULTURAL COLLEGE BINDOON	
CORAM	COMMISSIONER J L HARRISON	RESPONDENT
DATE	MONDAY, 7 APRIL 2014	
FILE NO/S	U 3 OF 2014	
CITATION NO.	2014 WAIRC 00284	

Result	Discontinued
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Representation

Applicant	Mr S Edwards (as agent)
Respondent	Mr G Atkins (of counsel)

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act).

On 5 February 2014, and with the consent of the respondent, the Commission convened a conference for the purpose of conciliating between the parties, however no agreement was reached.

The Commission wrote to the parties on 6 March 2014 requesting dates to list the matter for hearing and determination.

On 13 March 2014 the applicant filed a Notice of Withdrawal or Discontinuance form in respect of the application and the respondent consented 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

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

CONFERENCES—Matters arising out of—

2012 WAIRC 00175

DISPUTE RE ALLEGED BREACH OF CLAUSE 15.1 OF THE ENTERPRISE ORDER BY RESPONDENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

FRIDAY, 30 MARCH 2012

FILE NO/S

C 13 OF 2012

CITATION NO.

2012 WAIRC 00175

Result Application discontinued

Representation

Applicant Mr N Paterson

Respondent Ms J Allen-Rana

Order

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

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

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 delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 37/2013	18/10/2013	Dispute re employment issues	Discontinued
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority of Western Australia	Kenner C	C 223/2013	18/10/2013	Dispute re alleged unfair dismissal	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers Western Australian Branch	Combined Metal Industries ABN: 185 102 32 767	Mayman C	C 5/2014	28/02/2014	Dispute re termination of employment	Discontinued
United Voice WA	The Director General Disability Services Commission	Harrison C	C 227/2013	14/10/2013 17/10/2013	Dispute re negotiations for industrial agreement	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00205

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SHIRLEY LORRAINE GRIFFIN

PARTIES

APPLICANT

-v-

ROBERT ROBSON

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE MONDAY, 17 MARCH 2014

FILE NO/S B 163 OF 2008

CITATION NO. 2014 WAIRC 00205

Result	Adjournment granted
Representation	
Applicant	No appearance
Respondent	Mr R Gifford (as agent)

Order

This is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.

On 20 December 2013 this application was set down for hearing on 14 March 2014.

On the evening of 12 March 2014 the applicant requested an adjournment of the hearing due to illness. On 13 March 2014 the applicant provided a medical certificate in support of this request indicating that she had laryngitis.

After the respondent informed the Commission on 13 March 2014 that it opposed an adjournment of the hearing, the parties were advised that the Commission would hear further from the parties about the applicant's request to adjourn at the commencement of the hearing on 14 March 2014. The parties were also advised that if the applicant did not attend the hearing the Commission would decide whether to adjourn the hearing on the information already submitted by her.

On the afternoon of 13 March 2014 the applicant provided clarification about her medical certificate and indicated she would not attend the hearing.

At the hearing on 14 March 2014 the respondent continued to oppose the adjournment of the hearing and advised the Commission that a major concern is that its main witness is going overseas for an indefinite period on 10 April 2014.

After considering the respondent's submissions and when taking into account the applicant's inability to conduct her case and give evidence due to laryngitis the Commission is of the view that an adjournment of the hearing set down on 14 March 2014 should be granted. In reaching this conclusion the Commission is of the view that the injustice to the applicant is greater than the injustice to the respondent if an adjournment is not granted as the applicant is unable to prosecute or defend her case (see *Myers v Myers* [1969] WAR 19).

Given the extensive delay in having this application listed for hearing the Commission will relist this matter at a date to be fixed but prior to 10 April 2014 given the unavailability of the respondent's main witness after that date.

If the applicant seeks a further adjournment of this application, direct evidence from a medical practitioner or other relevant person will be required with respect to that application.

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

THAT the hearing scheduled for 14 March 2014 is adjourned to a date to be fixed, but prior to 10 April 2014.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00285

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TROY PATRICK FRANSE

APPLICANT

-v-

ALFRESCO CONCEPTS PTY LTD

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

MONDAY, 7 APRIL 2014

FILE NO/S

B 166 OF 2013

CITATION NO.

2014 WAIRC 00285

Result Order issued

Order

HAVING heard Mr P Mullally as agent for the applicant and Mr G Jahn of counsel for the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the respondent provide discovery of its financial records sufficient to establish the gross sales revenue and turnover of its business operation for the period 4 July 2011 to 11 February 2013 at the offices of the respondent's solicitors on or before the 12th day of May 2014.
2. THAT there be liberty to apply.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2010 WAIRC 00449

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPLICANT

-v-

THE MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

WEDNESDAY, 14 JULY 2010

FILE NO.

C 24 OF 2010

CITATION NO.

2010 WAIRC 00449

Result Recommendation issued

Representation

Applicant Mr J Walker

Respondent Mr P Budd

Recommendation

WHEREAS the applicant on 14 June 2010 made an application to the Commission for a compulsory conference pursuant to s 44 of the *Industrial Relations Act 1979* ('the Act');

AND WHEREAS on 14 July 2010 a compulsory conference was convened by the Commission at which the Commission was informed that the parties were in dispute in relation to staffing levels at the Wooroloo Prison Farm in relation to an increase in the prison muster from 250 to 360 prisoners;

AND WHEREAS the Commission was informed that the respondent proposes an increase of 44 full-time equivalent staff members to cater for the increase in prison muster to 360 prisoners, with these positions being allocated across a number of areas including administration, accommodation units, security, prosecutions, VSOs and others;

AND WHEREAS as a part of the proposed staffing changes, it is intended to provide an additional nine VSO positions to provide employment for the majority of the additional prisoner population with the effect of relieving the security burden on officers manning the accommodation units;

AND WHEREAS it is accepted by both parties that a period of time will be required to enable the recruitment of additional VSO positions to take place and work programmes to be implemented;

AND WHEREAS the respondent proposed to maintain the existing peak muster prison officer unit staffing pending the recruitment of the additional VSO positions and the establishment of new industries with the issue arising as to whether the accepted peak muster unit staffing presently is two or three prison officers with the applicant maintaining the latter and the respondent the former;

AND WHEREAS the concept of a trial period for the implementation of new staffing arrangements was discussed in the conference as proposed by the Commission as a compromise interim proposal;

AND WHEREAS the respondent informed the Commission that the funding arrangements in place for staffing at the prison means that any additional peak muster officer deployment beyond two for the accommodation units will, on the overall staffing proposal, mean a reduction in staffing elsewhere;

AND WHEREAS the Commission informed the parties that it would make a recommendation in relation to the issues in dispute in an endeavour to assist the resolution of the matters before the Commission on an interim basis;

NOW THEREFORE the Commission pursuant to the powers conferred upon it by s 44 of the Act hereby recommends –

- (1) THAT on an interim basis for a trial period of six months or such further period as may be agreed between the parties the respondent's interim staffing proposal involving the maintenance of two peak muster accommodation unit officers be adopted pending the recruitment of additional VSO positions and the establishment of new industries for prisoner work programmes.
- (2) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00278

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 4 APRIL 2014

FILE NO.

C 228 OF 2013

CITATION NO.

2014 WAIRC 00278

Result

Recommendation issued

Representation

Applicant

Ms A Hamlin

Respondent

Mr M Hammond and Ms S Young

Recommendation

WHEREAS this is an application made pursuant to section 44 of the *Industrial Relations Act 1979* (WA) by which the applicant seeks that the respondent agree to review the fixed term contracts of Education Assistants as to whether they should be made permanent under the terms of the Education Assistants' (Government) General Agreement 2013; and

WHEREAS on Friday, 4 April 2014 at around 2.30 pm, the Commission convened a further conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the Commission issued recommendations as a means of assisting in the progress of resolution of the matter;

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

1. THAT in relation to claims numbered 20 to 25:
 - (a) The respondent advise the applicant of its assessment within 7 days of Friday, 4 April 2014;
 - (b) The applicant respond promptly to the respondent's assessments;
 - (c) The respondent respond to any issues raised by the applicant within 14 days of the applicant's response being provided;
2. THAT in relation to claims numbered 1 to 16, the respondent provide the applicant with a response within 14 days of Friday, 4 April 2014;
3. THAT the last date for any new claim to be brought shall be Friday, 11 April 2014.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00286

DISPUTE RE FIXED TERM CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

TUESDAY, 8 APRIL 2014

FILE NO.

C 228 OF 2013

CITATION NO.

2014 WAIRC 00286

Result

Recommendation amended

Recommendation

WHEREAS this is an application made pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 4th day of April 2014 the Commission issued a Recommendation [2014] WAIRC 00278 following a conference convened in this matter; and

WHEREAS by email on the 7th day of April 2014 the respondent requested an amendment to that Recommendation 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 recommendations;

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

1. THAT the respondent advise the applicant of its assessment for claims 20 to 25 within 7 days of the 4th day of April 2014.
2. THAT the respondent advise the applicant of its assessment for claims 26 to 28 within 14 days of the 4th day of April 2014.
3. THAT the applicant respond promptly to the respondent's assessments referred to in recommendations 1 and 2.
4. THAT the respondent advise the applicant of its position in relation to the applicant's position (already provided) in relation to claims 1 to 19 within 14 days of the 4th day of April 2014.
5. THAT the respondent advise its position in response to claims 20 to 28 within 2 weeks of receiving the applicant's position.
6. THAT the last date for any new claim to be brought shall be Friday the 11th day of April 2014.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00218

DISPUTE RE TERMINATION OF EMPLOYMENT

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
	THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS WESTERN AUSTRALIAN BRANCH	APPLICANT
	-v-	
	COMBINED METAL INDUSTRIES	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	FRIDAY, 21 MARCH 2014	
FILE NO/S	CR 5 OF 2014	
CITATION NO.	2014 WAIRC 00218	

Result	Directions issued
Representation	
Applicant	Ms P Lim
Respondent	Mr G McCorry (as agent)

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 is set down for hearing on 3rd and 4th day of June 2014;
2. On or before 4:00 pm on 6 May 2014 the applicant file and serve the following:
 - a. A statement of facts asserted and upon which the applicant relies;
 - b. Witness statements in support of the facts asserted;
 - c. An outline of submissions; and
 - d. Any other documentary material the applicant intends to rely on in support of its application.
3. On or before 4:00 pm on 19 May 2014 the respondent file and serve the following:
 - a. A response to the statement of facts asserted by the applicant;
 - b. A statement of facts asserted and upon which the respondent relies;
 - c. Witness statements in support of any facts asserted;
 - d. An outline of submissions; and
 - e. Any other documentary material the respondent intends to rely on in support of its defence.
4. There is liberty to apply for either party at short notice in respect of these directions.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00269

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 AUGUST 2013

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2014 WAIRC 00269
CORAM	: PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT- CHAIRMAN DR N ROTHNIE - BOARD MEMBER MR B DODDS - BOARD MEMBER
HEARD	: MONDAY, 24 MARCH 2014
DELIVERED	: THURSDAY, 3 APRIL 2014
FILE NO.	: PSAB 17 OF 2013
BETWEEN	: DR JONATHAN THABANO Applicant AND THE CEO, CHEMCENTRE RESOURCES AND CHEMISTRY PRECINCT Respondent

CatchWords	:	Public Service Appeal Board – Application for further and better discovery – Order for formal discovery
Legislation	:	<i>Industrial Relations Act 1979</i> s 80L
Result	:	Application for discovery granted in part
Representation:		
Applicant	:	Dr J Thabano on his own behalf
Respondent	:	Mr D Matthews of counsel and with him Mr I Miller

Reasons for Decision

- 1 On 30 January 2014 the Public Service Appeal Board (the Board) issued Orders for discovery in this matter relating to the preliminary issue of jurisdiction. The applicant filed an application for further and better discovery on 17 March 2014, the hearing of some aspects of which relate to enforcement of the Orders. We suggested to the applicant that it may be appropriate for him to communicate directly with Mr Matthews, for the respondent, in respect of a number of matters.
- 2 One of the major issues that repeatedly arose during Dr Thabano's submissions was his concern that he had not been provided with all of the documents that exist and he suggested that the records may have been tampered with. He provided no evidence to support this submission. He seeks some form of authentication of the records that have already been produced to him, or which he has inspected.
- 3 Mr Matthews for the respondent, says that the respondent has provided discovery on an informal basis, but would have no objection to an order for it to provide formal discovery and it seems that this might allay some of the applicant's concerns, although, as noted during the hearing, it is not appropriate for allegations of tampering with documents or providing misleading discovery to be made without evidence.
- 4 The basis upon which the Commission, and the Board, by s 80L of the *Industrial Relations Act 1979*, may provide discovery is set out in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel and Others* (1995) 75 WAIG 1801 at 1805:

The purpose of documentary discovery is to provide each party to an action with access before trial to the relevant documents in the hands of his opponent, so avoiding trial by ambush, saving costs and encouraging settlement in proper cases.

The first stage of the process, which is properly termed 'discovery', is the delivery of a list of documents verified by affidavit. The second stage is the production of documents for inspection, where no privilege is claimed in respect of such documents (see Seaman 'Civil Procedure Western Australia' at page 6419 et seq).

...

Discovery, production and inspection of documents is not available as of right in this jurisdiction. It is available only if the Commission makes an order under s.27(1)(o) of the Act. S.27(1)(o) reads as follows:-

(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it—

...

- (o) make such orders as may be just with respect to any interlocutory proceedings to be taken before the hearing of any matter, the costs of those proceedings the issues to be submitted to the Commission, the persons to be served with notice of proceedings, delivery of particulars of the claims of all parties, admissions, discovery, inspection, or production of documents, inspection or production of property, examination of witnesses, and the place and mode of hearing;

The Commission may therefore only make an order if such order is just (see *Springdale Comfort Pty Ltd t/a Dalfield Homes v. BTA (op cit)* (IAC)).

...

It is for the applicant, for an order under s.27(1)(o), to establish that it is just for such an order to be made. The expression 'just' means 'right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right' (see *Loxton v. Ryan* [1921] State Reports (Qld) 79 at 84 and 88 per Lukin J). Perhaps more appositely in *Smith's Weekly Publishing Co Ltd v. Sunday Times Newspaper Co Ltd (op cit)*, which was a case relating to discovery of documents, Isaacs and Rich JJ at page 526 held that 'just' means 'just according to law'.

- 5 In the circumstances, while we do not find that there is any basis to conclude that the respondent has not complied with the previous order, or that particular documents have been excluded, it is our view that an order that the respondent provide formal discovery within 21 days may, in any event, assist in resolving many of the issues raised by the applicant.
- 6 We also note that the applicant says that there are emails missing from the list already provided to him, however, he has not identified any particular emails. We would encourage him to provide to the respondent a list of any particular emails which he

says ought to have been provided to him and thereby avoid the simplistic argument that everything has not been provided to him.

- 7 We also note that discovery is a process for documents, including electronic records, which are in existence to be provided by each side to the other. It is not a process where parties are required to develop documents not already in existence or to now record in writing those things which are only available by oral evidence where there is no written record. It is a process dealing with documents which are in existence.
- 8 In the circumstances, we intend to order that the respondent provide formal discovery within 21 days. In the meantime, the matter of jurisdiction will be listed for hearing.

2014 WAIRC 00270

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DR JONATHAN THABANO

APPLICANT

-v-

THE CEO, CHEMCENTRE RESOURCES AND CHEMISTRY PRECINCT

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
DR N ROTHNIE - BOARD MEMBER
MR B DODDS - BOARD MEMBER

DATE

THURSDAY, 3 APRIL 2014

FILE NO

PSAB 17 OF 2013

CITATION NO.

2014 WAIRC 00270

Result

Application for discovery granted in part

Order

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

THAT the respondent provide formal discovery to the applicant within 21 days of the date of this order.

[L.S.]

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

2014 WAIRC 00234

DISPUTE RE ROSTER CHANGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPLICANT

-v-

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
COMMISSIONER S M MAYMAN

DATE

MONDAY, 24 MARCH 2014

FILE NO

PSAC 1 OF 2014

CITATION NO.

2014 WAIRC 00234

Result	Order issued
Representation	
Applicant	Ms C Drew
Respondent	Ms M Muccilli and with her Mr M Golesworthy

Order

WHEREAS on 4 January 2014 the Health Services Union of Western Australia (Union of Workers) (the applicant union) referred a s 44 application to the Western Australian Industrial Relations Commission (the Commission). The application related to a dispute between the applicant union's members and their potential members; anaesthetic technicians at Sir Charles Gairdner Hospital (SCGH) and The Minister for Health is Incorporated as the Board of the Hospitals formerly comprised in the Metropolitan Health Service Board under s 7 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 (the respondent).

The Commission convened a number of conciliation conferences on 23 January 2014, 24 January 2014, 4 February 2014 and 17 March 2014. No agreement was able to be reached between the parties in relation to the issues in dispute.

WHEREAS the Commission sought written submissions from the parties on 17 March 2014 on whether an order ought issue covering the parties for a three month trial of the anaesthetic technicians at SCGH also providing liberty to apply. Furthermore, the parties were asked whether Commissioner Mayman should inspect SCGH, the theatre technicians work area on Friday, 21 March 2014 between 8.00am – 8.30am to discuss the prospect of the shift trial. In addition a flexibility agreement is to be drawn up to cover the parameters of trial and a number of other matters the parties were asked to comment on.

The respondent was opposed to the issuance of the draft order and opposed to the inspection of the work area by the Commissioner but supportive of entering into an agreement that defined the parameters to apply to an agreed roster trial. The applicant union was supportive of the issuance of the order, supportive of the flexibility agreement to be drawn up between the parties and supportive of the three month trial.

The Commission listed an urgent hearing pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) to hear from the parties. Correspondence was forwarded to the parties on 20 March 2014 asking each of the parties to consider, when drawing together their submissions on the question of whether an order ought issue the following matters;

- the public interest;
- the prevention or deterioration of industrial relations;
- taking into account the interest of those persons directly involved in this dispute; and
- the interests of the community as a whole.

NOW THEREFORE having heard Ms Drew on behalf of the applicant union and Ms Muccilli on behalf of the respondent and the Commission having regard for the interests of the parties directly involved, the public interest and in order to prevent any further deterioration of industrial relations, and pursuant to the powers conferred upon the Commission by the Act, and in particular s 44(6)(ba)(i) and (ii) and s 44(6)(bb)(i), the Commission hereby orders:

1. THAT the applicant union and the respondent are to commence a 12 week shift trial for anaesthetic technicians at Sir Charles Gairdner Hospital commencing as soon as the terms of the trial referred to in order (4) have been agreed to;
2. THAT SCGH anaesthetic technicians who are not currently on the 10, 9, 6 shift roster will not be compelled to work the 10, 9, 6 roster pattern;
3. THAT minimum number of anaesthetic technicians will be set in consultation between the union and the respondent to continue to work the 10, 9, 6 roster;
4. THAT the parties are to negotiate the parameters of the trial prior to its commencement having regard for:
 - additional shifts eg. 5 and half hours;
 - family/friendly hours;
 - the times of the day when the respondent is short or has an oversupply of anaesthetic technicians; and
5. A consultative committee will established to oversee the trial. The consultative committee will be made up of respondent, supervisory and union representatives and will meet on a regular basis;
6. THAT the Commission will undertake site inspections of the relevant work areas six weeks out from the commencement of the work trial on a date to be fixed by the parties in consultation with the Commission. During the inspection the Commission will hear separately and collectively from the respondent and employees regarding the operation of the trial;
7. THAT a copy of these orders will be placed in the anaesthetic technicians work area;
8. THAT no industrial action is to take place with respect to the issues in dispute between the parties whilst this issue is under trial;

9. THAT this order is to remain in force until revoked or varied by the Commission; and
 10. THAT liberty to apply is reserved to the parties in relation to this order.

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

[L.S.]

2014 WAIRC 00216

DISPUTE RE ALLEGED BULLYING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE AUSTRALIAN MEDICAL ASSOCIATION (WESTERN AUSTRALIA) INCORPORATED

APPLICANT

-v-

THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 WA), AS PARTY TO THE DEPARTMENT OF HEALTH MEDICAL PRACTITIONERS (METROPOLITAN HEALTH SERVICES) AMA INDUSTRIAL AGREEMENT 2013

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
 COMMISSIONER S M MAYMAN

DATE

THURSDAY, 20 MARCH 2014

FILE NO

PSAC 6 OF 2014

CITATION NO.

2014 WAIRC 00216

Result

Order Issued

Representation

Applicant

Mr E Moran (of counsel)

Respondent

Mr H Millar (of counsel)

Order

WHEREAS this is an application referred under s 44 of the *Industrial Relations Act 1979*; and

WHEREAS in order to expedite the matter the parties have agreed to a number of orders. Accordingly, the Commission, in accordance with the powers conferred on it under the *Industrial Relations Act 1979* hereby orders:

1. THAT Dr Kelly be afforded, on her return to work, the opportunity to have a support person of her choosing present in any formal discussion(s) with SARC or Department of Health Management; and
2. THAT there be liberty to apply at short notice.

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

[L.S.]

2014 WAIRC 00212

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LEILA GAITSKELL

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

COMMISSIONER S M MAYMAN

DATE

THURSDAY, 20 MARCH 2014

FILE NO/S

U 111 OF 2013

CITATION NO.

2014 WAIRC 00212

Result	Order issued
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Ms R Hartley (of counsel)

Order

HAVING heard Mr Stojanoski (of counsel) on behalf of the applicant and Ms Hartley (of counsel) on behalf of the respondent the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the hearing be set down for 12 – 15 May 2014;
2. THAT discovery is to be informal;
3. THAT the parties draw up an agreed statement of facts if any can be agreed to;
4. THAT the applicant file in the Commission and serve upon the respondent any signed witness statements upon which it intends to rely on by close of business on 31 March 2014;
5. THAT the respondent file in the Commission and serve upon the applicant any signed witness statements upon which it intends to rely on by close of business on 14 April 2014;
6. THAT the applicant file in the Commission and serve upon the respondent an outline of submissions by close of business on 28 April 2014;
7. THAT the respondent file in the Commission and serve upon the applicant an outline of submissions by close of business on 5 May 2014; and
8. THAT the parties have liberty to apply at short notice.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 00225

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GEORGE KURILOWSKI

APPLICANT

-v-

SHARYN O'NEILL, DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 24 MARCH 2014
FILE NO. U & B 178 OF 2013
CITATION NO. 2014 WAIRC 00225

Result	Directions issued
Representation	
Applicant	Mr M Rennie (of counsel)
Respondent	Mr D Matthews and Ms S Teoh (both of counsel)

Directions

THE COMMISSION has heard from the applicant and the respondent and in order to expedite the hearing 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 hearing be set down for 4, 5, 6 and 7 August 2014;
2. With respect to application B 178 of 2014 the applicant is to provide further and better particulars to the respondent with a copy to the Commission by close of business on 14 April 2014;
3. Discovery of documents is to be informal and is to be completed by close of business on 30 April 2014;
4. The parties are to draw up statement of agreed facts prior to the hearing;
5. The applicant is to file and serve on the respondent witness statements by close of business on 7 July 2014;

6. The respondent is to file and serve on the applicant witness statement by close of business on 21 July 2014: and
 7. There be liberty to apply at short notice.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.**2014 WAIRC 00219**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GEORGE KURILOWSKI**PARTIES****APPLICANT****-v-**

SHARYN O'NEILL, DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 24 MARCH 2014
FILE NO/S U 178 OF 2013
CITATION NO. 2014 WAIRC 00219

Result Change of respondent's name
Representation
Applicant Mr M Rennie (of counsel)
Respondent Mr D Matthews (of counsel)

Order

WHEREAS this application was lodged in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
 AND WHEREAS at the directions hearing held on 17 March 2014 the applicant made application to change the respondent's name;
 AND WHEREAS at the hearing the respondent did not object to changing the name of the respondent;
 AND WHEREAS the Commission formed the view that it was appropriate to amend the respondent's name;
 NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the name Department of Education be deleted and Sharyn O'Neill, Director General of the Department of Education be inserted in lieu thereof.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.**2014 WAIRC 00221**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GEORGE KURILOWSKI**PARTIES****APPLICANT****-v-**

SHARYN O'NEILL, DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 24 MARCH 2014
FILE NO/S B 178 OF 2013
CITATION NO. 2014 WAIRC 00221

Result Change of respondent's name

Representation

Applicant Mr M Rennie (of counsel)

Respondent Mr D Matthews (of counsel)

Order

WHEREAS this application was lodged in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS at the directions hearing held on 17 March 2014 the applicant made application to change the respondent's name;
AND WHEREAS at the hearing the respondent did not object to changing the name of the respondent;
AND WHEREAS the Commission formed the view that it was appropriate to amend the respondent's name;
NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the name Department of Education be deleted and Sharyn O'Neill, Director General of the Department of Education be inserted in lieu thereof.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority (Transwa) Enterprise Agreement 2014 AG 4/2014	21/03/2014	The Public Transport Authority Of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner S J Kenner	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2014 WAIRC 00084

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6TH NOVEMBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEPHEN JOHN BARCLAY

APPELLANT

-v-

KARL O'CALLAGHAN
COMMISSIONER OF POLICE
WESTERN AUSTRALIAN POLICE SERVICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MS B CONWAY - BOARD MEMBER
MS N SAGAR - BOARD MEMBER

DATE

THURSDAY, 6 FEBRUARY 2014

FILE NO

PSAB 25 OF 2013

CITATION NO.

2014 WAIRC 00084

Result Order issued

Representation

Appellant In person

Respondent Mr T Clark

Order

WHEREAS the appellant sought and was granted leave to discontinue the application, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

2014 WAIRC 00085

NOTICE OF APPEAL AGAINST THE DECISION GIVEN ON 11 NOVEMBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPELLANT

-v-

THE DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MS T RAINFORD-WATSON - BOARD MEMBER
MS J FREEMAN - BOARD MEMBER

DATE

FRIDAY, 7 FEBRUARY 2014

FILE NO

PSAB 27 OF 2013

CITATION NO.

2014 WAIRC 00085

Result

Direction issued

Representation

Appellant

Ms P Marcano

Respondent

Mr M Aulfrey of counsel and with him Ms J Symons

Direction

HAVING heard Ms P Marcano on behalf of the appellant and Mr M Aulfrey of counsel and with him Ms J Symons on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the matter be listed for a half day hearing on the jurisdictional and out of time issues, on a date to be fixed.
- (2) THAT the appellant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.
- (3) THAT the appellant and respondent file and serve upon one another any signed witness statements upon which they intend to rely no later than 3 days prior to the date of hearing.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

2014 WAIRC 00217

NOTICE OF APPEAL AGAINST THE DECISION GIVEN ON 11 NOVEMBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPELLANT**-v-**

THE DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER OF HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MS T RAINFORD-WATSON - BOARD MEMBER
MS J FREEMAN - BOARD MEMBER**DATE**

FRIDAY, 21 MARCH 2014

FILE NO

PSAB 27 OF 2013

CITATION NO.

2014 WAIRC 00217

Result Order issued**Representation****Appellant**

Ms P Marcano and with her Mr C Panizza

Respondent

Mr M Aulfrey of counsel

Order

WHEREAS the appellant sought and was granted leave to discontinue the appeal, the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

On behalf of the Public Service Appeal Board.

[L.S.]

2013 WAIRC 01040

APPEAL AGAINST THE DECISION BY THE RESPONDENT TO FIND THE APPELLANT'S PERFORMANCE SUBSTANDARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MR PAUL HOGG

APPELLANT**-v-**

MR BRIAN BRADLEY, DIRECTOR GENERAL, DEPARTMENT OF COMMERCE

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G BROWN - BOARD MEMBER
MS L HEATH - BOARD MEMBER**DATE**

TUESDAY, 3 DECEMBER 2013

FILE NO

PSAB 19 OF 2013

CITATION NO.

2013 WAIRC 01040

Result	Direction issued
Representation	
Appellant	In person
Respondent	Mr D Anderson of counsel

Direction

HAVING heard the appellant in person and Mr D Anderson of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the appellant file and serve an amended notice of appeal, setting out the grounds of appeal, by 17 December 2013.
- (2) THAT the respondent file and serve a notice of answer by 13 January 2014.
- (3) THAT the matter be listed for hearing for 2 days on dates to be fixed.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

2014 WAIRC 00140

**APPEAL AGAINST THE DECISION BY THE RESPONDENT TO FIND THE APPELLANT'S PERFORMANCE
SUBSTANDARD**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MR PAUL HOGG	APPELLANT
	-v-	
	MR BRIAN BRADLEY, DIRECTOR GENERAL, DEPARTMENT OF COMMERCE	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER - CHAIRMAN MR G BROWN - BOARD MEMBER MS L HEATH - BOARD MEMBER	
DATE	WEDNESDAY, 26 FEBRUARY 2014	
FILE NO	PSAB 19 OF 2013	
CITATION NO.	2014 WAIRC 00140	

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr D Anderson of counsel

Order

WHEREAS the appellant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—**2014 WAIRC 00251**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	TANYA BAILEY	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 56 OF 2007	
CITATION NO.	2014 WAIRC 00251	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00259

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MS JENNIFER COMO	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 122 OF 2007	
CITATION NO.	2014 WAIRC 00259	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00257

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	CARMEL FEATHERSTONE	
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 61 OF 2007	
CITATION NO.	2014 WAIRC 00257	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00248

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	SHARRON GAGLIO	
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 51 OF 2007	
CITATION NO.	2014 WAIRC 00248	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00262

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JENNIFER JEAN GAUNT **APPLICANT**

-v-
DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN
HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES
ACT 1927 AS THE EMPLOYER **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 2 APRIL 2014

FILE NO PSA 12 OF 2009

CITATION NO. 2014 WAIRC 00262

Result Application dismissed

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00247

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
DONNA GRAFTON **APPLICANT**

-v-
DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN
HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES
ACT 1927 AS THE METROPOLITAN HEALTH SERVICE **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 2 APRIL 2014

FILE NO PSA 50 OF 2007

CITATION NO. 2014 WAIRC 00247

Result Application dismissed

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00261

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION FIONA MURRAY	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 11 OF 2009	
CITATION NO.	2014 WAIRC 00261	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00250

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DOREEN NELSON	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 53 OF 2007	
CITATION NO.	2014 WAIRC 00250	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00258

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SHIRLEY PAISLEY **APPLICANT**

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 2 APRIL 2014

FILE NO PSA 62 OF 2007

CITATION NO. 2014 WAIRC 00258

Result Application dismissed

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00253

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SUSAN PETCHELL **APPLICANT**

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 2 APRIL 2014

FILE NO PSA 58 OF 2007

CITATION NO. 2014 WAIRC 00253

Result Application dismissed

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00252

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION VICKI THOMPSON-DAVIES	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 57 OF 2007	
CITATION NO.	2014 WAIRC 00252	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00249

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DEON WAY	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 52 OF 2007	
CITATION NO.	2014 WAIRC 00249	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00260

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION VICKI RAE WEBSTER	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 10 OF 2009	
CITATION NO.	2014 WAIRC 00260	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00256

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION RAELENE WILLIAMS	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 60 OF 2007	
CITATION NO.	2014 WAIRC 00256	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

2014 WAIRC 00254

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	SABINA WRIGHT	
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 2 APRIL 2014	
FILE NO	PSA 59 OF 2007	
CITATION NO.	2014 WAIRC 00254	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 5/2014	Request for mediation re alleged breach of contract	Mayman C	N/A	Dismissed
APPL 7/2014	Request for mediation re employment issues	Scott A/SC	N/A	Discontinued

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2013 WAIRC 01062

	APPEAL RE TERMINATION OF TRAINING CONTRACT	
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	KEVIN COSMO GUGLIOTTA	APPLICANT
	-v-	
	DR RUTH SHENAN	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 13 DECEMBER 2013	
FILE NO/S	APA 3 OF 2013	
CITATION NO.	2013 WAIRC 01062	

Result	Order issued
Representation	
Appellant	In person
Respondent	Mr R Andretich of counsel

Order

HAVING heard the appellant on his own behalf 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 name of the respondent on the notice of appeal be amended by deleting the name “Dr Ruth Shenan” and inserting in lieu thereof the name “Director General, Department of Training and Workplace Development.”

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00199

**APPEAL RE TERMINATION OF TRAINING CONTRACT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2014 WAIRC 00199
CORAM	:	COMMISSIONER S J KENNER
HEARD	:	WEDNESDAY, 11 DECEMBER 2013
DELIVERED	:	WEDNESDAY, 12 MARCH 2014
FILE NO.	:	APA 3 OF 2013
BETWEEN	:	KEVIN COSMO GUGLIOTTA Appellant AND DIRECTOR GENERAL, DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT Respondent

Catchwords	:	Industrial law (WA) – Vocational education and training – Appeal against the decision of the chief executive of the respondent to cancel the training contract – Allegation of serious misconduct – Trust and confidence had broken down – Application made by the employer to the respondent to terminate the training contract – Not able to train the apprentice adequately – Appeal by way of rehearing not de novo – Distinction between cancellation of the training contract by the respondent and termination by the employer – Termination not open to the employer – Appellant not denied procedural fairness – Appeal dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) ss 27(1)(u), 49, 49(4)(a) <i>Industrial Training Act 1975</i> (WA) s 37C <i>Vocational Education and Training Act 1996</i> (WA) ss 4(a), 4(g), 53, 60A, 60E(1), 60E(1)(a)(i), 60F, 60F(5), 60F(8), 60F(9), 60G, 60G(4), 60H, Pt 7, Div 2 <i>Industrial Relations Commission Regulations 2005</i> (WA) reg 101 <i>Vocational Education and Training (General) Regulations 2009</i> (WA) regs 44, 44(a), 44(b), 44(c), 49(4), 49(8), 51, 51(1), 53, 53(2)
Result	:	Appeal dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr R Andretich of counsel

Case(s) referred to in reasons:

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

Galofaro v Metropolitan Fire and Emergency Services Appeals Commission [2005] VSC 356

Hambledon Nominees Pty Ltd as Trustee for The Hooper Family Trust trading as “Coastal Motor Sales” (employer) v Gary Shane Hancock (apprentice) and Lorna Hancock (guardian) (1983) 63 WAIG 628

Lackovic v Insurance Commission (WA) (2006) 31 WAR 460

Milentis v The Honourable Minister for Education (1987) 67 WAIG 1124

Nicotra v L & A Electrical (2002) 82 WAIG 3096

P.M. and R.T. Sarich t/a Cape Bouvard Farm v Peter Thomas Cornock (apprentice) (1992) 72 WAIG 1710

Reasons for Decision

- 1 Mr Gugliotta was employed by Path Transit on 17 September 2012 as a bus driver. He also was party to a training contract with the employer, under which Mr Gugliotta was seeking to complete a Certificate III in Driving Operations in a Road Transport Traineeship. The training contract was registered under the Vocational Education and Training Act 1996. The traineeship had a nominal term of three years.
- 2 As a consequence of an allegation of serious misconduct in the workplace on 8 August 2013, Mr Gugliotta's training contract was ultimately suspended on 23 August 2013. There was an assertion made by Mr Gugliotta, that his employer had unlawfully terminated his employment sometime earlier. Ultimately, an application was made by Path Transit to the Department to terminate the contract in accordance with regs 49(8) and 51 of the Vocational Education and Training (General) Regulations 2009. The grounds cited in support of the application to terminate Mr Gugliotta's training contract, were his misconduct in the workplace in August 2013, and also a prior record of poor work performance. The application to terminate the training contract was opposed by Mr Gugliotta. The Department attempted to informally mediate a resolution of the issues in dispute however, the employer declined to take part.
- 3 After considering all of the circumstances of the application to terminate the training contract, and the response of Mr Gugliotta, including the failure to mediate a resolution, the Department determined that the best course of action was the cancellation of the registration of the training contract under s 60F(5) of the Act and reg 44(b) of the Regulations. By this provision, the chief executive officer of the Department may cancel the registration of a training contract, if the conclusion is reached that the employer is no longer able to adequately train the apprentice. I should note at this point, that "apprentice", for the purposes of Part 7 of the VET Act, means the person named in a training contract, irrespective of whether they are described as an apprentice, trainee or something else: s 60A.
- 4 By letter of 20 September 2013, the Department informed Mr Gugliotta that as a result of an irretrievable breakdown of the relationship between Path Transit and Mr Gugliotta, the Department had reached the view that the employer would not be able to train Mr Gugliotta adequately. The registration of the training contract was cancelled effective 20 September 2013.
- 5 Mr Gugliotta has now commenced this appeal against the chief executive's decision to cancel the registration of the training contract. Whilst the Department's letter of 20 September 2013, advising Mr Gugliotta of the cancellation, referred to his right to appeal the decision to the Industrial Relations Commission under s 60G(4) of the VET Act, given that the registration of the training contract was cancelled by the Department and not terminated by the employer, with the approval of the chief executive, the appeal is brought under s 60F(8) of the VET Act.

Contentions of the parties

- 6 Mr Gugliotta's notice of appeal attaches a single paragraph statement, as his grounds of appeal. In it, Mr Gugliotta alleges that Path Transit actually terminated his training contract unlawfully on or about 15 August 2013, and then subsequently, falsified a document on 23 August 2013, to say that the training contract was suspended. Mr Gugliotta further alleges that Path Transit has engaged in misleading and deceptive conduct in relation to this material. He also contended that CCTV footage of the workplace on and around the date of the alleged serious misconduct, contradicts the assertions of Path Transit.
- 7 Mr Gugliotta further asserted in his appeal notice, that as a consequence of these matters, the termination of the training contract was unlawful. He also contended that the chief executive's decision to cancel the training contract, on the ground that the working relationship between himself and Path Transit had become untenable, involved a denial of procedural fairness. This was said to be because he was not given the opportunity to present all of the evidence at a meeting with the Department, with Path Transit being present.
- 8 For the Department it was submitted that the training contract was cancelled because the essential element of trust and confidence, equally necessary for both the employment and the training contract, between Mr Gugliotta and his employer, Path Transit, had evaporated. Given the nature of the training contract and the obligation on Path Transit to provide training to Mr Gugliotta, in view of the total breakdown in the relationship between the parties, as evidenced by Mr Gugliotta's allegations of fraud and misleading and deceptive conduct by Path Transit, the Department had no real option but to cancel the training contract.
- 9 Further, given that the training contract was not terminated by approval of the chief executive, it was not necessary, and, on the facts, not possible, to determine the truth or otherwise, of the misconduct allegations. Rather, based on the application by Path Transit, Mr Gugliotta's response and the investigation undertaken by the Department, the Department submitted that it was clear that the training objectives of the training contract could no longer be met in this case.

The statutory scheme

- 10 By its long title, the VET Act concerns itself with the establishment of a vocational education and training system for the State and amongst other things, is established "to provide for the training of people, such as apprentices, under training contracts with employers". By its objects in s 4(a), the legislation has, as a main object "to establish a State training system for the effective and efficient provision of vocational education and training to meet the immediate and future needs of industry and the community". Further, by s 4(g), it is also a main object, "to provide for people, such as apprentices, to be trained for some occupations under training contracts with employers."
- 11 Part 7 of the VET Act, deals with obtaining vocational education and training qualifications and provides, amongst other matters, for the making of training contracts by employers and employees. Under s 60E(1), a training contract may be made which requires an employer to employ the trainee under the training contract; to train the employee; to permit the employee to be trained under the training contract and to be assessed. The employee party to the training contract is required to agree to meet his or her obligations under the training contract and to be trained and assessed in accordance with its terms.

- 12 Under s 60F, provision is made for training contracts to be registered by the Department. A training contract comes into effect on and from registration. By s 60F(5) the Department may cancel the registration of a training contract “for any reason prescribed by the regulations”. Regulation 44 provides, that for the purposes of s 60F(5) of the VET Act, the chief executive may cancel the registration of a training contract for a number of reasons including, in (b), if “the chief executive is satisfied the employer is not able to train the apprentice adequately ...”
- 13 By s 60G, once outside of the probationary period, and other than by consent of the apprentice, an employer party to a training contract may terminate it. This can only be with the approval of the chief executive of the Department, which must be given if, amongst other things, the chief executive is satisfied that the apprentice has engaged in serious misconduct. An appeal lies to the Commission from a decision by the Department to approve the termination of a training contract.
- 14 Therefore, from these provisions of Part 7 of the VET Act, there is a clear distinction between action of the chief executive of the Department to cancel the registration of a training contract on the one hand, and the approval of a proposed termination of a training contract by an employer, on the other. One thing they both have in common however, is, that if a training contract ceases to have effect for either reason, the employment of the apprentice under the training contract also ceases: s 60H. Whilst it is not necessary to finally decide the matter for the purposes of this appeal, it is strongly arguable that employment that ceases as a consequence of the cessation of a training contract does so by operation of law and not at the initiative of either the employer or the employee.
- 15 From the objects and purposes of the statutory scheme set out above, in my view, when the Commission comes to consider an appeal of the present kind, it must always be kept at the forefront of its consideration, that it is training and vocational education and the achievement of these objects, which is the focus of an inquiry into the cessation of a training contract, in any particular case.

Nature of the appeal

- 16 By s 60F(8) an appeal lies to the Commission by a person who is “dissatisfied by a decision made by the chief executive under this section”. The relevant decision concerned is the decision to cancel the registration of a training contract, for any reason prescribed in the Regulations. The terms of ss 60F(8) and (9) provide as follows:

60F. Registration of training contracts

.....

- (8) A person who is dissatisfied by a decision made by the chief executive under this section may appeal against it to the Western Australian Industrial Relations Commission.
- (9) On an appeal made under subsection (8) against a decision, the Commission must rehear the matter and may confirm the decision or set it aside and either substitute a decision the chief executive could make or order the chief executive to decide the matter again.
- 17 The first point to be noted in relation to s 60F(9) is on an appeal of the present kind, the Commission is required to “rehear the matter”. It is then empowered to do a number of things, including confirming the original decision, or setting it aside and making another decision that could have been made by the chief executive officer at first instance. The Commission may also order the chief executive officer to re-decide the matter. There is no indication in s 60F(9) that the Commission must “rehear” the matter on the basis of the materials before the chief executive when he or she made the relevant decision the subject of the appeal. This is in contrast with, for example, s 49 of the Industrial Relations Act 1979 dealing with appeals to the Full Bench of the Commission. Under s 49(4)(a), an appeal is required to be heard and determined on the evidence and matters raised in the proceedings at first instance. No such limitation is apparent in s 60F(9) of the VET Act. Regulation 101 of the Industrial Relations Commission Regulations 2005 sets out the procedural requirements in relation to an appeal.
- 18 This raises the question as to nature of an appeal under s 60F(9). The fact that the Parliament has used the words “must rehear” in s 60F(9) is significant, but not decisive. Under the former s 37C of the then Industrial Training Act 1975, a person party to an apprenticeship or traineeship agreement could appeal to the Industrial Commission from a range of decisions of the then Director of Industrial Training. The provision in question simply said the person aggrieved “may appeal to the Commission”. There was a difference of view as to whether this meant an appeal to the Commission was to be conducted on the same basis as appeals under s 49 of the Act, or whether there was greater capacity for the Commission to rehear the matter and receive fresh evidence as part of hearing the appeal: *Hambleton Nominees Pty Ltd as Trustee for The Hooper Family Trust trading as “Coastal Motor Sales” (employer) v Gary Shane Hancock (apprentice) and Lorna Hancock (guardian)* (1983) 63 WAIG 628; *Nicotra v L & A Electrical* (2002) 82 WAIG 3096; cf *P.M. and R.T. Sarich t/a Cape Bouvard Farm v Peter Thomas Cornock (apprentice)* (1992) 72 WAIG 1710.
- 19 The issue of appeal provisions in statutes was the subject of consideration by the Full Bench of the Commission in *Milents v The Honourable Minister for Education* (1987) 67 WAIG 1124. In that matter, on a referral of a matter of law under s 27(1)(u) of the Act, the Full Bench was called upon to determine the nature of an appeal by a teacher to the then Government School Teachers Tribunal, a constituent body of the Commission under the Act. In dealing with the nature of a statutory right of appeal, the Full Bench said at 1125 as follows:

A right of appeal is peculiarly a statutory right and the nature and extent of that right is dependent on the language of the particular statute. As Windeyer J. observed in *Da Costa v. Cockburn Salvage and Trading Pty Ltd* (1971) 124 CLR 192 at 202:-

the word “appeal” has itself more than one sense for modern law: e.g. *ex parte* Australian Sporting Club Ltd; *re Dash* (1947) 47 SR (NSW) 238.

It is therefore probably helpful at the outset to try and understand and distinguish various types of appeal and the following passage from Mason J. in *Builders Licensing Board v. Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619 is illuminating:-

An appeal is not a common law proceeding. It is a remedy given by statute [Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v. Dignan (1931) 46 CLR 73 at 108; Commissioner for Railways (NSW) v. Cavanough (1935) 53 CLR 220 at 225]. Upon an appeal *stricto sensu* the question considered is whether the judgment complained of was right when given [Ponnamma v. Arumogam (1905) AC 383 at 388], that is whether the order appealed from was right on the material which the lower court had before it.

An appeal *stricto sensu* is to be distinguished from an appeal by way of rehearing of which the most notable example has been the appeal to the English Court of Appeal provided for by the Supreme Court of Judicature Act 1873, sections 18-19 and the Rules of Procedure contained in the Schedule to the Act of 1875. It was provided that the appeal should be by way of rehearing and that the court should have power to take fresh evidence and draw inferences of fact (see O 58, rr. 1, 4). The appeal had its origin in the jurisdiction of the Court of Appeal in Chancery established by 14 and 15 Vict clause 83 to rehear cases determined in Chancery. This appeal by way of rehearing involves rehearing of the cause at the date of the appeal, that is "by trial over again on the evidence used in the Court below; but there is special power to receive further evidence" [In *re* Chennell; Jones v. Chennell (1978) 8 Ch D 492 at 505]. On such an appeal the rights of the parties must be determined by reference to the circumstances as they then exist and by reference to the law as it then exists; the appellate court may give such judgment as ought to be given if the case at that time came before the court of first instance. But this appeal by way of rehearing did not call for a fresh hearing or hearing *de novo*; the court does not hear the witnesses again. See generally the Victorian Stevedoring Case (1931) 46 CLR at 107-109; *Da Costa v. Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 208.

It was observed by Viscount Sankey L.C. in *Powell v. Streatham Manor Nursing Home* (1935) AC 243 at 249, that "There are different meanings to be attached to the word 'rehearing'". The appeal to Quarter Sessions in New South Wales is frequently described as a rehearing although the Justices Act 1902, as amended, contains no specific provision to that effect. In truth the appeal to Quarter Sessions is most aptly described as a hearing *de novo* because, even if it be the defendant who appeals, the informant or complainant starts again and has to make out his case and call his witnesses. The appeal to Quarter Sessions is the outcome of historical development and its only utility for present purposes is that it provides an illustration of what is in truth a hearing *de novo*, although, as I have said, it is frequently described as a rehearing.

- 20 Thus, appeals can be characterised as appeals in the strict sense; appeals by way of rehearing; and appeals by way of hearing *de novo*. Part of the consideration for the nature of the appeal, is the type of decision from which the appeal is brought. Where, for example, the appeal is from a purely administrative decision, in which there is no provision for a hearing, no right to representation, and the decision-maker is not required to publish reasons for decision, or maintain a record of proceedings, then it may be inferred that the appeal is to be by way of a hearing *de novo*: *Galofaro v Metropolitan Fire and Emergency Services Appeals Commission* [2005] VSC 356.
- 21 The procedure for applications to the chief executive under Part 7 Div 2 of the VET Act is set out in reg 53 of the Regulations. Under this provision, the chief executive may inform himself or herself as they see fit. The parties must be given the opportunity to make submissions and provide evidence. A hearing may be permitted, but is not required. A party may be represented. The decision and reasons for it are required to be given by the chief executive to the parties.
- 22 Given the statutory provisions to which I have referred and the relevant principles, I consider that an appeal to the Commission from a decision of the chief executive is to be by way of a rehearing, not a hearing *de novo*. Such an appeal would normally be based on the evidence and other materials before the chief executive. However, it seems to me that as with appeals by way of rehearing generally, further evidence may be admitted in the appeal. There would however, need to be a case made as to why further evidence should be admitted.
- 23 As with appeals in a strict sense, an appeal by way of a rehearing still requires the appellant to demonstrate error: *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194. So much is also clear by reference to the powers of the Commission on the determination of an appeal. The Commission is empowered, on the determination of an appeal, to "confirm" or to "set aside" a decision. Such a decision necessarily requires a conclusion to be reached, that the chief executive's decision was either correct or in error, in some material respect. Relevant principles in relation to an appeal by way of rehearing were set out by Buss JA in *Lackovic v Insurance Commission (WA)* (2006) 31 WAR 460 at 477-8.
- 24 On the basis of these conclusions as to the nature of an appeal under the VET Act, for the purposes of reg 44 of the Regulations, in my opinion, the "satisfaction" of the chief executive as to the various matters set out in pars (a) to (c) is to be considered objectively.

Consideration

- 25 The first issue raised by Mr Gugliotta was that he was not given the notice of the suspension of the training contract by his employer, as required by reg 49(4) of the Regulations. Mr Gugliotta received a copy of the notice from Ms Ho of the Department, on or about 3 September 2013. A copy of the suspension notice, dated 23 August 2013, addressed to Mr Gugliotta, was exhibit A1. According to an email from Path Transit to Ms Ho of 17 September 2013, contained in the Department's bundle of documents at exhibit R1, Path Transit initially decided to terminate Mr Gugliotta's employment as a result of misconduct on 8 August 2013 and a subsequent disciplinary review by the employer on 13 August. Subsequently, Path Transit took advice in relation to their obligations under the VET Act, which led to Mr Gugliotta being suspended instead.
- 26 Subsequently, on 22 August 2013, Path Transit applied to the Department to terminate the training contract under reg 51(1) of the regulations. A copy of the application to terminate and the grounds and documents in support of it, are set out at p 4-15 in exhibit R1. By letter of 3 September 2013, the Department provided Mr Gugliotta with a copy of the employer's application to

terminate the training contract. Mr Gugliotta was invited to respond to the application to terminate the training contract. On 13 September 2013, by his then solicitor, Mr Gugliotta provided a detailed submission in response to Path Transit's application. A copy of Mr Gugliotta's response is at pp 19-23 of exhibit R1. In it, Mr Gugliotta asserts that the chief executive had no jurisdiction to terminate the training contract because by letter of 15 August 2013, Path Transit had earlier purported to terminate Mr Gugliotta's employment. Mr Gugliotta was not suspended as alleged by Path Transit. In his response, Mr Gugliotta alleges that the letter of 23 August 2013 from Path Transit to him, regarding the suspension of the training contract, was a fabrication.

- 27 As to the incident on 8 August 2013, in which Mr Gugliotta is said to have harassed and verbally attacked a co-employee, Mr Gugliotta contended that the documents provided by Path Transit, from interviews with other employees, including the employee said to be harassed, were inconsistent with CCTV footage of the area at the time. It was also contended that the report of the other employee, confronted by Mr Gugliotta in the workplace, contains exaggerations and was also inconsistent with the CCTV footage. The previous work performance relied upon by Path Transit, in terms of Mr Gugliotta's poor driving record and requirements to undergo retraining and assessments, were also said by him to be an exaggeration. It was also submitted by Mr Gugliotta that these matters may have been added to his work record, after his alleged dismissal.
- 28 The complaint of unlawfulness by Mr Gugliotta in his submissions cannot succeed. This is because, whilst a suspension of a training contract by an employer, is a precondition to an application to the chief executive for approval of the termination of a training contract under reg 49 of the Regulations, in this case, the chief executive did not rely on her power to approve the termination of the training contract under s 60G of the VET Act. In this case, the chief executive exercised her power under s 60F(5) of the VET Act, to cancel the registration of the training contract. A cancellation under this power, in reliance on a ground set out in reg 44 of the Regulations, is not dependent on the existence of a valid suspension of a training contract under reg 49. As noted earlier in these reasons, the power of the chief executive to cancel the registration of and the power to approve termination of a training contract, and the requirements for the same, are separate and distinct.
- 29 Even if this is not so, any purported termination of employment by the employer, outside of the probationary period, without compliance with the requirements set out in reg 49, would arguably be unlawful and of no effect. This is because a training contract and a contract of employment for an apprentice are inextricably linked. The VET Act and the Regulations, provide a comprehensive scheme for the regulation of training contracts, and the employment which accompanies them. By s 60E(1)(a)(i), an employer "agrees" under the training contract, that the person concerned "will be employed while he or she fulfils the requirements of the contract" It is difficult to see how an employer can unilaterally terminate an apprentice's employment, without compliance with the statutory scheme set out in the VET Act and Regulations.
- 30 Mr Gugliotta next argued that because there was no mediation between himself and Path Transit, the chief executive was in error in proceeding to cancel the contract. It is to be pointed out at this stage, that there was no dispute by the Department that mediation did not take place. Mediation was proposed by the ApprentiCentre, to take place on 23 August 2013, in order to try to resolve the issues in dispute. However, Path Transit did not agree to participate in the mediation. As a part of this submission, Mr Gugliotta made the general assertion that he was denied the opportunity to be heard by the Department, in relation to Path Transit's application to terminate the training contract. In this respect, Mr Gugliotta submitted that the chief executive simply accepted what Path Transit had to say on these issues, and he was not given a proper opportunity to be heard.
- 31 In considering this submission, the first point to note is that there is no obligation on the chief executive under reg 53 of the Regulations, to mediate a dispute such as the present. The chief executive is required to give the opportunity for parties to be heard by submissions and evidence. As already noted above, there is no requirement on the chief executive to hold a hearing. Whilst there is also no requirement to mediate such a dispute, informal mediation is a useful tool in dispute resolution and it would be sensible for such a process to occur, in an attempt to resolve a dispute under a training contract. However, despite it not being a statutory requirement, and therefore no basis for an allegation of error by the chief executive, mediation is, by its nature, voluntary. A party cannot be forced to take part in mediation. There is therefore no merit in this complaint by Mr Gugliotta.
- 32 As to the general submission made by Mr Gugliotta that he was not given an opportunity to be heard, this is not correct. By reg 53(2) of the Regulations, the chief executive may inform himself or herself as he or she sees fit. Mr Gugliotta had the assistance from a solicitor, who made a detailed written submission to the chief executive on Mr Gugliotta's behalf. Documents were also provided. Ms Ho, who gave evidence on behalf of the Department as to how Mr Gugliotta's case was dealt with by the Department, enquired into Path Transit's application to terminate the training contract. Ms Ho obtained information from the parties, including the CCTV footage and viewed it.
- 33 The submissions of the parties, supporting documents, and a report by Ms Ho, were all provided to the chief executive. Ms Ho's testimony was that she considered the material provided by both Path Transit and Mr Gugliotta, in connection with the application to terminate the training contract. Ms Ho also said the CCTV footage was not of much assistance in resolving the allegations. It was Ms Ho's testimony that whilst she considered that the Path Transit case to terminate the training contract was reasonably strong, she could not come to any concluded view in relation to the conduct complained of, because so much of it was disputed by Mr Gugliotta.
- 34 Importantly however, Ms Ho said that from considering all of the material, and liaising with the parties, it became clear to her that the employment relationship between Mr Gugliotta and Path Transit had completely broken down. She said this informed her view that the training objectives of the training contract were seriously jeopardised. It was on this basis that Ms Ho recommended to the chief executive that she cancel the registration of the training contract.
- 35 Given the material before the Commission on this appeal, it has not been established by Mr Gugliotta that the conclusion reached by the chief executive, that it would be appropriate to cancel the registration of the training contract, was in error and not one reasonably open to her. The trust and confidence between Mr Gugliotta and Path Transit had clearly broken down to the point where it is difficult to see how Path Transit could continue to discharge its obligations under the training contract, to provide training for Mr Gugliotta. It is also difficult to see, how the objective of the legislation would be able to be met in this case. Not only had the employer lost all confidence in the apprentice, also, Mr Gugliotta had accused Path Transit of

fraudulent conduct and made specific allegations in that regard, against a senior manager of the company, to whom Mr Gugliotta was ultimately responsible. The manager was accused of fabricating documents given to the Department.

- 36 These are serious allegations in and of themselves. However, they also speak volumes as to the breakdown in relations between the parties. Having regard to these matters, and all of the material before the chief executive at the time she made her decision, the decision to cancel the registration of the training contract between Mr Gugliotta and Path Transit under s 60F(5) of the VET Act must be confirmed. The appeal is therefore dismissed.

2014 WAIRC 00201

APPEAL RE TERMINATION OF TRAINING CONTRACT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
KEVIN COSMO GUGLIOTTA

PARTIES**APPELLANT****-v-**

DIRECTOR GENERAL, DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 12 MARCH 2014
FILE NO/S APA 3 OF 2013
CITATION NO. 2014 WAIRC 00201

Result Appeal dismissed

Representation**Appellant** In person**Respondent** Mr R Andretich of counsel

Order

HAVING heard Mr Gugliotta in person and Mr R Andretich of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Vocational Education and Training Act 1996 hereby orders –

- (1) THAT the name of the respondent be amended by deleting the name “Director General, Department of Training and Workplace Development” and inserting in lieu thereof the name “Director General, Department of Training and Workforce Development”.
- (2) THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2013 WAIRC 01073**REFERRAL OF DISPUTE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TOM JAKOVICH

PARTIES**APPLICANT****-v-**

NDK PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 19 DECEMBER 2013
FILE NO. RFT 11 OF 2013
CITATION NO. 2013 WAIRC 01073

Result Direction issued

Representation**Applicant** Mr A Dzieciol of counsel**Respondent** Ms S McLeod of counsel

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms S McLeod of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.
- (2) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2014 WAIRC 00051****REFERRAL OF DISPUTE**

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

TREADSTONE HAULAGE PTY LTD

APPLICANT

-v-

NDK PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 31 JANUARY 2014
FILE NO/S RFT 11 OF 2013
CITATION NO. 2014 WAIRC 00051

Result Order issued

Representation

Applicant Mr A Dzieciol of counsel
Respondent Mr M Cox of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr M Cox of counsel 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 –

- (1) THAT the name of the applicant on the notice of application be amended by deleting the name “Tom Jakovich” and inserting in lieu thereof the name “Treadstone Haulage Pty Ltd”.
- (2) THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2013 WAIRC 00431****REFERRAL OF DISPUTE**

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

TRANSPORT WORKERS UNION OF AUSTRALIA INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

LN PRICE AND PARTNERS PTY LTD TRADING AS BUSSELTON FREIGHT SERVICES

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 16 JULY 2013
FILE NO/S RFT 12 OF 2012
CITATION NO. 2013 WAIRC 00431

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol
Respondent	Mr S Kemp and Mr A Price

Order

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

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

NOTICES—Application for General Order—

2014 WAIRC 00290

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

111 St Georges Terrace, Perth

Submissions for the 2014

WA Minimum Wage

The WAIRC is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee of \$645.90 per week was set in June 2013 to apply from 1 July 2013.

The WAIRC invites interested persons or organisations to make a submission to the Commission on what minimum wage should be set in 2014. The Commission will hear oral submissions commencing on Wednesday, 28 May 2014. The proceedings are open to the public and will be webcast. Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Friday, 9 May 2014.

Written submissions are also welcomed. Any person or organisation who wishes to make a written submission should do so in writing or by email by Friday, 9 May 2014. Please note that copies of written submissions may be made available to other persons and may be displayed on the Commission's website.

Further particulars may be obtained from the Registry of the WAIRC and from the Commission's website at www.wairc.wa.gov.au.

All correspondence should be addressed to the Registrar at the above address or by email to registrar@wairc.wa.gov.au quoting Matter number 1 of 2014.

DATED at Perth this 9th day of April 2014.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.
