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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—General Matters—

2014 WAIRC 00615

SALARY CAP FOR LODGING CLAIMS OF UNFAIR DISMISSAL OR DENIAL OF CONTRACTUAL BENEFITS

Section 29AA(3) and (4) of the *Industrial Relations Act 1979* provides that the Commission must not determine a claim for harsh, oppressive or unfair dismissal or a claim for a denied contractual benefit if an industrial instrument does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount. What is meant by an industrial instrument is defined in section 29AA(5) of the *Industrial Relations Act 1979* and was discussed by the Full Bench in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* (2006) 86 WAIG 2725. The prescribed amount of the salary is determined by Regulations 5 and 6 of the Industrial Relations (General) Regulations 1997. The amount is adjusted each July 1.

The figure that will apply 1 July 2014 has been calculated by the Registrar as being $149,400.00. The amount is a matter for the Commission to determine so that figure must be seen as a guide, until such time as the Commission may determine a different amount.

FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 00562

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 29 OF 2012 GIVEN ON 14 FEBRUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00562
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
HEARD	**:**	WEDNESDAY, 16 APRIL 2014
DELIVERED	**:**	FRIDAY, 27 JUNE 2014
FILE NO.	**:**	FBA 5 OF 2014
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
		Appellant
		AND
		PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**[2014] WAIRC 00102; (2014) 94 WAIG 268**
File No.	**:**	**CR 29 of 2012**

CatchWords	**:**	Industrial law (WA) - Appeal against decision of the Commission - Claim for alteration of rosters for passenger ticketing assistants on the Armadale line - Inquisitorial powers of the Commission considered - Non-compliance with s 26(3) of the *Industrial Relations Act 1979* (WA) rendered decision invalid - Decision quashed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 12(1), s 23(1), s 26(1), s 26(1)(b), s 26(2), s 26(3), s 27, s 27(1)(b), s 27(1)(i), s 27(1)(p), s 27(1)(q), s 27(1)(r), s 44(9), s 49
Result	**:**	Order made
Representation:		
Counsel:		
Appellant	**:**	Mr C A Fogliani
Respondent	**:**	Mr D J Matthews
Solicitors:		
Appellant	**:**	W G McNally Jones Staff
Respondent	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56; (2012) 248 CLR 378

Commissioner of Police v Eaton [2013] HCA 2; (2013) 87 ALJR 267; (2013) 230 IR 78

Monis v The Queen [2013] HCA 4; (2013) 249 CLR 92

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

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82

Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia (1990) 70 WAIG 2083

Stamco Pty Ltd v The Shop, Distributive and Allied Employees' Association of WA (1992) 72 WAIG 1980

Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161 CLR 141

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00534

Woodberry v Koolan Island Club Inc (1992) 72 WAIG 1751

Case(s) also cited:

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

Reasons for Decision

SMITH AP:

Introduction

1 This is an appeal to the Full Bench pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision of the Commission given on 14 February 2014 in CR 29 of 2012: [2014] WAIRC 00102; (2014) 93 WAIG 268. The order provides:

(1) THAT the Base Roster for the Armadale Line incorporates the matters referred to in the numbered paragraphs (1) to (5) under the heading 'Relief Links' in exhibit R1 at p 69.

(2) THAT delegates of the applicant and rostering representatives employed on the Armadale Line be given full access to the respondent's Rostering and Payments System.

(3) THAT the parties have liberty to apply.

(4) THAT otherwise the application be and is hereby dismissed.

Inherent in the order was the rejection of a claim by The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the union) for work carried out by employees of a contractor, MSS Security Pty Ltd (MSS), at the Victoria Park station on the Armadale line, to be allocated to employees of the Public Transport Authority of Western Australia (the PTA) who are passenger ticketing assistants. Passenger ticketing assistants were introduced into the urban rail network in 2006.

2 The rostering dispute on the Armadale line has a lengthy history. The Armadale line runs from Perth station to Armadale station, with some 20 stations in between. The line is busy. It carried in excess of nine and a half million passengers in the 2012-13 year.

3 The job of a passenger ticketing assistant involves providing patrons with advice about train schedules, timetables and ticketing. They also assist in revenue protection by checking tickets and issuing fare evasion infringements at fare gates. The employment of passenger ticketing assistants is covered by the terms of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011*.

4 A number of alterations were made to rosters in 2012 which led to a number of issues being raised by the union with the PTA. The learned Commissioner summarised these issues as follows:

(a) A complaint that there are too many 'spare lincs' on the Armadale Line base roster;

(b) The fact that the Armadale 2 shift was not allocated to a line in the roster;

(c) That the employees wished to implement a balanced roster;

(d) The differing shift lengths in the new proposed roster made shift swaps difficult, if not impossible;

(e) Complaints in relation to the unfair allocation of overtime and that PTAs on the Armadale Line were the lowest paid generally;

(f) That contractors were being used to perform work on the line which could be performed by PTAs; and

(g) That the employees' access to the Authority's Rostering and Payments System had been withdrawn.

5 It is common ground that at Victoria Park station on weekdays one passenger ticketing assistant is allocated a shift that finishes at 15:00 hours. The passenger ticketing assistant is allocated on weekdays to the Victoria Park station to provide services to disabled passengers who regularly catch trains to and from that station to access the Association for the Blind WA premises that are located close to the station. The work in question is work performed at Victoria Park after the passenger ticketing assistant hands over their work:

(a) Between 14:45 and 15:30 on every weekday, by two MSS employees; and

(b) Between 15:30 and 16:45 on every weekday, by two different MSS employees.

6 The memorandum of matters referred for hearing and determination under s 44(9) of the Act were as follows:

(1) The Union and the Authority are in dispute in relation to rostering practices for Passenger Ticketing Assistants on the Authority's Armadale line.

(2) The Union contends that the current base roster on the Armadale line fails to strike a fair balance between operational requirements and work/life balance for the affected employees. The Union claims that the adoption of the 'option three' roster, set out in Attachment A, will meet the operational requirements of the Authority and the work/life balance of the affected employees.

(3) Furthermore, the Union contends that in relation to the Authority's existing rostering practices:

(a) There are an unreasonable number of spare lincs in the Armadale roster. The number of spare lincs on the Armadale roster should be reduced to two spare lincs;

(b) The current rostering arrangements give rise to inconsistent length of shifts which negatively impacts on the capacity of employees to engage in shift swaps, thereby affecting work/life balance. All shifts on the base roster, wherever possible, should be ten hours in length;

(c) There should be no 'floating shifts' on the base roster. Presently there are shifts, such as the Armadale 2 shift, which are not permanently allocated to a line on the roster. The Union contends that all shifts should be permanently allocated to a roster line;

(d) The base roster fails to provide balanced working weeks. The Union contends that the base roster must contain balanced weeks of work;

(e) The Authority is currently contracting out work of Passenger Ticketing Assistants at the Victoria Park station. The Union contends this work could be covered by employees on the Armadale line at lower cost to the Authority and there is an operational need for an increase in hours at both Victoria Park and Thornlie Stations; and

(f) The employees concerned are being unreasonably denied access to the RAPS system. Presently employees are only able to access their current fortnight's roster. They are unable to access historical data. This has led to an inability to properly check historical pay information and previously worked rosters. The Union seeks full access to RAPS.

(4) In relation to the Union claims, the Authority:

(a) Opposes the claim for reduction in spare lincs on the Armadale roster. It contends that relief lincs have been a part of the roster since its inception in 2006. They are necessary for coverage of planned and unplanned absences, consistent with other lines across the Authority's operations;

(b) Has no preference regarding balanced or unbalanced week rosters. However, proposals to date from the affected employees have not advanced a proposed roster which meets the Authority's operational requirements and constitutes an improvement on the current base roster;

(c) Contends that in relation to shift swaps, this matter relates to changes of start times at the Thornlie Station, consequent upon coverage requirements at the Kelmscott Station. The Authority acknowledges that shift swaps at the Thornlie Station are now more difficult to achieve on an individual basis. They may still be reasonably swapped on a fortnightly basis, consistent with other lines and rosters. The Authority's primary consideration is optimal customer service to patrons, whilst having regard to staff requirements; and

(d) Enables access to current operational rosters through RAPS for all customer service staff. Additionally, PDF versions of the posted and operational rosters are available. The Authority contends that all its obligations under the Agreement have been met.

(5) Furthermore, the Authority contends that it has the right to make reasonable and legitimate changes to its rosters to meet its operational requirements in order that its operations are conducted in a cost effective manner. The Authority seeks a reaffirmation of these principles.

(6) The parties seek appropriate declarations and orders.

7 The union claimed the PTA should reallocate the work performed by MSS employees to passenger ticketing assistants. In submissions filed before the matter was heard by the learned Commissioner, the union set out the claim insofar as it related to the work carried out by MSS employees as follows:

> The use of four contractors to cover work that could be performed by one Passenger Ticketing Assistant is a harsh, unfair, and capricious use of the respondent's discretion.
>
> *Particulars*
>
> 9.2.1. The work being performed by the MSS Security Guards at Victoria Park is the same work that would ordinarily be done by a Passenger Ticketing Assistant.
>
> 9.2.2. The Affected Employees could cover the hours at less of a cost to the respondent.
>
> 9.2.3. The respondent has committed and agreed to the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011*. Similarly, the Passenger Ticketing Assistants are covered by the *Railway Employees' Award No. 18 of 1969*. The use of MSS Security Guards as Passenger Ticketing Assistants is a demarcation issue. The demarcation issue will only escalate if it is not adequately resolved.

The evidence given in the proceedings at first instance about the use of contractors

8 The following witnesses gave evidence on behalf of the union about the dispute insofar as it related to the work performed by MSS employees:

(a) Mr Jesse Charles Watts is a passenger ticketing assistant on the Armadale line. He has worked on the Armadale line since 1993. He said passenger ticketing assistants work from about 07:00 until 15:00. Two MSS employees come in to relieve him once he leaves work at 15:00 after having completed an eight-hour shift. Passenger ticketing assistants assist special needs people off the train and up the lift or the staircase. A few of those special needs clients return to the Victoria Park station after 15:00 and the MSS employees assist them on the trains to various locations. He told the Commission that there was no reason why the PTA could not extend the passenger ticketing assistant's shift at Victoria Park station to 17:00 as the MSS employees perform the same duties as a passenger ticketing assistant. He also said morale on the Armadale line had been very poor for a number of years because the hours of work had been cut.

(b) Mr William Jeet Singh is also employed as a passenger ticketing assistant on the Armadale line. Mr Singh explained when he works at the Victoria Park station the MSS employees come and relieve him at 14:45. At a handover he explains to the MSS employees who are the special needs customers they will need to deal with and where they are going. When asked if there was any difference between the work the MSS employees are performing to the work he was performing when he was relieved by the MSS employees, he said there was no difference except that two MSS employees perform the same duties as he performed. Mr Singh, however, conceded that the MSS employees ride trains as part of their work.

(c) Mr Jason Michael Britza is also employed as a passenger ticketing assistant. His evidence was similar to the evidence given by Mr Jesse Watts and Mr William Singh. He said that two MSS employees work at Victoria Park and they provide the same services as the passenger ticketing assistant. He said, however, that on occasions one of the MSS employees may leave and go to Cannington with a visually impaired passenger. That is not something that the passenger ticketing assistants do. He also said that two MSS employees relieve for an hour and then they leave and another two MSS employees arrive at the station for a second hour of work. He also conceded that prior to the MSS employees starting their shift at Victoria Park they ride trains and that a transit officer could also be rostered to carry out work at Victoria Park station from 14:45. He said, however, that the difficulty with transit officers working at Victoria Park was that they could be called away at any time to deal with a security issue and that is not 'very good' for visually impaired passengers.

(d) Ms Tracy Ann Flavel was a passenger ticketing assistant based on the Armadale line. At the time of giving evidence she was allocated to the Mandurah line. She gave evidence that all the rosters on the Mandurah north line were 10 hour shifts, even on the spare links. She also gave similar evidence about the duties of the MSS employees at Victoria Park. She said that the MSS employees often called in prior to their shift starting to make sure they were informed about what was to happen with visually impaired and wheelchair-bound passengers. She also said that some disabled customers would become confused when dealing with the MSS employees because the MSS employees are not the same people every day as they rotate through different areas of work. This is different to the passenger ticketing assistants who work on the Armadale line. They get to know the clients and

have a good rapport with them as they work at the Victoria Park station on a regular basis and the clients know each of the passenger ticketing assistants by name. She also said that there was no reason why the shifts at Victoria Park station could not be extended to 17:00 on weekdays. Ms Flavel gave some evidence that was ruled by the learned Commissioner to be confidential. This evidence related to the rates of pay of the passenger ticketing assistants compared to the rates paid by the PTA to MSS to provide employees.

(e) Mr Barry Keith Watts is the current president of the customer service branch of the union. He, too, gave evidence that when the MSS employees are at the Victoria Park station they carry out the same duties as passenger ticketing assistants.

9 On behalf of the PTA, Mr Ian Bernard Luff, the manager of customer service for Transperth Train Operations gave evidence about the role of passenger ticketing assistants. He said in general passenger ticketing assistant shifts were designed to meet up with the transit officers. He also said on the majority of the days of the week there are approximately 20 hours of operation where the passenger ticketing assistants work 10 hours from 05:00. The transit officers commence work around 15:00. This is the time of the day that they are needed for not only customer service, but for the general security aspect of their role. Consequently, the Transperth trains generally run with customer service in the day until around about 15:00 and from that time onwards primarily with security staff.

10 Mr Luff explained that although the patronage of the Victoria Park station would not by itself normally warrant a staff member there, because of the nature of the regular customers who have special needs, they roster a passenger ticketing assistant to work at the Victoria Park station. Usually the security staff take over from the customer service staff at 15:00. However, a mobile security patrol 'Delta' is normally based at Victoria Park from 15:00 onwards but the mobile security patrol have to leave Victoria Park to unlock park and ride facilities. In order to cover the window of time when the mobile security patrol are not at the Victoria Park station, revenue protection staff or the MSS employees are assigned to fill in that role until such time as the Delta transit officers return to the station. He also said he understood that MSS employees come off trains to carry out that work. Yet in eight months' time the locked car parks will no longer exist and he suspects that the Delta vehicle will no longer be needed to attend the car parks. He also said if the MSS employees did not attend Victoria Park for the period in question they would otherwise be on trains. Thus, he said in terms of any cost saving, there was not any as having a passenger ticketing assistant would provide another body on duty and create an additional cost.

11 When Mr Luff was asked what the security area do in relation to rostering he said that that was not something that he was aware of, nor did he have any knowledge of the content of the MSS contract with the PTA. He said that was not something that he got involved in.

12 In cross-examination it was put to Mr Luff that the MSS employees at the Victoria Park station between 14:45 and 16:45 on Monday to Friday are performing the same role as a passenger ticketing assistant. In response, Mr Luff said that they certainly perform a similar role. It was then put to him that if the passenger ticketing assistants were to man the Victoria Park station between 14:45 and 16:45 on Monday to Friday there would be no operational requirement for the PTA to have four MSS employees at the Victoria Park station between those hours because they would not be required. In response Mr Luff said in terms of how their contract is set up he did not know what work they would be engaged in. He also was not able to comment on whether the MSS employees could carry out alternative work.

13 In re-examination Mr Luff was asked to explain how the MSS role at Victoria Park station would compare to the role conducted by a transit officer if a transit officer was available to work at Victoria Park station. In response, he said, if a transit officer was available the major difference would be that the transit officer could perform security-related duties such as arresting patrons which was an unlikely occurrence given the clientele that frequent the Victoria Park station. He also said that if the transit officers were not tending to the car parks and releasing people's cars after 15:00, they were performing the same duties at the Victoria Park station as the MSS employees.

14 At the conclusion of Mr Luff's evidence the learned Commissioner requested that further information be provided by the PTA about the work of the MSS employees. The learned Commissioner asked:

> Just a couple of points of clarification, if I can, Mr Luff?--Yes.
>
> You gave some evidence earlier in the course of cross-examination about the issue of relief and the impact of reducing the relief - - -?-Yes.
>
> - - - line and I understand the tenor of what you were saying is that to cover the amount - the same amount of work in ordinary hours would require you increase the fulltime equivalent, the FTEs - - -?---Yes.
>
> - - - is that essentially what - what you're saying? I assume that the inverse of that is that if it's not ordinary hours then the work could be covered in overtime as opposed to additional people?--Correct.
>
> All right. Thank you. The other question is, I suppose it's a question of a bit of clarification really and that was the questions you were asked about the scope of the MSS security work - - -?--Yes.
>
> - - - and I think you mentioned that you weren't sufficiently familiar with all of that to answer some of the questions which Mr Fogliani put to you. As a matter of filling in the gaps, could you or others within the organisation get that information and provide it to me in due course; that is other work that's done?--Yeah. Yes, by - - -
>
> The MSS security people?--Certainly - certainly with the - sorry, in explanation; they - they are generally doing train riding work or - or gates but certainly for - at that time of day, yes. Yes, we can get that information.
>
> All right. Mr Farrell, could I - - -
>
> **LUFF, MR:** If I specifically - - -
>
> **KENNER C:** - - - leave that with you just to clarify that for me?

FARRELL, MR: Commissioner, just to be clear, I understand the query to be in relation to particular individuals that - -

KENNER C: This is Victoria Park.

FARRELL, MR: - - - that attended Victoria Park - - -

KENNER C: And yes, what else they do - - -

FARRELL, MR: What else they do in the course of their shift, yes.

KENNER C: - - - in the - other than the two - sorry, the 45 minutes I think it is or it's not each of them aren't there for very long - - -

FARRELL, MR: No, no. Yes.

KENNER C: - - - what else they do for the rest of their time because that - that has implications as to how that might be covered if it's done by employees in some senses, so that would be helpful.

FARRELL, MR: Yes.

KENNER C: Thank you very much, Mr Luff.

(WITNESS WITHDREW)

KENNER C: Mr Farrell?

FARRELL, MR: Commissioner, perhaps just dealing with that housekeeping matter then, what would I - could do is to arrange for, say Mr Kitis to provide a - a one-page - - -

KENNER C: Yes. Absolutely fine.

FARRELL, MR: - - - statement or - or something along those lines just to continue as to what - what the position was.

KENNER C: Just to fill the gap as to what's done.

FARRELL, MR: Yes.

KENNER C: Yes, that would be helpful.

FARRELL, MR: Okay.

15 At the conclusion of the hearing the learned Commissioner informed the parties that he reserved his decision and that the matter would be adjourned to a date to be fixed.

16 On 30 October 2013, Mr Kivraj Singh, the industrial officer of the union, received a copy of an email from Judy Allen-Rana, a principal consultant labour relations employed by the PTA, which attached a statement made by Mr John Kitis, a transit manager in the security service section of Transperth Train Operations. The email was sent to the Associate to Commissioner Kenner and to Mr Singh.

17 It is common ground that no contact was made with the union on behalf of the learned Commissioner about whether the learned Commissioner intended to take into account the matters stated in Mr Kitis' statement or whether the union wished to be heard about that document.

18 In a document titled 'Statement of Evidence – John Kitis', which appears to be signed by Mr Kitis on 29 October 2013, and is otherwise not in the form of a statutory declaration or affidavit, he stated as follows:

(a) He is employed by the PTA as a transit manager in the security service section of the Transperth Train Operations Division and has held that role since 2002.

(b) It is one of his responsibilities to oversee rostering to achieve the presence of appropriate personnel at identified locations on Transperth's urban rail system at the times at which that presence is identified to be most required.

(c) Personnel are deployed to cover stations by the security service section for multiple reasons – to contribute to passenger safety and security, but also to minimise fare evasion and to provide assistance and information to passengers.

(d) The personnel available to the security service section are:

(i) transit officers employed by the PTA whose role includes all of those functions; and

(ii) revenue protection officers employed by MSS whose role does not extend to providing passenger security other than by providing a physical presence and whose services are provided to the PTA by MSS under a contract.

(e) It is one of the responsibilities of his role, after all available transit officer employees have been rostered, to oversee the notification to MSS of rostered shifts required to be filled by revenue protection officers.

(f) Up until about 15:00 on weekdays, the role of the security service section on the urban rail network is limited to the provision of mobile transit officer patrols in Delta vehicles, to respond to any passenger and employee safety and security issues which arise along the line, and the provision of train-riding personnel which is currently revenue protection officers.

(g) Up until about 15:00 on weekdays, deterrence of fare evasion and provision of passenger assistance at stations are dealt with by staff employed by the customer service section. However, from about 15:00, the security service section assumes responsibility for deterrence of fare evasion and provision of passenger assistance at stations as well as safety and security.

(h) Transit officers will be rostered at major stations across the network during and after the afternoon peak to provide security, while revenue protection officers will cease train-riding during the afternoon peak to staff station fare gates until about 18:00, and those rostered after 18:00 then resume train-riding.

(i) The arrangements at Victoria Park station are consistent with this approach. A mobile Delta squad of transit officers is based at Victoria Park station. However, currently they have the duty of unlocking the lock and ride car parks on the Armadale line prior to the afternoon peak, so that they cannot remain at the Victoria Park station.

(j) Given the identified need to frequently have a physical presence at the Victoria Park station to service the needs of patrons attending the nearby Royal Institute of the Blind, MSS are notified that a daily work schedule of 14:45 - 17:30 is required to be filled on weekdays by revenue protection officers, on the basis that officers who would otherwise be riding trains may be used.

(k) It is a decision for MSS whether that work schedule is filled by a single pair of officers otherwise engaged on train-riding shifts starting at 10:00 and finishing after 17:30 or used as a handover point between the pair finishing an early morning train-riding shift and another pair commencing a late night train-riding shift.

(l) The need for MSS to provide revenue protection officers to attend Victoria Park station after 1 July 2013 [sic] will be reviewed, because lock and ride car parks are being discontinued from that date, so that the Delta transit officer unit based at Victoria Park station will no longer be routinely required to be absent from the station during afternoon peak period to unlock the car parks.

The learned Commissioner's reasons at first instance

19 After considering the evidence given in relation to other issues raised in the matter before him, the learned Commissioner made the following findings. These findings were as follows:

(a) As outlined by Mr Luff the history of customer service at the Victoria Park station arises because the Association for the Blind of WA is across the road from the station. Mr Luff testified that customer service is generally provided to 15:00, from which time security staff take over coverage. This work is done by transit officers.

(b) Given the shortage of transit officers, some of this work has been given to a contractor, MSS. The PTA does have a mobile security patrol (Delta patrol) based at the Victoria Park station. However, they have previously been required to leave the station to attend to other duties, including unlocking 'park and ride' facilities in other locations on the Armadale line. According to Mr Luff, when the MSS employees are not at the Victoria Park station, they are riding on trains, providing a security presence and performing a revenue protection role. Mr Luff understood the position to be that if the MSS employees were not allocated station duties at the Victoria Park station, they would spend the same time riding on trains. Thus, no savings would actually be generated if they ceased to perform the station work. On the other hand, Mr Luff said that if the passenger ticketing assistants' rostered hours were extended to cover the work done by MSS presently, this would have an impact which would require that 10 additional hours of work would need to be found from the roster, which would mean a reduction in hours elsewhere.

(c) The evidence of Mr Luff on this issue was supplemented by a witness statement of Mr Kitis, the PTA's transit manager security services.

(d) Mr Kitis referred to the model also mentioned by Mr Luff, in terms of the interface between customer service and security services on the PTA's network. Up until 15:00 daily, fare evasion deterrence and customer assistance is provided by customer service employees. After 15:00, these functions are undertaken by security services. Revenue protection officers (under contract with MSS) cease train riding, and staff stations, from 15:00 to about 18:00. From 18:00 onwards, they resume train-riding duties.

(e) Mr Kitis also referred to the mobile Delta squad who, while based at the Victoria Park station, are required to leave the station to unlock 'lock and ride' car parks on the Armadale line, prior to the afternoon peak period. Because of the identified need to have a presence at the Victoria Park station in their absence, the MSS personnel go to this location between 14:45 and 17:30. They would otherwise be on trains. Mr Kitis said that how MSS make this work was a matter for them. He also referred to a review of this coverage at Victoria Park station, with the discontinuance of 'lock and ride' car parks from 1 July 2013 [sic].

(f) For the union, Mr BarryWatts said that he did not see a need for a transit officer or security presence at the Victoria Park station, as it is a 'special needs station'. Along with Mr Britza, the view seemed to be that as MSS provide the same special needs services to customers this could equally be provided by passenger ticketing assistants. Ms Flavel also expressed similar views that the passenger ticketing assistants could do the MSS work, at a lower hourly rate of pay.

20 The learned Commissioner found, after considering this evidence, that he was not persuaded by the union that the MSS work should be discontinued and that the passenger ticketing assistants should have their shifts extended to cover the work in question. He then went on to find that:

(a) The principal reason the PTA uses MSS for this work is because the work is a part of the security services.

(b) On the evidence of both Mr Luff and Mr Kitis, this work is performed because the existing transit officers were required to leave the Victoria Park station to attend to other duties. If they were not required to do so previously, presumably no need would arise for the MSS involvement.

(c) It is not a case of the MSS employees replacing passenger ticketing assistants previously performing this work, or otherwise taking work away from them.

(d) The work involved is essentially a support to the security services at the Victoria Park station. The rest of the time the MSS employees work on trains to provide a physical presence and revenue protection services.

(e) How the security services of the PTA request the deployment of MSS to provide coverage for Victoria Park station, is a matter for the employer.

21 The learned Commissioner then found that he was not satisfied that there had been any unfairness or injustice demonstrated, in the exercise of the PTA's managerial discretion in respect of this issue.

The grounds of appeal

22 The grounds of appeal are that the learned Commissioner made an error of law by failing to observe the requirements of s 26(3) of the Act, namely, by:

(a) taking into account the evidence of Mr Kitis, which was evidence that was provided to the Commission by the PTA after the hearing of the matter; and

(b) failing to notify the union and affording the union the opportunity of being heard in relation to Mr Kitis' evidence.

The union's submissions

23 The union contends that the decision made by the learned Commissioner was ultra vires on grounds he failed to notify the union he intended to rely upon the matters stated in Mr Kitis' statement and failed to afford the union the opportunity of being heard in relation to Mr Kitis' statement of evidence. The union say that whilst there is no doubt that the learned Commissioner was entitled to consider Mr Kitis' statement of evidence because s 26(1)(b) of the Act allows the learned Commissioner to inform himself on any matter in such a way that he thinks just, his capacity to do so is controlled by the requirement to act in the procedurally fair way prescribed by s 26(3) of the Act.

24 The union says that one of the issues that caused the dispute to come to the Commission was that it had become impossible for employees on the Armadale line to shift swap because of shifts of different lengths. By allowing extra time at Victoria Park it would have had the effect that one of the shifts on the line would be a 10-hour shift which would have increased the ability for the passenger ticketing assistants to shift swap. Consequently, the MSS contract issue tied in with that issue. Thus, the MSS issue was not just a demarcation issue in terms of the work that the MSS employees were performing which the union says was essentially the same work as the passenger ticketing assistants. Yet the PTA led evidence in the proceedings that the work that was performed by the MSS employees was the same work as transit officers. This was an important issue in dispute. The union contends that the evidence put before the Commission on behalf of the union by Mr Britza, Ms Flavel and Mr Barry Watts, was that the work by the MSS employees was exactly the same as the work performed by them. Their evidence was supported by the evidence of Mr Luff in cross-examination who said that the work was very similar.

25 Essentially, there were three elements to the union's argument. The first was that the work carried out by the passenger ticketing assistants and the MSS employees was the same. The second is that if the passenger ticketing assistants were able to carry out that work they would have increased the length of the shift to facilitate the shift swaps and the third aspect was an argument that tied into the cost of making the work available to passenger ticketing assistants. In respect of the issue of cost, the union put forward an argument that the rates paid to the passenger ticketing assistants were less than the rates paid to the MSS employees by the PTA. Mr Luff as sole witness for the PTA, could not comment on that evidence because he was not aware of the contractual arrangements that were in place between the PTA and MSS.

26 At the conclusion of the oral evidence the union says it understood by the questions asked by the learned Commissioner that the PTA was going to provide a one page statement by Mr Kitis about what the MSS employees do when they are not standing at the platform at Victoria Park between 14:45 and 16:45. The union did not have an issue in relation to that matter because it was not relevant to their case what the MSS employees do when they are not working at Victoria Park station. Their case was based on what the MSS employees did when they were at Victoria Park. However, the statement of evidence of Mr Kitis provided by the PTA traversed issues more than what was asked by the Commissioner; that is, it dealt with issues that were in contest between the parties. In particular the statement dealt with work performed by transit officers and work performed by MSS employees while they are at Victoria Park and why they are there. The union also contended they expected that although the learned Commissioner had reserved his decision the matter would be listed for further proceedings.

27 The union says the learned Commissioner relied upon the evidence of Mr Kitis not just about what the MSS employees do when they are not working at Victoria Park, but relied upon the other evidence Mr Kitis gave as to what the MSS employees do at Victoria Park and why they are there. That is evidence they say that was not within the scope of what was contemplated in the exchange that occurred the final day of the hearing. The union say that the learned Commissioner relied upon Mr Kitis' statement to their detriment because they were not afforded an opportunity to speak to, or make submissions about, how Mr Kitis' evidence should be treated in light of other evidence given by Mr Luff in cross-examination and the witnesses for the union that the work carried out by the MSS employees and the passenger ticketing assistants at Victoria Park was the same.

28 Whilst the union was sent a copy of Mr Kitis' statement they were not given the opportunity to protest against or to criticise what was in the statement of Mr Kitis. Consequently, the union says it was denied the opportunity of making submissions about Mr Kitis' evidence. They say the submissions they could make were that Mr Kitis' evidence was not made under oath, nor was it subject to cross-examination and thus the weight of his evidence should not be that significant. Also, whilst they did not have an issue about the credibility of Mr Kitis' evidence, they wished to take issue with the matters set out in Mr Kitis' statement and test the propositions stated by Mr Kitis and this is a matter that may have required Mr Kitis giving oral evidence under oath in relation to the matters stated in his statement.

The submissions made on behalf of the PTA

29 The PTA says that the learned Commissioner correctly identified that the matter was one of whether the PTA's managerial prerogative had been exercised so unfairly or unjustly that the Commission should interfere. They submit that there were two

issues before the learned Commissioner. The first was that the union contended the work being performed by MSS employees at Victoria Park was the same work that ordinarily would be done by the passenger ticketing assistants and the second was that the affected employees could cover the hours at less of a cost to the PTA.

30 It is clear that the learned Commissioner did not decide the matter on the basis that the exercise of the managerial prerogative was not unfair because it was cheaper for the PTA to use MSS employees and therefore the PTA had a good reason, based on expense, for exercising the managerial prerogative in the way it did. The whole question of cost was not, in the end, significant in the learned Commissioner's determination of the matter. The learned Commissioner decided the matter on the basis that the PTA was entitled to deploy its resources in the way it wanted, especially if that deployment did not involve directly employed staff having work taken away from them. The ratio of the learned Commissioner's decision in no way relied upon the evidence of Mr Kitis or the issue of cost that the union sought to rely upon.

31 Whether or not the union cross-examined Mr Kitis on the material in his statement, or provided further evidence in response to it, is not material in light of the way the matter was decided.

32 The issue might theoretically be different if Mr Kitis had given evidence to the effect 'it is much cheaper for the PTA to use MSS staff as opposed to direct employees' and the learned Commissioner had gone on to make a finding to the effect 'I consider that the exercise of the managerial prerogative is fair because it is a cheaper option for the PTA despite the fact that it takes work away from direct employees' but this did not happen.

33 In any event, if an employer decides to deploy its resources in a way that is more expensive than an alternative, the fact the employer's decision is more expensive could not alone make it an unfair or unjust exercise of the managerial prerogative.

34 The PTA's case at first instance was that the transit officers at Victoria Park have to leave the station and they put in MSS employees to cover for the transit officers. This is essentially what the learned Commissioner found in his reasons for decision. He found that if the transit officers were not required to leave the station to attend to the car parks, presumably no need would arise for MSS involvement. It is not a case of the MSS employees replacing passenger ticketing assistants previously performing this work, or otherwise taking work away from them. The PTA says that simply was not in dispute and there was plenty of evidence upon which the learned Commissioner could have relied on to make this finding.

35 If the union is of the view that the learned Commissioner erred in finding that, in fact, what the MSS employees did was security work, or transit officer work, or that an aspect of their work was security work, or that the work that MSS employees did at Victoria Park station matched up with what transit officers did more than with what passenger ticketing assistants did they needed to appeal that. However, there is not an appeal before the Full Bench on that basis.

36 The evidence of Mr Luff when he was asked whether he disputed whether the MSS employees were performing the exact same role as what passenger ticketing assistants would do, he said that they certainly perform a similar role. But the learned Commissioner still found there was a replacement of transit officers and that if the transit officers did not have to leave the Victoria Park station, the MSS employees would not have had to work at that station. Consequently, the MSS employees are employed, effectively, as transit officers. Thus, it is said by the PTA there may be some similarities in the role, but the evidence did not dig down in relation to what the differences were. The statement of Mr Kitis did not address what the MSS employees do at Victoria Park station. All he does in his statement is speak about the way in which the PTA organises its security and that did not add a lot to what Mr Luff had already told the Commission.

37 The PTA says there was no failure to comply with s 26(3) of the Act as this provision did not apply to this matter in the way the union contends. It is said that the union assumes that 'the hearing' referred to in s 26(3) is confined to the oral part of the hearing. It is clear that a hearing before the Commission can proceed in various ways and have different facets. Sometimes there is a 'hearing' on the papers and there is no oral part of the hearing at all. It is common for the Commission, as part of the hearing, to receive material after the oral part of the hearing, where there is an oral part to the hearing.

38 In this case, there was an oral hearing and at that oral hearing the learned Commissioner made it clear that another part to the hearing would be the receipt of information from the PTA on some matters. As it turned out that information was provided by way of a statement by Mr Kitis sent to the Commission and the union. Section 26(3) of the Act prohibits the Commission from obtaining information outside the hearing without providing an opportunity for the parties to be heard in respect of that information.

39 Receipt of the statement by Mr Kitis was part of the hearing. It is not right to say that the statement was 'information that was not raised before the Commission on the hearing of the matter' within the meaning of the words in s 26(3) of the Act. Even if the word 'hearing' in s 26(3) was confined to the oral hearing, the information in Mr Kitis' statement was 'raised' before the Commission at the oral hearing of the matter. Section 26(3) must be read together with s 26(1)(b) of the Act which provides that the Commission shall not be bound by the rules of evidence, but may inform itself on any matter in such a way as it thinks just. This provision enables the Commission to get its information from anywhere, as part of the hearing or outside the hearing. This is an inquisitorial aspect to the powers of the Commission. If it does so then the Commission must comply with s 26(3) of the Act. In this matter, s 26(3) was not enlivened because the provision of Mr Kitis' statement was part of the hearing. It was raised before the Commission at the oral hearing of the matter.

40 Even if it could be said that s 26(3) of the Act applied, the union had notice that the information was to be provided by the PTA. Also, it is clear that the Commission was aware that the union was in possession of a copy of Mr Kitis' statement. Thus, there was no need to 'notify' the union pursuant to s 26(3) of the Act because the information was received by the Commission (and sent to the union) as part of the hearing. If the union wished to be heard further on the matter, either orally or in writing, following receipt of the statement it could have sought to be so heard. This is as axiomatic as cross-examining the witness or replying to written submissions. That the union did not realise it could do so, or did not take up the opportunity to do so, is not a failure by the Commission to afford the union the opportunity of being heard on information contrary to s 26(3) of the Act because that provision only deals with information not raised as part of the hearing and the provision of Mr Kitis' statement was clearly part of the hearing.

41 Section 26(3) of the Act would be unnecessary but for the presence of s 26(1)(b) of the Act, because the Commission, but for s 26(1)(b), would be confined to deciding matters solely on the information raised as part of the hearing. Accordingly, all s 26(3) does is make it clear that the normal rules of natural justice are not ousted by s 26(1)(b) of the Act.

42 Receipt of the statement of Mr Kitis was not part of the hearing, but, in any event, if it is accepted that s 26(3) of the Act may have application, the contents of Mr Kitis' statement were not 'taken into account' in the sense that phrase is used in s 26(3). The phrase 'take into account' means to take into consideration in a material way. The Commission does not have to, pursuant to s 26(3), tell the parties about everything it knows outside of what it has learned in the hearing. It is only information that has a material bearing on the outcome of the matter before the Commission to which s 26(3) applies.

43 The learned Commissioner summarising the contents of Mr Kitis' statement does not mean he took account of it in the sense meant by s 26(3). In fact, once the ratio of the decision is examined it is clear that the learned Commissioner did not take the statement into account.

44 The PTA says the appeal is misconceived in relying upon a failure to comply with s 26(3). The union's complaint is in essence that it was not afforded procedural fairness. Such a complaint is unfounded. The union was aware that this information was coming from Mr Kitis, was aware of the statement of Mr Kitis and, by its representation, was aware that it could have reacted to the statement of Mr Kitis as part of the hearing or sought to do so.

45 In any event, and importantly, the Commission did not materially rely upon the statement of Mr Kitis in a way adverse to the union or, it is respectively submitted, at all. Further, the union does not address the question in what way did any alleged breach of procedural fairness affect its claim. The learned Commissioner had ample evidence before him and the evidence of Mr Luff that MSS employees are employed as transit officers and they replace the transit officers at the Victoria Park station that have to leave. That was enough for the learned Commissioner to find that they are not replacing or taking work away from passenger ticketing assistants. Consequently, there is no unfairness in the exercise of the PTA's management prerogative and there was nothing that Mr Kitis said that went one way or the other in relation to that.

46 Finally, in the alternative, even if there was a failure to comply with the rules of procedural fairness or s 26(3) of the Act, there was no unfairness because it is clear that compliance would not lead to a different result. This is because the information in Mr Kitis' statement was not important to the outcome. A court should not quash a decision in these circumstances: ***Stead v State Government Insurance Commission*** [1986] HCA 54; (1986) 161 CLR 141, 147; ***Re Refugee Review Tribunal; Ex parte Aala*** [2000] HCA 57; (2000) 204 CLR 82, 116 - 117.

Section 26(3) of the Act

47 The meaning of a statutory provision must be determined by reference to the language of the statute as a whole, taking into account its context, general purpose, policy and its consistency and fairness: ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [69] - [70]; ***Commissioner of Police v Eaton*** [2013] HCA 2; (2013) 87 ALJR 267; (2013) 230 IR 78 [78] (Crennan, Kiefel and Bell JJ); ***Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*** [2012] HCA 56; (2012) 248 CLR 378 [24] (French CJ and Hayne J). Where competing constructions of a provision are open, the court should prefer a construction which strives to give meaning to every word of the provision: ***Project Blue Sky Inc*** [71] (McHugh, Gummow, Kirby and Hayne JJ); ***Eaton*** [98] (Gageler J). Whilst the focus of construction concerns language, it is not assisted by a focus upon the clarity of expression of its context: ***Monis v The Queen*** [2013] HCA 4; (2013) 249 CLR 92 [309] (Crennan, Kiefel and Bell JJ).

48 Recently French CJ and Hayne J in ***Certain Lloyd's Underwriters*** said [26]:

> The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions (See *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 262 [28]; *Byrnes v Kendle* (2011) 243 CLR 253 at 283 [97]). As Spigelman CJ, writing extra-curially, correctly said (Spigelman, '*The intolerable wrestle: Developments in statutory interpretation*', *Australian Law Journal*, vol 84 (2010) 822, at p 826):
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> > 'Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. *It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a specific case*.'
>
> (Emphasis added.) And as the plurality said in *Australian Education Union v Department of Education and Children's Services* ((2012) 248 CLR 1 at 14 [28]. See also *Miller v Miller* (2011) 242 CLR 446 at 459 [29]):
>
> > 'In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.'

49 The jurisdiction of the Commission is conferred solely by statute. Section 23(1) of the Act confers on the Commission, subject to the Act, the power to enquire into and deal with any industrial matter. Whilst the Commission, pursuant to s 26(1)(b) of the Act, is not bound by any rules of evidence and may inform itself on any matter in such a way as it thinks just, the power to do so is subject to the condition in the opening words of s 26(1), 'in the exercise of its jurisdiction under the Act'. The same applies to the Commission's powers under s 27 of the Act. Pursuant to s 27(1)(i), the Commission may, in relation to any matter before it, refer any matter to an expert and accept his report as evidence. The Commission is also empowered under s 27(1)(p), s 27(1)(q) and s 27(1)(r) to enter premises, inspect among other things any work, material, machinery, books, records and question any person at the place which is the subject of the matter before the Commission or is related thereto.

50 Whilst the Commission is pursuant to s 12(1) of the Act a court of record, the Commission's powers, functions and jurisdiction to enquire into and deal with industrial matters is unlike the powers of an inferior or superior court of record whose jurisdiction is largely confined to exercises of judicial power. The power of the Commission to enquire into and deal with industrial

matters will, unless it is a matter involving a claim of contractual benefits, require the Commission to exercise arbitral power, which is to make a determination of future rights and conditions. In the exercise of this jurisdiction, the Commission is conferred with the inquisitorial powers provided in s 27(1)(b), s 27(1)(i), s 27(1)(p), s 27(1)(q) and s 27(1)(r) of the Act.

51 In support of its inquisitorial powers, the Commission in granting relief or redress under the Act is not restricted to the specific claim made or to the subject matter of the claim: s 26(2) of the Act.

52 In ***Stamco Pty Ltd v The Shop, Distributive and Allied Employees' Association of WA*** (1992) 72 WAIG 1980, 1993 Sharkey P observed that it is a false premise to say the Commission is bound by the same rules and concepts as traditional courts. His Honour explained:

> Although the Commission is, by section 12 of the Industrial Relations Act 1979, established as a court of record, it is not a court of law as Wallace J observed in Amalgamated Metal Workers and Shipwrights Union of Western Australia v. Griffin Coal Mining Company Ltd and Western Collieries Ltd (1980) 60 WAIG 2137 at 2139. Rather, it is as Wickham J observed in Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others v. State Energy Commission of Western Australia (1979) 59 WAIG 494 at 496 'in some respects an administrative body, in some respect a court of record, and in some respects a legislative body'.
>
> As Olney J observed in Robe River Iron Associates v. Amalgamated Metal Workers and Shipwrights Union of Western Australia (1987) 68 WAIG 4 at 6 the Commission 'is not the Supreme Court nor is it a court of justice acting according to the principles of the common law. It is a tribunal created by statute exercising a limited jurisdiction of a specialist nature which it is required to exercise according to defined principles'. Those principles, which are substantially set out in section 26 of the Industrial Relations Act 1979 ('the Act'), require that the Commission determine any matter before it according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms. In so doing, the Commission is not bound by any rules of evidence and may inform itself on any matter in such a way as it thinks just. This is not to say that the Commission can do as it pleases without regard to the rules of natural justice (see: Robe River Iron Associates v. Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others (1986) 66 WAIG 1553; and see too: Australasian Society of Engineers, Moulders and Foundry Workers, Industrial Union of Workers, Western Australian Branch and Others v. State Energy Commission of Western Australia and Others (1991) 71 WAIG 315). Nonetheless, the Commission has wide powers and is required to function in a way which is quite different to that expected of the traditional courts.
>
> Notably, the Commission is not confined to determining any matter only on the basis of material put before it by the parties. Indeed, in many cases, to do that may produce a result which would not only not be in the interests of the parties, but be contrary to the interests of the community as a whole. It is frequently the case that parties to proceedings of the kind now in question either represent themselves or are represented by unskilled advocates who not infrequently fail to call into question all matters of moment. Not only is the Commission authorised to inform itself on any manner in such a way as it thinks just, but in granting relief or redress it 'is not restricted to the specific claim made or to the subject matter of the claim' (subsection 26(2) of the Act).

53 When the power to enquire into and determine an industrial matter are considered, it is clearly apparent that the Commission is able when dealing with a matter to instigate the provision of further evidence and documentary material and open fresh issues that may not have been directly raised by the parties. The Commission, however, cannot do so unless it complies with s 26(3) of the Act. Section 26(3) provides:

> Where the Commission, in deciding any matter before it proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.

54 Whilst it is clear that the union was provided with a copy of Mr Kitis' statement prior to the learned Commissioner delivering his decision in respect of the matter before him in CR 29 of 2012, I do not agree that the statement by Mr Kitis can be characterised as information that was raised before the Commission on the hearing of the matter. All that was raised in the hearing was a request by the learned Commissioner that information be provided to the Commission about what other work the MSS employees who attend Victoria Park station carry out in their shift. Although this was an issue touched on by Mr Kitis in his statement, the matters stated by Mr Kitis strayed well beyond that issue and dealt with the issues squarely in dispute between the parties. It cannot be said that Mr Kitis' statement did not address the matters set out in the work performed by the MSS employees at Victoria Park, as it is clear that Mr Kitis addressed patterns of work across all lines which includes work performed at Victoria Park.

55 The learned Commissioner accorded the matters stated in Mr Kitis' statement the same weight as he gave to the evidence of Mr Luff. It is also clear from the reasons for decision of the learned Commissioner that he relied upon the matters stated in Mr Kitis' statement to reach the decision to dismiss this part of the union's claim. Yet the matters stated by Mr Kitis had not been tested by cross-examination, nor had any submission been put in respect of Mr Kitis' statement.

56 Although the union had 'notice' of Mr Kitis' statement as they were provided with a copy by email, notice in these circumstances is not sufficient to comply with s 26(3) of the Act. In ***Woodberry v Koolan Island Club Inc*** (1992) 72 WAIG 1751, 1754 Sharkey P unequivocally found:

> The Commission's clear duty under s.26(3) is this. If in deciding any matter it proposes to take into account any matter or information not raised before it, it must do two things. Firstly, it must notify the parties that it intends to do so, identifying the matter or information. Secondly, it must afford the parties concerned the opportunity of being heard in relation to that matter or information.

57 Section 26(3) of the Act required the learned Commissioner to give the requisite notice to the parties and provide them with an opportunity to be heard. The failure to do so cannot be cured by the absence of an objection by the union to the Commission having regard to the whole or part of Mr Kitis' statement.

58 Powers of a statutory body such as the Commission are circumscribed by the statute governing its activities. The question that arises in this matter is whether non-compliance with the conditions set out in s 26(3) of the Act which regulate the power of the Commission to take into account any matter or information not raised before it, invalidates the decision of the Commission.

59 The PTA say the answer to the question is no, as a breach of s 26(3) is a mere breach of procedural fairness. Breaches of a procedural fairness do not invalidate a decision if compliance would not have led to a different result.

60 In ***Stead*** the High Court unanimously observed:

> The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker L.JJ.) in *Jones v. National Coal Board* [1957] 2 Q.B. 55, at p. 67, in these terms:
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> > 'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'
>
> That general principle is, however, subject to an important qualification which Bollen J. plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.
>
> For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.
>
> Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference (145).

61 I do not accept the PTA's contention that the Commission did not materially rely upon the matters stated in the statement of Mr Kitis. In the absence of an opportunity to test the evidence of Mr Kitis, it is difficult for the Full Bench to conclude that the breach of procedural fairness had no bearing on the decision or that the same decision would inevitably result. For these reasons, I am not persuaded that it can be found that compliance with s 26(3) of the Act would not have led to a different result.

62 In any event, I am of the opinion that non-compliance with s 26(3) of the Act invalidates the decision. In these circumstances, the principle enunciated in ***Stead*** has no application. As Brennan CJ in ***Project Blue Sky Inc*** explained:

> When the validity of a purported exercise of a statutory power is in question, the intention of the Parliament determines the scope of a power as well as the consequences of non-compliance with a provision prescribing what must be done or what must occur before a power may be exercised. If the purported exercise of the power is outside the ambit of the power or if the power has been purportedly exercised without compliance with a condition on which the power depends, the purported exercise is invalid [41].

Thus the decision in this matter is invalid.

63 For these reasons, I am of the opinion that an order should be made that the decision should be quashed. Although the union seeks an order that the case be remitted to the Commission for further hearing and determination, where a decision is void and a nullity there is nothing to suspend and the appropriate order is to quash the decision: ***Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1990) 70 WAIG 2083, 2085; recently applied in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 00534. Whilst the Full Bench has no power to remit the case to the Commission when it quashes a decision, when a decision of the Commission is quashed on grounds of invalidity, the Commission is not prohibited from further hearing and determining the industrial matter: ***Robe River Associates*** (2085).

SCOTT ASC

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

HARRISON C

65 I have had the benefit of reading the reasons for decision of her Honour, the Acting President. I agree with those reasons and have nothing to add.

2014 WAIRC 00576

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPELLANT
	-and-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 2 JULY 2014
FILE NO.	FBA 5 OF 2014
CITATION NO.	2014 WAIRC 00576

Result	Order made
Appearances	
Appellant	Mr C A Fogliani (of counsel) and with him Mr K Singh
Respondent	M D J Matthews (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 16 April 2014, and having heard Mr C A Fogliani (of counsel) on behalf of the appellant, and Mr D J Matthews (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 27 June 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be and is hereby upheld.
2. The decision made by the Commission in matter No CR 29 of 2012 given on 14 February 2014 is hereby quashed.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

2014 WAIRC 00451

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO CR 2 OF 2013 GIVEN ON 21 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00451
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 11 MARCH 2014
DELIVERED	**:**	WEDNESDAY, 4 JUNE 2014
FILE NO.	**:**	FBA 12 OF 2013
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
		Appellant
		AND
		PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**[2013] WAIRC 00752; (2013) 93 WAIG 1436**
File No	**:**	**CR 2 of 2013**

CatchWords	**:**	Industrial law (WA) - Appeal against a decision of the Commission to dismiss an application on grounds that further proceedings not necessary or desirable in public interest - Termination of employment of a transit officer - Spent conviction order made by the Supreme Court - Effect of spent conviction order on employment as a security officer considered - Doctrine of approbate and reprobate considered - Claim before the Commission error in exercise of discretion demonstrated - Not satisfied claim of unfair dismissal had clear potential to undermine Supreme Court decision
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 23A, s 23A(1), s 23A(4), s 23A(5), s 23A(6), s 26(1), s 26(1)(a), s 26(1)(c), s 27, s 27(1), s 27(1)(a), s 27(1)(a)(ii), s 44, s 49
		Criminal Code (WA) s 313(1)
		Spent Convictions Act 1988 (WA) s 18, s 20, s 22, div 4, sch 3, sch 3 cl 1(1) item 11
		Criminal Appeals Act 2004 (WA) s 7(1)
		Conciliation and Arbitration Act 1904 (Cth) s 41(1)(d), s 41(1)(d)(iii)
Result	**:**	Appeal upheld
Representation:		
Counsel:		
Appellant	**:**	Mr P G Laskaris
Respondent	**:**	Mr D J Matthews
Solicitors:		
Respondent	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

Civil Service Association of WA Inc v Director General, Ministry of Justice [2003] WAIRC 08587; (2014) 94 WAIG 215

Codrington v Codrington (1875) LR7HL 854

Elder's Trustee & Executor Co Ltd v Commonwealth Homes & Investment Co Ltd [1941] HCA 31; (1941) 65 CLR 603

Express Newspapers v News (UK) Ltd [1990] 1 WLR 1320

Lissenden v CAV Bosch Ltd [1940] AC 412

M v O'Neill [2013] WASC 187

Mcjannett v Reynolds [2009] WAIRC 01282; (2009) 89 WAIG 2395

McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423

Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] [1920] HCA 40; (1920) 28 CLR 278

O'Connor v S P Bray Ltd (1936) SR (NSW) 248

Osland v Secretary, Department of Justice [2008] HCA 37; (2008) 234 CLR 275

O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210

Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia (1987) 72 ALR 1; (1987) 21 IR 151

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

Tudor Developments Pty Ltd v Makeig [2008] NSWCA 263; (2008) 72 NSWLR 624

Case(s) also cited:

Civil Service Association of Western Australia Inc v Director General, Ministry of Justice [2003] WAIRC 08587; (2014) 94 WAIG 215

House v The King (1936) 55 CLR 499

Pridmore v Magenta Nominees Pty Ltd [1999] FCA 0152; (1999) 161 ALR 458

Sanzana and Director General, Disability Services Commission [2011] WASAT 208

The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd [2006] WAIRC 03535; (2006) 86 WAIG 1268

Reasons for Decision

SMITH AP:

Introduction

1 This is an appeal to the Full Bench pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision of the Commission given on 21 August 2013 in CR 2 of 2013: [2013] WAIRC 00752; (2013) 93 WAIG 1436.

2 The decision appealed against is an order dismissing an application which arose out of an application for a conference in C 2 of 2013, under s 44 of the Act, in respect of an industrial matter. The industrial matter was a dispute, between The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the union) and the Public Transport Authority of Western Australia (the PTA), in relation to an alleged unfair dismissal of an employee of the PTA who is a member of the union. The employee in question was employed at all material times as a transit officer. In these reasons he will be referred to as Mr M.

3 Mr M was dismissed by the PTA in December 2012, following an incident which occurred in March 2010. The incident involved Mr M, in the course of his duties, assaulting a patron of the PTA at a train station. The incident resulted in Mr M being charged by the police with three counts of common assault which were part of a single course of conduct, contrary to s 313(1) of *Criminal Code* (WA).

4 In October 2010, Mr M was stood down from operational status by the PTA and reduced in grade, from transit officer level 4 to transit officer level 3, for a period of four months.

5 On 4 May 2012, Mr M was convicted of the charges of assault in the Magistrate Court of Western Australia, fined $5,000 and ordered to pay $639 in costs. At the time Mr M was convicted he was still employed as a transit officer by the PTA. Mr M subsequently filed an appeal against conviction and penalty.

6 On 28 December 2012, the PTA terminated Mr M's employment and on 3 January 2013 the union filed an application for a conference claiming that the dismissal was unfair: C 2 of 2013.

7 C 2 of 2013 was referred for hearing as CR 2 of 2013. On 14 March 2013, the parties agreed to vacate the hearing dates set in March 2013 until after the delivery of a decision in the appeal in the Supreme Court. At that time the PTA had undertaken that if the appeal was successful, and the convictions were overturned, Mr M would be returned to his employment as a transit officer (AB 18).

8 On 5 April 2013, the Supreme Court granted Mr M's application to amend his grounds of appeal to remove the appeal against conviction. The appeal in the Supreme Court proceeded solely on the basis that there had been a miscarriage of justice occasioned by the failure of counsel to apply for a spent conviction order.

9 On 17 May 2013, McKechnie J delivered a decision upholding the appeal and granting a spent conviction order.

10 After the publication of McKechnie J's reasons for decision the union sought the relisting of CR 2 of 2013. The matter was listed for mention and in the course of the proceedings the PTA foreshadowed an application under s 27(1)(a) of the Act, seeking an order that the Commission dismiss or refrain from hearing the matter. The grounds of the application by the PTA were that as CR 2 of 2013 seeks the reinstatement of Mr M to his employment as a transit officer the matter should not proceed further, as it was not in the public interest to do so, as the circumstance of Mr M not having employment as a transit officer and not returning to that employment were determinative, or at the least very significant, factors in the decision of McKechnie J to grant Mr M a spent conviction order.

Supreme Court decision to grant spent conviction order to Mr M

11 As the observations of McKechnie J in ***M v O'Neill*** [2013] WASC 187 are of paramount importance in the resolution of the issues in this appeal, I will set out the findings made by his Honour in some detail. In reasons for decision, his Honour made the following findings:

(a) The question to be resolved in the appeal was whether there was a miscarriage of justice because a spent conviction order should have been made by the Magistrate ([9]).

(b) The three assaults were part of one course of conduct, a point apparently accepted by the Magistrate in imposing a global penalty ([10]).

(c) The Magistrate made findings for the purpose of sentencing and set out the following relevant mitigating factors [15]:

(i) Mr M had no prior convictions.

(ii) There was a significant impact on Mr M's job. Although he still had his job he suffered financially as a result of not being able to work the hours he was working before and perhaps for other reasons.

(iii) Mr M initially was acting entirely properly and within his powers and reasonably.

(iv) The action against the victim of spraying pepper spray and bringing him to the ground with the use of force was severe and a long way from what should have been applied.

(v) The global fine of $5,000 takes account of the fact that Mr M had suffered some financial distress, but the penalty reflects the serious nature of the offence, the fact that he was a person in authority; and the fact that there were a lot of alternatives available which he put aside and substituted the use of force.

(vi) Mr M was with other officers who were fully supportive of him. There was no violence being threatened to him. There is a need for an element of personal deterrence. There is also a need for a general deterrence in terms of the way railway officers, authority officers and security officers approach their tasks and the need to strictly comply with the law and in that regard to comply with what they are trained to do.

(vii) Mr M's relative immaturity was to be taken into account together with the fact that his actions were probably as a result of some lack of experience and maturity in dealing with that sort of situation.

(d) Mr M was granted leave to adduce further evidence relevant to sentencing. Mr M deposes he is now 25 years old and was 22 when the offences occurred. He joined the PTA as a transit officer in July 2007, just over 2 1/2 years before the offences. He completed high school to Year 12 and did a one-year TAFE police preparation course, before working at several jobs over the next two years, including storeman and pizza driver, ultimately joining the PTA. He was stood down from operational status in October 2010 and his employment terminated on 28 December 2012. He is presently employed as a storeman. Following the incident on 28 March 2010, the PTA commenced an internal investigation demoting him in pay grade for three months which resulted in $1,200 lost wages ([16] - [18]).

(e) In respect of future employment, Mr M in his affidavit states that he wishes to use the training he received from the PTA and his subsequent experience to obtain future employment in the security industry and without a spent conviction he will not be able to secure a police clearance certificate. Following the termination of his employment he started looking for work and discovered that most jobs in the mining industry and even certain cleaning jobs required police clearance certificates. In January 2013, he decided to apply to join the armed forces. He wishes to attend a program at the Australian Defence Force Academy in the ACT and obtain a degree whilst working in the military ([19]).

(f) Mr M provided impressive character evidence. Extracts from those character statements give a picture of a young man whose actions on the night were entirely out of character ([20] - [21]).

(g) The term 'spent conviction' is a misnomer. The conviction is not spent at all. It remains on the record for subsequent court proceedings. The *Spent Convictions Act 1988* (WA) prevents discrimination against a person for employment and other purposes and allows them to answer 'No' to questions about convictions. But there are many exceptions listed in the *Spent Convictions Act* sch 3, including for persons applying to be police officers or security guards when the benefits of a spent conviction do not apply ([23]).

(h) The questions to be asked when considering whether to make a spent conviction order are [26] - [28]:

(i) Is the offender unlikely to commit such an offence again?

(ii) Is the offence trivial?

or

Is the offender of previous good character?

(iii) Should the offender be relieved immediately of the adverse effect that the conviction might have on the offender?

The answer to the first question involves a prediction, noting the prediction is of the likelihood of committing 'such' an offence, not 'any' offence.

The answers to the alternatives in the second question are matters of fact.

(i) The answer to the third question is a matter of discretion. The discretion will be formed by a number of considerations including [29]:

A. The discretion should be exercised:

- sparingly;
- in a clear case; and
- for good reason is desirable.

B. The court should take into account:

- the nature and seriousness of the offence (both in its commission and referable to the offender); and
- the rehabilitative effect of immediate removal of the conviction, the effect both on the offender and the community being considered. The conviction for a lesser offence (of which this is one) will be able to become spent after 10 years so emphasis is placed on immediacy.

(j) At [30] McKechnie J said:

In taking into account the rehabilitative effect it may be necessary to consider, among other things:

- impact on employment, present or future; and
- exceptional hardship to offender or family.

C. The court must also take into account the public interest which includes:

- any employer or potential employer being aware of the offences in assessing suitability and reliability for the type of work; and
- general and personal deterrence.

(k) Under the heading 'Question 1: Is the appellant unlikely to commit such an offence again?' McKechnie J said [32] - [33]:

The respondent submits that there is no evidence that the appellant is 'unlikely to commit an offence again'. The appellant submits that the court can infer the appellant is unlikely to offend having regard to:

- his antecedents;
- the specific circumstances in which these offences occurred no longer existing;
- the serious consequences of these offences to the appellant;
- the appellant was 22 years old when the offences occurred and had been a transit guard prior to the offences without incident;
- the learned magistrate took the view that the appellant's immaturity and lack of experience were factors in what occurred;
- the circumstances of the offences also require consideration. They occurred when the appellant was on duty as a Public Transit Authority officer where he had lawful access to OC spray. He encountered the Hagerstroms and it is not in dispute that Shane Hagerstrom was acting like a fool and being obstructive to the appellant doing his job;
- the learned magistrate made the following observations in sentencing:

> I find that effectively what happened is he allowed himself to be overcome - emotionally is probably not the right word but it is probably good enough - by the behaviour of the father and the son.
>
> That is in circumstances where there were members of the public present, there were his colleagues present. Very stressful for him. I find that for whatever reason he allowed that to build up into frustration - some frustration, some anger and he lost his cool, to put it in the vernacular, and therefore committed these three offences.

The appellant is now older and has paid dearly for his offending. The consequences have been brought home to him. Despite his desires, it is unlikely that he will obtain employment where he is in a position to exercise lawful force over others for sometime, if ever. There are relevant employment exemptions to the operation of the *Spent Convictions Act* in the schedule. I am of opinion that the appellant is unlikely to commit such an offence again. All of his character witnesses attest to this being out of character with the person they know. The answer is yes.

(l) Under the heading 'Question 2: Is the appellant previously of good character?' McKechnie J said, it was conceded by Mr M that the offences of assault were not trivial and it was conceded by the respondent that Mr M is of good character, so the second question is satisfied ([34] - [35]).

(m) Under the heading 'Question 3: Should the appellant immediately be relieved of the adverse effects of the conviction?' McKechnie J said [36] - [47]:

The appellant argues there is no public interest in maintaining the conviction. He is no longer a person in authority. The community is not better protected by knowing of the conviction. The community is better served by rehabilitation compared with adverse consequences. There is nothing overwhelming about the community interest.

The respondent argues that the circumstances could reoccur in a similar field and the public interest is in knowing the facts is a relevant and decisive consideration. He was in a position of authority and acted with excessive force. He could be in a similar position in the security field or in the military. Other potential employers should have the same information as the PTA to take it into account as to whether he needs extra training etc.

The assaults in combination were serious. Although not accompanied by any pleaded circumstance of aggravation, they are made serious by the circumstances in which they occurred.

Seriousness is not an automatic bar to a spent conviction order: ***Riggall v The State of Western Australia*** [2008] WASCA 69; (2008) 37 WAR 211. It is a factor to be considered in balance with other factors. Factors balancing the seriousness of the particular offence are findings by the magistrate previously set out, including:

- his age;
- the circumstances were very stressful for the appellant;
- lack of experience; and
- relative immaturity.

The impact on actual or potential employment is often a battle ground in appeals such as this. It is a factor but never the only factor. Sometimes arguments between the parties develop into disputes about the

impact of a lack of spent conviction on an appellant with suggestions that an appellant must establish impact before the discretion is enlivened. This is incorrect.

In an employment environment where police clearances are common for many occupations the particular question becomes whether the circumstances of the particular conviction should be known to employers not listed in the exemption schedule so they can assess the employment application 'without blinkers', to borrow an expression from ***Brewer v Bayens*** ([2002] WASCA 271; (2002) 26 WAR 510).

It is often clearly in the public interest that rehabilitation of an offender is actively assisted through employment.

There is an obvious need for general deterrence. Peace officers of all types are given lawful authority to deploy force. It is important they should know there are consequences to the misuse of that authority. The appellant has paid a heavy penalty and lost his job. There is little extra general deterrence by the public continuation of the conviction.

The appellant does not require further personal deterrence by continuation of the conviction for the personal matters I have previously outlined in a slightly different context.

Young men and women sometimes do really silly things and go on to lead fulfilling lives. The appellant was a young man in a stressful situation who over reacted. The past does not have to be brought up on every occasion. This is one such case.

Balancing all the factors I have outlined, the public interest is now best served by the rehabilitation of the appellant, which will be assisted if the adverse effects of the conviction are immediately removed.

I am satisfied there will be a miscarriage of justice if a spent conviction order is not made.

Findings made at first instance by the Commission

12 After setting out the findings made by McKechnie J in his reasons for decision and the submissions made by the parties, the learned Commissioner made the following findings:

(a) A tribunal or Court in exercising a power to refrain from hearing grounds of public interest, ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree: ***Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia*** (1987) 72 ALR 1; (1987) 21 IR 151 (5); (154) (***Re QEC***) (Mason CJ and Wilson and Dawson JJ). The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked: ***Re QEC*** (12 - 13); (162) (Deane J).

(b) The discretion open to the Commission to be exercised under s 27(1)(a) of the Act is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the PTA in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1987) 68 WAIG 4.

(c) The present case involves a balancing of competing interests. It is generally in the public interest that industrial disputes and industrial matters be resolved by the Commission, where a party invokes the jurisdiction. This is not a case where, on its face, the union's claim is so manifestly hopeless that it obviously has no prospect of success or that there is a clear issue of a lack of jurisdiction or for example, the case is affected by manifest delay. The issues arising in this matter are far more nuanced than that. The Commission must also have regard for the fact that it is part of the hierarchy of courts of the State, and it should not act in such a way which may undermine the due administration of justice in the State.

(d) In this case, it is necessary as a first step, to reach some view as to the degree to which McKechnie J relied upon Mr M's loss of employment and it not being restored, in the grant of a spent conviction. As well as the reasons for judgment, the Commission also has before it, the transcript of the proceedings before McKechnie J.

(e) In the Supreme Court appeal Mr M said in affidavit evidence in support of his appeal that he had his employment as a transit officer terminated by the PTA. No reference was made by Mr M in his affidavit to his application for reinstatement before this Commission, nor was the issue raised before McKechnie J in the oral submissions of the parties. Therefore, his Honour was not aware of these proceedings, and that Mr M was seeking the restoration of his employment, in circumstances where he maintained on his appeal, that his loss of employment, and the unlikelihood of it being restored, was a significant factor in terms of the 'price' paid by him for his offending, and the impact of that loss in terms of both personal and general deterrence.

(f) From a fair reading overall of the submissions made by counsel, the transcript of proceedings and the judgment of McKechnie J, there is no doubt, that the case for Mr M for a spent conviction order, was advanced on the basis that he had lost his employment as a result of his conviction for assault and he was not going to get his job back. Mr M was considering other options, such as employment in the security industry or a career in the military. The court clearly took into account, as a factor of significance that Mr M had lost his job and he had therefore 'paid dearly' for his conduct. The conclusion that Mr M would be unlikely, if ever, to be in a position to exercise lawful

force over another person was specifically identified and relied upon by McKechnie J in answering the first question, as to the likelihood of Mr M committing such an offence again in the future.

(g) In relation to the third question, and the issue of general deterrence, his Honour placed considerable weight, as is evidenced from [43] of the judgment, on Mr M's loss of his job, as largely satisfying this element, and there being little extra general deterrence to be achieved by the continuation of the conviction.

(h) Mr M's loss of employment, and the fact that it would not be recovered, was central to Mr M's appeal and the seeking of a spent conviction order. The learned Commissioner also concluded that this was a significant factor relied upon by McKechnie J in the upholding of Mr M's appeal, and the making of a spent conviction order, as is evident by a fulsome reading of his Honour's judgment and the transcript.

13 The learned Commissioner, after finding those facts, then went to consider how the discretion under s 27(1)(a) of the Act should be exercised in the matter. In doing so, he made the following findings:

(a) Whilst it is quite correct to say, as did the union in these proceedings, that the question of whether Mr M should be granted a spent conviction order and whether he was unfairly dismissed are quite distinct enquiries, that is really beside the point. The key point is the reliance by Mr M on this state of affairs that is his dismissal and him not being restored to his employment, as a ground to obtain a spent conviction order.

(b) Mr M made his election in the Supreme Court appeal to pursue a spent conviction order so he can obtain other employment in the future, without generally having to disclose his conviction for assault. As the PTA put it in its submissions, by seeking now to continue with these proceedings in relation to a claim for reinstatement, Mr M is attempting to both approbate and reprobate. He is content to take the benefit of the Supreme Court appeal on the one hand, by the receipt of a spent conviction order, largely based on his loss of employment, but on the other, pursue these proceedings in an attempt to recover what he said to the Supreme Court appeal he had lost and the 'price he paid' for his offending.

(c) This matter has involved some difficult issues to reconcile. The Commission will not terminate a proceeding at this stage, unless there is very good reason to do so. However, after carefully considering the interests of the parties, for Mr M to be able to proceed with the present claim would be contrary to equity and good conscience. It has the clear potential to undermine the decision of the Supreme Court granting Mr M a spent conviction. That is a course that should not be permitted. It would not, in the present case, weighing up the competing interests of the parties, be in the public interest for the application to be heard by the Commission. Accordingly, the application is dismissed.

Grounds of appeal

14 The grounds of appeal, with particulars omitted, are as follows:

2.1. The Learned Commissioner made an error of law:

In holding that Mr M had made an election in pursuing the Supreme Court appeal and that the union was therefore not entitled to pursue, on behalf of Mr M, the unfair dismissal claim, including the seeking of an order for reinstatement of Mr M in the employ of the PTA, as it would be contrary to equity and good conscience.

2.2. The Learned Commissioner made an error of law:

In holding that Mr M in the Supreme Court appeal maintained as a ground to obtain a spent conviction order his dismissal and non-restoration to his position of employment with the PTA.

2.3. The Learned Commissioner made an error of law:

In holding that the maintenance of the unfair dismissal claim has the clear potential to undermine the decision of the Supreme Court appeal granting Mr M a spent conviction.

2.4. The Learned Commissioner made an error of law:

In holding that it would not, in the present case, weighing up the competing interests of the parties, be in the public interest for the unfair dismissal claim to be heard by the Commission.

Submissions made by the union

(a) Appeal ground 2.1

15 The union takes issue with the finding made by the learned Commissioner that Mr M had made his election in the Supreme Court appeal to pursue a spent conviction order and by seeking now to continue with the unfair dismissal claim in relation to a claim for reinstatement, Mr M is attempting to both approbate and reprobate.

16 The particulars to each of the grounds set out the submissions to be put in respect of each ground.

17 The particulars to ground 2.1 point out the right of Mr M to bring the criminal sentencing appeal is a legislative right given to him under s 7(1) of the *Criminal Appeals Act 2004* (WA) unencumbered by any concomitant prohibition on commencing or maintaining the unfair dismissal claim. Also they say in the particulars that the right of the union on behalf of Mr M to bring or continue the unfair dismissal claim following the commencement and maintenance of the criminal sentencing appeal is not prohibited by any legislative enactment or rule of law (legal or equitable).

18 It is also contended in the particulars that the right of the union, on behalf of Mr M, to bring or continue the unfair dismissal claim cannot be contrary to equity and good conscience because the claim does not have the potential to undermine the decision of the Supreme Court granting Mr M a spent conviction.

19 The union submits that the equitable concept of an 'election' has no application to the determination of a question under s 27(1)(a) of the Act. The concept of an 'election' is an election in equity which provides that a person taking a benefit under a deed or will cannot 'elect' to accept only that part of the instrument conferring the benefit and reject the rest – that is, he or she cannot approbate and reprobate: ***O'Connor v S P Bray Ltd*** (1936) SR (NSW) 248, 263 (Jordan CJ); approved by the High Court in ***Elder's Trustee & Executor Co Ltd v Commonwealth Homes & Investment Co Ltd*** [1941] HCA 31; (1941) 65 CLR 603, 617 - 618 (Rich ACJ, Dixon and McTiernan JJ); and followed in ***Tudor Developments Pty Ltd v Makeig*** [2008] NSWCA 263; (2008) 72 NSWLR 624, [28], 630 (Basten JA) (with whom Beazley JA agreed); ***Codrington v Codrington*** (1875) LR7HL 854, 861 - 862 (Lord Cairns).

20 The union also takes issue with the finding made by the learned Commissioner that the case for Mr M for a spent conviction order was advanced on the basis that he had lost his employment as a result of his conviction for assault and he was not going to get his job back. This submission is dealt with in grounds 2.2 and 2.3 of the grounds of appeal.

21 The union also argues that the respondent in the Supreme Court appeal clearly disclosed the fact of the unfair dismissal application and that McKechnie J clearly contemplated the possibility of Mr M getting back his employment. However, even if that proposition is rejected, it is clear that the Supreme Court appeal and the unfair dismissal application have nothing to do with each other.

22 It is also put on behalf of the union that even if the equitable doctrine of approbation and reprobation applies to applications in the Commission so as to prohibit parties to legal proceedings adopting two inconsistent stances on grounds that a party is not allowed to blow hot and cold, the union asks the question what benefit has Mr M taken or what has arisen in the course of him pursuing the Supreme Court appeal which is inconsistent with his right to pursue an unfair dismissal claim.

(b) Appeal grounds 2.2 and 2.3

23 In ground 2.2 the union says that the learned Commissioner made an error of law in holding that Mr M in the Supreme Court appeal maintained as a ground to obtain a spent conviction order his dismissal and non-restoration to his position of employment with the PTA.

24 In ground 2.3 the union contends that the learned Commissioner made an error of law in holding that the maintenance of the unfair dismissal claim has the clear potential to undermine the decision of the Supreme Court appeal granting Mr M a spent conviction.

25 The union says that the learned Commissioner correctly identified the principles to be applied in considering an application under s 27(1)(a) of the Act. When having regard to matters of public interest he did not identify any reason why the allowance of the unfair dismissal claim to proceed in the Commission would constitute an undermining of the due administration of justice in the State.

26 The fact that Mr M had lost his job with the PTA and put forward the fact of his lost job as a ground of appeal to the Supreme Court is in error. There was only one ground of appeal and that was that there had been a miscarriage of justice because a spent conviction order should have been made by the Magistrate's Court.

27 It was contended on behalf of the union that a statement made in the respondent's outline of submissions to the Supreme Court at [25] in which it was stated, 'In support of this appeal, the appellant relies upon the effects of these convictions upon his efforts to retain his employment as a security guard for the Public Transport Authority' can only mean that the unfair dismissal claim is being recognised by the respondent and was brought to the attention of the Supreme Court because he had already been dismissed from his employment in December 2012 and these submissions are dated 18 April 2013 in preparation for the hearing before McKechnie J on 23 April 2013. Also in [27] of the respondent's submissions they state, 'The offences should properly be able to be taken into account by the Public Transport Authority in assessing the appellant's suitability for future employment in that role.' It is said this submission contemplates that the respondent was saying to the Supreme Court, which submission ultimately failed, that you should not grant a spent conviction to Mr M because if you do so then it will be difficult for us to argue before the Commission in the unfair dismissal claim that the PTA were entitled to take into account the conviction of Mr M of the three assault charges in terminating his employment.

28 Whilst it is common ground that a submission was made by counsel on behalf of Mr M in the Supreme Court appeal that there was an unfair dismissal application on foot, the union says that McKechnie J in his reasons for decision did not rely upon, in making his decision, that there had been a miscarriage of justice, any issue that relates to Mr M having been terminated from his employment.

29 The union rejects the contention that McKechnie J had formed the opinion that the circumstances which led to the offence were no longer on foot because Mr M was no longer employed as a transit officer and does not have or will not have access in the future to exercise statutory powers of a transit officer. To the contrary, the union says that McKechnie J's decision expressly considered the possibility of Mr M having resort to employment in the security field which could include employment with the PTA. In particular, McKechnie J in stating it is unlikely that he would obtain employment where he is in a position to exercise lawful authority over others for some time contemplates the possibility that he could obtain employment at some time in the future. Further, McKechnie J goes on and critically says that there are relevant employment exemptions to the operation of the *Spent Convictions Act*. In particular, in item 11 of cl 1(1) of sch 3 of the *Spent Convictions Act*, the PTA is identified as an entity that does not have to have regard to the provisions of s 18, s 20, s 22 and Division 4 of the *Spent Convictions Act*. Consequently, if a person is an applicant for a job as a transit officer with the PTA and he has been granted a spent conviction the PTA is entitled to inquire and you are obliged to inform the PTA of that conviction.

30 In the submissions made by counsel on behalf of Mr M in the Supreme Court appeal it is stated that the circumstances in which Mr M found himself that night are unlikely to reoccur now that he is no longer in the employment of the PTA. The union says that this submission should be read as simply an opinion of counsel about the likelihood of Mr M being reinstated.

31 In addition, the submission made on behalf of the respondent to the Supreme Court appeal that Mr M was no longer seeking to retain, or, as it were, get back his employment with the PTA but is looking at other similar positions in the security field or in the military, was not a submission put on behalf of Mr M by his counsel. It is said that this submission should be understood as a submission that even if you accept that Mr M had abandoned his intention of getting his job back with the PTA you should still refuse to grant a spent conviction because he might be looking for employment in other security-related fields and as a matter of public interest his conviction should be recorded on his record.

32 Further, it is contended that the finding made by McKechnie J that the specific circumstances in which the offence occurred no longer existed must be understood in the light of the evidence that Mr M was at the time a young security officer who was inexperienced and not properly trained.

33 Also, counsel for Mr M in the Supreme Court appeal made an important submission that the position you hold, or the occupation you have, has not been accepted by McKechnie J as a basis for refusing to grant a spent conviction.

34 The reasoning of McKechnie J does not, and cannot, affect the reasoning the Commission must adopt for the purposes of the consideration of the merits of the unfair dismissal claim. However, the fact of the granting of the spent conviction order is relevant to the determination required to be made by the Commission in the unfair dismissal claim as it can inform the Commission on the ultimate question which it has to decide, being whether the PTA's dismissal of Mr M was harsh, oppressive or unfair (s 23A(1) of the Act). In deciding whether or not a person has been unfairly dismissed the Commission informs itself by having regard to the equity, good conscience and the merits of the case, but the reasons of the Supreme Court decision have nothing to do with the indicia that the Commission has to consider.

(c) Appeal ground 2.4

35 In ground 2.4 the union says the learned Commissioner erred in law by finding that having weighed up the competing interests of the parties it would not be in the public interest for the unfair dismissal claim to be heard by the Commission. An argument is put on behalf of the union that although the public interest can include the interest of the parties pursuant to s 27 of the Act it is the matters of public interest which relate to industrial issues which must be considered.

36 It is also contended that the competing interests of the parties in relation to the unfair dismissal were not the subject of any evidence or any determination by the learned Commissioner in his reasons for decision, despite the fact that the learned Commissioner did find that this was not a case where, on its face, the union's claim is so manifestly hopeless that it obviously had no prospects of success or there is a clear issue of lack of jurisdiction or the case is affected by a manifest delay.

37 The union also says that the Supreme Court appeal did not involve any competing interests of the parties, as the PTA was not a party to that proceeding. In any event, it says that the reasons for decision do not weigh up the competing interests of the parties. In particular, it says that as a matter of law the ambit of the public interest referred to in s 27(1)(a)(ii) of the Act is confined to the resolution of merits of the issues raised by the unfair dismissal claim in the Commission of which there has not been any findings.

38 It is also said that the basis of the finding made by the learned Commissioner that to allow the unfair dismissal claim to proceed could undermine the due administration of justice in the State is a finding made unsupported by any finding as to how that is the case. In particular, when the reasons for decision of McKechnie J are examined, his Honour is saying that employment is not that relevant to determining whether a spent conviction order should be made. His Honour found that whether or not Mr M obtains employment in the security industry in the future was not in any way critical to the decision as to whether or not his Honour would grant a spent conviction order. If that analysis is right, how can that reasoning affect or disentitle Mr M through his union to pursue an unfair dismissal claim in the Commission.

Submissions made by the PTA

39 The PTA says the learned Commissioner did not err in the exercise of his discretion in dismissing the application on grounds that further proceedings were not in the public interest. The learned Commissioner also correctly found that if he was to allow the matter to proceed he would not be acting consistently with the statutory guiding principle, binding the Commission in the exercise of its jurisdiction, to act with equity and good conscience, as found in s 26(1)(a) of the Act. In addition, the learned Commissioner, as he was obliged to do pursuant to s 26(l)(c) of the Act, also took into account Mr M's interests as a person immediately concerned with the matter.

40 The PTA contends it is clear that the learned Commissioner considered it was not in the public interest for the matter to proceed further when the matter sought the reinstatement of Mr M to his previous employment in circumstances where Mr M had relied upon the loss of, and non-return to, that employment to achieve a successful outcome on the Supreme Court appeal and the interests of Mr M in having the matter proceed before the Commission were not sufficient to override this.

41 In relation to the question of public interest, the learned Commissioner clearly and cogently enunciated his decision, which was to the effect that pursuit of an unfair dismissal claim had the potential to undermine the decision of the Supreme Court.

42 In relation to the question of Mr M's interests, the learned Commissioner clearly and cogently set out what they were and his decision on why they did not override the public interest in the matter, which was to the effect that Mr M had made a choice to rely on the loss of, and non-return to, employment to his advantage in court proceedings and that, having done this, it would be unfair if he was later, in other proceedings, returned to that employment.

43 The learned Commissioner appropriately applied the principle that there is a genuine public interest in consistent decision-making across various bodies with judicial and quasi-judicial functions and powers. A decision in the proceedings before the learned Commissioner that the dismissal of Mr M had been unfair and that he should be reinstated (or have some other remedy) would clearly be inconsistent with the decision of the Supreme Court that because, in part or whole, Mr M had lost that employment and would not be returning to it he should be granted a remedy by that court. If the proceedings could lead to that outcome it was not in the public interest for those proceedings to continue.

44 The learned Commissioner noted that, prima facie, Mr M had an entitlement to an unfair dismissal claim being pursued on his behalf. However, the learned Commissioner properly found that Mr M's interests in relation to the matter had to include that Mr M had relied upon his dismissal and him not being restored to his employment as a ground to obtain a spent conviction order. On this ground the learned Commissioner found that it would not be unfair to the interests of Mr M if the proceedings did not proceed and that, in fact and at law, it would be contrary to equity and good conscience if they did. Thus, properly taking into account Mr M's interests did not overcome the public interest in the proceedings not being further heard.

(a) Appeal ground 2.1

45 The PTA says that the union in its submissions makes too much of the learned Commissioner's use of the terms 'election' and 'approbate and reprobate'. It says the Commission is entitled to have regard to relevant equitable principles as part of inquiring into and dealing with an industrial matter: ***Civil Service Association of WA Inc v Director General, Ministry of Justice*** [2003] WAIRC 08587; (2014) 94 WAIG 215 [55]. However, it is clear that the learned Commissioner used the term simply to explain Mr M's conduct in properly and thoroughly considering the interests of Mr M and the question of overall fairness.

(b) Appeal grounds 2.2 and 2.3

46 The PTA says the learned Commissioner explained clearly and cogently why he considered that the proceedings had the clear potential to undermine the decision of the Supreme Court. The learned Commissioner correctly found that a significant factor in McKechnie J's decision to make an order in favour of Mr M was the very circumstance that was sought to be reversed in the proceedings before him.

47 The obvious concern about the undermining of the decision of the Supreme Court is that 'the overall jurisdiction of the courts and public tribunals' may be brought into disrepute if different branches make decisions without regard to relevant proceedings in other branches. This is not in the public interest. The learned Commissioner's decision avoided, and with respect properly so, the potential for Mr M to be returned to employment after the Supreme Court appeal had granted him a remedy based, in part or whole, on the loss of, and non-return to, that employment.

(c) Appeal ground 2.4

48 The PTA says the learned Commissioner, went through a thorough process of weighing up the interests of the parties, noting the effect that an exercise of discretion under s 27(1) of the Act would have and giving detailed consideration to the interests of Mr M in the whole of the circumstances in which the application under that subsection was before him. The public interest, as explained by the learned Commissioner, went beyond and involved matters other than who was a party to what proceedings and the resolution of the merits of the issues raised by the unfair dismissal claim in the Commission.

The public interest

49 Section 27(1)(a) of the Act provides:

> Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

50 The parties agree that the principles to be applied to an exercise of the discretion conferred by s 27(1)(a)(ii) of the Act to refrain from further hearing a matter were correctly identified by the learned Commissioner. However, the union argues that the learned Commissioner did not correctly identify relevant matters of public interest.

51 The words 'in the public interest' ordinarily require consideration of a number of competing arguments about, or features or 'facets' of, the public interest: ***Osland v Secretary, Department of Justice*** [2008] HCA 37; (2008) 234 CLR 275 [137] (Hayne J); applying ***McKinnon v Secretary, Department of Treasury*** [2006] HCA 45; (2006) 228 CLR 423 [55].

52 The nature of determining what is in the 'public interest' was described in ***O'Sullivan v Farrer*** [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ):

> [T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view': *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 CLR 492, 505 per Dixon J.

53 In ***Re QEC,*** the Queensland Electricity Commission applied to the Conciliation and Arbitration Commission to refrain from further hearing, or from further determining an industrial dispute insofar as it related to Queensland. The application was made under s 41(1)(d) of the *Conciliation and Arbitration Act 1904* (Cth). Section 41(1)(d)(iii) created a discretionary power to dismiss a matter or refrain from further hearing, the terms of which were substantially the same as the discretion to dismiss, or refrain from further hearing or determination, conferred by s 27(1)(a)(ii) of the Act. After hearing the parties, the Full Bench of the Conciliation and Arbitration Commission acceded to the application. The matter was subsequently reviewed by the

High Court in an application for the issue of a writ of mandamus and a writ of certiorari by the Electrical Trades Union of Australia (ETU).

54 In their reasons for decision each of the justices of the High Court found the Full Bench of the Conciliation and Arbitration Commission had not erred and that the Full Bench had recognised the existence of competing public interests and then proceeded to weigh up the factors on one side against the factors on the other. In a joint judgment Mason CJ, Wilson and Dawson JJ observed:

> Counsel for the ETU seeks to meet the onus resting on his client in relation to the first ground that we have set out by an argument made up of several steps. First, it is said that the Act makes it clear that the settlement of industrial disputes is the fundamental concern of the Act and that consequently any consideration of the public interest under s 41(1)(d)(iii) must take that concern into account.
>
> …
>
> The first step in this argument makes an important point. It is undoubtedly correct. At the same time, it is necessary to remember that the importance the Act places upon the settlement of industrial disputes cannot of itself dictate the exercise of the discretion given by s 41(1)(d)(iii). That paragraph itself recognises that it may be in the public interest to leave an industrial dispute unresolved. Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree (5).

55 Justice Deane observed that the starting point in the rare instances where a court or tribunal is given a broad discretion to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point whether a refusal is warranted in the circumstances of a particular case is the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (13); applying ***Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1]*** [1920] HCA 40; (1920) 28 CLR 278, 281 (Higgins J). Justice Deane also found:

> In the context of the general legislative policy that a party to an inter-State industrial dispute should ordinarily be entitled to invoke the jurisdiction of the Commission and of the general philosophy underlying the Act that the exercise of that jurisdiction to settle inter-State industrial disputes will be in the public interest, that onus is a particularly heavy one in a case where what is sought is a refusal to exercise jurisdiction on the general 'public interest' ground (s 41(1)(d)(iii)) and it appears that there is no other tribunal which possesses jurisdiction fully to resolve the dispute.

56 As the learned Commissioner correctly found in ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** the Industrial Appeal Court made it plain that in the exercise of the discretion to refrain, the Commission is required to have regard to its obligations under s 26(1) of the Act.

57 This is a matter that forms part of the legislative scheme of the Act and as such is a matter of 'public interest': ***Re QEC*** (13) (Deane J).

58 When all these principles are considered it is clear that the learned Commissioner in this matter was obliged to have regard to:

(a) The union is ordinarily entitled to invoke the jurisdiction of the Commission to settle the industrial matter concerning its member, Mr M.

(b) Pursuant to s 26(1)(c) of the Act, the interests of Mr M as a person immediately concerned in the industrial matter is a matter relevant to the interests and right of the union to invoke the jurisdiction of the Commission.

(c) Pursuant to s 26(1)(a) of the Act, the Commission is required to act according to equity, good conscience and the substantial merits of the case.

(d) The 'onus' on a party seeking the refusal to exercise jurisdiction is a heavy one as the only tribunal who possesses jurisdiction to deal with the industrial matter in issue, is the Commission: ***Re QEC*** (13) (Deane J).

(e) If it could be established that the continuation of the unfair dismissal claim had the potential to undermine the decision given by McKechnie J, the competing matter of public interest that was to be weighed and balanced is that the Commission is part of the hierarchy of courts of the State, and it should not act in such a way which may undermine the due administration of justice in the State.

59 These are all matters the learned Commissioner had regard to. In my opinion unless it can be established that the learned Commissioner erred in finding that the continuation of the unfair dismissal claim was likely to undermine the decision made by McKechnie J to grant a spent conviction to Mr M, no error in the exercise of the discretion to refrain from hearing could be demonstrated.

60 Given that the union has a prima facie right to insist upon the exercise of the Commission's jurisdiction to hear and determine an industrial dispute, the onus in refraining to hear a matter is heavy when a refusal of jurisdiction is sought on a public interest ground. Thus, where a mere potential to undermine a decision of another Court or tribunal is raised, on the matters pleaded in a matter before the Commission, this would be insufficient to ground a decision to refrain from hearing a matter.

Did the continuation of the unfair dismissal claim have the potential to undermine the decision given by McKechnie J?

61 This question is, in my view, the central and determinative issue in this appeal.

62 What is firstly of importance in the resolution of this issue is that whilst reinstatement of Mr M is the remedy sought in the application before the Commission, it is not the only remedy open if the Commission was to determine that the dismissal of Mr M was harsh, oppressive or unfair. Pursuant to s 23A(4), s 23A(5) and s 23A(6) of the Act, if the Commission considers that reinstatement would be impracticable, it may order re-employment of the employee in another position, or make an order for compensation.

63 The application referring the matter under s 44 of the Act sets out in some detail the reasons why the union contends that the dismissal of Mr M was unfair. Two of the grounds why it is said the dismissal was unfair raise issues of procedural unfairness. The first ground relies upon an argument that pursuant to cl 2.8.6 to cl 2.8.8, cl 2.8.17.2 and cl 2.8.16.2 of the *Public Transport Authority (Transit Officers) Agreement 2010* (2010 Agreement) the time for taking and completing a disciplinary inquiry must not exceed longer than six months. If this ground were to succeed, the union says it follows that the PTA were unable to take any disciplinary action against Mr M after he was convicted of the three assaults (AB 13). The second argument is put in the alternative and that is if the first argument is rejected, the PTA took an unreasonable time to discipline Mr M. The remaining grounds raise arguments as to why the union contends that the dismissal of Mr M was substantively unfair.

64 In making an assessment of the facts of the convictions, the Commission would be bound by the findings made by the Magistrate who heard the assault charges and the findings made by McKechnie J about the facts of the matter.

65 If after hearing the matter referred by the union the Commission was to find that the dismissal was unfair, the Commission would at that point be required to consider whether reinstatement of Mr M was impracticable. If the Commission was to find that an order for reinstatement was impracticable and re-employment by the PTA should not be made it could be difficult to find that a decision that the dismissal was unfair would undermine the decision of McKechnie J. This would be particularly so if it was also found that the dismissal of Mr M was unfair solely on grounds that the PTA was prohibited from taking disciplinary action against Mr M by operation of the provisions of the 2010 Agreement.

66 Secondly of importance, is the fact that although McKechnie J varied the sentence imposed on Mr M for the assaults by making a spent conviction order, the effect of the spent conviction order is not a matter that should cause the decision made by the PTA to terminate the employment of Mr M to be viewed differently by the PTA, or by the Commission, in the unfair dismissal claim. This is because item 11 of cl 1(1) of sch 3 of the *Spent Convictions Act* has the effect that (in respect of employment as a transit officer), Mr M's convictions are not 'spent', in the sense that they cannot be acted upon by the PTA. As McKechnie J said in his reasons for decision the term 'spent conviction' is a misnomer. A spent conviction remains on the record for subsequent court proceedings and the benefits of a spent conviction do not apply to employment as a transit officer as such a position is clearly a security officer within the meaning of item 11 of cl 1(1) of sch 3 of the *Spent Convictions Act*.

67 The issue whether Mr M was unfairly dismissed by the PTA and whether he should be reinstated to the position of transit officer is a matter that would require a determination being made by regard to all relevant facts and matters. However, a matter relevant to the determination of that issue would not be the fact that after Mr M's employment was terminated the sentence imposed on him had been varied by the Supreme Court. This is because for the purposes of employment as a transit officer regard can be had to the convictions of assault.

68 When his Honour found at [33] of his reasons for decision that despite his desires, it was unlikely that Mr M would obtain employment where he is in a position to exercise lawful force over others for some time, if ever, his Honour was expressing a view that organisations such as the PTA can when considering employment as a transit officer have regard to convictions that are 'spent'. Thus, his Honour went on to say after making this observation that there are relevant employment exemptions to the operation of the *Spent Convictions Act* in the schedule [33].

69 Despite the lengthy and valiant submissions made by counsel for the union in this appeal, it is absolutely clear that at the hearing of the appeal, McKechnie J was informed by counsel for Mr M that he had lost his employment as a transit officer, so the very circumstances in which he would be given a lawful use of force on members of the public had gone (AB 125, 9). Justice McKechnie also had before him an affidavit in which Mr M deposed that he had decided in January 2013 to apply to join the armed forces. It also seems from the matters stated in his affidavit that he was seeking work in the security industry and in the mining industry.

70 It is plain from the reasons of McKechnie J that he was not informed that Mr M was seeking reinstatement to his position as a transit officer. To the contrary it could clearly be inferred from the matters deposed in Mr M's affidavit and the submissions of his counsel that he was not seeking a review of his dismissal or reinstatement to his previous position as a transit officer. For these reasons I am not satisfied that ground 2.2 of the grounds of appeal has been made out.

71 However, the fact that Mr M was no longer in a position of authority to exercise lawful force, had lost his job as a transit officer and was unlikely to ever obtain another position that enabled him to exercise lawful force were only part of the reasons why McKechnie J found that Mr M was unlikely to commit such an offence again (AB 95 - 96, [32] - [33]). The other reasons were:

(a) his antecedents;

(b) his age and fact that he had been a transit officer prior to the offences without incident;

(c) his immaturity and lack of experience; and

(d) he is now older.

72 In making the finding that Mr M was unlikely to ever obtain another position that enabled him to exercise lawful force, McKechnie J had regard to:

(a) the submission by Mr M's counsel to that effect; and

(b) that the PTA and other employers of court and custodial officers could have regard to the convictions as if they were not 'spent' (AB 93, [23]).

73 However, McKechnie J did not find that the PTA would not or should not re-employ Mr M as a transit officer. He left this matter open. He simply made a prediction that such an occurrence was unlikely for some time, if ever. This finding is consistent with the submission made by counsel for Mr M when she said:

> What the PTA thinks or whether they might decide to give him back his job because he got a spent conviction and in the future they might say, 'We now think you're older and wiser and we forgive you,' who knows, that's a matter for the Public Transport Authority. We wouldn't even begin to suggest as to what they might do (AB 141, 25).

74 In the event that the Commission was to find that Mr M had been unfairly dismissed and concluded that Mr M should be reinstated, that finding would unlikely to be inconsistent with the findings made by McKechnie J as his Honour left open the issue whether Mr M should be re-employed as a transit officer in the future. Thus this is a matter that would be open to the Commission to consider if a finding is made that the dismissal of Mr M was harsh, oppressive or unfair.

75 For these reasons I am satisfied that grounds 2.3 and 2.4 of the grounds of appeal have been made out.

76 In respect of ground 2.1 of the appeal, I do not accept the union's contention that the doctrine of approbate and reprobate has no application in any matter before this Commission. This doctrine has been described as prohibiting a litigant from blowing hot and cold. In cases where the doctrine does apply the person concerned must choose between two alternative or mutually exclusive rights: ***Lissenden v CAV Bosch Ltd*** [1940] AC 412 (Atkin LJ) (429); ***Express Newspapers v News (UK) Ltd*** [1990] 1 WLR 1320 (1329) (Browne-Wilkinson VC).

77 This doctrine was applied by Ritter AP in ***Mcjannett v Reynolds*** [2009] WAIRC 01282; (2009) 89 WAIG 2395 [8](a), [98] - [100]. In that matter Mr Mcjannett sought to argue that the Construction, Forestry, Mining and Energy Union of Workers did not have any members as those who had voted in an election were not properly enrolled. Mr Mcjannett sought an inquiry into an election under s 66 of the Act. The standing he relied upon to bring the application was that he was a member of the union. Acting President Ritter found that if Mr Mcjannett's contentions were accepted he would not be a member of the union.

78 Whilst I am of the opinion that the doctrine of approbate and reprobate can be applied to matters before the Commission, I am not satisfied that the pre-conditions for the application of that doctrine arise as I am of the opinion that seeking a spent conviction in the Supreme Court appeal could have no effect on the issue whether Mr M was unfairly dismissed or not.

79 For the reason that McKechnie J left open the prospect of future employment with the PTA, providing the findings made by the Magistrate who heard the charges against Mr M and the facts about the circumstances of the assaults found by McKechnie J are regarded as binding, the right to seek the spent conviction on the basis that Mr M's employment had been terminated by the PTA, cannot be said to be inconsistent with the right of the union to seek the reinstatement of Mr M. For this reason I am of the opinion that ground 2.1 of the grounds of appeal has been made out.

80 For these reasons I am of the opinion that an order should be made that the decision should be suspended and the case remitted to the Commission for further hearing and determination.

BEECH CC:

81 I have read in advance the Reasons for Decision of Her Honour the Acting President and gratefully adopt the background as set out by her. The learned Commissioner stated at the commencement of his Reasons for Decision that the substantive application in the matter is one by the union on behalf of its member that Mr M has been unfairly dismissed. The particulars of the claim set out in [4] - [24] (AB 9 - 14) show the significant majority of the particulars detail the reasons why the appellant considers the dismissal to have been unfair. The relief sought is that Mr M be reinstated to his former position as a transit officer by the PTA, however, the relief to be granted if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair is a matter for the Commission; the relief claimed is not necessarily the relief to be ordered by the Commission. The respondent's application to the Commission at first instance to dismiss the substantive application under s 27(1)(a) of the Act conflated the relief sought with the claim that the dismissal was unfair.

82 A finding that Mr M's dismissal was unfair would not undermine the reasons why Mr M was granted a spent conviction. As Her Honour points out, reinstatement is not the only remedy open if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair: s 23A of the Act.

83 In any event, for the reasons given by Her Honour, I am far from persuaded that an order of reinstatement would have the potential to undermine the decision given by McKechnie J. The conclusion of McKechnie J was not that Mr M's employment would not be recovered but that it is unlikely that he will obtain employment where he is in a position to exercise lawful force over others for some time, if ever. That conclusion leaves open whether or not Mr M would obtain employment in a position where he is able to exercise lawful force over others.

84 The particular 2.1.4 to ground 2.1, that the learned Commissioner's conclusion that the right of the union on behalf of Mr M to bring or continue the unfair dismissal claim under the *Industrial Relations Act* cannot be contrary to equity and good conscience because it does not have the potential to undermine the decision of the Supreme Court granting Mr M a spent conviction, and grounds 2.3 and 2.4, in my view are made out.

85 For those reasons, I agree with the order to issue.

MAYMAN C

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

2014 WAIRC 00534

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 2 OF 2013 GIVEN ON 21 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00534
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 11 MARCH 2014, WEDNESDAY, 18 JUNE 2014
DELIVERED	**:**	FRIDAY, 20 JUNE 2014
FILE NO.	**:**	FBA 12 OF 2013
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Appellant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**[2013] WAIRC 00752; (2013) 93 WAIG 1436**
File No	**:**	**CR 2 of 2013**

CatchWords	**:**	Industrial Relations (WA) - Appeal against decision of the Commission - Speaking to the minutes - Whether to quash or suspend and remit the decision made at first instance considered - Implied power of the Full Bench to make a consequential order considered
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 12(1) s 27(1)(a), s 49(5), s 49(5)(b), s 49(5)(c), s 49(6), s 49(6a)
Result	**:**	Order made
Representation:		
Counsel:		
Appellant	**:**	Mr P G Laskaris
Respondent	**:**	Mr D J Matthews
Solicitors:		
Respondent	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (1992) 72 WAIG 1499

Grassby v The Queen (1989) 168 CLR 1

Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia (1990) 70 WAIG 2083

Robe River Iron Associates v Federated Engine Drivers and Firemens' Union of Workers' of Western Australia (1986) 67 WAIG 315

Supplementary Reasons for Decision

THE FULL BENCH:

Introduction

1 The Full Bench upheld grounds 2.1, 2.3 and 2.4 of the grounds of appeal in its reasons for decision delivered on 4 June 2014 and issued a minute of proposed order in the following terms:

> 1. The appeal be and is hereby upheld.
>
> 2. The decision made by the Commission in matter No CR 2 of 2013 given on 21 August 2013 be and is hereby suspended.

3. The matter be and is hereby remitted to the Commission at first instance for further hearing and determination.

2 The Union sought to speak to the minute of the proposed order and sought that an order be made in the following terms:

1. The appeal be and is hereby upheld.
2. The decision made by the Commission in matter No CR 2 of 2013 given on 21 August 2013 be and is hereby quashed.
3. The application made by the Respondent under sec. 27(1)(a) of the Industrial Relations Act 1979 in matter No CR 2 of 2013 be dismissed.
4. The matter be and is hereby remitted to the Commission at first instance for further hearing and determination.

3 The effect of the reasons for decision of the members of the Full Bench is that the Commission at first instance erred in finding that it was not in the public interest for the application referred in CR 2 of 2013 to be heard by the Commission and that the application made by the PTA under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (the Act) to dismiss the application or refrain from hearing it should have been dismissed. Consequently, the Union seeks an order which dismisses the PTA's application made under s 27(1)(a) of the Act. It also seeks an order quashing, rather than suspending, the decision of the Commission.

Should an order issue to quash or suspend the decision at first instance?

4 The powers of the Full Bench to make orders on appeal are set out in s 49(5), s 49(6) and s 49(6a) of the Act. These provisions state as follows:

(5) In the exercise of its jurisdiction under this section the Full Bench may, by order —

(a) dismiss the appeal; or

(b) uphold the appeal and quash the decision or, subject to subsection (6), vary it in such manner as the Full Bench considers appropriate; or

(c) suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

(6) Where the Full Bench varies a decision under subsection (5)(b) the decision as so varied shall be in terms which could have been awarded by the Commission that gave the decision.

(6a) The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

5 Section 49(6) is immaterial in this appeal. The Union seeks to rely upon part of s 49(5)(b) to quash, and part of s 49(5)(c) to remit. However, the Full Bench is not empowered to both quash a decision and remit the case to the Commission for further hearing and determination. The power to remit in s 49(5)(c) is only if the decision is suspended. This is made clear in a decision of the Industrial Appeal Court in ***Robe River Associates v The Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1990) 70 WAIG 2083, 2085. In that matter Justice Brinsden, with whom Rowland J and Nicholson J agreed, held that a decision to make an award contrary to natural justice was void and a nullity. Therefore, the operation of the award could not be suspended because there was nothing to suspend (2085). Consequently, his Honour found that the Full Bench should have upheld the appeal under s 49(5)(b) and quashed the decision of the Commissioner. In that matter the parties wished to have the application for an award reconsidered by the Commission following the appeal being determined by the Industrial Appeal Court. Justice Brinsden found that if an order was made to quash the decision the Full Bench had no power to remit the matter back to the Commission for further consideration, however, it could not be said that the Commission at first instance was functus officio, that is to say the Commissioner was not prohibited from further considering the matters concerned in the award.

6 In this appeal the decision made by the Commission to dismiss the application in CR 2 of 2013 cannot be said to be void or a nullity because a decision to dismiss is a decision that may be open to the Commission to make after hearing and determining the merits of the application.

7 For these reasons we are of the opinion that an order should be made to suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

8 Given the wording in s 49(5) it is inherent in what Brinsden J in ***Robe River*** that the Full Bench cannot make an order to uphold the appeal under s 49(5)(b) when it makes an order to suspend and remit a decision of the Commission under s 49(5)(c).

Is it open for the Full Bench to make an order to dismiss the PTA's application?

9 In relation to the order sought by the appellant to dismiss the PTA's application the Commission is not a superior court of record and it has no inherent jurisdiction. Its jurisdiction is limited to that expressly provided by the Act: ***Robe River Iron Associates v Federated Engine Drivers and Firemens' Union of Workers' of Western Australia*** (1986) 67 WAIG 315; ***Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch*** (1992) 72 WAIG 1499. Pursuant to s 12(1) of the Act, the Commission is a court of record. As its jurisdiction is limited, it is an inferior court of record. Whilst the Commission's powers are circumscribed by statute, the Commission does have implied powers that arise by necessary implication out of the effect of the exercise of a jurisdiction which is expressly conferred. In ***Grassby v The Queen*** (1989) 168 CLR 1, Dawson J delivered the leading judgment of the court in which he discussed the limits of the implied jurisdiction of an inferior court. In that matter members of the High Court were called upon to consider the implied powers of a magistrate when sitting as a local court exercising administrative functions. Justice Dawson explained that the fact that a magistrate sits as a court and is under a duty to act fairly does not

carry with it any inherent power even when exercising judicial functions and that must be the case when its functions are of an administrative character: (15-16). His Honour then found (16 - 17):

> [N]otwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental.
>
> The point may be illustrated by reference to the power to punish summarily for contempt not committed in the face of the court. Such a power is inherent in a superior court but forms no part of the powers of an inferior court: see *Reg. v. Lefroy* (1873) LR 8 QB 134. A superior court, however, not only has power to punish contempt against itself committed out of court, but in the exercise of its inherent jurisdiction it may prevent and punish summarily as a contempt any interference with the due course of justice in an inferior court. In *John Fairfax* & *Sons Pty. Ltd. v. McRae* (1955) 93 CLR 351, at p 365 this Court pointed out that the jurisdiction over contempts committed against inferior courts was inherited by the superior court as 'custos morum of all the subjects of the realm' and was but an aspect of 'the traditional general supervisory function of the King's Bench, the function of seeing that justice was administered and not impeded in lower tribunals' (1955) 93 CLR at p 363. The immediate basis for the exercise of such a function is to be found in the absence of any inherent jurisdiction in inferior courts similarly to protect themselves: see *R. v. Davies* [1906] 1 KB 32, at pp 47-48. A magistrate's court in New South Wales now has, of course, a statutory power to punish for contempt: *Justices Act*, s. 152.
>
> It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'. There is in my view no reason why, where appropriate, they may not extend to ordering a stay of proceedings: cf. *R. v. Hush; Ex parte Devanny* (1932) 48 CLR 487, at p 515.

10 In this matter it is clear that in suspending the decision to dismiss the application and remit the matter for further hearing and determination it is also necessary to dismiss the application made by the PTA under s 27(1)(a) of the Act. To make such an order arises by necessary implication out of the exercise of jurisdiction the Full Bench has to hear and determine an appeal. This is because the application made under s 27(1)(a) should not remain on foot in light of the reasons of decision of the Full Bench. Such an order in our opinion is in the circumstances of this matter necessary for the effective exercise of the Full Bench's jurisdiction to dispose of the matters raised in this appeal.

2014 WAIRC 00535

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPELLANT
	-and-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 20 JUNE 2014
FILE NO.	FBA 12 OF 2013
CITATION NO.	2014 WAIRC 00535

Result	Order made
Appearances	
Appellant	Mr P G Laskaris (of counsel)
Respondent	Mr D J Matthews (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 11 March 2014, and having heard Mr P G Laskaris (of counsel) on behalf of the appellant, and Mr D J Matthews (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 4 June 2014 and 20 June 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The decision made by the Commission in matter No CR 2 of 2013 given on 21 August 2013 be and is hereby suspended.
2. The application made by the Respondent under s 27(1)(a) of the *Industrial Relations Act 1979* be dismissed.
3. The matter be and is hereby remitted to the Commission at first instance for further hearing and determination.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2014 WAIRC 00488

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 45/2013 GIVEN ON 17 OCTOBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00488
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 8 APRIL 2014
DELIVERED	**:**	MONDAY, 16 JUNE 2014
FILE NO.	**:**	FBA 17 OF 2013
BETWEEN	**:**	MARCUS JOHN GRIFFITHS AND ANGELINE GRIFFITHS TRADING AS MIDWEST TOP NOTCH TREE SERVICES Appellant AND JEREMY FREEMAN Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner J L Harrison**
Citation	**:**	**[2013] WAIRC 00871; (2013) 93 WAIG 1711**
File No	**:**	**U 45 of 2013**

CatchWords	**:**	Industrial Law (WA) - Appeal against decision of the Commission - Termination of employment - Commission found employee unfairly dismissed - Applications to adduce fresh evidence considered - Appeal against discretionary decision - Turns on own facts - No error demonstrated - Appeal dismissed - Applications for costs and interest dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 23A(6), s 26(1)(a), s 27(1)(c), s 29(1)(b)(i), s 49(2), s 49(4)(a) *Minimum Conditions of Employment Act 1993* (WA) s 5, pt 5, s 41, s 43
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	Mr M J Griffiths and Ms A Griffiths
Respondent	**:**	Ms A Tapsell, as agent

Case(s) referred to in reasons:

Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd (1987) 67 WAIG 733

Brailey v Mendex Pty Ltd (1993) 73 WAIG 26

Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 61 IR 32; (1995) 185 CLR 410

Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1

Gilmore v Cecil Bros (1996) 76 WAIG 4434

Gromark Packaging v The Federated Miscellaneous Workers Union of Australia, WA Branch (1992) 73 WAIG 220

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

Shire of Esperance v Mouritz (1991) 71 WAIG 891

WA Access Pty Ltd v Vaughan (2000) 81 WAIG 373

Case(s) also cited:

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

Reasons for Decision

THE FULL BENCH:

The appeal and the order appealed against

1 This appeal is instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the Act) against the decision made by the Commission on 17 October 2013 ([2013] WAIRC 00871; (2013) 93 WAIG 1711) in U 45 of 2013.

2 Application U 45 of 2013 was an industrial matter referred to the Commission by Jeremy Freeman under s 29(1)(b)(i) of the Act. Mr Freeman claimed he was harshly, oppressively or unfairly dismissed by Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services (Top Notch Tree Services).

3 Application U 45 of 2013 was lodged in the Commission on 25 March 2013. Mr Freeman claimed his employment was terminated on 18 December 2012. Consequently, the application was 69 days outside of time for filing an application pursuant to s 29(1)(b)(i) of the Act. The matter was heard on 5 September 2013. At the hearing at first instance Mr Freeman gave evidence in support of his claim and Ms Griffiths gave evidence on behalf of Top Notch Tree Services. At the conclusion of the hearing of oral evidence, the Commissioner informed Ms Griffiths that she required copies of Mr Freeman's time and wages records to be produced. These records were provided to the Commission on 12 September 2013.

4 After hearing the parties, the Commission made an order that application U 45 of 2013 be accepted out of time. The Commission also made a declaration that the dismissal of Mr Freeman by Top Notch Tree Services was unfair, that reinstatement or re-employment was impracticable and ordered Top Notch Tree Services to pay Mr Freeman compensation in the sum of $3,240 gross within 14 days of the date of the order.

5 Mr Freeman also made an application for contractual benefits in B 45 of 2013 which was heard at the same time as the claim for unfair dismissal in U 45 of 2013. The claims related to the non-provision of wage slips and the ability to access eight hours leave to attend job interviews. After hearing the matter an order was made to dismiss B 45 of 2013.

6 The grounds of appeal are drafted in narrative and set out some of the submissions why it is said that the Commissioner erred in making the declaration that Mr Freeman was unfairly dismissed. It appears, however, from the grounds of appeal and the submissions made by the parties that the decision to accept the application for unfair dismissal out of time is not directly challenged in this appeal.

Reasons for decision at first instance

7 The Commissioner hearing the matter found the following facts:

(a) Mr Freeman commenced employment with Top Notch Tree Services in early May 2012 and his last day of work was 18 December 2012. He was employed on a full-time basis and paid $27 per hour. He undertook grounds person duties which included cutting trees and feeding them into a chipper.

(b) Mr Freeman's terms and conditions of employment were contained in a written contract of employment (exhibit A1). Clause 16 of the contract states that either the employee or employer may terminate the employee's employment by giving two weeks' notice during the employee's first year of employment or payment in lieu of notice. The employer could pay the employee's wages for the notice period or require him to work either part or none of the notice period.

(c) Mr Freeman was informed by Mr Griffiths, on or about 18 December 2012 that he was terminated as the business was closing down in December 2012. Top Notch Tree Services claimed that it had decided that after the two week Christmas close down commencing on 20 December 2012, it would cease to operate or continue trading after restructuring its operations. Either way Mr Freeman's services would no longer be required in 2013. If Top Notch Tree Services was to continue trading other employees were to be retained who were more skilled than Mr Freeman and therefore more flexible with respect to the work that they could undertake.

(d) During the Christmas close down period Top Notch Tree Services decided to continue operating in 2013 and to employ all of its permanent employees except Mr Freeman and Mr Malcolm McIntyre, who no longer wished to work for Top Notch Tree Services. The employees who remained working for Top Notch Tree Services included Mr Brett Marendez, Mr Caleb Dumitro and Mr Mark Rulyanich. Even though Mr Rulyanich had less service than Mr Freeman as a permanent employee, he was more multi-skilled than Mr Freeman.

8 The Commissioner set out the evidence given by Mr Freeman as follows:

(a) After Mr Freeman had worked 17 days for the employer on a job in Southern Cross he returned to work on 17 December 2012. The next day he spoke to Mr Griffiths about returning to New Zealand during the employer's Christmas close down. In response Mr Griffiths told him that he did not have a job next year as Top Notch Tree Services was closing down. He was also told that the employer would give him a positive reference. On 19 December 2012, Mr Griffiths rang Mr Freeman to invite him to the employer's Christmas 'break-up' function. Mr Griffiths also sent Mr Freeman a text message saying he 'couldn't go about it (Mr Freeman's termination) the way I have' (ts 21) and he told Mr Freeman to return to work for two weeks in January 2013 and he would then be terminated.

(b) As Mr Freeman had already been dismissed and his job would not continue after the two weeks he was asked to work in January 2013 he decided to use the two week notice period in January 2013 to look for other work.

(c) Mr Freeman spoke to Mr Dumitro in February 2013 about obtaining a reference from the employer and he discovered that Top Notch Tree Services was still trading and continued to employ all of its other permanent employees except for him. Mr Freeman then contacted the Fair Work Commission on or about 27 February 2013 and the Commission about his options, including lodging an unfair dismissal claim.

(d) After he was terminated Mr Freeman was unsuccessful in obtaining other employment. He applied for a number of jobs including concreting, joinery, gardening and work at the local bowling club. Mr Freeman was due to commence employment in Brisbane in October 2013 working in the building industry.

9 The Commissioner found the employer's evidence was as follows:

(a) It was Ms Griffiths' understanding that on 17 December 2012 (in order to give as much notice as possible to its employees), all employees were told by Mr Griffiths that the employer would be reducing the number of its employees or closing after Christmas. This notice was to allow employees to look for alternative work. However, they were still required to work the remainder of that week. Top Notch Tree Services then received advice that employees could not be given notice of their termination during a Christmas close down period so Mr Griffiths left a message on Mr Freeman's telephone telling him that he was required to return to work for two weeks in January 2013 to work out his notice period.

(b) When Mr Freeman did not return to work for the rest of that week or for two weeks in January 2013 the employer assumed he had abandoned his employment so he was not paid the two weeks' notice due to him.

(c) Ms Griffiths stated that the employer was unaware that Mr Freeman was unhappy about his termination or that he would be contesting his termination until they received a copy of his application in the mail.

10 The Commissioner set out the test for determining whether a dismissal is unfair. She found that the principles are well settled. These are as follows:

(a) The onus is on Mr Freeman to establish that the dismissal was, in all the circumstances, unfair.

(b) Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against Mr Freeman as to amount to an abuse of the right needs to be determined.

(c) 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: ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891 and ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 61 IR 32; (1995) 185 CLR 410. In ***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.

(d) Redundancy is itself a sufficient reason for dismissal: ***Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd*** (1987) 67 WAIG 733. When an employer reduces its workforce due to an excess of employees reasonably required to perform the work available this constitutes a redundancy situation: ***Gromark Packaging v The Federated Miscellaneous Workers Union of Australia, WA Branch*** (1992) 73 WAIG 220, 224.

(e) By virtue of s 5 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act), pt 5 of that Act is implied into Mr Freeman's contract of employment and a failure to comply with the mandatory requirements under this section is a factor to be taken into account in deciding whether a dismissal is unfair: ***Gilmore v Cecil Bros*** (1996) 76 WAIG 4434, 4445; ***WA Access Pty Ltd v Vaughan*** (2000) 81 WAIG 373, 378.

(f) Section 41 of the MCE Act requires that an employee is to be informed by the employer of the decision to make him or her redundant in a timely manner and an employer is required to discuss the effect of the redundancy on the employee and measures that may be taken to minimise the impact of the effect of the redundancy. Section 43 of the MCE Act provides that an employee is entitled to paid leave of up to eight hours to attend interviews for other employment and the eight hours need not be consecutive.

(g) Mr Freeman was unfairly terminated. He was not given any notice of his termination prior to being terminated by Mr Griffiths on 18 December 2012, nor was he given a payment in lieu of notice when he was terminated and told his services were no longer required. The employer subsequently sent Mr Freeman a text message on or about 19 December 2012, after his termination, asking him to return to work in January 2013 for two weeks to work out his notice, effectively reinstating him. The sending of a text message to an employee to reinstate him in this

instance was inappropriate when taking into account that Mr Freeman had been terminated without notice the day before.

(h) As Mr Freeman was entitled to two weeks' notice of termination under his contract of employment and taking into account s 26(1)(a) of the Act and the duty on the Commission to consider the relief being sought on the basis of equity, good conscience and the substantial merits, an order would be made that Top Notch Tree Services pay Mr Freeman three weeks' remuneration as compensation for his unfair dismissal.

Grounds of appeal

11 Although the grounds of appeal are not drafted in a conventional way, there appears to be two grounds of appeal. The first is that the Commissioner erred in law in that she was remiss in her duty to be unbiased and failed to act in a manner equitable to both parties. The second ground of appeal is that although the onus was on Mr Freeman to prove his claim, he failed to provide any proof whatsoever to substantiate his claim.

12 Top Notch Tree Services argue that the Commissioner accepted Mr Freeman's evidence despite conflicting details to his story. In particular, the whole of Mr Freeman's evidence should have been rejected as there was evidence before the Commission which showed that Mr Freeman's evidence was unreliable in respect of a number of issues.

Applications to adduce fresh evidence

13 At the hearing of the appeal, both parties sought to tender into evidence copies of documents that were not before the Commission at first instance. On behalf of Top Notch Tree Services an application was made to tender a Telstra telephone account invoice issued on 16 January 2013 to Terra Form Contracting for a mobile telephone which shows numbers dialled and the duration of telephone calls from a mobile telephone. One call on the list is said to be a record of a telephone call to the mobile telephone of Mr Freeman on 19 December 2012 at 7:38pm for a duration of one minute. The telephone bill was sought to be admitted on grounds that it shows that on 19 December 2012, Ms Griffiths telephoned Mr Freeman. This was said to support the oral evidence that she gave that they attempted to make telephone contact with Mr Freeman.

14 Mr Freeman's agent, Ms Tapsell, also made an application to tender a number of documents into evidence. These were said to be evidence of Mr Freeman's driver's licence, evidence of phone records, emails and a timebook which was relevant to the contention by Mr Freeman that workers' compensation had not been paid to him. Ms Tapsell conceded that at the hearing at first instance Mr Freeman had those documents in court but they were not produced to the Commission or shown to any witness. When asked why, Ms Tapsell said that those documents were not asked for and the timebook was already one of the documents which had been tendered into evidence.

15 Whilst the application made on behalf of Top Notch Tree Services was not opposed by Mr Freeman's representative, after hearing from the parties, the Full Bench informed the parties that the application to adduce evidence by Top Notch Tree Services was refused. The reasons why the Full Bench refused the application are as follows:

(a) Section 49(4)(a) of the Act provides that an appeal to the Full Bench shall be heard and determined on the evidence and matters raised in the proceedings before the Commission.

(b) The Full Bench does, however, have a discretion to receive additional evidence within strict confines which is that fresh evidence can only be admitted if:

> The evidence, insofar as it was relevant, and some of it was not, could only be admissible if it were not 'available to the appellant at the time of the trial' and could not by reasonable diligence have been made available. Further, it is only admissible if the evidence sought to be admitted is credible, although it does not have to be beyond controversy. Further, it can only be admitted if it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached: *Underdown v Dowford Investments Pty Ltd* [2005] WAIRC 01243; (2005) 85 WAIG 1437 [8] (Sharkey P and Kenner C); applied in *Merredin Customer Service Pty Ltd v Green* [2007] WAIRC 01150; (2007) 87 WAIG 2789 [10]; *Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health* [2011] WAIRC 00192; (2011) 91 WAIG 291 [60].

16 The application made on behalf of Top Notch Tree Services to adduce evidence of the Telstra telephone account was refused on grounds that it was a document that could have been produced at the hearing at first instance if reasonable diligence had been used to locate the document prior to the hearing.

17 The application made on behalf of Mr Freeman to produce documents was also refused. The reason the application was refused was because it is well established that each party is bound by the case that they run at first instance. If a party has documents available to them at a hearing and they choose not to seek to tender them into evidence or put them to any witnesses for examination or cross-examination, then they are bound by the course that they have taken and the documents in question should not be admitted on appeal.

18 An application was also made on behalf of Top Notch Tree Services for Mr Griffiths to give evidence about what occurred at the meeting which Mr Griffiths had with Mr Freeman and the other employees on Monday, 17 December 2012. The grounds upon which that application was made were that the Commissioner had rejected the evidence given by Ms Griffiths about what was said at the meeting on grounds of hearsay because she was not present at that meeting. This application to adduce further evidence was also refused on grounds of the principle that each party is bound by the way they conduct their case at first instance.

19 In ***Coulton v Holcombe*** [1986] HCA 33; (1986) 162 CLR 1, 7 Gibbs CJ, Wilson, Brennan and Dawson JJ observed:

> It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

Submissions

20 Both parties filed written submissions prior to the hearing of appeal. Top Notch Tree Services also sought to rely upon matters set out in a statutory declaration made by Ms Griffiths on 15 November 2013. In this appeal we have only had regard to the matters set out in the statutory declaration which are submissions made about the issues raised in the appeal and the evidence before the Commission at first instance.

Submissions made on behalf of Top Notch Tree Services

21 The relevant submissions as to the reasons why Top Notch Tree Services says the evidence given by Mr Freeman should not have been accepted by the Commission at first instance are as follows:

(a) The meeting at which Mr Griffiths informed Mr Freeman that the business would be either downsizing or closing down occurred on Monday, 17 December 2012, not 18 December 2012. The wage records completed by Mr Freeman show that he finished work at 1:00pm on Monday, 17 December 2012 and he did not come to work on Tuesday morning, 18 December 2012. The timesheet for the week ending 19 December 2012 was tendered as part of exhibit R1(2). That document shows that Mr Freeman worked six hours that week and on 17 December 2012 he started work at 7:00 am and finished at 1:00 pm.

(b) Mr Freeman claims to have been terminated on 18 December 2012, days before they ceased operating for Christmas because there was no work. However, there was enough work for all of the other employees for the remainder of the week until they closed down, including three casuals (ts 32). Ms Griffiths gave evidence that there was tree cutting to carry out on 18, 19 and 20 December 2012 and they had a Christmas party on the evening of 20 December 2012.

(c) Mr Freeman claimed that he had not received any wage slips and he had raised this issue at the staff meetings, yet he failed to provide any witnesses or statements to confirm this. At the commencement of the hearing of this matter and prior to evidence being adduced by the parties, Ms Griffiths informed the Commission that when Mr Freeman first commenced employment her practice was to put each wage slip in Mr Freeman's time book. Halfway through that employment she changed her practice and sent the payslips by email (AB 39).

(d) The Commissioner failed to act in a manner equitable to both parties. Mr Freeman was provided approximately six weeks to request documents for the hearing. He failed to do so in the allocated timeframe. The Commissioner then contacted Top Notch Tree Services via email requesting the documents and they were provided limited time, 27 hours to produce them.

(e) Mr Freeman also claimed he had not been paid workers' compensation. After viewing his payslips, the Commissioner was satisfied that his workers' compensation had been paid, disproving that claim. However, she failed to acknowledge discrepancies in his wages which support the claim that he was unreliable, demonstrating that her interest was in finding evidence in support of his claim rather than focusing on getting to the truth of the matter. Thus, it is contended that the Commissioner showed bias. Also, the employer says this evidence shows that Mr Freeman's evidence should not have been accepted because his workers' compensation had been paid and that is reflected in the payslips, so therefore the whole of his evidence should be regarded as unreliable.

(f) Ms Griffiths also gave evidence that there were other reasons which contributed to the decision not to keep him on, because they downsized, because Mr Freeman did not have a current licence and it was impractical to use him. From this submission it is said he was unreliable and thus his evidence should have been regarded as unreliable (AB 28).

(g) Top Notch Tree Services contend that the events set out in the evidence given by Ms Griffiths should have been accepted by the Commissioner. This evidence was that before the meeting on 17 December 2012 Ms Griffiths and Mr Griffiths were trying to decide whether or not to close the business or downsize as the business was not financially viable. However, they did not make their final decision until sometime during the two-week period they closed over Christmas. In that period they decided to retain Mr Dumitro, Mr Marendez and Mr Rulyanich and for Mr Griffiths to take on a more managerial role. Prior to the meeting on 17 December 2012, she discussed with Mr Griffiths what was to occur. Mr Griffiths told Ms Griffiths that he was going to tell the employees that they were considering closing down or downsizing to give them notice and plenty of opportunity to look for other work. Because they had had issues with terminating employees before, she told Mr Griffiths to make sure he did it procedurally correct. However, at the time of the conversation she wondered if they could terminate any employees over the two-week period that they were closed over Christmas. At the meeting on 17 December 2012, the four employees including the casuals and Mr Freeman were told that they would be terminated after Christmas or that they would not be required. Sometime later she telephoned Wageline and was informed that they were unable to terminate employees during the Christmas period. After she was told by Wageline that she could not give people notice over the period that they were closed for Christmas, she told Mr Griffiths after he had met with the employees that:

> On the Tuesday morning you go in and you inform everybody that we have to give them two weeks' notice and that they can work when we start back after Christmas for two weeks, specifically Mr Freeman. That's why we rang and left a message on his phone (AB 57).

When asked by the Commissioner was that confirmed in writing that employees still had a job after Christmas, Ms Griffiths said:

> Well, basically, Mr Freeman was the only one entitled, the other three were casuals. My husband rang his phone and left him a message telling him that, as Mr Freeman stated in his application. He said - you know, under our, 'We're obligated to provide you these two weeks' notice, so come back to work when we start back after Christmas for two more weeks' work' (AB 58).

(h) Mr Freeman did not complete all the tasks required of him. He was repeatedly instructed to obtain a driver's licence. Because he did not, it was impractical for Top Notch Tree Services to maintain his employment when they downsized, as was explained to him on 17/18 December 2012 (AB 93). Pursuant to the express terms of Mr Freeman's contract of employment on grounds of failing to follow all lawful and proper directions Top Notch Tree Services was entitled to terminate Mr Freeman's employment summarily.

(i) Mr Freeman was not paid the two-week notice period because he abandoned his employment, did not request job search entitlements or provide proof that he had attended any interviews.

(j) A finding should have been made that Mr Freeman abandoned his employment because he did not continue to work the days prior to Christmas, nor did he return to work after Christmas and for those reasons they did not make any further payments to him other than his wages and his leave entitlements.

Relevant submissions made on behalf of Mr Freeman

22 Mr Freeman gave evidence at first instance that he was off work for two weeks and made a workers' compensation claim, but he was not paid workers' compensation because he was not at work to fill in his timebook (AB 32). The submission was made that when the payslips are examined for the period 4 October 2012 to 10 October 2012 it can be seen that he was paid sick leave for that period instead of being paid workers' compensation, so consequently that period of time he was off work was deducted from his sick leave.

23 Ms Tapsell, on behalf of Mr Freeman, pointed out that even if you have regard to the evidence given by Ms Griffiths in her evidence, her evidence could not be accepted in its entirety because it is clear that it is common ground that a telephone call was made to Mr Freeman in which he was told that he was effectively being reinstated to return to work for two more weeks of work after Christmas. Thus, it is said that if it were the case that Mr Freeman was not terminated at the meeting prior to Christmas 2012 then there would have been no reason for that telephone call to have been made. It was clear that the employer had already decided to terminate Mr Freeman's employment and had done so.

Did the Commissioner err in finding Mr Freeman had been unfairly dismissed?

24 The central issue in the employer's grounds and submissions is a contention that the Commissioner unfairly preferred the evidence given by Mr Freeman to the evidence given by Ms Griffiths.

25 The decision made by the Commissioner that the dismissal of Mr Freeman was unfair was made by the Commissioner on assessment by her of the evidence given in proceedings at first instance which included the documents tendered into evidence on behalf of the employer at the hearing. She also had regard to copies of payslips and payroll transactions provided by the employer after the hearing of oral evidence.

26 The assessment of evidence is a discretionary decision. A discretionary decision cannot be set aside because members of a Full Bench would have exercised the discretion in a different way. Error in the decision-making process must be demonstrated. In ***Michael v Director General, Department of Education and Training*** [2009] WAIRC 01180; (2009) 89 WAIG 2266 Ritter AP said ([140] - [143]):

> The relevant principles were set out in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 504-505 as follows:
>
> > 'The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'
>
> As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19]-[21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76, that a discretionary decision results from a 'decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result"'. Instead 'the decision-

> maker is allowed some latitude as to the choice of the decision to be made'. At [21] their Honours said that because 'a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process'. Their Honours then quoted part of the passage of *House v King* which I have quoted above.
>
> Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with 'caution and restraint'. His Honour said this is 'because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view'. (See also *Norbis v Norbis* (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535).
>
> These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 519. There, his Honour explained that although 'error in the proper weight to be given to particular matters may justify reversal on appeal, … disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge'. This is because, in considering an appeal against a discretionary decision it is 'well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion', and that when 'no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight'. (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]).

27 The employer's submissions are founded in part on a contention that insufficient weight was given to the documentary evidence, which are the payslips and the timesheets for the week ending 19 December 2012, which contradicts Mr Freeman's evidence that he was not paid workers' compensation when he was unfit for two weeks in September 2012 and the meeting at which he said he was dismissed occurred on Monday, 17 December 2012. When Mr Freeman gave evidence he simply said he was not paid workers' compensation (AB 20 - 21). He also said he was not trying to prove that was the case; only that he was 'using it for an example of how unfair they were' (AB 21). The payslips provided to the Commission following the hearing showed he was paid wages in September 2012 and October 2012. However, an inference that Mr Freeman's evidence was not reliable or truthful in respect of this issue cannot be conclusively drawn from the timesheets. The Commissioner found in her reasons for decision that Mr Freeman was employed full-time and his contract of employment states his ordinary hours are eight hours a day ([34], AB 78). This finding has not been challenged in this appeal.

28 Clause 5.1 of the contract states (exhibit A1):

> the Employee is required to work a maximum of 40 hours/week. They may be required to work reasonable additional hours

29 Whilst the contract of employment contemplates that Mr Freeman was to work up to 40 hours a week together with reasonable overtime, the hours of work for which he was paid varied. Mr Freeman gave uncontradicted evidence that he had an accident on 20 September 2012 (ts 20, AB 41). The payslips for the two weeks prior to the accident indicate he was paid for the following hours:

(a) pay period 6 September 2012 to 12 September 2012 – 40.75 hours;

(b) pay period 13 September 2012 to 19 September 2012 – 30 hours.

30 The payslips for the four weeks on and from 20 September 2012 indicate he was paid for the following hours:

(a) pay period 20 September 2012 to 26 September 2012 – 37 hours;

(b) pay period 27 September 2012 to 3 October 2012 – 23 hours;

(c) pay period 4 October 2012 to 10 October 2012 – 11 hours and 24 hours;

(d) pay period 11 October 2012 to 17 October 2012 – 36.5 hours;

31 Whilst the payslips indicate that Mr Freeman was paid wages in the period in question, no evidence was before the Commission as to the entitlements from which those payments were made. In particular, whether the payments made were deducted from sick leave credits or were payments of workers' compensation is not known. Nor was any finding made by the Commissioner that Mr Freeman was paid compensation for the period he was off work in September or in October 2012.

32 Mr Freeman's evidence was that he went to work on Monday, 17 December 2012 and after finishing one job at 1:00 pm he was told:

> 'See you in the morning', come into work. The boys are saying, 'We've got no work on for the rest of the year. We might be closing down - closing down earlier than we were going to', so I thought, 'Well, I'll go and see Marcus', because I was wanting to go back to New Zealand for Christmas. If there was going to be something down early, I asked him, 'Could I be let go early to go home for Christmas?' and right at that minute he goes to me, 'Hang on, hang on, we're going to have a meeting', and I said, 'Oh, yeah', and we go to the meeting and he goes to me, 'I wouldn't go spending all your money on plane tickets because you've got no job next year'. That's what he said. That's the exact words.
>
> And then what happened?-And then we had a meeting - the other boys came in. We sat down and he bought up the spiel of, 'I'm closing down Top Notch Trees next year. I'm closing the (indistinct 10.02.49)'. That's what he said, 'Closing the business of Top Notch Trees next year, so there's no job for me' (AB 36).

33 The evidence given by Ms Griffiths that the meeting Mr Griffiths convened with Mr Freeman and the other employees occurred on Monday, 17 December 2012 and not Tuesday, 18 December 2012 could be said to be consistent with and

supported by Mr Freeman's timesheet which indicates he only carried out work on Monday, 17 December 2012. However, in the notice of answer and counterproposal Top Notch Tree Services clearly sets out material facts that are inconsistent with the evidence of Ms Griffiths that:

(a) no decision had been made to downsize the business prior to the Christmas shutdown; and

(b) Mr Freeman was not told at the meeting his employment was terminated.

34 To the contrary, the following matters are clearly stated that are contrary to the evidence given by Ms Griffiths:

(a) at the meeting Mr Griffiths notified the employees they may be closing down or at least downsizing;

(b) Mr Freeman and three employees were informed that their employment would be terminated.

35 In the notice of answer and counterproposal, Top Notch Tree Services state:

> Monday 17 December 2012, Marcus notified the Employees that we may be closing down the business after Christmas, or at least downsizing. Four employees including you, were informed that your employment would be terminated. (You chose not to attend the last three days of work before we closed for Christmas, therefore you could not have been informed of your termination in person on the day).
>
> Your duties are currently being performed by Brett Marendaz who commenced employment with us January 2011.
>
> You requested time off to seek alternative employment. According to your time book, you finished work at 1pm Monday 2012 [sic].
>
> Tuesday 18 December 2012, Marcus left a message on your phone and provided you opportunity to continue your employment, meeting our obligations to provide adequate notice of termination of employment (AB 14).

36 It is also claimed that Mr Freeman requested time off to seek alternative employment and according to his time book he finished work at 1:00pm. The fact that Mr Freeman asked for time off work to seek alternative employment is consistent with his evidence that his employment was terminated at the meeting in question. Mr Freeman's evidence is also consistent with the evidence given by both him and Ms Griffiths that he received a text or telephone message on the day following the meeting telling him that they (Top Notch Tree Services) had to give him two weeks' notice after the Christmas shutdown and asking him to return to work after Christmas for two weeks. If the employer had not terminated the employment of Mr Freeman at the meeting there would be no reason to call him to tell him to return to work after Christmas. If his employment had not been terminated, as a full-time employee he would have been expected to return to work after Christmas. Nor is it relevant that there was work performed by other employees on 18, 19 and 20 December 2012. Mr Freeman's employment had been terminated. It is immaterial that other employees continued to work. It is common ground that in the text message sent to Mr Freeman, Mr Griffiths did not ask Mr Freeman to work on 18, 19 or 20 December 2012. Even if the telephone record of calls made from the mobile phone in the account of Terra Form Contracting was admitted into evidence, it would not have assisted Top Notch Tree Services' case as the evidence of Ms Griffiths was simply that she attempted to telephone Mr Freeman to inquire if he intended to attend the Christmas party. A call for this purpose could not shed any light on whether Mr Freeman's employment was terminated on Monday, 17 December 2012. In any event, Mr Freeman's evidence was that he not only received a text message from Mr Griffiths he also received a telephone call from Mr Griffiths who gave him information about the Christmas party that was to be held on 20 December 2012 and told Mr Freeman to bring 'his missus' (AB 42).

37 Even if Mr Freeman's assertion that he was not paid workers' compensation for the period he was unable to work as a result of a workplace injury or that the meeting occurred on Tuesday, 18 December 2012 is accepted as wrong or even misleading, it does not mean that the Commissioner should have rejected all of his evidence, as she is required to weigh all of the evidence in light of the matters pleaded by the parties.

38 Whilst it is clear that the reasons for decision of the Commissioner do not disclose her analysis of her assessment of the weight of the evidence of each party, it is clear that she rejected the evidence of Ms Griffiths about her understanding of what was said by Mr Griffiths at the meeting in question. In our opinion, when the evidence given by Mr Freeman and Ms Griffiths about the meeting in question and the evidence of the subsequent message Mr Freeman received on his mobile telephone is analysed, no error in the decision made by the Commissioner can be demonstrated.

39 The evidence given by Mr Freeman about the meeting and what was said by Mr Griffiths at the meeting were matters within his own knowledge, as he was present at the meeting. On the other hand, the evidence of Ms Griffiths about those matters was evidence of what Mr Griffiths told her had been said. She was not present at the meeting.

40 Whilst the Commission is not bound by the rules of evidence and can have regard to hearsay, the fact that evidence is hearsay affects the weight to be given to that evidence. What this means is that where there is evidence given by a person who has actually experienced the event in question and conflicting evidence given by a second person who has not experienced the event but whose source of evidence about the event is what he or she has been told by a third person who experienced the event, it would not be reasonable for a decision-maker to accept a version of events of the second person, unless the evidence given by the first person could not be relied upon. For example, such circumstances rendering the evidence by the first person unreliable could arise if the first person was heavily intoxicated at the time of the event in question and the evidence of the second person was consistent with and supported by other evidence or other material.

41 In this matter, the only evidence that could be said to support Ms Griffiths' version of events is the timesheet for 17 December 2012. However, that evidence also supports Mr Freeman's version of events as he gave evidence that he finished work on 17 December 2012 at 1:00pm which is the time recorded on the timesheet. Also, the evidence of the text message from Mr Griffiths is consistent with Mr Freeman's evidence that his employment had been terminated prior to receiving the text

message. Further, as set out above, the evidence of Ms Griffiths is clearly inconsistent with the matters pleaded in the notice of answer.

42 The submission that Top Notch Tree Services was entitled to summarily dismiss Mr Freeman because he failed to obtain a driver's licence is not a submission that is open to be put in this appeal. No evidence was adduced in the hearing before the Commission at first instance that was the reason for the dismissal. The evidence of Ms Griffiths was that Mr Freeman's employment was terminated because a decision was made to downsize the business. The reason why they chose to retain other employees rather than Mr Freeman was because the other employees were more skilled than Mr Freeman. If it was the case that Mr Freeman did not have a driver's licence that may have been a factor as to why a decision was made to retain other employees and not him. However, such a decision was part of the reason to terminate Mr Freeman on the grounds that a decision was made to operate the business with fewer employees.

43 For these reasons, no error can be demonstrated in the findings made by the Commissioner to accept the evidence of Mr Freeman and reject the evidence of Ms Griffiths about what occurred at the meeting Mr Griffiths held with the employees. As the Commissioner properly found, once Mr Freeman had been dismissed on 18 December 2012 on grounds that the business was to be downsized, it was not open to attempt to reinstate Mr Freeman by providing him with a further two weeks' work as work within a notice period, to terminate the contract of employment. It was not open to the employer to do so, as Mr Freeman's employment came to an end on 18 December 2012. The termination was not effected in accordance with the requirements of cl 16 of the contract which expressly required written notice of two weeks or two weeks' pay in lieu of notice. Further, no error has been demonstrated in the finding made by the Commissioner to award one week's remuneration as compensation for the failure of the employer to comply with the requirements of s 41 and s 43 of the MCE Act.

44 The rule against bias requires a member of a tribunal to hear a matter without a closed mind. The tribunal member must not merely listen but be open to persuasion: Forbes J R S, *Justice in Tribunals*, (3rd ed, 2010) [15.1].

45 The grounds upon which the employer says the Commissioner was biased appear to be that her findings did not reflect the evidence. However, for the reasons set out above, this submission has absolutely no merit whatsoever. In addition, the transcript of the proceedings reveals that the employer was provided with an opportunity to test the evidence of Mr Freeman in cross-examination; to lead evidence in chief and in reply; and to make submissions at the close of the evidence. The Commissioner also properly invited Ms Griffiths to tender into evidence the documents attached to the notice of answer and to subsequently provide copies of payslips and payroll transactions showing payments made to Mr Freeman from 17 May 2012 until 10 January 2013.

46 The submission that the Commissioner allowed Mr Freeman six weeks to request documents and only allowed Top Notch Tree Services 27 hours to produce documents is incorrect and misleading. The Commission file records that on 5 July 2013 the Associate to Commissioner Harrison sent a letter to both parties in which it was stated in respect of U 45 of 2013 and B 45 of 2013:

> In relation to both applications, the parties are advised as follows:
>
> 1. Each party is to provide to the other party the names of any witnesses they intend to call to give evidence at the hearing, by no later than 26 August 2013.
>
> 2. Discovery of documents is to be informal. The parties are to exchange any documents they will be relying on at the hearing and any additional documents relevant to the proceedings, by no later than 16 August 2013.
>
> 3. Liberty to apply is granted to the parties to seek the assistance of the Commission in relation to the discovery of documents

47 The direction to Top Notch Tree Services to provide discovery of documents was not contingent on a request from Mr Freeman for documents. Pursuant to the direction Top Notch Tree Services was required to produce all relevant documents and they had six weeks to do so.

48 The email referred to by Top Notch Tree Services in their submissions is contained in the appeal book at AB 87. The email was sent to Top Notch Tree Services on 29 August 2013 at 1:52pm by the Associate to Commissioner Harrison. In the email the Associate stated:

> Dear Ms Griffiths
>
> Please find following a copy of the email that Mr Freeman says was sent to you on 12 July 2013 requesting documents for the hearing.
>
> Commissioner Harrison has asked that the respondent provide copies of the documents requested by the applicant to him by no later than close of business Friday 30 August 2013.

49 Thus, it is palpably clear that contrary to the submission made by Top Notch Tree Services that they only had 27 hours to produce documents, the time to produce discoverable documents was in fact extended. Notice was given on 5 July 2013 that discovery was to be provided by 16 August 2013 and this requirement was later extended to 30 August 2013.

50 For these reasons, we are of the opinion that the grounds of appeal have not been made out and an order should be made to dismiss the appeal.

Costs and interest

51 An order for costs of defending the appeal is sought on behalf of Mr Freeman as follows:

Petrol to Magistrates Court @ 1.56km x 28.3km	$	44.15
Wages for Tuesday 19th 2012 [sic] @ $27.00 x 3hours	$	81.00
Paper Ream	$	6.40
Time and energy 85hrs x $20hr	$	1,700.00
Personal Leave 24hrs taken instead of compensation	$	648.00

52 Pursuant to s 27(1)(c) of the Act, the Commission is empowered to make an order for costs. Such orders are, however, rarely made. In ***Brailey v Mendex Pty Ltd*** (1993) 73 WAIG 26, the Full Bench found it is well settled in industrial law that an order for costs ought not to be awarded, except in extreme cases such as where proceedings have been instituted without reasonable cause. Whilst the ground of appeal in which it is argued the Commissioner was biased is a matter that has no reasonable basis, the other ground of appeal which raises issues of weight to be given to parts of the evidence whilst weak could not be classed in the category of grounds of appeal that are so manifestly untenable so as to attract an order of costs against Top Notch Tree Services.

53 For these reasons, we are of the opinion the application on behalf of Mr Freeman for an award of costs should be dismissed.

54 An order is also sought on behalf of Mr Freeman for an award of interest on the amount to be paid to Mr Freeman as compensation for his unfair dismissal. The Full Bench, however, is unable to deal with this application as the Commission is not empowered to make an award of interest on awards of compensation made pursuant to s 23A(6) of the Act. For these reasons, we are of the opinion that this application should also be dismissed.

2014 WAIRC 00489

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MARCUS JOHN GRIFFITHS AND ANGELINE GRIFFITHS TRADING AS MIDWEST TOP NOTCH TREE SERVICES

APPELLANT

-and-

JEREMY FREEMAN

RESPONDENT

CORAM FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER A R BEECH

ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 16 JUNE 2014

FILE NO/S FBA 17 OF 2013

CITATION NO. 2014 WAIRC 00489

Result Appeal dismissed

Appearances

Appellant Mr M J Griffiths and Ms A Griffiths

Respondent Ms A Tapsell, as agent

Order

This appeal having come on for hearing before the Full Bench on 8 April 2014, and having heard Mr M J Griffiths on behalf of the appellant, and Ms A Tapsell, as agent, on behalf of the respondent, and reasons for decision having been delivered on 16 June 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be and is hereby dismissed;
2. The respondent's application for an award of costs be and is hereby dismissed; and
3. The respondent's application for an award of interest be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2014 WAIRC 00542

APPLICATION PURSUANT TO S.62 - ALTERATION OF REGISTERED RULES - RULE 10 - COUNCIL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00542
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	**:**	THURSDAY, 19 JUNE 2014
DELIVERED	**:**	TUESDAY, 24 JUNE 2014
FILE NO.	**:**	FBM 5 OF 2014
BETWEEN	**:**	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH Applicant

CatchWords	**:**	Industrial Law (WA) - Application pursuant to s 62(2) to alter rules of an organisation to delete a rule that provides for the holders of an office in the counterpart Federal body to hold an office in the State organisation - Effect of deletion of the rule on s 71 certificate considered
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 56(1), s 62(2), s 62(4), s 71, s 71(5), s 71(5)(a), s 71(5)(d)
Result	**:**	Order made
Representation:		
Applicant	**:**	Ms V Loveridge and with her Ms B E Burke (of counsel)

Reasons for Decision

THE FULL BENCH:

Introduction

1 The Full Bench had before it an application made under s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The application seeks to delete r 10(5) of the rules of The Australian Nursing Federation, Industrial Union of Workers Perth (the State organisation). Rule 10(5) of the rules of the State organisation provides as follows:

> Notwithstanding any other provision in these Rules, the Council may declare that the Council of the WA Branch of the Australian Nursing Federation, an organisation registered under the provision of the Conciliation and Arbitration Act, 1904, shall be the Council of the Union and the officers of the WA Branch shall hold the corresponding offices of the Union.

2 The effect of r 10(5) of the rules of the State organisation is that it provides for officers holding office of the council of the WA Branch of the Australian Nursing Federation, which is the State organisation's counterpart Federal body, to hold corresponding offices in the council of the State organisation. As this is a matter referred to in s 71(5) of the Act, pursuant to s 62(2) of the Act, the alterations sought by the State organisation to delete r 10(5) are required to be authorised by the Full Bench.

3 After hearing submissions on behalf of the State organisation on 19 June 2014, the Full Bench was of the opinion the application should be granted and it made the following order:

> The Registrar is hereby authorised to register the alteration to the rules of the applicant by deleting r 10(5).

4 These reasons set out the reason why the Full Bench made the order.

5 Pursuant to s 62(4) of the Act, the requirements of s 55(4) of the Act must be complied with before the Full Bench can approve a rule alteration application. Section 55(4) of the Act provides that the Full Bench shall refuse an application by the organisation unless it is satisfied that:

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

6 The first matter about which the Full Bench must be satisfied is that the proposed rule alteration must be authorised by the State organisation in accordance with its rules. The authority of the State organisation to alter its rules is found in r 35 of the rules of the State organisation. Rule 35 provides as follows:

(1) The Union shall have the right to make Rules for its own use and guidance. Rules may be amended, added to, varied, repealed by notice of any proposed alteration to the Rules being given by any member to the Secretary in writing. The same shall be laid before the Council or before a meeting of the Union under Rule 27 of these Rules, which may amend, add to, vary or repeal the Rules or any part of them in accordance with the proposal in the said notice or any reasonable amendment of same.

(2) No amendment, addition to variation, repeal, or substitution, of these Rules shall be made unless a notice of the proposed alteration, and the reasons therefore is:

(a) sent to each workplace for the attention of all members; or

(b) published in a Union magazine which shall be distributed to all members.

(3) In the notice referred to in sub-rule (2) members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Registrar to reach him or her no later than 21 days after the date of issue of the notice in (2) (a) above or 21 days after the date of issue of the magazine as in (2) (b) above, as the case may be.

7 The facts supporting the State organisation's submission that it complied with its rules and the statutory requirements of the Act are set out in a statutory declaration made on 13 May 2014 by Mark Anthony Olson, the Secretary of the State organisation. Mr Olson's statutory declaration and attachments provide evidence of the following matters:

(a) A member of the union, Michael Clancy, wrote to the Secretary on 10 April 2014 to request a number of proposed changes to the rules. One of the changes Mr Clancy sought was a change to the rules of the State organisation to separate the councils of the State organisation and the counterpart Federal body and to hold separate elections for half of the council every two years and that this motion be moved at the next meeting of the council of the State organisation.

(b) Mr Clancy's letter and the proposed variations to the rules were sent to the council of the State organisation on 23 April 2014.

(c) The minutes of the meeting of the council on 6 May 2014 record that the variation to r 10 by deleting r 10(5) was considered and carried unanimously.

(d) Following the meeting of the council a notice of the proposed rule changes and the reasons therefore was included in the April - May 2014 edition of 'The Western Nurse'. A copy of 'The Western Nurse' was posted to each member of the union on 9 May 2014. In the notice, members were informed that they could object to the rule change by forwarding a written objection to the Registrar no later than 4 June 2014.

(e) Under the heading 'What's changing and why?' in the notice sent to members of the State organisation they were informed of the following matters:

The ANF IUWP Council will be elected separately to the election of the WA Branch of the Federal Union.

The ANF IUWP in Western Australia will no longer be obliged to pay additional levies to the Australian Nursing & Midwifery Federation (ANMF) Federal Office.

As you are probably aware, for the past decade or more the ANF in Western Australia has taken a different direction to the ANF in other states, pursuing a service model with the goal of providing as many services as possible to members at either no cost, or low cost.

> That is why we are the only state that has holiday units, free online education, the extensive range of free products in the ANF membership pack, and the extensive prize give-aways. We believe that investing in the services and benefits for our members is the best investment we can make to ensure the success and growth of the ANF in Western Australia.
>
> Our Legal Team has trebled in size and our Industrial Team has doubled. We have also been able to introduce important initiatives such as Professional Indemnity Insurance, free of charge to our members.
>
> With assets now in the tens of millions of dollars, we need to take every step available to protect all that the union and its WA members have achieved, and all that we want to achieve in the future.
>
> Under the existing arrangement, the Federal Union has the power to replace the WA Branch Council. This means the Federal Union also has the power to replace your ANF IUWP Council, because both are linked by virtue of a single election for both Councils.
>
> We want remove [sic] that link by having separate elections, thereby removing any possibility that the Federal Union has any control over the affairs of the ANF IUWP in WA.
>
> ANF IUWP members remain entitled to be members of the WA Branch of the ANMF but the ANF IUWP Council – your elected representatives – want to ensure that only the ANF members in this state determine how your fees are spent.

8 The minutes of the meeting of the council record when it met on 6 May 2014 that 12 members of the council were present. Pursuant to r 10(1), the council consist of 25 members. However, the Full Bench was satisfied that there was a quorum when the resolution to delete r 10(5) was passed. Pursuant to r 26, the quorum for a meeting of the council is a simple majority of all its members. At the time the meeting was convened council comprised 23 members as there were two casual vacancies. Pursuant to r 10(3), council is empowered to act where a vacancy in its membership exists and none of its acts or proceedings are invalid or void for reason only of a vacancy in an office. Consequently, a simple majority of the council on 6 May 2014 was 12 members.

9 Subsequent to the filing of the application in the Commission the Registrar received two objections to the deletion of r 10(5). In Mr Olson's statutory declaration he records that as at 13 May 2014, the number of members of the State organisation was 26,320. Both objections were received by the Registrar on 4 June 2014 and are identical. Both objectors requested that their identity remain confidential. Each member sent an email to the Commission in which they set out their objection to the deletion of r 10(5). Their objection is as follows:

> Currently Officers (councillors) of the Branch are deemed to be officers of the Union and vice versa. This state has been maintained over the years to avoid the possibility of having 2 separate Councils which may end up in conflict with each other. All Branches of the Australian Nursing Federation including NSW/NSWNMA and Queensland/QNU hold elections to their Councils in tandem. The system has worked well for over 40 years and I do not believe that there is any advantage in changing it. The current State Secretary's argument that 'under the existing arrangement the Federal Union has the power to replace the WA Council. This means the Federal Union also has the power to replace (your) ANF IUWP Council, because both are linked'. It has always been recognized that the two entities are separate and autonomous.

10 Whilst the objection made by each of the objectors relates to the reasons why r 10(5) should not be deleted from the rules of the State organisation, the matters raised in the objections are not matters which go to any issue that is within the jurisdiction of the Full Bench to consider. In approving the registration of a rule alteration the Full Bench can only consider the matters which are set out in the Act. These are whether the provisions of the rules of a State organisation and the provisions of the Act which relate to the alteration of rules of an organisation have been complied with. Pursuant to s 55(4), the Full Bench must consider whether the members of the State organisation have been afforded a reasonable opportunity to make an objection to the making of the alteration and whether less than five percent of the members of the organisation have objected to the making of the application or to the rules or any of them as the case may be. In this matter it was clear to the Full Bench that members of the State organisation were given a reasonable opportunity to make an objection to the alteration to r 10(5) and that less than five percent of the members of the State organisation have objected to the deletion of r 10(5).

11 For these reasons, the Full Bench was satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act had been complied with. Section 55(4)(e) and s 56(1) of the Act provide for procedural rules that are to be provided for in the rules of all organisations in respect of elections by secret ballot. The State organisation's current rules provide for the procedures as required by these provisions of the Act and the alterations sought in this application do not relate to those matters.

12 The effect of deleting r 10(5) is that the State organisation will be required to have separate elections for members of its council which is the committee of management of the State organisation. Although the State organisation has at the present time a s 71 certificate issued by the Registrar of the Commission under s 71(5) of the Act, there is no application before the Commission to cancel the certificate. However, the provisions of the Act do not contemplate such an application. In any event, once the deletion of r 10(5) is registered by the Registrar, the s 71 certificate will cease to have effect as s 71(5)(d) provides that a certificate which declares that persons holding office in a State organisation in accordance with a rule made pursuant to s 71(5)(a) of the Act shall, for all purposes, be the officers of the State organisation. As there will be no rule as contemplated in s 71(5)(a) of the Act and consequently no officers of a counterpart Federal body holding office in the State organisation, the s 71 certificate will cease to have effect.

2014 WAIRC 00511

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

APPLICANT

-and-

(NOT APPLICABLE)

RESPONDENT

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

DATE THURSDAY, 19 JUNE 2014

FILE NO. FBM 5 OF 2014

CITATION NO. 2014 WAIRC 00511

Result Application granted

Appearances

Applicant Ms V Loveridge and with her Ms B E Burke (of counsel)

Order

This matter having come on for hearing before the Full Bench on 19 June 2014, and having heard Ms V Loveridge on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The Registrar is hereby authorised to register the alteration to the rules of the applicant by deleting r 10(5).

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2014 WAIRC 00519

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BRENDAN REEVE

APPLICANT

-and-

THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

RESPONDENT

CORAM THE HONOURABLE J H SMITH, ACTING PRESIDENT

DATE THURSDAY, 19 JUNE 2014

FILE NO. PRES 1 OF 2012

CITATION NO. 2014 WAIRC 00519

Result Discontinued

Appearances

Applicant Ms N Ireland

Respondent Mr L McLaughlan

Order

WHEREAS this is an application made pursuant to s 66(1)(a) of the *Industrial Relations Act 1979* and filed on 21 May 2012*;*

AND WHEREAS on 12 June 2014, the applicant filed a Notice of withdrawal or discontinuance in respect of the application;

AND WHEREAS on 18 June 2014, the respondent informed the Commission that it consents to the application being discontinued;

NOW THEREFORE, the President, pursuant to the powers conferred on her under the *Industrial Relations Act 1979*, hereby orders:—

THAT the application be and is hereby discontinued by leave.

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

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2014 WAIRC 00470

APPLICATION FOR CONCILIATION RE TERMS OF ENTERPRISE AGREEMENT

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, 11 JUNE 2014
FILE NO.	APPL 6 OF 2014
CITATION NO.	2014 WAIRC 00470

Result	Recommendation issued
Representation	
Applicant	Mr J Walker
Respondent	Ms T Borwick

Recommendation

1 This application comes before the Commission in circumstances that are unusual. The application is made under s 29 of the Act, regarding a dispute between the Union and the Minister in relation to the interpretation of certain provisions of the Department of Corrective Services Prison Officers' Enterprise Agreement 2010. This Agreement is now cancelled, on the making of a replacement industrial agreement in 2013. In issue is the proper meaning of provisions of the 2010 Agreement providing for the payment of a "composite allowance", as set out in cls 17.5-17.9 of the Agreement. As the 2010 Agreement is no longer "in force" for the purposes of ss 46(1) and (5) of the Act, the present issue is not able to be the subject of an application under that section of the Act, for a formal interpretation and the making of a declaration.

2 As a consequence of the issues raised in the conciliation conference, the Commission proposed to the parties that it would endeavour to assist in the resolution of the dispute, by considering the submissions of the parties and by the making of a recommendation. The parties accept however, that as the 2010 Agreement is no longer in force, any such recommendation has no binding force for the purposes of s 46(3) of the Act.

Provisions of the 2010 Agreement

3 The relevant provisions of the 2010 Agreement, which are presently in dispute, were in the following terms:

Payment for Out of Hours Worked

17.5 Payment for out of hours will be determined by the nature of the out of hour's duty performed, as follows:

(a) Ordinary Overtime Hours; subject to the Emergency Duty section of this clause payment for all out of hours work, will be calculated at the rate of time and a half the Officer's annualised rate of pay for all excess time worked;.

(b) In addition, a composite allowance will be paid for all out of hours worked, excluding hours worked in accordance with the Emergency Duty section of this clause.

Composite Allowance

17.6 For the duration of this Agreement an Officer shall be paid a prisons composite allowance. This allowance is payable in recognition of out of hours participation and current staffing levels.

17.7 The allowance shall be paid only for overtime shifts worked and shall be a flat rate as set out below per 12 hour overtime shift worked (this equates to the equivalent of double time on the base rate for all hours at the prison officer shift thereafter rate).

(a)	Date of Registration of Agreement	$44.00
(b)	11 June 2011	$45.80
(c)	11 June 2012	$47.80

17.8 The allowance shall not be paid for all purposes of the Agreement or Award.

17.9 Pro rata rates shall be applied for all overtime worked that is less than 12 hours duration.

Contentions of the parties

4 The Union submitted that the Minister has failed to properly apply the provisions of the 2010 Agreement. Specifically, it contended that the Minister has not paid the composite allowance to a prison officer who has worked overtime in excess of a 12 hour period, on the basis that the Minister contended that by cl 17.9, an effective "cap" is imposed on the payment of the composite allowance, limiting it to a maximum of 12 hours in duration. The Union contended that it was always the intention that the allowance be paid for all out of hours duty. The pro rata provision would apply regardless of whether an officer works less than or greater than 12 hours overtime.

5 Reference was made by the Union to the variation to the Prison Officers' Award. The variation to the Award, inserting the composite allowance, similarly applied to all duty performed by a prison officer on overtime, regardless of whether it was less than or more than 12 hours, on the Union's submission. Reference was also made by the Union to the negotiations to replace the 2007 Agreement with the 2010 Agreement.

6 Furthermore, the Union contended that it would be nonsensical for the interpretation of the 2010 Agreement to provide that a prison officer working for say 23 hours, on a double shift basis, would be paid the composite allowance for the first 12 hours but not be paid an allowance for the remaining 11 hours. On this basis, and on its proper construction, the Union contended that there was never any intention to cap the composite allowance at a maximum of 12 hours.

7 For the Minister it was contended that there was such a cap. Having regard to the decisions of the Commission as presently constituted in the interim order proceedings and Beech CC in the Award variation proceedings, it was the submission of the Minister that the focus of those decisions was on "shifts" of overtime in respect of which the additional payment would be made. That is, the hourly rate for the incentive payment was linked to shifts other than 12 hour shifts. Thus, on this reasoning, the provisions of the 2010 Agreement do not provide for an entitlement to the composite allowance for prison officers who work in excess of a 12 hour shift.

Consideration

8 The approach to the interpretation of awards and industrial agreements is well settled.

9 Where the terms of an award or industrial agreement are clear and unambiguous, then the award or industrial agreement must be interpreted in accordance with the text used. Whilst this is the general approach, it is also well settled that in interpreting awards and industrial agreements, courts and tribunals will approach the task by adopting a generous approach to construction. Where ambiguity does exist, extrinsic evidence and materials may be referred to. This may include the history and surrounding circumstances of an award and the judgements or reasons accompanying the making of an award as a part of the interpretive process. The intentions of the parties leading to the making of an award or industrial agreement are not relevant to the interpretation of its terms. In the case of an agreement, regardless of what either party may have intended as a part of their negotiations for the making of an agreement, the common intention of the parties must be determined from the agreed terms reflected in the industrial agreement document itself.

10 In my view, in this case, there is some ambiguity in the provisions of the 2010 Agreement, particularly when regard is had to cls 17.5(b) and 17.9.

11 In my decision of 12 September 2008 (*Commissioner, Department of Corrective Services v Western Australian Prison Officers' Union of Workers* (2008) 89 WAIG 1013), in the interim order case, I determined that an incentive payment should be implemented on a trial basis, for three months. In coming to this conclusion, I said at pars 39 and 40 as follows:

> 39. In all of the circumstances I consider that an additional incentive to work overtime shifts should be implemented on a trial basis for a period of three months. The Commission in determining this matter is not limited to the specific claim made or to the subject matter of the claim: s 26(2) Act. The incentive will be a flat per shift payment. The payment will be an amount of $129.00 per twelve hour shift. It will be payable on overtime shifts required to be filled by the applicant. For those prison officers who may work eight or 10 hour shifts, a pro rata amount should be paid.
>
> 40. The rate has been struck as an average rate used by the applicant for the purposes of its costing of the respondent's claim and is based on the difference between overtime at time and one half for all hours worked and overtime at time and one half for the first three hours and double time thereafter, for the Prison Officer Shift 4-5 years classification, a predominant classification level within the prison system. In my view this represents reasonable additional compensation for an overtime shift. The focus needs to be on those groups of prison officers working the least amount of overtime, based upon the material before the Commission.

12 It is clear from my reasons as a whole in that matter, that the Commission was determining additional payments for prison officers to encourage a greater number of them to work additional overtime. The rate was set at $129 for each 12 hour shift. As

it was established in that case that some prison officers also worked eight and ten hour shifts, provision was made for a payment to them also, on a pro rata basis.

13 In my further reasons for decision on 26 September 2008 (*Commissioner, Department of Corrective Services v Western Australian Prison Officers' Union of Workers* (2008) 89 WAIG 1017), in considering some further issues to be resolved, I noted at par 11 that the issue was an "increased take up rate of overtime shifts". The "Joint Outcomes Version" document agreed between the parties, which formed part of the Commission's interim order, incorporated the $129 payment for 12 hour overtime shifts and also an hourly payment of $10.75 per hour for "hours other than 12 hour shifts". This must be read consistent with the Commission's reasons for decision leading to the making of the interim order. That is, the purpose of the interim order was to encourage officers to work more overtime.

14 Following this trial under the interim order, the Commission dealt with an application to vary the Award to incorporate the incentive payment. In assessing the evidence in support of the application, Beech CC accepted the testimony led on behalf of the Union as to the "success" of the trial, in terms of an increase of the take-up rate of overtime shifts: *Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services* (2009) 90 WAIG 94 at pars 45 and 47. That is, a measure of the performance of the trial ordered by myself was the take-up rate of overtime shifts, to cover vacancies. As a result of accepting the Union's claim, Beech CC issued an order varying the Award to insert a new cl 13.4. The variation contained a sunset provision so it would cease to have effect on the making of a new industrial agreement to replace the then 2007 Agreement.

15 There was nothing to suggest in the reasons of Beech CC, that the principles determined by myself in the interim order matter were not to be reflected in the Award provisions. Clause 13.4 as inserted in the Award, provides as follows:

> 13.4 Payment for Excess Hours
>
> (1) Payment for all out of hours work, other than that set out in subclause 13.4(2) of this subclause, will be calculated at the rate of time and a half the Officer's annualised rate of pay for all excess time worked.
>
> (2) Any Officer who is called in for Major Emergency Duty shall be paid at the rate of doubletime the Officer's annualised rate of pay for all hours worked outside the Officer's rostered hours of duty on that major emergency.
>
> (3) (a) This provision shall apply from the beginning of the first pay period on or after 15 January 2010 and shall cease to apply upon the registration of an industrial agreement to replace the Department of Corrective Services Prison Officers' Enterprise Agreement 2007 No. AG 58 of 2007.
>
> (b) Any Officer, Canine Handler, Emergency Services Group Officer or Front Gate employee who performs duty outside the Officer's or employee's rostered hours of duty in circumstances where a Peak Muster exists shall be paid an overtime incentive payment of $143 per 12 hour shift or $11.90 for hours other than 12 hour shifts, in addition to the payment for out of hours payable under clause 13.4(1) in respect of that duty.
>
> (4) Subclause (3) of this clause shall apply to Canine Handlers, Emergency Services Group and Front Gate staff when one or more of the following Prisons has a Peak Muster:
>
> Hakea Prison
>
> Casuarina Prison
>
> Bandyup Women's Prison
>
> (5) When the Peak Muster overtime incentive payments are triggered the overtime incentive payment contained in subclause 13.4(3) of this clause will continue to be paid until the end of the current roster period, or until the prison population and staffing levels fall outside the defined Peak Muster levels, whichever occurs last.

16 In my view, the reference in cl 13.4(3)(b) read with the terms of the interim order, and the reasons of myself and Beech CC, to "hours other than 12 hour shifts", was not only a reference to the pro rata incentive payment to be made to those prison officers working eight and ten hour shifts. As both my and Beech CC's reasons reveal, the focus of the respective proceedings and orders, was the working of additional overtime by prison officers. I therefore conclude that at least for the purposes of the interim order and the subsequent Award variation, in relation to the incentive payment, their terms as to the hourly rate of pay applied to shifts of 12 hours in duration and all other overtime hours worked by a prison officer. No "cap" as such was to apply. Such an interpretation is consistent with the intention of the orders to increase the take-up of overtime work by prison officers generally, because of increases in prison musters and the then short fall in the recruitment of prison officers. It is to be noted also that the heading to the clause in the Award refers to "Payment for Excess Hours".

17 The 2007 Agreement and the Award variation were replaced by the 2010 Agreement. However, it is against the above background that the 2010 Agreement provisions should be considered. Whilst the Union placed some weight on the negotiations for the 2010 Agreement in relation to replacing the incentive payment, regard to these negotiations is impermissible in the interpretation of the 2010 Agreement, once made. As already noted above, the common intentions of the parties to an industrial agreement are to be ascertained from the terms of the agreement itself: *Printing & Kindred Industries Union & Anor v Davies Bros Ltd* (1986) 18 IR 444.

18 Returning then to the terms of cls 17.5 and 17.9 of the 2010 Agreement. The Union has placed some emphasis on the words "for all out of hours work" in cl 17.5(b). Additionally, the terms of cl 17 need to be considered as a whole. Clause 17.7 commences with the words "The allowance shall be paid only for overtime shifts worked". Provision is then made for a flat rate payment "per 12 hour overtime shift worked".

19 It is important to recognise that the composite allowance was payable under the 2010 Agreement in addition to payment for "out of hours" work performed by a prison officer. For the purposes of cl 17.1 of the 2010 Agreement, "Out of hours work" was defined as "all work performed at the direction of the Superintendent or a duly authorised Officer outside the Officer's rostered hours of duty, commonly referred to as overtime". There was nothing to suggest in cls 17.2-17.5 that "ordinary overtime" was to be limited to the working of minimum shift lengths or was to be capped. In particular, by cl 17.5(a), it is clear that overtime was payable for all out of hours duty, at the rate of time and a half the officer's annualised rate of pay.

20 In addition to the payment for ordinary "out of hours" overtime, by cl 17.5(b), the composite allowance was also payable for "all out of hours worked". It is clear from reading cl 17.5 as a whole, that the "payment for out of hours worked" by a prison officer, comprised two elements. The first was payment for "Ordinary Overtime Hours" at one and a half times the prison officer's annualised rate of pay. The second element was the composite allowance, paid in addition to the ordinary overtime payments.

21 The existence of cl 17.9 was said by the Minister to mean that the composite allowance was "capped" at a maximum of 12 hours of work. Thus, if an officer works overtime for more than a 12 hour shift, then no allowance is payable for that period beyond 12 hours of work. In my view, from the above analysis, cls 17.5-17.9 of the 2010 Agreement do not support that interpretation. There was no express limitation on the number of hours of work that could be performed "out of hours". Nor, in my opinion, should such a limitation be implied. It is clear that cl 17.9 was inserted into the clause to provide a means of calculating the composite allowance benefit for a prison officer who happens to work a shift of less than 12 hours, given the rate is expressed as a flat rate, for a 12 hour shift, in cl 17.7. However, nowhere in cls 17.5-17.9, of the 2010 Agreement, was it said that out of hours payments would not be made where a prison officer worked in excess of 12 hours overtime.

22 Furthermore, it would be a curious result, if a provision which was inserted into the Award and the 2010 Agreement, to encourage the take-up of overtime by prison officers, would have the effect of not providing any additional compensation, simply because the prison officer worked beyond a prescribed number of hours of overtime.

Conclusion

23 Accordingly, in my opinion, the approach to the interpretation of the 2010 Agreement adopted by the Union is to be preferred and I so recommend.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2014 WAIRC 00500

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEGAN FRANCES BASKWELL
	APPLICANT
	-v-
	ELIZABETH WIESE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 18 JUNE 2014
FILE NO/S	B 76 OF 2014
CITATION NO.	2014 WAIRC 00500
Result	Application dismissed

Order

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

WHEREAS on the 17th day of June 2013 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00552

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KASHLYN BRENNAN
	APPLICANT
	-v-
	GLENN GRANT GRAMAL INVESTMENTS CALTEX HIGHGATE AND EAST PERTH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	B 92 OF 2014
CITATION NO.	2014 WAIRC 00552

Result	Application discontinued
Representation	
Applicant	Mr C Sharpe
Respondent	Mr A Shuli (of counsel)

Order

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

AND WHEREAS on 13 June 2014 a conference between the parties was convened;

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

AND WHEREAS on 24 June 2014 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THERFORE, 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 00551

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KASHLYN BRENNAN
	APPLICANT
	-v-
	MR GLENN GRANT GRAMAL INVESTMENTS CALTEX HIGHGATE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	U 92 OF 2014
CITATION NO.	2014 WAIRC 00551

Result	Application discontinued
Representation	
Applicant	Mr C Sharpe
Respondent	Mr A Shuli (of counsel)

Order

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

AND WHEREAS on 13 June 2014 a conference between the parties was convened;

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

AND WHEREAS on 24 June 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00606

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE CAHILL
	APPLICANT
	-v-
	UNIVERSAL ENERGY SERVICES
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 10 JULY 2014
FILE NO/S	B 60 OF 2014
CITATION NO.	2014 WAIRC 00606

Result	Application dismissed

Order

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

WHEREAS on the 30th day of June 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00276

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ABRAHAM JACOBUS COETZEE
	APPLICANT
	-v-
	HORIZON POWER
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 4 APRIL 2014
FILE NO.	B 61 OF 2014
CITATION NO.	2014 WAIRC 00276

Result	Direction issued
Representation	
Applicant	Mr A Coetzee
Respondent	Not applicable

Direction

WHEREAS the applicant filed a notice of application on 17 March 2014;

AND WHEREAS the respondent has not yet been served with the notice of application;

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

THAT the Registrar serve on the respondent forthwith a copy of the notice of application.

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

2014 WAIRC 00491

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ABRAHAM JACOBUS COETZEE
	APPLICANT
	-v-
	HORIZON POWER
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 17 JUNE 2014
FILE NO/S	B 61 OF 2014
CITATION NO.	2014 WAIRC 00491

Result	Application discontinued
Representation	
Applicant	Applicant in person
Respondent	Mr S Bowler of counsel

Order

HAVING heard Mr A Coatzee on his own behalf and Mr S Bowler of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2014 WAIRC 00586

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE DENNIS
	APPLICANT
	-v-
	SHIRE OF KATANNING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 7 JULY 2014
FILE NO/S	U 87 OF 2014, B 94 OF 2014
CITATION NO.	2014 WAIRC 00586

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms D Hunter (as agent)

Order

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

The Commission listed a conference on 22 May 2014.

On 21 May 2014 the applicant advised the Commission that she did not wish to proceed with the matters and filed a Notice of Withdrawal or Discontinuance in respect of the applications and the conference was vacated.

The respondent consents to the matters being discontinued.

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

THAT these applications be, and are hereby discontinued.

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

2014 WAIRC 00597

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLAIRE CHERIE DOWLING
	APPLICANT
	-v-
	MT HELENA TAVERN DANNYEL BROADBENT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 JULY 2014
FILE NO/S	U 107 OF 2014
CITATION NO.	2014 WAIRC 00597

Result	Application discontinued
Representation	
Applicant	Mr C Dowling
Respondent	Mr R Ballucci (as agent)

Order

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

AND WHEREAS on 23 June 2014 a conference between the parties were convened;

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

AND WHEREAS on 7 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00549

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00549
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	MONDAY, 23 JUNE 2014
DELIVERED	**:**	WEDNESDAY, 25 JUNE 2014
FILE NO.	**:**	U 25 OF 2014
BETWEEN	**:**	SHANE ANDREW ELLIOTT
		Applicant
		AND
		JOHN FERRARO
		CENTRAL WEST PEST CONTROL PHD LIC 974
		Respondent

CatchWords	**:**	Termination of employment - Claim of harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should not be exercised - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979 (WA)* s 29(1)(b)(i),(2)&(3)
Result	**:**	Claim of unfair dismissal made out of time dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr J Ferraro

Case(s) referred to in reasons:

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

Reasons for Decision

1 On 22 January 2014 Mr Shane Elliott referred a claim of unfair dismissal to the Commission. His employment terminated on 24 December 2013. Claims of unfair dismissal must be referred to the Commission no later than 28 days after the day the employment terminated. Mr Elliott's claim is one day out of time.

2 The Commission may accept a claim of unfair dismissal that was out of time if the Commission considers it would be unfair not to do so. Mr Elliott's claim was set down for hearing to allow him and the respondent Mr John Ferraro an opportunity to be heard on whether it would be unfair not to accept the claim.

The Hearing

3 On the day of the hearing both Mr Elliott and Mr Ferraro appeared on their own behalves. Both elected to make submissions rather than give evidence under oath. Mr Ferraro tendered as exhibits a number of work orders relating to 24 December 2013, travel reports and a payroll advice together with a DVD recording of Mr Elliott in the office. Neither called any witnesses.

Considerations

4 Considerations which are usually relevant in deciding whether it would be unfair not to accept a claim of unfair dismissal that is out of time are discussed in the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683. These considerations, in the context of Mr Elliott's claim, are as follows.

1. The length of the delay

5 The length of the delay is one day. That is not a long delay relative to the 28 day period prescribed under the *Industrial Relations Act 1979* for referring claims of unfair dismissal to the Commission.

2. The reasons for the delay

6 Mr Elliott says that he was dismissed on 24 December 2013 and was due to commence leave the next day. He says he was not going to lose his holiday time and was out of town for 21 days or more from 25 December 2013. He said that approximately two weeks into his leave he received his final payment which consisted of holiday pay and wages for time worked up to 24 December 2013, and he found out that he was not going to be paid three weeks' pay in lieu of notice. He says that it was when he realised this that he decided to claim unfair dismissal. When he returned to town he contacted various State government agencies to seek assistance.

7 Mr Ferraro opposes the extension of time. He says Mr Elliott was in fact in Geraldton on 8 January 2014 because Mr Elliott rang him from a government office there and they spoke, with Mr Elliott asking if he still had a job. Mr Elliott also was in town on 14 January 2014 because he rang Mr Ferraro from a Centrelink office and on 15 January 2014 he came to Central West Pest Control to return his uniforms.

3. The merits of Mr Elliott's claim

8 When considering whether it would be unfair not to accept Mr Elliott's claim of unfair dismissal out of time, it is also relevant to make some assessment of the merits of his claim because it would not be unfair to reject a claim that is out of time if the claim could not succeed anyway. Similarly, it might be more difficult to refuse to accept a claim that is out of time if it appears to be a strongly arguable case of unfair dismissal.

9 Mr Elliott, who has worked for Mr Ferraro as a pest control operator since September 2010, says that he worked as usual on 24 December 2013, commencing 7.00 am and collected his job cards. He says he went to Northampton for the first job. He ran half an hour late for the next job and he called Mr Ferraro about 11.30 am saying there was no time for a lunch break and inadequate travel time. They argued and Mr Ferraro said to come into town, and not come back after the holiday.

10 In relation to 24 December 2013, Mr Ferraro explained the job sheets and tendered copies showing that Mr Elliott in fact had finished the first job 20 minutes early, had arrived at the second job five minutes early and finished only 15 minutes after the scheduled finishing time. Mr Elliott had rung him about 11.30 am and had asked Mr Ferraro to cancel the last jobs. Mr Elliott was swearing every three words, saying it was Christmas Eve and he wanted to go home. He says that Mr Elliott walked out. Mr Ferraro was obliged to complete Mr Elliott's remaining jobs and did so, returning at 4.00 pm. He said that time was a normal time to end the day.

4. Action taken by Mr Elliott to contest the dismissal other than making the claim

11 Mr Elliott did not take any action to contest the dismissal other than making the claim. He did not say that either at the time it occurred, or subsequently, he had informed Mr Ferraro that he contested his dismissal.

5. Prejudice to Mr Ferraro including prejudice caused by the delay

12 A delay of one day is not significant and I do not think there is any material prejudice to Mr Ferraro caused by the delay. Mr Ferraro had prepared well for the hearing, including regarding what happened on 24 December 2013, so he has already incurred the time and trouble of defending the case. I am not aware of any additional prejudice which Mr Ferraro would incur if Mr Elliott's claim was accepted out of time and allowed to proceed.

6. Considerations of fairness as between Mr Elliott and other persons in like position

13 There is no suggestion that there are other employees in a similar position to Mr Elliott, therefore this consideration does not assist in this case in deciding whether it would be unfair not to accept the claim out of time.

Conclusion

14 The starting point in considering whether it would be unfair not to accept Mr Elliott's claim out of time is that the legislative time limit of 28 days after his employment terminated should be complied with unless there is an acceptable explanation for the delay which makes it equitable to extend the time. Special circumstances are not necessary but the Commission must be positively satisfied that the prescribed period should be extended.

15 The decision whether it would be unfair not to accept Mr Elliott's claim involves notions of fairness. This means fairness to all, obviously to Mr Elliott and to Mr Ferraro, 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.

16 In this case Mr Elliott has not satisfied me there is a reasonable explanation for the delay, even though it is only one day. I find that he decided to challenge what occurred only after he realised he was not going to be paid in lieu of notice. Whether an employee is entitled to pay in lieu of notice depends upon whether he was dismissed. It has nothing to do with whether the dismissal was unfair or not. A dismissal may still be unfair even if the employee is given pay in lieu. Non payment of pay in lieu does not make a dismissal unfair if in all other respects it was fair.

17 In any event, Mr Elliott has not shown that it is likely that he was dismissed. Mr Ferraro's submission of what occurred is just as likely to be the case as Mr Elliott's submission. Mr Elliott did not give evidence under oath and Mr Ferraro's submissions as to the timing of jobs on 24 December 2013 are more accurate than Mr Elliott's submissions because they are supported by the work orders. It leads me to conclude Mr Ferraro is likely to be more accurate about the timing of lunch breaks and travelling times and in his recollections of the discussions than Mr Elliott. When Mr Elliott made his submissions he was vague as to the dates of his leave and did not even mention that he had conversations with Mr Ferraro on 8, 14 and 15 January 2014. Mr Ferraro did so, and did so accurately because Mr Elliott subsequently agreed he had done so, and therefore I have no reason to doubt any of Mr Ferraro's submissions.

18 Mr Elliott is required positively to satisfy me that it would be unfair not to accept his application out of time. He has not shown any reason why I should prefer his submissions over Mr Ferraro's submissions. His claim is dismissed.

2014 WAIRC 00540

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANE ANDREW ELLIOT
	APPLICANT
	-v-
	JOHN FERRARO
	CENTRAL WEST PEST CONTROL PHD LIC 974
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 23 JUNE 2014
FILE NO/S	U 25 OF 2014
CITATION NO.	2014 WAIRC 00540

Result	Claim of unfair dismissal made out of time dismissed
Representation	
Applicant	In person
Respondent	Mr J Ferraro

Order

HAVING heard Mr S Elliot on his own behalf and Mr J Ferraro on his own behalf as owner of the respondent;

AND HAVING given reasons for decision, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order:

THAT this claim of unfair dismissal made out of time be dismissed.

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

2014 WAIRC 00595

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES GICHO GICHUHI
	APPLICANT
	-v-
	CH2M HILL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 JULY 2014
FILE NO/S	U 129 OF 2014
CITATION NO.	2014 WAIRC 00595

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 7 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00575

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTINE GROVE
	APPLICANT
	-v-
	TWISTED COUTURE FOR HAIR
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JULY 2014
FILE NO/S	U 85 OF 2014
CITATION NO.	2014 WAIRC 00575

Result	Application discontinued
Representation	
Applicant	Ms C Grove
Respondent	Ms Z Mijajlovic

Order

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

AND WHEREAS on 16 June 2014 a conference between the parties was convened;

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

AND WHEREAS on 1 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THERFORE, 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 00596

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLISON BARBARA MARY HARDMAN
	APPLICANT
	-v-
	FRANK KARL WALSER (BY GEOFFREY WALSER AS ADMINISTRATOR OF THE ESTATE OF THE LATE FRANK KARL WALSER) TRADING AS TWO ROCKS PHARMACY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 JULY 2014
FILE NO/S	U 84 OF 2014
CITATION NO.	2014 WAIRC 00596

Result	Application discontinued
Representation	
Applicant	Mr M Tuohy (of counsel)
Respondent	Ms Sonia Owen

Order

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

AND WHEREAS on 5 June 2014 a conference between the parties was convened;

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

AND WHEREAS on 7 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00506

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY HUGH JERVIS
	APPLICANT
	-v-
	CORRUPTION AND CRIME COMMISSION WA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 19 JUNE 2014
FILE NO/S	U 20 OF 2014
CITATION NO.	2014 WAIRC 00506

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms M Binet of counsel

Order

HAVING heard Mr B H Jervis on his own behalf and Ms M Binet of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2014 WAIRC 00590

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSH MCDOUGALL
	APPLICANT
	-v-
	CHAMFORD INTERIORS (MEGAN AND BEN DAVEY)
	THE TRUSTEE FOR THE TERPSTRA DAVEY DISCRETIONARY TRUST ABN 77 409 692 927
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 7 JULY 2014
FILE NO/S	B 7 OF 2014
CITATION NO.	2014 WAIRC 00590

Result	Application dismissed

Order

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

WHEREAS on the 13th day of June 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00484

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00484
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	FRIDAY, 13 JUNE 2014
DELIVERED	**:**	FRIDAY, 13 JUNE 2014
FILE NO.	**:**	U 213 OF 2013
BETWEEN	**:**	LIESL MCGANN
		Applicant
		AND
		MR SANDEEP KUMAR
		CLASSIC CUTS BARBER
		Respondent

CatchWords	**:**	Unfair dismissal – Termination of employment – Mitigation of loss – Compensation
Legislation	**:**	*Industrial Relations Act 1979* s 23A(6), s 23A(7), s 23A(8)
Result	**:**	Declaration of Unfair Dismissal
		Order of Compensation Issued
Representation:		
Applicant	**:**	Ms L McGann on her own behalf, and with her Mr M Vincent
Respondent	**:**	No appearance

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings

taken from transcript as edited by the Commission

1 The applicant claims that she was employed by the respondent as a Senior Hairdresser in the respondent's business from 4 September 2013 until the termination of her employment by the respondent on 5 December 2013. She worked 34 hours per week at the rate of $21.57 per hour. She described how the relationship with the respondent began to deteriorate as she asked him about issues associated with payments to her. She also says that from the beginning of October 2013, the respondent began paying her irregularly, and without notice or discussion he reduced her hours of work towards the end of the employment. She also gave evidence of other hairdressers being employed.

2 On 5 November 2013, when the applicant arrived at work, she asked to speak to the respondent. He asked her to come into the kitchen where they had a discussion. The applicant asked about her hours being reduced, and about not receiving pay slips, and about outstanding salary owed to her. At this point, the respondent advised her that he was dismissing her. He gave no reason, however, he said he was happy with her work performance. The applicant received no pay in lieu of notice and finished work that day. The applicant says that during her employment the respondent did not raise with her any issues regarding her work or indicate that there were any complaints against her. The decision to terminate her employment came without prior notice or warning.

3 An employer has a lawful right to terminate an employee's employment, but the question is whether the employer has exercised that right so harshly, oppressively or unfairly in dismissing the employee as to amount to an abuse of that right (*Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385). An employee should be warned if his or her employment is in jeopardy and be given an opportunity to rectify any problems. It may be manifestly unfair to dismiss an employee who has received no warning to improve his or her performance (*DVG Morley City Hyundai v Fabbri* [2002] WAIRC 07057; (2002) 82 WAIG 3195 per Sharkey P).

4 I accept the applicant's evidence that she had no warning that her employment was in jeopardy. Further, there is no evidence that there was any proper reason to justify the dismissal. In the circumstances, I find that the respondent has unfairly dismissed the applicant.

5 As to the remedy, I accept the applicant's evidence that it would be difficult for her to return to the workplace in the circumstances that have occurred and given the lack of contact by the respondent in response to inquiries in this matter, which I referred to at the commencement of proceedings. All of this leaves me with no confidence in the prospect that the respondent may willingly and cooperatively receive the applicant back into the workplace. I find that reinstatement would be impracticable. Therefore, compensation needs to be considered.

6 The Commission may order an employer to pay the employee an amount of compensation for loss or injury caused by the dismissal (s 23A(6) of the *Industrial Relations Act 1979*). And the amount of compensation is not to exceed 6 months' remuneration of the employee (s 23A(8)).

7 In deciding the matter of compensation to be paid, regard is to be had to s 23A(7)(a), (b) and (c), which require consideration of any efforts of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal, and any redress the employee has obtained under any other enactment, or any other matter the Commission considers relevant.

8 I find that the applicant has attempted to mitigate her loss. She has made efforts to find other employment by circulating her CV to local businesses and has advertised to undertake mobile hairdressing work. At the time she was working for the respondent, the applicant also undertook two days per week work with another employer. She obtained an additional two days or 16 hours per week with that other employer, commencing on around 7 May 2014.

9 The loss that she has suffered as a result of the dismissal is from the date of termination until 7 May 2014, a period of 21 weeks, when she would otherwise have been paid for 34 hours per week at $21.57 per hour. This loss totals $15,400.98.

10 For the six weeks following 2 May 2014 until today, her loss has been 18 hours per week, that is, instead of 34 hours per week with the respondent, she has lost 18 hours because she has gained 16 hours with her other employer. Six weeks at 18 hours per week at the rate of $21.57 per hour totals $2,329.56.

11 The two amounts total $17,730.54, being the applicant's loss to date.

12 The Commission can order a maximum of 6 months' remuneration, in this case, $19,067.88.

13 In all of the circumstances, I intend to issue an order that the respondent pay to the applicant an amount of $17,730.54, less any tax due to the Australian Taxation Office.

2014 WAIRC 00563

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIESL MCGANN
	APPLICANT
	-v-
	MR SANDEEP KUMAR
	CLASSIC CUTS BARBER
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 JUNE 2014
FILE NO/S	U 213 OF 2013
CITATION NO.	2014 WAIRC 00563

Result Reasons for Decision corrected

Order

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

WHEREAS the matter was heard before the Commission on Friday, the 13th day of June 2014; and

WHEREAS the Commission delivered Reasons for Decision extemporaneously and in writing ([2014] WAIRC 00484); and

WHEREAS the Commission was made aware of a typographical error in the written reasons.

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

THAT the word "November" in the first line of paragraph 2 of the written reasons for decision ([2014] WAIRC 00484) be deleted and the word "December" inserted in its place.

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

2014 WAIRC 00564

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIESL MCGANN
	APPLICANT
	-v-
	MR SANDEEP KUMAR CLASSIC CUTS BARBER
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 JUNE 2014
FILE NO/S	U 213 OF 2013
CITATION NO.	2014 WAIRC 00564

Result Order issued

Order

HAVING heard the applicant on her own behalf and there being no appearance for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

1. Declares that the applicant was unfairly dismissed by the respondent.
2. Declares that reinstatement or re-employment would be impracticable.
3. Orders that the respondent pay to the applicant an amount of $17,730.54 less any amount due to the Australian Taxation Office within 21 days from the date of this Order.

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

2014 WAIRC 00544

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GLENN ALLAN MOUNSEY
	APPLICANT
	-v-
	WORKPAC,DOWNERMOUCHEL
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 25 JUNE 2014
FILE NO/S	U 65 OF 2014
CITATION NO.	2014 WAIRC 00544

Result Application dismissed

Order

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

WHEREAS the Commission set the matter down for hearing for mention on the 9th day of May 2014; and

WHEREAS at the hearing the applicant agreed to inform the Commission within 21 days as to whether he wished to proceed with his application. He also agreed that if he had not advised the Commission within that time, the application could be dismissed; and

WHEREAS by the 30th day of May 2014 the applicant had not contacted the Commission to indicate his intention to proceed with the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00560

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR LEON COHEN
	APPLICANT
	-v-
	GREEN ENGINEERING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	B 96 OF 2014
CITATION NO.	2014 WAIRC 00560

Result Application dismissed

Order

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

WHEREAS by email and telephone advice received on the 18th day of June 2014 the applicant advised that he no longer wished to proceed with the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00555

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR LEON COHEN
	APPLICANT
	-v-
	GREEN ENGINEERING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	U 96 OF 2014
CITATION NO.	2014 WAIRC 00555

Result Application dismissed

Order

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

WHEREAS by email and telephone advice received on the 18th day of June 2014 the applicant advised that he no longer wished to proceed with the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00499

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YAO HUA MU
	APPLICANT
	-v-
	MR NOEL OGDEN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 18 JUNE 2014
FILE NO/S	B 74 OF 2014
CITATION NO.	2014 WAIRC 00499

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 16 June 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued

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

2014 WAIRC 00545

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUZANNA DAWN MURPHY
	APPLICANT
	-v-
	SERCO GROUP PTY LIMITED
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 25 JUNE 2014
FILE NO/S	U 54 OF 2014
CITATION NO.	2014 WAIRC 00545

Result	Application discontinued
Representation	
Applicant	In person
Respondent	Ms C Writer

Order

WHEREAS this is a claim of unfair dismissal made pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act);

AND WHEREAS on the 7th day of April 2014 the respondent filed a Notice of answer and counter-proposal in which it stated that this Commission does not have jurisdiction because the applicant was covered by the *Fair Work Act 2009 (Commonwealth*);

AND WHEREAS on the 10th day of April 2014, the Commission wrote to Ms Murphy setting out the jurisdiction issue and notifying that the application would be listed for mention on this issue;

AND WHEREAS the application was listed for mention for the 1st day of May 2014 and the hearing proceeded and was adjourned until the 21st day of May 2014 in order for Ms Murphy to advise in writing whether she withdraw her claim or the basis upon which she considers that the Commission has jurisdiction;

AND WHEREAS on two occasions Ms Murphy requested an extension of time in which to reply that were granted;

AND WHEREAS on the 18th day of June 2014, Ms Murphy advised she wished to part withdraw the jurisdiction application;

AND WHEREAS on the 19th day of June 2014, at my direction my Associate telephoned Ms Murphy, and Ms Murphy clarified that she wished to withdraw the whole of the unfair dismissal application;

NOW THEREFORE, I, the undersigned, pursuant to the powers conferred on me under s 27(1)(a) of the Act, hereby order:

THAT this application be, and is hereby, discontinued.

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

2014 WAIRC 00585

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULA ANNE NOLAN
	APPLICANT
	-v-
	MANJIMUP VOLUNTEER & RESOURCE CENTRE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 7 JULY 2014
FILE NO/S	U 33 OF 2013, B 33 OF 2013
CITATION NO.	2014 WAIRC 00585

Result	Discontinued
Representation	
Applicant	Mr R Meiklejohn (of counsel) and later Ms S Brook (of counsel)
Respondent	Mr K Trainer (as agent)

Order

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

The Commission listed a conference on 19 April 2013 however on the day of the conference the parties advised the Commission that they had reached a settlement and the conference was vacated.

At the request of the parties, a conciliation conference was convened on 1 August 2013 and on 12 August 2013 the Commission was advised that the parties had reached an agreement with respect to the applications.

On 29 August 2013 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the applications and the respondent consents to the matters being discontinued.

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

THAT these applications be, and are hereby discontinued.

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

2014 WAIRC 00598

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACQUELINE PICONE
	APPLICANT
	-v-
	OSBORNE PARK BOWLING CLUB INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 JULY 2014
FILE NO/S	B 98 OF 2014
CITATION NO.	2014 WAIRC 00598

Result	Application discontinued
Representation	
Applicant	Ms J Picone
Respondent	Ms S Maddern and Ms G Caterina (both of counsel)

Order

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

AND WHEREAS on 26 June 2014 a conference between the parties were convened;

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

AND WHEREAS on 7 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00550

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROHAN RAY PLATT
	APPLICANT
	-v-
	CENTRAL INSTITUTE OF TECHNOLOGY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	U 105 OF 2014
CITATION NO.	2014 WAIRC 00550

Result	Application dismissed

Order

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

WHEREAS by email on the 17th day of June 2014 the applicant advised that he no longer wished to proceed with the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00607

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VENKATA R.RAPAKA
	APPLICANT
	-v-
	MICHELLE HOOPER MORAWA PHARMACY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 10 JULY 2014
FILE NO/S	B 110 OF 2014
CITATION NO.	2014 WAIRC 00607

Result	Application dismissed

Order

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

WHEREAS on the 9th day of July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00504

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ABDULLAH SOLAK
	APPLICANT
	-v-
	PSS LABOUR HIRE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 19 JUNE 2014
FILE NO/S	B 109 OF 2014
CITATION NO.	2014 WAIRC 00504

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 18 June 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued

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

2014 WAIRC 00574

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE VICTOR STOPFORTH
	APPLICANT
	-v-
	TWO ROCKS PHARMACY (ESTATE OF FRANK WALSER)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JULY 2014
FILE NO/S	U 91 OF 2014
CITATION NO.	2014 WAIRC 00574

Result	Application discontinued
Representation	
Applicant	Mr WV Stopforth
Respondent	Ms S Owen (as agent)

Order

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

AND WHEREAS on 5 June 2014 and 24 June 2014 conferences between the parties were convened;

AND WHEREAS at the conclusion of the conference on 24 June 2014 an agreement was reached between the parties;

AND WHEREAS on 1 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 00608

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN KEITH WALL
	APPLICANT
	-v-
	SHIRE OF DANDARAGAN
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 10 JULY 2014
FILE NO/S	U 27 OF 2014
CITATION NO.	2014 WAIRC 00608

Result	Application dismissed
Representation	
Applicant	Mr S Heathcote of counsel
Respondent	Mr S Roffey as agent

Order

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

WHEREAS the application was set down for a hearing on the 28th and 29th days of July 2014; and

WHEREAS on the 9th day of July 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Alexia Mitchell	Greg Polland	B 68/2014		Discontinued
Andrea Sharee King	The Trustee for Separovic Family Trust	U 78/2014	Commissioner S J Kenner	Discontinued
Andrea Sharee King	The Trustee for Separovic Family Trust	B 81/2014	Commissioner S J Kenner	Discontinued

Parties		Number	Commissioner	Result
Chacko (James) Varkey	The Roman Catholic Archbishop of Perth Corporation Sole ABN No. 96 993 674 415	B 113/2014	Commissioner S J Kenner	Discontinued
Damian Hutton	Millbrook Winery	B 192/2013	Chief Commissioner A R Beech	Discontinued
Damian Hutton	Millbrook Winery	B 141/2013	Chief Commissioner A R Beech	Discontinued
Gary Kentfield	Gold Corporation	U 39/2014	Chief Commissioner A R Beech	Discontinued
Gary Lawson	Linfox Australia Pty Ltd	B 49/2014	Commissioner S J Kenner	Discontinued
Gregory John Saggers	Western Australia Police	U 43/2014	Commissioner S J Kenner	Discontinued
Ms Caroline Yip	Volunteer Task Force	U 134/2013		Discontinued
Top Wongthawat Hawkins	David Ashworth	U 106/2014	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2014 WAIRC 00569

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

APPLICANT

-v-

THE GOVERNING COUNCIL OF CENTRAL INSTITUTE OF TECHNOLOGY

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 30 JUNE 2014

FILE NO/S C 20 OF 2014

CITATION NO. 2014 WAIRC 00569

Result Order issued

Representation

Applicant Mr M Amati

Respondent Mr P Watson

Order

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

WHEREAS on 12 and 17 June 2014 the Commission convened conferences for the purposes of conciliation; and

WHEREAS following the latter conference the parties reached agreement on terms for resolution of the matter; and

WHEREAS the parties agreed that the terms of their agreement should be reflected in an Order of the Commission in accordance with s 44(8)(a); and

WHEREAS the Commission is of the view that it is appropriate to issue such an Order;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me by the *Industrial Relations Act 1979*, and by consent, hereby order that:

1. The respondent provide to Ms Flint an unredacted copy of the report relied on by the respondent in this matter on the basis of written undertakings to be provided by Ms Flint as to confidentiality and that she will not raise the matter with any of the students.
2. The respondent will receive any response to the report from Ms Flint, to be placed on the file.
3. The penalties set out in the letter dated 30 May 2014 to Ms Flint from the Managing Director of the respondent will apply, except that the 12 month demotion and salary reduction will be substituted with six months.

4. Ms Flint is to demonstrate the capabilities enumerated in the letter of 30 May 2014 in paragraph 2(a)(i) to (v) to either the Learning Portfolio Manager (Mr Atkinson) or the Executive Director.

5. That the matter be, and is otherwise hereby dismissed.

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

CONFERENCES—Matters referred—

2014 WAIRC 00605

DISPUTE RE ALLEGED BREACH OF DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, CHALLENGER TAFE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 10 JULY 2014
FILE NO	PSACR 3 OF 2014
CITATION NO.	2014 WAIRC 00605

Result Application dismissed

Order

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

WHEREAS on the 17th day of February 2014, the 24th day of February 2014, the 21st day of March 2014 and the 31st day of March 2014 the Public Service Arbitrator (the Arbitrator) convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the last such conference the parties were not able to reach agreement; and

WHEREAS on the 16th day of April 2014 the Arbitrator referred the matter for hearing and determination; and

WHEREAS on the 1st day of July 2014 the applicant filed a Notice of Discontinuance in respect of the matter;

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

THAT the matter be, and is hereby dismissed.

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

2014 WAIRC 00561

DISPUTE RE FUNDING RELIEF RE PERFORMANCE MANAGEMENT PROCESSES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	CR 33 OF 2011
CITATION NO.	2014 WAIRC 00561

Result	Consent order issued
Representation	
Applicant	Mr M Amati
Respondent	Mr K Dodd

Consent Order

WHEREAS this is a matter referred pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Commission convened multiple conferences for the purposes of conciliating between the parties; and

WHEREAS on the 28th day of October 2013 the Commission referred the matter for hearing and determination; and

WHEREAS on the 26th day of May 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to continue discussions in an endeavour to resolve the matter; and

WHEREAS on the 16th day of June 2014 the parties advised that the Director General of the Department of Education and the President of the State School Teachers' Union of W.A. (Inc.) have agreed to the following process to be applied so as to resolve any disputes about the scheduling of performance management meetings for teachers, thereby avoiding arbitration by the Commission, in the following terms, and requested that a consent order be issued by the Commission reflecting that agreement; and

WHEREAS the Commission is of the opinion that it is appropriate to issue such a consent order;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 44(8)(a) of the *Industrial Relations Act 1979*, and by consent, hereby orders that:

1. The following process is to be applied to resolve disputes about the scheduling of performance management meetings with teachers:
    - (a) The principal, or the principal's nominee, will consult with the teaching staff at a school in order to try and reach agreement on when the teaching staff will participate in performance management meetings. Performance management meetings can occur outside the normal school day (i.e. before or after the school bell); during Duties Other Than Teaching (DOTT) time; during class time with teacher relief provided; through a combination of these options; or as otherwise agreed between the principal and a member of the teaching staff.
    - (b) Where agreement as per paragraph (a) cannot be reached between the principal, or the principal's nominee, and a member of the teaching staff, the principal will determine when the performance management meetings are to occur.
    - (c) If a member of the teaching staff is aggrieved by the decision of the principal as to when performance meetings are to occur, that member may request the principal review his or her decision. A school level meeting will be held, which may be attended by an official of the Union and a representative from the Employee Relations Directorate of the Department of Education, during which the principal and the member of the teaching staff will endeavour to negotiate a mutually acceptable resolution.
    - (d) If a mutually acceptable resolution cannot be reached at the school level either party may make application under section 44 of the *Industrial Relations Act 1979* for an urgent conference. In making an application the relevant party will request that the conference be convened before A/Senior Commissioner Scott. The parties agree to abide in full with any recommendation made by the A/Senior Commissioner or other member of the Commission chairing the conference.
    - (e) When a member of the teaching staff requests that the principal review their decision as to when the performance management meeting(s) are to occur, as per paragraph (c) above, the performance management meetings will not be held until the issue is resolved by negotiation under paragraph (c) or by a recommendation of the mediator under paragraph (d), with which the parties have agreed to comply.
2. For the avoidance of any doubts, the parties agree that:
    - (i) Where performance management meetings occur during DOTT time, or before or after the school bell, no additional payments of any kind are payable.
    - (ii) Nothing in paragraph 2. (ii) above is intended to prevent a principal from providing alternative DOTT time at a later or more convenient time in the school year.
3. This arrangement constitutes the entire arrangement between the parties in respect of its subject matter and supersedes all previous agreements and arrangements.
4. The application be, and is otherwise hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers	The Minister for Health	Harrison C	C 37/2012	27/06/2012 19/04/2013	Dispute re change of roster	Discontinued
Australian Nursing Federation, Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health services Board	Beech CC	C 222/2013	6/09/2013	Dispute re employment restrictions	Discontinued
Health Services Union of Western Australia (Union of Workers)	Minister for Health	Scott A/SC	PSAC 17/2013	18/09/2013 2/10/2013 16/10/2013 28/10/2013	Dispute re employment status	Concluded
The Australian Rail, Tram and Bus Industry Union of Employees West Australian Branch	Public Transport Authority of Western Australia	Kenner C	C 235/2013	23/12/2013 19/03/2014	Dispute re transfer of employee	Discontinued
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority of Western Australia	Kenner C	C 5/2013	1/02/2013	Dispute re rostering and pay conditions	Discontinued
The Civil Service Association Incorporated	Commissioner for Corrections, Department of Corrective Services	Kenner C	PSAC 4/2014	25/03/2014	Dispute re alleged deduction of overpayments	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Child Protection	Harrison C	PSAC 3/2012	19/03/2012 2/04/2012 3/04/2012	Dispute re performance process	Concluded
United Voice WA	Autism Association of Western Australia	Harrison C	C 7/2014	N/A	Dispute re termination of employment	Discontinued
United Voice WA	The Disability Services Commission	Harrison C	C 218/2013	6/09/2013 15/11/2013 17/03/2014	Dispute re terms of working conditions	Discontinued
United Voice WA	The Autism Association of Western Australia (Inc)	Harrison C	C 8/2014	9/05/2014	Dispute re termination of employment of union members	Discontinued
United Voice, Western Australian Branch	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as Mimidi Park Mental Health Unit, Rockingham Hospital	Harrison C	C 217/2013	12/09/2013	Dispute re failure to observe the procedures	Discontinued
Wayne Collyer, Managing Director, Swan Tafe	The State School Teachers' Union of W.A. (Incorporated)	Harrison C	C 19/2007	2/08/2007 24/08/2007 6/09/2007	Dispute re Industrial Action	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00548

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRISTY MILLS
	APPLICANT
	-v-
	QANTAS AIRWAYS LTD, QANTAS CENTRE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 25 JUNE 2014
FILE NO/S	B 31 OF 2014
CITATION NO.	2014 WAIRC 00548
Result	Order issued

Order

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

WHEREAS on the 18th day of March 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed that if a resolution could not be found an agreed Minute of Proposed Orders would be provided to the Commission; and

WHEREAS by email on the 24th day of June 2014 the applicant's representative provided a copy of an agreed Minute of Proposed Orders to the Commission; and

WHEREAS the Commission is of the opinion that the issuing of the Order will assist in the conduct of the hearing of the matter;

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

1. THAT by the 25th day of June 2014 the respondent file and serve any summons to witness to produce documents, with the documents listed in the respective schedules to be produced by the 9th day of July 2014.
2. THAT by the 9th day of July 2014 the applicant produce to the Commission all or any of the documents as listed in Schedule A.
3. THAT by the 14th day of July 2014 the applicant file and serve any witness statements upon which she intends to relying at the hearing of this matter.
4. THAT by the 18th day of August 2014 the respondent file and serve any witness statements or documents upon which it intends relying at the hearing of this matter.
5. THAT the applicant file and serve its outline of submissions 14 days prior to the hearing.
6. THAT the respondent file and serve its outline of submissions 7 days prior to the hearing.
7. THAT this matter be listed for hearing on a date to be fixed not before 8 September 2014 for a period of 3 days.

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

SCHEDULE A

In this Schedule, "document" means any record of information including but not limited to papers, books, records, correspondence, emails, text messages, file notes, files and diary notes.

Produce all documents in your possession or under your control as follows:

(a) copies of all mobile telephone records or bills for the period 20 January 2013 to 7 April 2013 in relation to any communication between you and Mr Lyndon Waples concerning travel by Mr Lyndon Waples as your nominated travel beneficiary on each or any of the flights listed in Annexure A;

(b) any correspondence (including emails and text messages) between you and Mr Waples in relation to or connected with Mr Waples being your nominated travel beneficiary under the Qantas Staff Travel Program including any emails or other correspondence between you and Mr Lyndon Waples in relation to travel by Mr Waples as your nominated travel beneficiary on each or any of the flights listed in Annexure A.

Annexure A

Staff No : 321491

Name : KRISTY MILLS

Orgunit : PERTH AIRPORT CUSTOMER SVS

Position : CUSTOMER SERVICES AGENT APORTS

Issue date	Itinerary no.	TAC	TOUR	TRIP	Grp	Sub	Name	Itinerary uplift details
07-04-2013	2424685962	PER	QF-C	QEAD	A	05	WAPLES/LYNDON MR	QF 775 E 08APR13 1 MELPER SA1 B
03-04-2013	2424539431	MEL	QF-C	QEAD	A	05	WAPLES/LYNDON MR	QF 480 E 03APR13 3 PERMEL SA1 B
17-03-2013	2424065190	BNE	QF-C	QEAD	A	05	WAPLES/LYNDON MR	QF 652 E 17MAR13 7 PERBNE SA1 B QF 968 E 18MAR13 1 BNETSV SA1 B QF 973 E 22MAR13 5 TSVBNE SA1 B QF 665 E 22MAR13 5 BNEADL SA1 B QF 595 E 24MAR13 7 ADLPER SA1 B
02-03-2013	2423592953	PER	QF-C	QEAD	A	05	WAPLES/LYNDON MR	QF 481 E 02MAR13 6 MELPER SA1 B
28-02-2013	2423519883	MEL	QF-C	QEAD	A	05	WAPLES/LYNDON MR	QF 476 E 28FEB13 4 PERMEL SA1 B
02-02-2013	2422718510	MEL	QF-C	QEAD	A	05	WAPLES/LYNDON MR	QF 768 E 03FEB13 7 PERMEL SA1 B QF 777 E 07FEB13 4 MELPER SA1 B

2014 WAIRC 00512

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANDJELKO BUDIMLICH

APPLICANT

-v-

J-CORP PTY LTD

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE THURSDAY, 19 JUNE 2014

FILE NO. B 63 OF 2013

CITATION NO. 2014 WAIRC 00512

Result Further Amended Directions issued

Representation

Applicant Mr P Mullally

Respondent Ms J Howard (of counsel)

Further Amended Directions

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS the Commission issued directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437) and amended directions 29 October 2013 ([2013] WAIRC 00928);

AND WHEREAS the Commission is of the opinion that the directions issued on 29 October 2013 ought be replaced by the following further amended directions in the terms agreed between the parties;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) of the *Industrial Relations Act 1979*, and by consent, hereby direct:

1. By 18 July 2014 the applicant file and serve full particulars of his claim.
2. By 8 August 2014 the respondent will file and serve a response to the applicant's full particulars.
3. The applicant will file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 5 September 2014.
4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions by 3 October 2014.
5. The witness statements will stand as evidence-in-chief of those witnesses.
6. The parties will file a statement of agreed facts by 10 November 2014.
7. The application will be heard jointly with applications B 64, B 65 and B 164 of 2013, and be listed for four consecutive days, being 11, 12, 13 and 14 November 2014.

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

2014 WAIRC 00556

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDJELKO BUDIMLICH
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	B 63 OF 2013
CITATION NO.	2014 WAIRC 00556

Result	Further Amended Directions amended
Representation	
Applicant	Mr P Mullally
Respondent	Ms J Howard (of counsel)

Order

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS the Commission issued Directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437), Amended Directions on 29 October 2013 ([2013] WAIRC 00928), and Further Amended Directions on 19 June 2014 ([2014] WAIRC 00512);

AND WHEREAS the respondent's final witness is unable to attend the hearing dates set in the Further Amended Directions;

AND WHEREAS the Commission will hear the evidence from this witness at an agreed alternative date;

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

THAT the Further Amended Directions ([2014] WAIRC 00512) be amended by adding:

"8. THAT the application will be listed for hearing on 24 November 2014 to hear the evidence from the respondent's final witness."

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

2014 WAIRC 00514

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HUGH SUTHERLAND ROGERS
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 19 JUNE 2014
FILE NO.	B 64 OF 2013
CITATION NO.	2014 WAIRC 00514

Result	Further Amended Directions issued
Representation	
Applicant	Mr P Mullally
Respondent	Ms J Howard (of counsel)

Further Amended Directions

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS the Commission issued directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437) and 29 October 2013 ([2013] WAIRC 201300929);

AND WHEREAS the Commission is of the opinion that the directions issued on 29 October 2013 ought be replaced by the following further amended directions in the terms agreed between the parties;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) of the *Industrial Relations Act 1979*, and by consent, hereby direct:

1. By 18 July 2014 the applicant file and serve full particulars of his claim.
2. By 8 August 2014 the respondent will file and serve a response to the applicant's full particulars.
3. The applicant will file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 5 September 2014.
4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions by 3 October 2014.
5. The witness statements will stand as evidence in chief of those witnesses.
6. The parties will file a statement of agreed facts by 10 November 2014.
7. The application will be heard jointly with applications B 63, B 65 and B 164 of 2013 and be listed for four consecutive days, being 11, 12, 13 and 14 November 2014.

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

2014 WAIRC 00557

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HUGH SUTHERLAND ROGERS
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	B 64 OF 2013
CITATION NO.	2014 WAIRC 00557

Result	Further Amended Directions amended
Representation	
Applicant	Mr P Mullally
Respondent	Ms J Howard (of counsel)

Order

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS the Commission issued Directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437), Amended Directions on 29 October 2013 ([2013] WAIRC 00929), and Further Amended Directions on 19 June 2014 ([2014] WAIRC 00514);

AND WHEREAS the respondent's final witness is unable to attend the hearing dates set in the Further Amended Directions;

AND WHEREAS the Commission will hear the evidence from this witness at an agreed alternative date;

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

THAT the Further Amended Directions ([2014] WAIRC 00514) be amended by adding:

"8. THAT the application will be listed for hearing on 24 November 2014 to hear the evidence from the respondent's final witness."

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

2014 WAIRC 00515

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EXPEDIT (STAN) CARVALHO
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 19 JUNE 2014
FILE NO.	B 65 OF 2013
CITATION NO.	2014 WAIRC 00515

Result	Further Amended Directions issued
Representation	
Applicant	Mr P Mullally
Respondent	Ms J Howard (of counsel)

Further Amended Directions

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS the Commission issued directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437) and 29 October 2013 ([2013] WAIRC 201300930);

AND WHEREAS the Commission is of the opinion that the directions issued on 29 October 2013 ought be replaced by the following further amended directions in the terms agreed between the parties;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) of the *Industrial Relations Act 1979*, and by consent, hereby direct:

1. By 18 July 2014 the applicant file and serve full particulars of his claim.
2. By 8 August 2014 the respondent will file and serve a response to the applicant's full particulars.
3. The applicant will file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 5 September 2014.
4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions by 3 October 2014.
5. The witness statements will stand as evidence in chief of those witnesses.

6. The parties will file a statement of agreed facts by 10 November 2014.

7. The application will be heard jointly with applications B 63, B 64 and B 164 of 2013 and be listed for four consecutive days, being 11, 12, 13 and 14 November 2014.

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

2014 WAIRC 00558

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EXPEDIT (STAN) CARVALHO
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	B 65 OF 2013
CITATION NO.	2014 WAIRC 00558

Result	Further Amended Directions amended
Representation	
Applicant	Mr P Mullally
Respondent	Ms J Howard (of counsel)

Order

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS the Commission issued Directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437), Amended Directions on 29 October 2013 ([2013] WAIRC 00930), and Further Amended Directions on 19 June 2014 ([2014] WAIRC 00515);

AND WHEREAS the respondent's final witness is unable to attend the hearing dates set in the Further Amended Directions;

AND WHEREAS the Commission will hear the evidence from this witness at an agreed alternative date;

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

THAT the Further Amended Directions ([2014] WAIRC 00515) be amended by adding:

"8. THAT the application will be listed for hearing on 24 November 2014 to hear the evidence from the respondent's final witness."

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

2014 WAIRC 00553

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	J-CORP PTY LTD
	APPLICANT
	-v-
	HUGH SUTHERLAND ROGERS
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	B 103 OF 2014
CITATION NO.	2014 WAIRC 00553

Result	Order issued
Representation	
Applicant	Mr D Fletcher, of counsel
Respondent	Mr P Mullally

Order

HAVING HEARD Mr D Fletcher, of counsel, on behalf of the applicant and Mr P Mullally on behalf of the respondent;

NOW THEREFORE, I, the undersigned, pursuant to the powers conferred on me under the Act, hereby order:

THAT this application is hereby adjourned indefinitely with leave to Mr Rogers to apply for listing on a date not before the Industrial Magistrates Court, Perth, hands down its judgment in the case brought by Mr Rogers against J-Corp Pty Ltd under case IM 47/2013.

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

2014 WAIRC 00516

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN VAN DER MEULEN
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 19 JUNE 2014
FILE NO.	B 164 OF 2013
CITATION NO.	2014 WAIRC 00516

Result	Directions issued
Representation	
Applicant	Mr P Mullally
Respondent	Ms J Howard (of counsel)

Directions

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS on 7 October 2013 the applicant lodged an application in the Commission pursuant to Section 29(1(b)(ii) of the *Industrial Relations Act 1979* claiming he has been denied a contractual benefit by the respondent;

AND WHEREAS the Commission is of the opinion that directions should issue for the orderly hearing of this application in the terms agreed between the parties;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) of the *Industrial Relations Act 1979,* and by consent, hereby direct:

1. By 18 July 2014 the applicant file and serve full particulars of his claim.
2. By 8 August 2014 the respondent will file and serve a response to the applicant's full particulars.
3. The applicant will file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 5 September 2014.
4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions by 3 October 2014.
5. The witness statements will stand as evidence in chief of those witnesses.
6. The parties will file a statement of agreed facts by 10 November 2014.
7. The application will be heard jointly with applications B 63, B 64 and B 65 of 2013 and be listed for four consecutive days, being 11, 12, 13 and 14 November 2014.

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

2014 WAIRC 00559

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN VAN DER MEULEN
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 26 JUNE 2014
FILE NO/S	B 164 OF 2013
CITATION NO.	2014 WAIRC 00559

Result	Directions amended
Representation	
Applicant	Mr P Mullally
Respondent	Ms J Howard (of counsel)

Order

HAVING HEARD Mr P Mullally on behalf of the applicant and Ms J Howard (of counsel) on behalf of the respondent;

AND WHEREAS the Commission issued Directions for the orderly hearing of this application on 19 June 2014 ([2014] WAIRC 00516);

AND WHEREAS the respondent's final witness is unable to attend the hearing dates set in the Directions;

AND WHEREAS the Commission will hear the evidence from this witness at an agreed alternative date;

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

THAT the Directions ([2014] WAIRC 00516) be amended by adding:

"8. THAT the application will be listed for hearing on 24 November 2014 to hear the evidence from the respondent's final witness."

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

2014 WAIRC 00572

DISPUTE RE ROSTER CHANGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS KING EDWARD MEMORIAL HOSPITAL
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 2 JULY 2014
FILE NO.	CR 2 OF 2014
CITATION NO.	2014 WAIRC 00572

Result	Directions issued
Representation	
Applicant	Ms R Savage
Respondent	Mr M Aulfrey of counsel

Direction

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS the matter was set down for a Directions hearing on the 1st day of July 2014; and

WHEREAS the Commission proposed that Directions be issued for the preparation for the hearing of the matter and heard from the parties; and

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

1. THAT the parties confer with a view to filing a Statement of Agreed Facts to be initiated by the applicant.
2. THAT the respondent file and serve an Outline of Submissions with respect to the issue of jurisdiction by close of business on the 11th day of July 2014.
3. THAT all evidence in chief shall be adduced by way of witness statements.
4. THAT any further evidence in chief will require leave of the Commission.
5. THAT the applicant file and serve any witness statements it intends to rely upon by Monday the 7th day of July 2014.
6. THAT the respondent file and serve any witness statements it intends to rely upon by Monday the 14th day of July 2014.
7. THAT the applicant file and serve an Outline of Submissions by Monday the 14th day of July 2014.
8. THAT the respondent file and serve an Outline of Submissions by Thursday the 17th day of July 2014.

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

2014 WAIRC 00611

DISPUTE RE ROSTER CHANGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS KING EDWARD MEMORIAL HOSPITAL
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 14 JULY 2014
FILE NO.	CR 2 OF 2014
CITATION NO.	2014 WAIRC 00611
Result	Direction amended

Direction

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 2nd day of July 2014 the Commission issued a Direction [2014] WAIRC 00572 in preparation for the hearing of this matter; and

WHEREAS by email on the 7th day of July 2014 the applicant requested an amendment to that Direction; and

WHEREAS by email on the 9th day of July 2014 the respondent advised that it consented to such a request subject to a consequential amendment in respect of its own filing of documents; and

WHEREAS the Commission is of the opinion that it is appropriate to amend the directions;

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

1. THAT Direction 7 of [2014] WAIRC 00572 be replaced by "THAT the applicant file and serve an Outline of Submissions by Wednesday the 16th day of July 2014."

2. THAT Direction 8 of [2014] WAIRC 00572 be replaced by "THAT the respondent file and serve an Outline of Submissions by midday Friday the 18th day of July 2014."

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

2014 WAIRC 00573

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEESA STUTT
	APPLICANT
	-v-
	STARFIX PTY LTD AS TRUSTEE FOR THE LJ HOOKER FREMANTLE UNIT TRUST
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 2 JULY 2014
FILE NO/S	U 207 OF 2013
CITATION NO.	2014 WAIRC 00573

Result	Change of respondent's name
Representation	
Applicant	Ms L Stutt (by way of written submissions)
Respondent	Mr J M Burke (by way of written submissions)

Order

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

AND WHEREAS the Commission sought written submissions from the parties regarding the jurisdictional objection raised by the employer;

AND WHEREAS the respondent informed the Commission that the respondent had been incorrectly identified in the application;

AND WHEREAS the Commission has formed the view that it is 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 LJ Hooker Fremantle be deleted and Starfix Pty Ltd as trustee for LJ Hooker Fremantle Unit Trust be inserted in lieu thereof.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Executive Transport Services Employees Agreement 2014 AG 8/2014	20/06/2014	The Executive Director Labour Relations of the Department of Commerce, acting as agent for, and on behalf of the Director General of the Department of Premier and Cabinet	The Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch	Acting Senior Commissioner P E Scott	Agreement registered
Identitywa and Coordinator Staff Certified Agreement 2013 AG 7/2014	18/06/2014	The Roman Catholic Church Archdiocese of Perth trading as Identitywa	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Chief Commissioner A R Beech	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Western Australian Fire Service Enterprise Bargaining Agreement 2014 AG 9/2014	7/07/2014	United Firefighters Union of Australia West Australian Branch, Department of Fire and Emergency Services of Western Australia	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered

NOTICES—Appointments—

2014 WAIRC 00536

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a period of one year from the 26th day of June, 2014.

Dated the 13th day of June, 2014.

L.S. (Sgd.) A.R. BEECH

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2014 WAIRC 00537

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00537
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT- CHAIRMAN DR N ROTHNIE - BOARD MEMBER MR B DODDS - BOARD MEMBER
HEARD	**:**	THURSDAY, 12 JUNE 2014
DELIVERED	**:**	MONDAY 23 JUNE 2014
FILE NO.	**:**	PSAB 17 OF 2013
BETWEEN	**:**	DR JONATHAN THABANO Appellant AND THE CEO, CHEMCENTRE RESOURCES AND CHEMISTRY PRECINCT Respondent

CatchWords	**:**	Public Service Appeal Board - Jurisdiction - Fixed term contract - Whether there was a decision to terminate - Conversion to permanency - Refusal to permanently appoint
Legislation	**:**	*Industrial Relations Act 1979* s 80I(1)
Result	**:**	Appeal dismissed for lack of jurisdiction
Representation:		
Appellant	**:**	The appellant on his own behalf
Respondent	**:**	Mr D Matthews of counsel and with him Mr J Carroll for the respondent

Reasons for Decision

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

2 The appellant was employed by the respondent as a Scientist (Chemist) in the respondent's Physical Evidence Section, Forensic Science Laboratory. He says that he was dismissed from his employment on 12 August 2013 and that the decision to dismiss was oppressive and unfair.

3 Part of the reasons relied upon by the appellant for claiming that he was dismissed is, he says, that he was told his employment would be made permanent, and further that another employee who was employed around the same time as himself was made permanent and he was not.

4 The respondent is a statutory authority providing scientific services including to WA Police. The respondent says that the Board has no jurisdiction to deal with the appeal on the basis that there was no dismissal, rather the appellant's contract of employment came to an end due to the effluxion of time.

5 The issue for consideration in this matter is whether the Board has jurisdiction to deal with the appeal on the basis of whether there was a decision to dismiss, in accordance with s 80I of the *Industrial Relations Act 1979* (the Act).

Background

6 The appellant responded to an advertisement which stated that employment would be for a fixed term. By letter dated 17 July 2010, the respondent offered the appellant employment, which included the following terms:

> Dear Jonathan
>
> **SCIENTIST (CHEMIST), CCW08001, SCL1, PHYSICAL EVIDENCE SECTION, FORENSIC SCIENCE LABORATORY, THREE YEAR CONTRACT (FULL-TIME)**
>
> I am very pleased to offer you employment as a Scientist (Chemist) within ChemCentre. You'll be reporting to Peter Collins, Physical Evidence Section, Forensic Science Laboratory, who will provide you with information about your job and ensure any queries you may have are addressed.
>
> Your employment is subject to the following terms and conditions:
>
> **Term of Employment:**
>
> - Your contract will commence on 22 July 2010 and will cease on 21 July 2013 subject to the continuation of your Visa status to work in Australia.
> - Your employment with ChemCentre will cease on the expiry of this contract. There is no obligation on either party to enter into further employment arrangements at the end of this contract.
>
> …
>
> (Exhibit 4)

7 Under the sentence 'I hereby accept the terms and conditions of this agreement' the appellant signed the letter and dated it 21 July 2010.

8 According to the evidence of Mr Ian Miller, the employment contract was for a fixed term because it was reliant on external funding from WA Police. The respondent's Forensic Science laboratory, where the appellant worked, undertook scientific services for WA Police on a fee for service basis under a Memorandum of Understanding (MoU). The duration of the appellant's contract was for three years due to this arrangement. The duration of the appellant's visa was relevant, not to whether or not he would be offered a fixed term contract, but to ensure that the term of the contract did not exceed the period covered by the visa.

9 The appellant continued to work pursuant to that contract.

10 The appellant claims that he was told that after a period of two years, his employment would become permanent. However, it did not become permanent. Further, he says that he was forced out to make way for a friend of his manager. Further, he says his employer encouraged him to purchase rather than rent accommodation, and he links this to the undertaking he says was given to him that he would be made permanent. He says that at one stage, his manager said he would soon be made permanent, but it still did not eventuate.

11 By letter dated 2 July 2013, the respondent wrote to the appellant in the following terms, formal parts omitted:

> Dear Jonathan
>
> **CONTRACT END DATE – OFFER OF A TWO MONTH CONTRACT (FULL-TIME)**
>
> As you are aware, your current employment contract with ChemCentre expires on 21 July 2013 and there is no obligation on either party to enter into a further employment arrangement on expiration of this contract.
>
> You would also be aware that ChemCentre is currently in negotiations with the WA Police regarding its Memorandum of Understanding (MoU) and as a result of those discussions, there is now funding and business uncertainty, particularly in the Physical Evidence section.
>
> With the above in mind, I am in a position to offer you employment as a Scientist (Chemist) SCL1, within ChemCentre for two months reporting to David Detata, Team Leader, Physical Evidence Section, Forensic Science Laboratory.
>
> Your employment would be on the following terms and conditions:

Term of Employment:

- Your contract will commence on 22 July 2013 and will cease on 21 September 2013.
- Your employment with ChemCentre will cease on the expiry of this contract. There is no obligation on either party to enter into further employment arrangements at the end of this contract.

…

(Exhibit 3)

12 Under the sentence 'I hereby accept the terms and conditions of this agreement' the appellant signed and dated the letter 9 July 2013.

13 By an undated letter received by the appellant on 12 August 2013, the respondent wrote to the appellant under the heading of "CONTRACT END DATE", in the following terms:

> As you are aware, your current employment contract with ChemCentre expires on 21 September 2013 and there is no obligation on either party to enter into a further employment arrangement on expiration of this contract.
>
> You would also be aware that ChemCentre's negotiations with the WA Police regarding its Memorandum of Understanding (MoU) is unresolved and ongoing funding and business remains uncertain.
>
> Following a recent assessment of work levels in the Physical Evidence Section, it has been determined that the number of cases has reduced sufficiently that we do not require the current levels of resourcing.
>
> With the above in mind, I regret to advise that your employment with ChemCentre will cease at the expiry of this contract and a new contract will not be offered beyond that date.
>
> …
>
> (Exhibit 1)

14 On that day, the appellant met with Peter Millington, the Chief Executive Officer of the respondent, and a Charlie Russo at which meeting the appellant was given the letter and there was a discussion of his outstanding work and how it was to be undertaken and re-allocated. Two days later, the appellant was asked to leave. He was paid until the end of the contract.

The Board's Jurisdiction

15 The jurisdiction of the Board is set out in s 80I of the *Industrial Relations Act 1979* (the Act) and relevantly for the appellant's claim this provides for an appeal 'against a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed, and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e).' Therefore, the appeal must be against the decision to dismiss.

16 The Board has previously considered matters of a similar nature including in *Keith Brocklehurst v Director General, Ministry of Justice* (1994) 74 WAIG 2024. In that case, the Board noted:

> We observe also that a failure to offer re-employment does not amount to a dismissal. When an employee accepts employment for a fixed term the employee must be taken to have consented to the position that the contract comes to an end on a specified day (see *Ex Parte Wurth; Re Tully* [1954] NSW(SR) 47 at pp 59-60, 62-63; and see also *Ex Parte; Public Service Commissioner*; Unreported; Full Court of the Supreme Court of WA; 24/5/94; Rowland J at p 8). A decision not to offer a contract of employment does not constitute a "decision" that can be reviewed by the Public Service Appeal Board. (see *Ex Parte; Public Service Commissioner*; Unreported; Full Court of the Supreme Court of WA; 24/5/94; and see also *CSA v. Public Service Commission* (1993) 73 WAIG 1845 and see also *CSA v. Public Service Commission* (1993) 73 WAIG 3003).
>
> In light of the Board's findings in this matter, the element of dismissal necessary to invoke the jurisdiction of the Board does not exist and this appeal should be dismissed.

17 The Board also considered a similar matter of an appeal against the non-renewal of the appellant's contract in *Kylie Oliver v Malcolm Goff, Managing Director, Challenger TAFE* [2006] WAIRC 05224. In that matter, the Board noted that 'unless there was a dismissal, there is no jurisdiction' (paragraph 9).

18 The Board also notes the decision of the Industrial Appeal Court in *Robert John Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166 where EM Heenan J noted with approval the decision of the President of the Full Bench below to the effect that a 'contract of employment … terminated … by the effluxion of time… is obviously not a dismissal because there is no termination at the initiation of the employer'. His Honour went on to note:

> There is ample authority for the proposition that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a "dismissal"…
>
> There will not be a dismissal where the terms of a contract of employment expires (citations omitted), or where such a contract is not renewed (citations omitted).

19 The authorities referred to by the appellant are also noted. In the case of *Rosemarie D'Lima v Board of Management, Princess Margaret Hospital for Children* [1995] IRCA 446 (25 August 1995), Ms D'Lima was employed on at least 12 short term contracts, and continued to work beyond the end of various contracts. Sometimes, a manager would ask her to sign a new form which had the effect of backdating a new contract to the end of the previous contract. This practice was found to be one of

administrative convenience and did not overcome the weight of other evidence as to the true nature of the employment being continuous.

20 The case of *ChevronTexaco Australia Pty Ltd v Anthony Richard Ross* [2004] WAIRC 12551 relates to a circumstance of an employee undertaking an international assignment within his existing contract of employment, and upon returning to Australia, was retrenched. The circumstances of the case, and the law relating to that matter do not relate to the present case.

21 In *Phillip Martin Andersen v Umbakumba Community Council* [1995] IRCA 166 (4 April 1995) the applicant was engaged on a fixed term contract of employment from 5 April 1993 to 4 April 1995, i.e. for two years. However, the respondent took active steps to bring the contract to an end after just over one year. In that situation, there was a dismissal. The issue in that case was not whether there was a genuine fixed term contract and a dismissal but whether the dismissal, half way through the contract, was unfair.

Issues and Conclusions

22 The evidence demonstrates, and the Board finds, that the appellant's contract of employment was initially for a fixed term of three years. The evidence also demonstrates that when this contract was about to come to an end by the effluxion of time, the respondent offered and the appellant accepted a new contract, also for a fixed term. This contract, as with the previous contract, expressly stated that it would 'cease on the expiry of the contract and that there was no obligation on either party to enter into further employment arrangements at the end of [the] contract'.

23 The circumstances of the second contract coming into existence are that in 2013, the respondent reviewed its structure and personnel requirements in light of funding uncertainty and workload issues and when negotiations with WA Police were unresolved. The second contract letter made this clear. The second contract was to enable further time for a final decision to be made. The respondent also offered this additional contract partly out of concern that it had not given the appellant sufficient forewarning of the impending expiration of the first contract. The appellant entered into the second contract in the knowledge that the situation was being reviewed and that there was no obligation on the respondent to provide further employment. The employment came to an end by the effluxion of time and in accordance with the terms of the contract.

24 There is no evidence that the two fixed term contracts were a sham, and that the employment was genuinely ongoing. The contracts were related to work the subject of external funding. They were not continuously rolled over. There was no intervening period where there was no contract in place. The circumstances of this case are to be distinguished from the case of *Rosemarie D'Lima v Board of Management, Princess Margaret Hospital (supra)* where there were numerous contracts, continuously rolled over and periods of work where no contract was in place.

25 The appellant signed the two contracts acknowledging his agreement to their terms. Those terms included that it was for a fixed term and that there was no obligation on either party to enter into further employment arrangements at the end of the contract.

26 The appellant may have been told that his employment may be made permanent at some point. However, by the time the second contract came to an end that had not occurred. If he was led to believe his employment may be made permanent it may be unfair, however it is not within the Board's jurisdiction to look into that matter if there is no decision to dismiss and the fixed term contract was genuine and not a sham. A failure or refusal to permanently appoint is not a decision to dismiss.

27 We also note with concern that, from our collective extensive experience of dealing with public sector employment matters, there is a not uncommon misconception that those engaged on fixed term contracts are likely, if not guaranteed, to be converted to ongoing or permanent employment after a given period. It is important that this misconception is corrected because it has the potential to create unfairness and disadvantage to employees. Employers and supervisors should ensure that any such misconceptions are not propagated in their workplaces.

28 At the time the appellant's second contract came to an end by the effluxion of time, there was no, and no requirement for there to be, a decision to dismiss. There was a decision not to renew the contract, however that is not a matter within the Board's jurisdiction. There must be a decision to dismiss, not a decision not to renew the contract, to enliven the Board's jurisdiction.

29 Further, whether another employee who was employed around the same time as the appellant was made permanent does not alter the appellant's status as a fixed term employee. It may go to an issue of unfairness in not being made permanent but does not alter this jurisdictional impediment.

30 Finally, the appellant complains that he was removed from the workplace a couple of days after being given the 'End of Contract' letter on 12 August 2013. This does not constitute a dismissal either as he was notified that his employment would cease at the expiration of the contract and that a new contract would not be offered, and he was paid until the end of the term of the contract. Once again, while the appellant may see this as unfair, it comes down to the point that the Board's jurisdiction is limited to an appeal against a decision to dismiss, not to a range of allegations of unfairness, which, while they may be associated with the circumstances of the employment coming to an end, they do not enliven the Board's jurisdiction.

31 Accordingly, there is no jurisdiction in the Board to deal with this appeal and an Order shall issue for its dismissal.

2014 WAIRC 00538

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 12 AUGUST 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR JONATHAN THABANO
	APPELLANT
	-v-
	THE CEO, CHEMCENTRE RESOURCES AND CHEMISTRY PRECINCT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	DR N ROTHNIE - BOARD MEMBER
	MR B DODDS - BOARD MEMBER
DATE	MONDAY, 23 JUNE 2014
FILE NO	PSAB 17 OF 2013
CITATION NO.	2014 WAIRC 00538

Result	Dismissed for want of jurisdiction
Representation	
Appellant	The appellant on his own behalf
Respondent	Mr D Matthews of counsel and with him Mr J Carroll for the respondent

Order

HAVING heard the appellant 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 this appeal be, and is hereby dismissed for want of jurisdiction.

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

RECLASSIFICATION APPEALS—

2014 WAIRC 00498

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROL COSTELLO
	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, 18 JUNE 2014
FILE NO	PSA 112 OF 2007
CITATION NO.	2014 WAIRC 00498

Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS this application was set down for hearing for mention on the 1st day of April 2014; and

WHEREAS at the hearing the applicant's representative sought time to seek further instructions; and

WHEREAS by email on the 6th day of June 2014 the applicant's representative advised that she wished to discontinue the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00577

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00577
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
HEARD	**:**	FRIDAY, 6 JUNE 2014, WRITTEN SUBMISSIONS - TUESDAY, 10 JUNE 2014, MONDAY, 16 JUNE 2014
DELIVERED	**:**	THURSDAY, 3 JULY 2014
FILE NO.	**:**	PSA 8 OF 2012, PSA 9 OF 2012, PSA 10 OF 2012, PSA 11 OF 2012, PSA 12 OF 2012
BETWEEN	**:**	ROBERT GOODIE; CHRISTINA SUZANNE STILIAN; MARCELLE CANNON; KENNETH THOMSON; JOHN BREARLEY Applicants AND 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 WA COUNTRY HEALTH SERVICE Respondent

CatchWords	**:**	Reclassification appeals – Health professional position requirements – Requirement for tertiary qualifications – Management position – Work value – Work Value Principle – Increased complexity
Result	**:**	Applications dismissed
Representation:		
Applicant	**:**	Ms P Marcano as agent for the applicants
Respondent	**:**	Mr J Sheppard for the respondent

Reasons for Decision

1 The applicants occupy positions of Regional Managers Mental Health classified at Level G10 and they seek reclassification to Level G11.

Clinical Role

2 The hearing of this matter was delayed for nearly a year due to attempts by the parties to resolve the dispute as to whether these positions are properly health professional positions, and the requirements or otherwise, for tertiary qualifications. The hearing finally proceeded on the basis that they are to be reviewed as general management, not health professional, positions. In those circumstances, I do not intend to determine that issue.

3 However, during the hearing the issue arose of any clinical requirements of these positions and then, by reference to other potential comparative positions, the requirement for clinical experience and whether this is a proxy for a tertiary qualification in a health profession calling. The parties have made written submissions.

4 While not determining that question, I make the following observations. It is for the employer to create positions according to its requirements. If those requirements, as determined by the employer, include that to perform the job properly, the incumbent needs to perform some clinical work, provide some clinical consultancy advice or oversight, or have a clinical background to

properly understand and manage the work of staff, such as if involved in a *clinical way* in clinical governance (as opposed to undertaking the organisational, processing and reporting on outcomes of meetings where clinical personnel are responsible for clinical input and determination), then it seems to me that the role is clinical and may well be a health professional position. There are some clinical roles which, due to either professional training or registration requirements, did not previously require a tertiary qualification. However, today they constitute a small and diminishing group and are being overtaken by more tertiary based qualification requirements. In those circumstances, it seems to me that to define such positions as non-health professional may deny the real and genuine requirements of the positions, notwithstanding what appears to be a conflict with the requirement for a tertiary qualification inherent in the specified callings.

5 One of the major issues for consideration in this matter is the role of the Regional Manager in regard to responsibilities undertaken 'in partnership' with the Clinical Director. The evidence of Mr Brearley makes clear that it is the Clinical Director who has responsibility for the oversight of clinical issues within the particular Mental Health Service. He spoke of the development of the clinical governance framework. The Western Australian Country Health Service (WACHS) produced an overarching clinical governance framework which applies to all services under the WACHS. Each service was then to prepare its own framework under that overarching framework, dealing with its own particular needs, including patient profiles and services. The Regional Manager's role was to bring together the appropriate people to make sure the service was meeting national standards. Mr Brearley cited an example regarding safety, quality and service development.

6 It is very clear, having heard his evidence and the evidence of Mr Goodie, that particular clinical governance issues come to the Regional Manager, who arranges for the particular issue to be reviewed at a meeting convened by him for which clinical advice will be provided. For example, where an issue has arisen in the Emergency Department and is referred to him by a member of the clinical staff, the patient or in any other way, the Clinical Director deals with the clinical aspects of the issue. The Regional Manager convenes the meeting, writes up the minutes and outcomes, and manages the action items. He or she is responsible for following up to ensure the appropriate actions and standards are complied with.

7 Mr Brearley also gave evidence of being without a dedicated Clinical Director in his region for over a year and he had to draw on the advice of consultant psychiatrists.

8 Without deciding the matter conclusively, the evidence of both Mr Brearley and Mr Goodie leads me to the view that the Regional Manager Mental Health role is a general management one. It involves staff management, financial management, strategic planning and service policy and procedures and the logistics of running the service. The management of the service is undertaken in collaboration with the Clinical Director, and it is this latter role which undertakes the clinical aspects of the work. The Regional Manager's role in the clinical governance process is about the process, not the clinical aspects; that is, ensuring that the appropriate processes have been adhered to. The Clinical Director's role is more about whether the appropriate clinical decisions and processes have been taken.

9 The selection criteria do not list a tertiary qualification as essential. A tertiary qualification in behavioural, social science or management is a desirable selection criteria, but it is not essential. What is not clear is whether, in reality, to have the appropriate background to understand the work of the service and the staff, a clinical background is necessary. Mr Goodie gave evidence that he could not have appropriate discussions about clinical governance issues with the Clinical Director without having a tertiary qualification.

10 This is a matter for the employer to determine. Does the employer want a manager whose role is financial and resource management, or does the proper performance of this role also require a clinical background?

Work Value Claim

11 The applicants rely predominantly on changes to the positions said to have occurred in around 2009 and 2010, and they say these changes constitute a significant net addition to work value.

12 The changes relied upon are:

- Professional supervision and management of staff and service delivery across multiple service sites
- Strategic Leadership and Management skills and knowledge;
- High level knowledge and skills ensuring compliance of mental health services and associated governance systems;
- Leadership, direction and decisions impacting on the formulation and development of strategic initiatives;
- Developing and implementing Mental Health Service Delivery initiatives;
- High level of knowledge and skills in providing guidance and consultation in relation to complex cases; and
- Sole accountability for the compliance and reporting requirement of clinical services.

These changes have evolved and have been the result of new requirements, some legislative, some organisational requirements, which have now become an intrinsic part of these roles.

(Applicants' Statement of Evidence (2), [6.1])

13 The question to be answered is whether the requirements of the position have changed by way of a significant net addition to work requirements since around 2009 as claimed. It is not a claim which can be justified by reference to comparative positions either primarily or alone. The first question is whether the work, skills and responsibilities of the position, or the conditions under which the work is performed, have changed such as to constitute a significant net addition to work requirements justifying a higher level of classification (*The Work Value Principle* (*State Wage General Order* [2013] WAIRC 00353, Schedule 7.2; (2013) 93 WAIG 476)). If the answer to that question is 'yes', only then do the comparisons come into the equation.

14 The respondent argues that these claims seek to double dip on changes from the Health Professions Work Value Review (*Hospital Salaried Officers Association of Western Australia (Union of Workers) v Hon Minister for Health and Others* (2006) 86 WAIG 279; [2006] WAIRC 03473). The changes in that case encompass the period to 6 August 2003. The changes in this case are said to have arisen since then, in 2009 and 2010.

15 I note the work requirements referred to in the reviews which have taken place over a number of years, including that undertaken by Mr Holland in 2005 and that by Mr Young in 2008. The review documents record and anticipate some of the changes relied on in this claim. For example, the 2005 review of the Kimberley Health region position recorded that the position already included a significant quality assurance role. Nothing described by the witnesses before me makes the quality framework duties referred to of a higher level than was undertaken in 2005. The review also anticipated the creation of in-patient units.

16 Other aspects of the work were described in the evidence in terms of increased complexity. However, I am unable to find that this is substantial, given the pre-existing requirements of the position as reflected, particularly in the 2005 Review. They appear to perform much the same work as previously. The arguments raised by the evidence appear to rely on claims regarding comparative positions rather than real change to the requirements of the positions compared with previous requirements. At least some of the changes relied on as justifying the higher classification were in place in 2005 and are not new since 2009-10.

17 Of the changes listed in [6.1] of the applicants' submissions, I am unable to find that the evidence demonstrates that these changes have occurred since 2009, or if they have, that they relate to work, skills or responsibilities or conditions which are beyond the requirements of Level 10.

18 In comparison with Level 10 Program Manager positions, some of these positions have some responsibilities particular to the issues of isolation and logistics. However, they do not make the overall position more complex.

19 In these circumstances, the applications must be dismissed.

2014 WAIRC 00578

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT GOODIE; CHRISTINA SUZANNE STILIAN; MARCELLE CANNON; KENNETH THOMSON; JOHN BREARLEY **APPLICANTS** **-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 WA COUNTRY HEALTH SERVICE **RESPONDENT**
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 3 JULY 2014
FILE NO	PSA 8 OF 2012, PSA 9 OF 2012, PSA 10 OF 2012, PSA 11 OF 2012, PSA 12 OF 2012
CITATION NO.	2014 WAIRC 00578

Result	Applications dismissed

Order

HAVING heard Ms P Marcano as agent for the applicants and Mr J Sheppard on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT these applications be, and are hereby dismissed.

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

2014 WAIRC 00588

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GREG THOMPSON
	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
	COMMISSIONER J L HARRISON
DATE	MONDAY, 7 JULY 2014
FILE NO	PSA 20 OF 2012
CITATION NO.	2014 WAIRC 00588

Result	Discontinued

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.

On 24 October 2013 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this appeal be, and is hereby discontinued

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

2014 WAIRC 00587

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL WHITE
	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
	COMMISSIONER J L HARRISON
DATE	MONDAY, 7 JULY 2014
FILE NO	PSA 19 OF 2012
CITATION NO.	2014 WAIRC 00587

Result	Discontinued

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.

On 24 October 2013 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this appeal be, and is hereby discontinued

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

RECLASSIFICATION APPEALS—Notation of—

File Number	Appellant	Respondent	Commissioner	Decision	Finalisation Date
PSA 5/2014	Ben Wooller	WA Police Organised Crime Squad	Kenner C	Discontinued	Not Applicable

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2014 WAIRC 00570

REFERENCE OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BRIAN DAVID WILSON

SUPERINTENDENT, ROEBOURNE REGIONAL PRISON

APPLICANT

-v-

MR GARY POPE

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE TUESDAY, 1 JULY 2014

FILE NO/S OSHT 1 OF 2014

CITATION NO. 2014 WAIRC 00570

Result Application discontinued

Representation

Applicant Mr N Cinquina and Ms J Vitale

Respondent Mr J Walker and Mr A Smith

Order

WHEREAS this is an application pursuant to the *Occupational Safety and Health Act 1984*;

AND WHEREAS this matter was listed for conference on 26 May 2014;

AND WHEREAS on 30 June 2014 the applicant file a Notice of Discontinuance;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby, discontinued.

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