



Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 4

WEDNESDAY 27 AUGUST, 2014

Vol. 94—Part 2

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

94 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2014 WAIRC 00911

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

WEDNESDAY, 6 AUGUST 2014

FILE NO/S

APPL 19 OF 2008

CITATION NO.

2014 WAIRC 00911

Result

Consent order issued

Representation

Applicant

Mr K Singh and with him Mr P Robinson

Respondent

Mr R Farrell

Consent Order

HAVING heard Mr K Singh and with him Mr P Robinson on behalf of the applicant and Mr R Farrell on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 be varied in accordance with the following schedule and that such variation will be effective from the date of this order.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

SCHEDULE

- 1. Clause 6.4. – Sick Leave: Delete paragraph (a) of subclause 6.4.3 of this clause and insert the following in lieu thereof:**
- 6.4.3 (a) Subject to paragraph (b) an employee shall be paid for sick leave at the employee's ordinary rate of pay. In addition payment shall include –
- (i) Shift penalties Monday to Friday inclusive; and

- (ii) Saturday penalty; and
- (iii) Sunday penalty

which the employee would have received for the ordinary time had the employee not ceased duty on account of sickness.

CANCELLATION OF—Awards/Agreements/Respondents—

2014 WAIRC 00752

PRINTING (GOVERNMENT) AWARD, 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COMMISSION'S OWN MOTION

PARTIES

APPLICANT

-v-
(NOT APPLICABLE)

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE WEDNESDAY, 23 JULY 2014
FILE NO/S APPL 17 OF 2014
CITATION NO. 2014 WAIRC 00752

Result Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 28th day of May 2014 of an intention to make an order cancelling the award; and

WHEREAS at the 28th day of June 2014 there were no objections to the making of such an order;

NOW THEREFORE, the Commission, pursuant to the powers conferred by s 47 of the *Industrial Relations Act 1979*, hereby orders that the following award be cancelled:

PRINTING (GOVERNMENT) AWARD 1990

[L.S.]

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2014 WAIRC 00765

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TERENCE CLARKE;
MR TERENCE PETER CLARKE

PARTIES

APPLICANT

-v-
THREE SPRINGS SHIRE COUNCIL;
GRANT MIDDLETON C.E.O. SHIRE OF THREE SPRINGS

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE WEDNESDAY, 30 JULY 2014
FILE NO/S U 190 OF 2012, B 190 OF 2012
CITATION NO. 2014 WAIRC 00765

Result Discontinued

Representation

Applicant In person

Respondent Mr M Fitz Gerald (as agent)

Order

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

On 26 November 2012 the Commission convened a conference for the purpose of conciliating between the parties and following the conference the applicant had further time to consider an offer made at the conference to settle the matters.

The Commission was advised on 3 December 2012 that the parties had reached an agreement.

On 22 July 2014 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.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00952

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JOHN GRAY	APPLICANT
	-v-	
	WASP HAIR DESIGN	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 15 AUGUST 2014	
FILE NO/S	U 137 OF 2014	
CITATION NO.	2014 WAIRC 00952	

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 letter dated the 22nd day of July 2014 the Commission invited the applicant to respond to the respondent's claim that the Commission has no jurisdiction to deal with the application no later than Tuesday the 12th day of August 2014 and that if the applicant had not contacted the Commission by that date it would be assumed that he did not wish to proceed with the application and an order would issue for its dismissal; and

WHEREAS by the 12th day of August 2014 the applicant had not contacted the Commission;

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

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 00830

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ELSPETH "KAY" HAIG	APPLICANT
	-v-	
	DEPARTMENT OF EDUCATION AND TRAINING	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	TUESDAY, 5 AUGUST 2014	
FILE NO/S	U 159 OF 2008	
CITATION NO.	2014 WAIRC 00830	

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr G Raithel (of counsel)

Order

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

The Commission convened a conciliation conference on 18 February 2009 and following the conference the applicant was given further time to consider her position.

The matter was listed for mention on 11 May 2009 and following this hearing the application was set down for a five day hearing commencing 29 June 2009.

At the request of the parties, on 18 June 2009 the Commission convened a further conciliation conference and the parties reached an in principle settlement.

The hearing was vacated on 19 June 2009.

The Commission contacted the applicant on numerous occasions about the status of the settlement and discontinuing the application.

The applicant filed a Notice of Withdrawal or Discontinuance on 28 July 2014 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2014 WAIRC 00939

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ALEX CARLYLE HUMBLE

APPLICANT

-v-

HI CONSTRUCTIONS (AUST) PTY LTD

RESPONDENT

CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 14 AUGUST 2014
FILE NO/S	B 138 OF 2014
CITATION NO.	2014 WAIRC 00939

Result	Application discontinued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr D Ellis (of counsel)

Order

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

AND WHEREAS on 31 July 2014 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 12 August 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 00831

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 DYLAN KUMARASIRI
 -v-
 AUTISM ASSOCIATION OF WA

APPLICANT

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 5 AUGUST 2014
FILE NO/S U 57 OF 2014
CITATION NO. 2014 WAIRC 00831

Result Discontinued
Representation
Applicant In person
Respondent Ms M Ivanovski (of counsel) and Mr G Spence

Order

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

On 23 May 2014 the Commission convened a conference for the purpose of conciliating between the parties and following the conference the applicant had further time to consider an offer made at the conference to settle the matter.

The Commission was advised on 27 May 2014 that the parties had reached an agreement.

On 25 July 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
 Commissioner.

[L.S.]

2014 WAIRC 00916

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 GEORGE KURILOWSKI
 -v-
 SHARYN O'NEILL, DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION

APPLICANT

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE FRIDAY, 8 AUGUST 2014
FILE NO/S B 178 OF 2013
CITATION NO. 2014 WAIRC 00916

Result Application discontinued
Representation
Applicant Mr M Rennie
Respondent Mr D Matthews (of counsel)

Order

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

AND WHEREAS this matter was listed for hearing on 4 and 5 August 2014;

AND WHEREAS at the hearing the applicant advised the Commission it did not intend to proceed with the application;

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

THAT the application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00763

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GERARD LEAHY	APPLICANT
	-v-	
	MEEDAC INCORPORATED	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 28 JULY 2014	
FILE NO/S	B 176 OF 2013	
CITATION NO.	2014 WAIRC 00763	

Result	Application discontinued
Representation	
Applicant	Ms P Mitchell (of counsel)
Respondent	Mr P King

Order

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

AND WHEREAS this matter was listed for hearing on 29 and 30 July 2014;

AND WHEREAS the hearing was vacated as the applicant advised the Commission it did not intend to proceed with the matter;

AND WHEREAS on 23 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00816

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TRACY MCAULIFFE	APPLICANT
	-v-	
	GOLDFINGER FACILITY MANAGEMENT PTY LTD	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 30 JULY 2014	
FILE NO/S	B 122 OF 2014	
CITATION NO.	2014 WAIRC 00816	

Result	Application dismissed
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Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979* filed on the 3rd day of June 2014; and

WHEREAS by a Notice of Hearing dated the 8th day of July 2014, the Commission advised the applicant that a hearing would be convened on the 30th day of July 2014 at 9.00 am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 30th day of July 2014 there was no appearance for or by the applicant; and

WHEREAS the Commission took account of the history of the application, that there was no evidence of it having been served on the respondent and other matters and decided to dismiss the application;

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

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 00617

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JUDITH ANNE MCCULLOCH	APPLICANT
	-v-	
	AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 16 JULY 2014	
FILE NO/S	B 24 OF 2014	
CITATION NO.	2014 WAIRC 00617	

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr M Olson and Ms K Post

Order

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

On 24 March 2014 the Commission convened a conference for the purpose of conciliating between the parties and following the conference the parties were to exchange documentation.

The Commission contacted the parties on 28 April 2014 about listing a further conference and on 30 April 2014 the applicant stated that she was considering her position in relation to the matter.

On 27 May 2014 the applicant advised that she did not wish to proceed with her application and filed a Notice of Withdrawal or Discontinuance on 3 June 2014. The respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00756

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR DEAN CAMPBELL	APPLICANT
	-v-	
	MS TONI WALKINGTON, THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 23 JULY 2014	
FILE NO/S	U 71 OF 2014	
CITATION NO.	2014 WAIRC 00756	

Result	Application dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr J Fiocco of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 16th day of June 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 17th 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 under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 00915

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR STEPHAN KIRSCH	APPLICANT
	-v-	
	THYSSENKRUPP POLYSIUS AUSTRALIA PTY. LTD.	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 7 AUGUST 2014	
FILE NO/S	B 70 OF 2014	
CITATION NO.	2014 WAIRC 00915	

Result	Discontinued
Representation	
Applicant	Ms J Knoth of counsel
Respondent	Mr T Davey of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
 Commissioner.

2014 WAIRC 00474

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2014 WAIRC 00474
CORAM	: COMMISSIONER S J KENNER
HEARD	: TUESDAY, 10 JUNE 2014
DELIVERED	: TUESDAY, 10 JUNE 2014
FILE NO.	: U 215 OF 2013
BETWEEN	: MS CHANTELLE CHERRIE SHACKLETON
	Applicant
	AND
	MR STEVE BLACK PRESIDENT/MANAGER
	BASSENDEN BOWLING CLUB
	Respondent

Catchwords	:	Industrial law (WA) – Termination of employment – Alleged harsh, oppressive and unfair dismissal – Application filed outside of 28 day time limit – Application for an extension of time – Principles applied – One factor being delay caused by the representative’s error – Commission satisfied that discretion should be exercised – Acceptance of application out of time
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) ss 29(1)(b)(i), 29(3)
Result	:	Extension of time granted
Representation:		
Applicant	:	Mr R Thompson as agent
Respondent	:	Mr B Davis as agent

Case(s) referred to in reasons:

Clark v Ringwood Private Hospital (1997) 74 IR 413

Malik v Albert, Director General, Department of Education of Western Australia (2004) 135 IR 238

*Reasons for Decision**Ex Tempore*

- 1 I have before me an application under s 29(1)(b)(i) of the Act. The application alleges that on or about 30 October 2013 the applicant, Ms Shackleton, was unfairly dismissed by the respondent, the Bassendean Bowling Club Incorporated. The application was filed on 8 January 2014 and therefore self-evidently is substantially out of time. The application should have been filed on or about 27 November 2013. That being so, the application is some ten weeks out of time.
- 2 The relevant principles in relation to whether the Commission should exercise its statutory power under s 29(3) of the Act to extend time are well settled. They are set out in the decision of the Industrial Appeal Court in *Malik v Albert, Director General, Department of Education of Western Australia* (2004) 135 IR 238. A copy of that judgement has been provided for the parties to these proceedings today. In that decision the court set out six considerations for the Commission to have regard to in relation to whether an extension of time ought be granted or not.
- 3 Those six considerations are firstly, special circumstances are not necessary but the court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend. Secondly, the action taken by the applicant to contest the termination other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time. Thirdly, prejudice to the respondent including prejudice caused by the delay will go against the granting of an extension of time. Fourthly, the mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time. Fifthly, the merits of the substantive application may be taken into account in determining whether to grant an extension of time. Finally, the consideration of fairness between the applicant and other persons in a like position are relevant to the exercise of the court’s discretion.
- 4 In this case the applicant contends that the reason for the significant delay is as a result of a delay caused by her agent, Mr Thompson, who appeared in these proceedings. The submission was that Mr Thompson was approached by the applicant some week or so after her dismissal with a request that he provide her with some assistance. The applicant’s agent informed the Commission that principally he and his organisation are involved in assisting parents in Family Court and child support matters and at the time of the approach by the applicant, that being around the Christmas period of 2013, by reason of other matters pressing at the time, the agent failed to action the applicant’s claim expeditiously as he ought to have done.
- 5 The Commission was further informed that the applicant did communicate with her agent and followed up and requested the matter be progressed on her behalf. Furthermore the Commission was informed that the applicant’s agent wrote to the respondent club to contest the applicant’s dismissal, with a view to seeking discussions and/or possible reinstatement of the applicant in her employment. No response was apparently received to that correspondence. The Commission was informed by the applicant that several emails and text messages were sent by her to the respondent club in relation to her dismissal. Therefore I can be satisfied that the applicant clearly contested her dismissal.
- 6 As to the merits of the case, the Commission at this stage only takes a broad brush view as to whether there may be some merit, or alternatively, that the claim is not completely unmeritorious.
- 7 The applicant says that on the day of 30 October 2013 she was off duty at the respondent’s club and engaged in a game of bowls. She says that another member, Mr Patterson, was rude to her eight year old daughter in the presence of others. The applicant spoke to Mr Patterson. It appears that an exchange of some kind took place. The applicant denies that she used profane language to Mr Patterson. However it does seem there was certainly an exchange between the two of them. The applicant says she was provoked by reason of Mr Patterson’s conduct towards her daughter.
- 8 It was not in dispute that the next day, the applicant received a text message from the respondent’s president Mr Black, to say that “We have to let you go effective immediately”. It was also common ground that was effectively a summary dismissal by text message. The applicant says that she was given no chance to put her side of the story or explain the situation. Furthermore, she alleges she was provoked by Mr Patterson’s behaviour. For those reasons, the applicant said that her dismissal was unfair and the case has some merit.
- 9 On the other hand the respondent said that on that day the applicant used inappropriate and profane language towards Mr Patterson in the presence of other members of the club. Further it was contended that the applicant has been counselled in

relation to the use of inappropriate language in the past, as is set out in the notice of answer filed by the club. Although, I note there is some dispute as to when that prior counselling is alleged to have taken place.

- 10 There is some suggestion in the answer filed by the respondent that the club is a trading corporation but there has been nothing put in these proceedings to this effect, for present purposes.
- 11 Furthermore there was no suggestion by the respondent that there would be any material prejudice if the application to extend time was granted.
- 12 In terms of the main reason for the lateness in the filing of the application, the issue of representative error may be a sufficient reason for the grant of an extension of time, but not necessarily so. It depends upon the circumstances of the case, in particular the conduct of the applicant in taking an active interest in the representative preparing and lodging an application. It is simply not enough for an applicant to sit idly by and take no interest in the matter and then allege that the representative's error was the cause of the delay. In that respect I refer to *Clark v Ringwood Private Hospital* (1997) 74 IR 413 a decision of the Australian Industrial Relations Commission. It is also the case that representative error or delay by an agent or counsel is only one consideration for the Commission to have regard to. It is not the sole basis for granting or refusing an extension of time as the case may be.
- 13 I have considered the submissions that have been made in relation to this matter. I am satisfied that representative error is a matter of some significance in this case and furthermore, that the applicant did not sit idly by and take no steps to urge her agent to take up the matter of the challenge to her dismissal. I am also satisfied that the applicant did contest her dismissal, both directly and by letter from her agent.
- 14 I am also satisfied, and it does seem accepted, that the applicant was given no opportunity to put her side of the case, as it were, prior to her summary dismissal. This is despite the fact that it seemed there was a previous issue in relation to conduct some time prior to the dismissal of the applicant. Despite the lengthy delay and the suggestion of that prior behaviour, in my view, having regard to all relevant considerations, for the purposes of s 29(3) of the Act, it would, in the circumstances, be unfair not to extend time.
- 15 What I intend to do is make an order that the time for filing the application be and is hereby extended to 8 January 2014, which was the date the application was filed. Therefore, the application is accepted out of time. If the respondent wishes to later contest that it is a trading corporation, then it will be given the opportunity of doing so when the matter is heard at a later date. The hearing on the merits will be listed on a date to be fixed.

2014 WAIRC 00487

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MS CHANTELE CHERRIE SHACKLETON

APPLICANT

-v-

MR STEVE BLACK PRESIDENT/MANAGER

BASSENDAN BOWLING CLUB

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 16 JUNE 2014

FILE NO/S U 215 OF 2013

CITATION NO. 2014 WAIRC 00487

Result Extension of time granted

Representation

Applicant Mr R Thompson as agent

Respondent Mr B Davis as agent

Order

HAVING heard Mr R Thompson as agent on behalf of the applicant and Mr B Davis as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for filing the application be and is hereby extended to 8 January 2014.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00815

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MS CHANTELE CHERRIE SHACKLETON	APPLICANT
	-v-	
	MR STEVE BLACK PRESIDENT/MANAGER BASSENDEAN BOWLING CLUB	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 30 JULY 2014	
FILE NO/S	U 215 OF 2013	
CITATION NO.	2014 WAIRC 00815	

Result	Application discontinued by leave
Representation	
Applicant	Mr R Thompson as agent
Respondent	Mr B Davis as agent

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00472

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MS. KELLY DOBSON	APPLICANT
	-v-	
	MSS SECURITY ATTENTION: PAUL PRICE GENERAL MANAGER	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 11 JUNE 2014	
FILE NO.	B 116 OF 2014	
CITATION NO.	2014 WAIRC 00472	

Result	Order issued
Representation	
Applicant	Ms E Palmer as agent
Respondent	Ms S Pedlow

Order

HAVING heard Ms E Palmer as agent on behalf of the applicant and Ms S Pedlow on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the name of the respondent on the notice of application be amended by deleting the name "MSS Security Attention: Paul Price General Manager" and inserting in lieu thereof the name "MSS Security Pty Limited".
- (2) THAT the applicant and respondent file an agreed statement of facts no later than 7 days prior to the date of hearing.

- (3) THAT the applicant and respondent file and serve an outline of submissions upon which they intend to rely no later than 3 days prior to the date of hearing.
- (4) THAT the matter be listed for a one day hearing on a date to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2014 WAIRC 00601**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MS. KELLY DOBSON **APPLICANT**

-v-
MSS SECURITY PTY LIMITED **RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 9 JULY 2014
FILE NO/S B 116 OF 2014
CITATION NO. 2014 WAIRC 00601

Result Application discontinued
Representation
Applicant Ms E Palmer as agent
Respondent Ms S Pedlow

Order

HAVING heard Ms E Palmer as agent on behalf of applicant and Ms S Pedlow 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.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2014 WAIRC 00620**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ALAN PAUL PATERSON **APPLICANT**

-v-
BORAL **RESPONDENT**

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE THURSDAY, 17 JULY 2014
FILE NO/S U 126 OF 2014
CITATION NO. 2014 WAIRC 00620

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 application down for a hearing for mention to show cause on the 15th day of July 2014; and

WHEREAS at the hearing the applicant was given until midday on the 22nd day of July 2014 to inform the Commission as to whether he wished to proceed with his application, and that if he had not advised the Commission within that time, the application could be dismissed; and

WHEREAS on the 15th 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.

[L.S.]

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

2014 WAIRC 00826

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ANJA ROSSOUW	APPLICANT
	-v-	
	MARK TREVOR CONNOR (SOLE TRADER) TRADING AS CHEMMART PHARMACY SUPERSTORE ROCKINGHAM	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 1 AUGUST 2014	
FILE NO/S	B 111 OF 2014	
CITATION NO.	2014 WAIRC 00826	

Result	Application dismissed
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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 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.

[L.S.]

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

2014 WAIRC 00618

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	DANIELLE SATTELL	APPLICANT
	-v-	
	AUTISM ASSOCIATION OF WESTERN AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 16 JULY 2014	
FILE NO/S	U 45 OF 2014	
CITATION NO.	2014 WAIRC 00618	

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms M Ivanovski (of counsel)

Order

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

On 9 May 2014 the Commission convened a conference for the purpose of conciliating between the parties and at the conference the parties reached a settlement of the matter.

On 11 June 2014 the applicant filed a Notice of Withdrawal or Discontinuance and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00628

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2014 WAIRC 00628
CORAM : COMMISSIONER S M MAYMAN
HEARD : BY WRITTEN SUBMISSIONS
DELIVERED : FRIDAY, 18 JULY 2014
FILE NO. : U 207 OF 2013
BETWEEN : NEESA STUTT
 Applicant
 AND
 STARFIX PTY LTD AS TRUSTEE FOR THE LJ HOOKER FREMANTLE UNIT TRUST
 Respondent

CatchWords : Industrial Law - Termination of Employment - Harsh, oppressive and unfair dismissal - Whether Commission has jurisdiction - Principles applied - Commission satisfied respondent is constitutional corporation - Claim beyond Commission's jurisdiction - Application dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), *Commonwealth Constitution* s 51(xx), *Fair Work Act 2009* (Cth) s 14(1)(a), s 26

Result : Application dismissed

Representation:

Applicant : Ms N Stutt (by way of written submissions)

Respondent : Mr J M Burke (of counsel) (by way of written submissions)

Case(s) referred to in reasons:

Springdale Comfort trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

Rai v Dogrin Pty Ltd (2000) 89 WAIG 1375

Bridge Shipping Pty Ltd v Grand Shipping SA and Another (1991) 173 CLR 231

Visser v Eral Pty Ltd (2007) WAIRC 01148

Reasons for Decision

- 1 Ms Neesa Stutt alleges she was unfairly dismissed by the respondent and filed a claim under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (the Act) in the Western Australian Industrial Relations Commission (the Commission) on 21 November 2013 seeking reinstatement.
- 2 LJ Hooker Fremantle (the respondent) opposed the claim and challenged the jurisdiction of the Commission to hear and determine the matter. The respondent suggests the Commission does not have jurisdiction to hear the application and requests the application be dismissed.
- 3 Consistent with the principles reflected by their Honours in *Springdale Comfort trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 325 reflect once a question of jurisdiction has been raised, the Commission must hear and determine that question.
- 4 The Commission wrote to Ms Stutt and the respondent on 22 January 2014 seeking their views with respect to jurisdiction. The respondent indicated the name of their company had been identified incorrectly and rather than LJ Hooker Fremantle should have been identified as Starfix Pty Ltd as trustee for the LJ Hooker Fremantle Unit Trust.
- 5 In determining whether to issue an order changing the respondent's name the Commission has had regard for the power contained in s 27(1)(m) of the Act. The decision whether or not this application should be granted is not automatic. It requires the Commission to make a decision and this necessarily will involve balancing various relevant considerations. The Commission is satisfied that the proper identity of Ms Stutt's employer was described inappropriately when Ms Stutt filed her

application and I find that the proper title of the respondent is Starfix Pty Ltd as trustee for the LJ Hooker Fremantle Unit Trust. Pursuant to the Commission's powers s 27(1)(m) of the Act allowing the Commission to correct, amend or waive any error, defect or irregularity whether in substance or in form, the Commission has issued an order changing the name of the respondent as referred to in the Notice of Application to reflect the proper name of the respondent. The named respondent in the application will therefore be deleted and replaced with Starfix Pty Ltd as trustee for the LJ Hooker Fremantle Unit Trust, see *Rai v Dogrin Pty Ltd* (2000) 89 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Another* (1991) 173 CLR 231.

Jurisdiction

- 6 The Commission wrote to the parties on the question of jurisdiction as raised by the respondent. Preliminary written submissions from Ms Stutt and the respondent relating to the issue of jurisdiction were received. Further correspondence was forwarded by the Commissioner's associate to the parties indicating that a series of assertions had been made by the respondent however there had been no proof provided and accordingly the Commission was providing a further opportunity to provide an affidavit addressing the question of legal personality, the nature of the activities carried out at the relevant time and any other matters considered relevant.

Applicant

- 7 Ms Stutt submitted that she did not understand what jurisdiction meant and felt she could not draw together a submission other than to say she did not understand why she could not put an application into a West Australian court when she was employed in a Western Australian workplace, an understandable sentiment. Ms Stutt submitted she was employed under the *Clerks Award* and was informed that she received a pay rise for undertaking good work. During the time of her employment she had all of her leave approved in accordance with the respondent's policy. Several days later Ms Stutt was terminated. It is Ms Stutt's view that she was terminated because she was pregnant. Ms Stutt submits her application is filed to protect this happening to others and to allow herself to clear her own name, and perhaps receive compensation for the financial stress or alternatively to be offered reinstatement.
- 8 In so far as she was aware Ms Stutt worked for an organisation that was based in Western Australia under a Western Australian award and therefore was protected by the state Western Australian industrial relations system.

Respondent

- 9 The respondent expends and receives substantial sums of money in the conduct of the business and accordingly, the business receives a profit which is distributed to unit holders:

The conduct of the Business is significant and substantial.

(Respondent's outline of submissions at [12])

- 10 The respondent submitted the application by Ms Stutt for unfair dismissal had no jurisdiction before the state Commission given the respondent is a trading corporation for the purposes of s 51(xx) of the *Commonwealth Constitution*.
- 11 The *Fair Work Act 2009* (Cth) (the FW Act) applies and excludes all state and territory laws in so far as they may otherwise apply in relation to a national system employer as it is defined under s 26 of the FW Act. The respondent submitted that the FW Act determines a national system employer to be a constitutional corporation by way of s 14(1)(a) of the FW Act. Whether a corporation is a trading corporation is essentially a matter of fact: *Visser v Eral Pty Ltd* (2007) WAIRC 01148 at [13].
- 12 The issues to be determined in this matter when deciding whether the respondent is a trading corporation are the character of the activities carried on by the organisation at the relevant time and whether or not it is engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.
- 13 The company director of the respondent, a Mr Andrew Johns, submitted an affidavit dated 7 March 2014. Within that affidavit are six documents; a Australian Securities and Investment Commission search of the respondent's deed of settlement for the trust, professional indemnity insurance, Ms Stutt's employment contract, the respondent's human resources manual and a copy of the Centrelink employment separation certificate for Ms Stutt.
- 14 Through the business the respondent engages in trading activities including the provision of real estate services to buyers and sellers of real estate and property management services. The business is the sole business conducted by the respondent and the gross revenue from business for the financial year ended 30 June 2013 was approximately \$1,800,000.

Conclusion

- 15 On the undisputed information and documentation presented by the respondent I am satisfied and I find that the respondent is an incorporated entity. The Commission finds the principle purpose of the respondent is to trade with the objective of generating a profit. The affidavit of Mr Johns confirms that the respondent provides a range of real estate services to the buyers and sellers of real estate. The primary focus of the respondent is to trade with a view to making a profit.
- 16 In the circumstances I find that the respondent is a trading corporation and Ms Stutt is therefore an employee of a national system employer employed under the FW Act and the Commission therefore does not have jurisdiction to deal with Ms Stutt's application for unfair dismissal.
- 17 An order will issue dismissing this application for want of jurisdiction.
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2014 WAIRC 00627

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
NEESA STUTT **APPLICANT**

-v-
STARFIX PTY LTD AS TRUSTEE FOR LJ HOOKER FREMANTLE UNIT TRUST **RESPONDENT**

CORAM COMMISSIONER S M MAYMAN
DATE FRIDAY, 18 JULY 2014
FILE NO/S U 207 OF 2013
CITATION NO. 2014 WAIRC 00627

Result Application dismissed
Representation
Applicant Ms N Stutt
Respondent Mr J M Burke (of counsel)

Order

HAVING HEARD Ms Stutt and Mr Burke (of counsel) by written submissions, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders:

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00829

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
AMANDA JAYNE TEDGE **APPLICANT**

-v-
SMYL COMMUNITY SERVICES **RESPONDENT**

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 5 AUGUST 2014
FILE NO/S U 53 OF 2012
CITATION NO. 2014 WAIRC 00829

Result Discontinued
Representation
Applicant In person
Respondent Mr G Giffard

Order

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

A conference listed on 23 May 2012 was vacated as the applicant advised the Commission that she did not wish to proceed with the matter.

On 25 July 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00905

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
BOOPATHY VELUSAMY **APPLICANT**

-v-
GROVES MANUFACTURING & TOOLING **RESPONDENT**

CORAM COMMISSIONER S M MAYMAN
DATE TUESDAY, 5 AUGUST 2014
FILE NO/S U 108 OF 2014 AND B 108 OF 2014
CITATION NO. 2014 WAIRC 00905

Result Applications discontinued

Representation**Applicant** Mr B Velusamy**Respondent** Mr S Groves*Order*

WHEREAS these are applications pursuant to sections 29(1)(b)(i) and (b)(ii) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 31 July 2014 the applicant filed a Notice of Discontinuance in respect of the applications;

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

THAT these applications be, and are hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00823

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ELIZABETH SIAN WARRICK **APPLICANT**

-v-
DR PHILLIP CHILDS - KNEE DEEP WINES **RESPONDENT**

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE THURSDAY, 31 JULY 2014
FILE NO/S U 115 OF 2014
CITATION NO. 2014 WAIRC 00823

Result Application dismissed

Order

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

WHEREAS on the 10th day of July 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 28th day of 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.

[L.S.]

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
JMH Corp Pty Ltd / John M.H. Morris	Cimeco Pty Ltd	U 98/2010	Commissioner J L Harrison	Concluded
John Raymond Nelley (Jnr)	RW and BF Liebig and Sons (REGD;WA0263179W)	B 135/2007	Commissioner J L Harrison	Concluded
Karen Louise Hudson	Western Australian Land Authority (Trading as Landcorp)	U 128/2014	Commissioner S J Kenner	Discontinued
Michelle Byrne	Autism Association of WA 54354917843 Jean Taylor	U 73/2014	Commissioner J L Harrison	Consent Order issued
Mr Jason China	Derbarl Yerrigan Health Services Inc.	U 139/2014	Commissioner S J Kenner	Discontinued
Nicolai Jai Struan	Polytechnic West	U 16/2012	Commissioner J L Harrison	Concluded
Sterling Bonython-Romanov	Chief Executive Officer Shire of Halls Creek	U 134/2014	Commissioner S J Kenner	Discontinued
Tamara Lee Gillespie	Aboriginal Legal Services of Western Australia (ALSWA)	U 107/2011	Commissioner J L Harrison	Concluded

CONFERENCES—Matters arising out of—

2014 WAIRC 00906

DISPUTE RE INVESTIGATION PROCESS WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00906
CORAM	:	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 30 JULY 2014, TUESDAY, 5 AUGUST 2014, MONDAY, 21 JULY 2014, MONDAY, 23 JUNE 2014
DELIVERED	:	TUESDAY, 5 AUGUST 2014
FILE NO.	:	PSAC 14 OF 2014
BETWEEN	:	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Applicant AND DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION Respondent

CatchWords	:	Public Service Arbitrator – Industrial Law (WA) – Application for interim order – Jurisdiction of the Public Service Arbitrator – Alleged breach of discipline – Disciplinary process – Termination of employment – Application no longer live – Public Service Appeal Board jurisdiction
Legislation	:	<i>Industrial Relations Act 1979</i> s 44, s 44(6)(ba), s 44(9), s 80I(1)(e) <i>Public Sector Management Act 1994</i> Part 5 <i>Public Sector Management (General) Regulations 1994</i>
Result	:	Application for interim order dismissed
Representation:		
Applicant	:	Ms J O'Keefe
Respondent	:	Mr R Andretich of counsel and with him Mr V Ritorto

Reasons for Decision

- On 19 June 2014, the applicant filed an application for an urgent conference pursuant to s 44 of the *Industrial Relations Act 1979* (the Act). The Schedule to the application contains 30 paragraphs comprehensively setting out the background to an allegation of a breach of discipline against the applicant's member, Mr Earle Lopez. This includes the detail of the alleged incident; comment as to why Mr Lopez's version of the incident ought to be accepted in preference to that of another witness; why it was improbable that Mr Lopez had behaved in the manner alleged; the process of the investigation; allegations of

unfairness in the process; reference to correspondence between the parties regarding the investigation; detail of there having been negotiations between the parties in an endeavour to resolve the issue of the allegation and the disciplinary process as they related to Mr Lopez, the findings and proposed penalties. The final paragraph of the Schedule, [31], then sets out four reasons why an urgent conference was sought. They were about details of the investigation process, the findings, the evidence, and finally that:

- (d) The proposed termination of Mr Lopez's employment on the basis of such an inadequate investigation; and in light of material already provided by the Applicant in response to the finding, would be harsh, unjust and unconscionable.
- 2 The application did not set out any particular remedies sought by the applicant.
 - 3 Attached to the application were documents relating exclusively to the allegation and investigation involving Mr Lopez.
 - 4 The Public Service Arbitrator (the Arbitrator) convened a conference on 23 June 2014 at which the details of the allegation and investigation were discussed, including the respondent's intention to terminate Mr Lopez's employment. There was discussion that the respondent had foreshadowed the likely termination of Mr Lopez's employment and the applicant indicated that it would seek an order pursuant to s 44(6)(ba) of the Act to prevent any termination pending the hearing and determination of the matter.
 - 5 The conference concluded on the basis that within 48 hours, the applicant would write to the respondent requesting that it make a decision based on the information currently before it rather than prolong the process, which had already taken a lengthy period of time. It would also make a written submission to the Arbitrator seeking an interim order to prevent the termination of employment pending hearing and determination. It was to also prepare, in draft form, its outline of the matter which it sought to have referred for hearing and determination pursuant to s 44 of the Act. The respondent was then to respond to those matters.
 - 6 It appears that the parties then entered into private discussions and the applicant says that it was agreed between them that the respondent would not terminate Mr Lopez's employment and the applicant would not seek interim orders. The applicant provided the respondent with further information regarding the circumstances associated with the allegation relating to Mr Lopez's conduct and the investigation.
 - 7 However, by email sent to the Arbitrator at 6.12 pm on 16 July 2014, the applicant advised the Arbitrator that that day, Mr Lopez had received a letter from the respondent which indicated that the respondent had reviewed the information provided by the applicant and the investigation report into the alleged incident, and that the respondent was soon to write to Mr Lopez advising him of a final outcome. The applicant advised the Arbitrator that it:
 - ... wishes to resume its application to the Commission seeking a s44(6)(ba) interim order to prevent any termination, pending the hearing and determination of the matter.
 - The Union will also provide the Commission the matters it wishes to be included in the memorandum of matters to be referred for hearing and determination.
 - 8 By email dated 17 July 2014 at 12.10 pm, the respondent advised the Arbitrator that '[t]he Director General has now imposed an outcome', and attached a copy of a letter advising Mr Lopez of the Director General's decision to terminate his employment with immediate effect.
 - 9 By email at 1.09 pm that day, the applicant advised the Arbitrator that it sought an interim order that Mr Lopez 'be reinstated until the matters subject of Application PSAC 14 of 2014 are heard and determined'. It is said that this was to prevent the deterioration of industrial relations between the parties.
 - 10 The Arbitrator convened a further conference on 21 July 2014. At this conference, the applicant submitted that it had many concerns relating to the respondent's approach to disciplinary matters involving many of its employees. Reference was made to an application for conference by the applicant in September 2012, which had been the subject of conciliation before Kenner C (PSAC 25 of 2012). In respect of that matter, Kenner C issued a Statement on Friday, 14 March 2014, noting that that application dealt not only with the circumstances applying to a particular employee but also 'to the broader matters of the disciplinary process for Social Trainers employed by the Department'. He also noted that 'the parties have engaged in an extensive process of discussion and negotiation, in order to codify the disciplinary processes adopted by the Department'. The Statement went on to identify measures discussed to resolve that 'broader' issue, including that the parties had reached agreement that there would be amendments to the *Public Sector Management (General) Regulations 1994* to provide that Social Trainers be subject to Part 5 of the *Public Sector Management Act 1994* for disciplinary process purposes, to 'provide the affected employees, the Association and the employer, with certainty in relation to the important issue of substandard performance and disciplinary matters'. The application was adjourned 'pending advice from the parties as to the progress in finalising amendments to the Regulations'.
 - 11 The applicant says that, given the level of concern amongst its members about the respondent's disciplinary processes, and that Mr Lopez, a long-standing employee whose dismissal is an exemplar of the problems with those processes, that the order for reinstatement would prevent the deterioration of industrial relations while the matter of his dismissal is arbitrated.
 - 12 The respondent objects to any interim order being issued for a number of reasons. It says that:
 - (1) The matter before the Arbitrator was the respondent's impending decision to dismiss Mr Lopez. As that has now occurred, there is nothing further before the Arbitrator. The dismissal is a matter not for the Public Service Arbitrator but for the Public Service Appeal Board (the Board).
 - (2) The issue before the Arbitrator is not the applicant's broader concern about the respondent's disciplinary processes, but is limited to the circumstances relating to Mr Lopez. There was a belated attempt, after the dismissal had taken place, to broaden the issues covered by the application. However, by that point, the subject matter of the application had been exhausted.

- (3) In that context, there is no basis for an interim order as it will not prevent the deterioration of industrial relations pending hearing and determination of that matter.
- (4) If there is a broader issue, it is the subject of a separate application which is still on foot.
- 13 In the circumstances, an order issued under s 44(6)(ba) of the Act to reinstate Mr Lopez would have the effect of being a final order as the matter before the Arbitrator has no further life. The Board does not have conciliation powers and cannot issue interim orders.

Consideration and conclusions

- 14 The terms of the Schedule to the Form 1 – Notice of application and its attachments make clear that the matter the subject of this application is the respondent’s disciplinary process in respect of Mr Lopez alone, and the prospect that the respondent would dismiss him. The application does not raise any issue about a broader problem with the respondent’s disciplinary processes beyond Mr Lopez’s situation.
- 15 The circumstances raised in the application have now been overtaken by the dismissal. There is no longer any live matter within this application. While the applicant says that there is a broader issue alive, that broader issue was not the subject of this application, rather, it is the subject of a separate application, PSAC 25 of 2012. That application is still on foot.
- 16 It is quite normal for the subject matter of an application for conference pursuant to s 44 of the Act to change and evolve as circumstances change, as conciliation resolves some issues and the parties take action as a consequence of the developments within the conciliation process. That is recognised by s 44(9), that during the conciliation some ‘question, dispute or disagreement *in relation to an industrial matter*’ may not have been settled and may be referred for hearing and determination (emphasis added). The industrial matter in this application was the impending dismissal. As a dismissal has now occurred, it is no longer impending, and that industrial matter is no longer live.
- 17 The dismissal itself and the grounds for a challenge to it is not a matter for the Arbitrator. That is a matter within the exclusive jurisdiction of the Board (s 80I(1)(e) of the Act).
- 18 I also note the Reasons for Decision of Kenner C in *The Civil Service Association of Western Australia Incorporated v Chief Executive Officer Disability Services Commission* [2005] WAIRC 01349. In that decision, the learned Commissioner recognised the distinction between the Arbitrator’s and the Board’s jurisdictions, and that once there has been a dismissal, given the terms of the legislation, the matter relating to that dismissal is for the Board, not for the Arbitrator.
- 19 The reasons set out in *The Civil Service Association of Western Australia Incorporated v Commissioner for Corrections Department of Corrective Services* [2006] WAIRC 05790 also notes that the two jurisdictions are separate, that the jurisdiction of the Arbitrator to issue orders pending hearing and determination relates to hearing and determination of the matter then before the Arbitrator, not the matter within the Board’s exclusive jurisdiction.
- 20 In any event, an order pursuant to s 44(6)(ba) of the Act is not a general injunctive order to prevent or require the doing of something. It is for the particular purposes set out there. The applicant says that the order it seeks would prevent the deterioration of industrial relations.
- 21 There is no evidence before me that any order is necessary to prevent the deterioration of industrial relations between the parties in respect of the matter before the Arbitrator. I acknowledge that after the dismissal had taken place, the applicant brought a number of its officers to provide information to the Arbitrator at the conference convened on 21 July 2014 about the number of disciplinary matters relating to current Social Trainers employed by the respondent. There is also an issue of the outsourcing of the Social Trainers’ work and this appears, in some way, to relate to the fact that the witness, who the applicant says cannot be relied upon, was an agency employee and not directly employed by the respondent. However, it is quite clear that the matter of the respondent’s disciplinary processes generally, the broader matter, is the subject of an application before Kenner C quite separately from this application, which dealt exclusively with Mr Lopez’s situation.
- 22 In all of the circumstances then, the application for an interim order that Mr Lopez be reinstated pending the hearing and determination of the matter is to be dismissed.

2014 WAIRC 00907

DISPUTE RE INVESTIGATION PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

TUESDAY, 5 AUGUST 2014

FILE NO

PSAC 14 OF 2014

CITATION NO.

2014 WAIRC 00907

Result

Application for interim order dismissed

Order

HAVING heard Ms J O'Keefe on behalf of the applicant and Mr R Andretich of counsel and with him Mr V Ritorto for the respondent, 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.

[L.S.]

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

2012 WAIRC 01127

DISPUTE RE NEGOTIATIONS FOR INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS: (I) THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD; (II) THE PEEL HEALTH SERVICES BOARD, AND (III) THE WA COUNTRY HEALTH SERVICE AND ANOTHER

APPLICANT

-v-

UNITED VOICE WA

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE FRIDAY, 28 DECEMBER 2012

FILE NO/S C 59 OF 2012

CITATION NO. 2012 WAIRC 01127

Result	Interim Orders made
Representation	
Applicants	Mr M Warner
Respondent	Mr D Kelly and Ms C Smith

Order

This application was lodged pursuant to s 42E of the *Industrial Relations Act 1979* (the Act) on 26 October 2012. The applicant sought the Commission's assistance to facilitate good faith bargaining with the respondent for a new industrial agreement to replace the *WA Health - LHMU - Support Workers Industrial Agreement 2007* (the Agreement); and

WHEREAS the Commission convened a number of conferences for the purpose of conciliating between the parties; and

WHEREAS on 10 December 2012 the applicant lodged an application to register the *WA Health - United Voice - Hospital Support Workers Industrial Agreement 2012*; and

FURTHER the parties agreed to the Commission arbitrating two wage increases to apply in the proposed industrial agreement pursuant to s 42G of the Act; and

WHEREAS the hearing listed for 18 December 2012 to register the new agreement was vacated as the respondent had issues with some clauses and would not sign the agreement; and

WHEREAS on 21 December 2012 a conference was held to discuss the issues of concern in the new agreement and the respondent told the Commission that work bans had been reinstated by the respondent; and

WHEREAS at this conference the parties did not reach agreement on the main clause in dispute - Clause 13 Rosters; and

WHEREAS the applicant confirmed that notwithstanding agreement not being reached on the terms of Clause 13 Rosters, all employees employed pursuant to the new agreement would receive a 4.5% pay increase backdated to 5 December 2012; and

WHEREAS on 27 December the respondent sought an urgent conference as members taking industrial action were told they would have their 4.5% pay increase withheld; and

WHEREAS the parties discussed alternative wording for Clause 13 Rosters and the respondent considered putting a counterproposal to the applicant the following day but did not do so; and

WHEREAS at a further conference held on 28 December 2012 the respondent sought the following order:

"That the applicant pay a 4.5% wage increase to all Hospital Support Workers who come within the coverage of the former *WA Health - LHMU - Hospital Support Workers Industrial Agreement 2007* in the pay period ending 30 December 2012 and that the wage increase be back paid to 5 December 2012. That shift, weekend, public holiday and

related allowances also be increased in line with the 4.5% wage increase and at the same time. That this 4.5% increase to be ongoing or until further order of the Commission.”

WHEREAS in support of this order issuing the respondent argued that:

- The Commission has the power to issue the order under s 44(6)(ba)(i) and s 42E(3) as the issue in dispute is an industrial matter and relates to good faith bargaining.
- The applicant has reneged on an unambiguous undertaking to employees to pay the 4.5% increase from 5 December 2012 notwithstanding an employee taking industrial action.
- Non payment of the 4.5% increase constitutes an unauthorised deduction from an employee’s pay and is unconscionable.
- The applicant does not have a proper, accurate and transparent process for identifying which employees are taking industrial action.
- Industrial action could be escalated if employees are selectively paid the 4.5% increase.
- The order sought is not a final order as it will operate alongside further negotiations taking place to finalise the new agreement.

WHEREAS the applicant opposed the order issuing and argued that:

- The applicant understood an agreement had been reached between the parties on the terms of the new agreement and the union and its members have reneged on this agreement.
- The applicant has the right to withhold an employee’s pay when he or she does not complete the full range of duties.
- The Commission does not have the power to issue the order being sought.
- The order sought is not interim as contemplated by s 44(6)(ba)(i).
- If the order issues the respondent and its members should be ordered to cease taking industrial action whilst this matter is before the Commission.

WHEREAS having heard from the applicant and the respondent and having considered the submissions made by both parties; and

WHEREAS the Commission is of the view that the issue in dispute is an industrial matter and the Commission has power to issue the order being sought; and

WHEREAS taking into account the public interest, the interest of the parties directly involved, equity and fairness, the substantial merits of this case, relevant objects of the Act and s 42E and s 44(6)(ba)(i) of the Act the Commission has formed the view that orders with respect to this application should issue to enable further conciliation and or arbitration to occur and to assist in good faith bargaining for a new agreement;

NOW THEREFORE having heard Mr M Warner on behalf of the applicant and Mr D Kelly and Ms C Smith on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, hereby orders:

1. THAT the respondent by its officers and employees and members is to lift all bans it currently has in place in relation to the finalisation of a new agreement and no further industrial action in any form is to be undertaken by the respondent by its officers and employees in relation to this issue whilst conciliation and/or arbitration by the Commission is occurring.
2. THAT the respondent by its officers and employees is to take reasonable steps to immediately inform its members about the terms of Order 1 and direct its members to comply with this order.
- 3(a). THAT the applicant pay an all purpose 4.5% wage increase to all Hospital Support workers currently employed pursuant to the terms of the former *WA Health – LHMU- Hospital Support Workers Industrial Agreement 2007* backdated to 5 December 2012, on 3 January 2013 whether or not that employee has taken industrial action relating to negotiations for a new agreement.
- 3(b). THAT this increase be paid on an ongoing basis until further order of the Commission.
4. THAT on 2 January 2013 the applicant is to have discussions with the respondent with respect to provisions in the new agreement relating to rostering.
5. THAT a report back conference be held in the Commission on 2 January 2013 to hear further from the parties as to the outcome of these discussions.
6. THAT this order is to remain in force until revoked or varied by the Commission.
7. THAT liberty to apply be granted to both parties with respect to these orders.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00631

DISPUTE RE NEGOTIATIONS FOR INDUSTRIAL AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, THE PEEL HEALTH SERVICES BOARD, AND THE WA COUNTRY HEALTH SERVICE.; THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY

APPLICANT

-v-

UNITED VOICE WA

RESPONDENT**CORAM**

COMMISSIONER J L HARRISON

DATE

TUESDAY, 22 JULY 2014

FILE NO/S

C 59 OF 2012

CITATION NO.

2014 WAIRC 00631

Result

Order revoked

Representation**Applicant**

Mr N Fergus

Respondent

Mr S Dane

Order

This application was lodged pursuant to s 42E of the *Industrial Relations Act 1979* seeking the Commission's assistance to facilitate good faith bargaining with the respondent for a new industrial agreement to replace the *WA Health - LHMU - Support Workers Industrial Agreement 2007*.

The Commission issued Interim Orders with respect to this application on 28 December 2012.

On 30 June 2014 the applicant advised the Commission that it wanted the file to be closed.

As the dispute between the parties the subject of this application has been resolved it is the Commission's view that the Interim Order which issued on 28 December 2012 should be revoked.

NOW THEREFORE having heard Mr N Fergus on behalf of the applicant and Mr S Dane on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the Order which issued in this matter dated 28 December 2012 is hereby revoked.
2. THAT this application otherwise be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

CONFERENCES—Matters referred—

2014 WAIRC 00416

DISPUTE RE ALLEGED DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT**CORAM**

COMMISSIONER S J KENNER

DATE

MONDAY, 19 MAY 2014

FILE NO/S

CR 3 OF 2014

CITATION NO.

2014 WAIRC 00416

Result	Order issued
Representation	
Applicant	Mr K Singh
Respondent	Ms J Rhodes of counsel

Order

HAVING heard Mr K Singh on behalf of the applicant and Ms J Rhodes of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

The respondent's witness, Mr Felix Geson, be granted leave to appear by video link subject to the venue being approved by the Commission.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00824

**DISPUTE RE ALLEGED DISCIPLINARY ACTION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2014 WAIRC 00824
CORAM	:	COMMISSIONER S J KENNER
HEARD	:	TUESDAY, 20 MAY 2014, WEDNESDAY, 21 MAY 2014
DELIVERED	:	FRIDAY, 1 AUGUST 2014
FILE NO.	:	CR 3 OF 2014
BETWEEN	:	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
		Applicant
		AND
		PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Respondent

Catchwords	:	Industrial law (WA) – Matter referred for hearing and determination under s 44(9) of the Act – Dispute regarding implementation of disciplinary procedures – Dispute regarding allegations concerning the conduct of employees – Disciplinary investigation – Reprimand – Credibility of witnesses – Penalty imposed was appropriate – Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) ss 44, 44(9)
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr K Singh
Respondent	:	Ms J Rhodes of counsel
Solicitors:		
Respondent	:	State Solicitor's Office

Reasons for Decision

- Ms Janet Vimpany is employed by the Authority as a Passenger Ticketing Assistant on the Joondalup line. On Saturday 27 April 2013 Ms Vimpany was rostered to work on an overtime shift with a colleague, Ms Jennifer Blake, at the Perth City Station. The shift commenced at 10am and was scheduled to finish at 4pm. It was common ground that both Ms Vimpany and Ms Blake were given permission by the morning duty Station Coordinator Mr Avtar Singh, to leave early by about 3:30pm, if their shift duties had been completed. In accordance with this understanding, Ms Vimpany and Ms Blake entered the station office to prepare to depart.
- At the time, Mr David Hammon had taken over from Mr Singh as the duty Station Coordinator. Mr Hammon was unaware of Mr Singh's earlier agreement that Ms Vimpany and Ms Blake could leave early, if their duties had been completed. As a result, Mr Hammon directed both Ms Vimpany and Ms Blake to complete their shift to their usual finish time of 4pm. It was contended by the Union, that Mr Hammon did so in a loud and aggressive manner, which caused upset to Ms Vimpany and Ms Blake.
- Subsequently, at about 3:50pm, Ms Vimpany returned to the station office to collect her belongings. She had previously, with Ms Blake, decided that she would speak with Mr Hammon about the previous encounter. Ms Vimpany said as she did so, Mr Hammon again became loud and aggressive and told Ms Vimpany to leave the office. Following these events, a complaint

was made by Mr Hammon to the Authority's senior management, asserting that Ms Vimpany had acted in an intimidating and inappropriate manner in speaking with him on her return to the station office. Additionally, Ms Vimpany also lodged a grievance in relation to Mr Hammon's conduct. The complaint of Mr Hammon ultimately led to disciplinary action against Ms Vimpany, in which she was issued with a formal reprimand. Additionally, further possible action against Ms Vimpany, in relation to allegations she knowingly misled the investigation into the relevant events, is pending.

- 4 The matter was unable to be resolved at a s 44 conciliation conference before the Commission. Accordingly, the matter has been referred for hearing and determination under s 44(9) of the Act. In essence, the Union and the Authority are in dispute over:
 - (a) Allegations concerning the conduct of the Union's member Ms Vimpany, and the Authority's Station Coordinator Mr Hammon, on the afternoon of 27 April 2013; and
 - (b) The Authority's implementation of its disciplinary procedures against Ms Vimpany.

5 There is a substantial body of agreed facts in this matter. They are set out below.

Agreed facts

- 6 On the afternoon of 27 April 2013 between 1500 and 1600 hours, there were two interactions at Perth Railway Station between the Union's member, Ms Vimpany, a Passenger Ticketing Assistant and Mr Hammon, a Station Coordinator, in the presence of other employees of the Authority.
- 7 Following the second interaction, Mr Hammon emailed the Authority's Passenger Service Manager Perth, complaining about Ms Vimpany's conduct during their second interaction. Specifically, Mr Hammon alleged that Ms Vimpany abused his position with threatening behaviour by pointing her finger directly in his face and saying "do not talk to me like that again and who do you think you are anyway?"
- 8 A memorandum dated 8 May 2013 sent on behalf of the Authority and received by Ms Vimpany on 10 May 2013 (the Memorandum):
 - (a) Notified Ms Vimpany of allegations that she:
 - (i) "Stormed" into the Station Coordinators' office area;
 - (ii) Shook her finger in Mr Hammon's face from within approximately two feet; and
 - (iii) Shouted at him in an intimidating and threatening manner; and
 - (b) Required Ms Vimpany to respond with a written statement explaining her actions.
- 9 Ms Vimpany booked off work on receipt of the Memorandum on 10 May 2013.
- 10 On 14 May 2013, Ms Vimpany submitted a Health and Safety Incident Report Form (the Form) in which she alleged that:
 - (a) Mr Hammon was aggressive, threatening and abusive towards her and bullied and harassed her on 27 April 2013;
 - (b) She felt anxiety, stress and tension headaches as a result of feeling vulnerable and powerless following her interactions with Mr Hammon on 27 April 2013; and
 - (c) Exposure to these mental stress factors, including receipt of the Memorandum, had resulted in psychological injuries.
- 11 On 17 May 2013, Ms Vimpany responded to the Memorandum stating that the allegations were false and not a true and correct account of what occurred.
- 12 Ms Vimpany lodged a workers' compensation claim with the Authority in relation to her absence commencing 10 May 2013.
- 13 On 24 May 2013, a representative of the Union raised a grievance with the Authority's Manager Human Resource Services relating to the conduct of Mr Hammon on 27 April 2013, alleging that Mr Hammon had humiliated, degraded and threatened Ms Vimpany and the Union's other member, Ms Blake in delivering an instruction to them aggressively, by yelling and screaming at them in the presence of other staff.
- 14 On 29 May 2013, the Authority's Acting Manager Human Resource Services recommended that the grievance first be raised with Mr Hammon's Manager.
- 15 On 7 June 2013, following a meeting with a representative of the Union and Ms Vimpany, the Authority's Acting Manager Human Resource Services discontinued the grievance on the basis that the disciplinary investigation would take into consideration Ms Vimpany's account of the events on 27 April 2013, and on the basis that Ms Vimpany's workers' compensation claim was still pending.
- 16 On 11 June 2013, Ms Vimpany submitted a revised response to the Memorandum which alleged that:
 - (a) During their first interaction, Mr Hammon "stood and glared at us and shouted instructions regarding our finishing time in an aggressive, threatening, intimidating and completely unnecessary manner" such that she had "never in (her) life been spoken to by a male in such a threatening way"; and
 - (b) During their second interaction, Mr Hammon reacted once again in a threatening, loud and aggressive manner, becoming agitated and unreasonable and entered her personal space.
- 17 The allegations against Ms Vimpany were referred to the Authority's Acting Supervisor Customer Service for investigation under cl 2.6 of the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011 (the Disciplinary Investigation). The Investigator stated in the introduction to his report that "As both parties lodged allegations of inappropriate conduct, a formal investigation was deemed necessary, as a finding against either party would be considered a breach of the Authority's Code of Conduct and as such, may result in disciplinary action".
- 18 An external investigator was also engaged by the Authority's insurer, RiskCover, to investigate Ms Vimpany's workers' compensation claim.

- 19 On 15 June 2013, Ms Vimpany returned to operational duties.
- 20 On 28 June 2013, the Union notified the Authority of a dispute under cl 8 of the Agreement contending that Transperth Train Operations management were not sufficiently capable, competent or independent to investigate the allegations between Ms Vimpany and Mr Hammon.
- 21 On 4 July 2013, the Union agreed to allow the Disciplinary Investigation to proceed.
- 22 During July 2013, interviews were conducted for the Disciplinary Investigation.
- 23 During the Disciplinary Investigation, Ms Vimpany stated to the Investigator that during their first interaction:
- (a) Mr Hammon seemed angry, and was very loud, abusive and threatening;
 - (b) Specifically, Mr Hammon said loudly “where do you think you are going, you are not off ‘til 1600” and when she replied that the boss had said they could go home earlier, he screamed “I’m the boss now, and you are rostered ‘til 4 and you will stay ‘til 4 so get back out there and don’t come back until 4 o’clock”.
- 24 During the Disciplinary Investigation, Mr Hammon stated to the Investigator that during their second interaction:
- (a) He was sitting at his desk within his cubicle and stayed seated throughout;
 - (b) Ms Vimpany confronted him in a threatening manner; and
 - (c) Specifically, Ms Vimpany entered his area, leant over and pointed her finger at his face (within approximately 30 cm) and said “don’t ever shout like that to me again. Who do you think you are?”
- 25 During the Disciplinary Investigation, Ms Vimpany stated to the Investigator that during their second interaction:
- (a) She felt verbally abused and threatened by Mr Hammon; and
 - (b) Specifically, Mr Hammon got up from his chair and stood face to face with her in her personal space and shouted “I did not scream at you Jan” and then said in a very loud voice “I suggest you leave Jan, leave now” with his arm outstretched and finger pointed to the door.
- 26 On 10 September 2013, Ms Vimpany’s workers’ compensation claim was declined by the Authority’s insurer, RiskCover, though Ms Vimpany’s wages during her absence have been paid due to the failure to meet the statutory 17 day time limit for notifying the decision as to the response.
- 27 On 11 September 2013, the Authority provided Ms Vimpany with the report from the Disciplinary Investigation and provided her with an opportunity to respond.
- 28 On 27 September 2013, Ms Vimpany responded again denying the allegations and alleging that the Disciplinary Investigation process had been a conspiracy.
- 29 On 17 October 2013, the Authority’s General Manager of TTO found the allegations set out in the Memorandum were proved and reprimanded Ms Vimpany accordingly.
- 30 On 23 September 2013, the Authority’s Manager Customer Service, notified Ms Vimpany of, and required a response to allegations that Ms Vimpany knowingly gave a false account of Mr Hammon’s actions on the afternoon of 27 April 2013 in support of the conclusion that his behaviour was intimidating and bullying towards her.
- 31 The Authority’s Manager Customer Service has not yet taken further action to pursue these allegations as a disciplinary matter for the purposes of cl 2.6.6 of the Agreement.
- 32 Given the nature of the matters in dispute between the parties, they have conferred and agreed upon the matters for determination in these proceedings. They are set out below.

Matters for determination

- 33 The matters arising for determination are as follows:
- (a) Whether during the first or second interaction between Mr Hammon and Ms Vimpany on 27 April 2013, Mr Hammon:
 - (i) Conducted himself in an intimidating manner by shouting instructions to Ms Vimpany about her finishing time in an aggressive, loud, abusive, threatening or intimidating manner;
 - (ii) Behaved in an agitated or unreasonable manner, entering her personal space and speaking in a threatening, loud or aggressive manner during the second interaction and yelled or screamed at Ms Vimpany in the company of other staff;
 - (iii) Was aggressive, threatening or abusive towards Ms Vimpany and Ms Blake; or
 - (iv) Bullied, harassed, humiliated or degraded Ms Vimpany.
 - (b) Whether, during the second interaction between Mr Hammon and Ms Vimpany on 27 April 2013, Ms Vimpany:
 - (i) Shouted at Mr Hammon;
 - (ii) Leaned over Mr Hammon or shook her finger in his face; and/or
 - (iii) Engaged in threatening or intimidating behaviour towards Mr Hammon in breach of the Authority’s Code of Conduct.
 - (c) Whether, in relation to the events of 27 April 2013, Ms Vimpany, Mr Hammon or any other employee of the Authority conducted themselves dishonestly by:
 - (i) Initiating an allegation or claim that they knew to be false; or
 - (ii) Giving an account of those events to investigators that they knew to be false.
 - (d) Whether the Authority abused its disciplinary procedures in relation to the events of 27 April 2013, in that the circumstances of the case did not warrant disciplinary action.

- 34 Based upon the issues referred for hearing and determination, the Union seeks relief by way of various declarations and orders in the following terms:
- (a) A declaration that the Authority initiated its disciplinary procedures against Ms Vimpany where the circumstances were inappropriate;
 - (b) A declaration that the Authority's decision to find Ms Vimpany in breach of discipline was in all of the circumstances harsh and unfair;
 - (c) An order removing the Final Determination Letter from Ms Vimpany's record;
 - (d) A declaration that, if the Authority implements further disciplinary action against Ms Vimpany in relation to the Secondary Allegations Letter, it would be in all of the circumstances harsh and unfair; and
 - (e) An order restraining the Authority from implementing any further disciplinary action against Ms Vimpany.
- 35 On the hearing of this matter, the Union was represented by Mr Singh and the Authority was represented by Ms Rhodes of counsel. I will deal with each of the issues to be determined, in light of the evidence, both oral and documentary, adduced in the course of the proceedings.

Issues 1 and 2 – the conduct of Mr Hammon and Ms Vimpany on 27 April 2013

- 36 It is convenient to deal with the alleged conduct of Mr Hammon and Ms Vimpany conjointly. Mr Hammon is a Station Coordinator employed by the Authority since September 2007. At the time of the events in question Mr Hammon was based at the Perth Station. He was rostered to work on the afternoon shift from 1:30pm to 11:30pm on Saturday 27 April 2013.
- 37 Mr Hammon and Customer Service Attendants occupy an office, which is essentially open-plan in design. A copy of the floor plan (not to scale) was part of the Agreed Bundle of Documents in exhibit A8. The Station Coordinator is positioned inside a partitioned area, the opening of which looks out to the open plan seating area. Adjacent to the partitioned area, are "hot desks" that are occupied by CSAs when on shift. On the day in question, three CSAs were present in the office, they being Mr Pontarolo, Mr Geson and Mr Barinder Singh.
- 38 Mr Hammon testified that he was seated in the partitioned area checking emails and attending to other matters. At some point, he stood up from his seat and began conversing with the CSAs in the office. Both Ms Vimpany and Ms Blake came into the office and began to remove their equipment. Mr Hammon noticed on the office clock that this was at about 3:15pm. Aware that both Ms Vimpany and Ms Blake were rostered to work until 4:00pm, Mr Hammon asked what they were doing. They told him they were going home. Mr Hammon said that he told them that they were rostered to 4:00pm and to go back out on the platform and to continue their duties. Mr Hammon testified that he said this in his normal tone of voice. He testified that being Scottish, his normal tone of voice is strong and pronounced, but denied that he spoke loudly.
- 39 According to Mr Hammon, both Ms Vimpany and Ms Blake seemed disappointed, confirmed by the looks on their faces. He said that they "mumbled something to themselves" as they left the office: T97.
- 40 Mr Hammon continued to work as he had been previously. Some time later, as he was seated at his computer, he heard someone coming up behind him. He was facing his computer with his back to the opening of the partition, sitting in his usual place. In his testimony, the following exchange took place as described at T97:
- Okay. So I'll take you then to what happened next, can you please give your account of that?---Yeah, working at my computer, I'm at my desk, you're kind of blindsided, you know. I can't - can't see somebody coming from behind me if you look at that area, and I think it was a book-off I was covering so I had different things happening on the screen. And I just got the noise of Ms Vimpany coming towards me and I - I've turned on my seat and she got to this area here with her finger and she's, "Don't you ever talk to me like that again, who do you think you are anyway?". And I turned and went, "Jan, this is not the time or place. I didn't talk to you in any way. I suggest you leave my office". And I pointed my hand, "I suggest you leave my office". Now, "Who do you think you are anyway?" again and, "Jan, not the time or place. Please, leave". She turned, walked away, again, mumbled some things that I wasn't privy to and I - and I just sat there kind of a bit dumbfounded to say the least.
- When she said those words to you, how would you describe her tone? --- Yeah, it was - it was aggressive, but the finger pointing was more aggressive. I learned to respect, you know, people's positions and as a supervisor, I would not expect that to be done to me, so I was a bit taken aback.
- And your responses to her, how would you describe your tone? --- Surprised. I was surprised and not the time or place. Didn't shout, didn't do anything like that. I was probably more calm, because it was the kind of shock that was given to me. But I said, "No. Jan, please leave", and that was it; that was - that was the total context of it.
- 41 In cross-examination, Mr Hammon said that Ms Vimpany approached him from his right hand side, while he was seated, and she "blind-sided me": T102.
- 42 At the time this occurred, Mr Hammon said that the other CSAs were in the office and were surprised and shocked by the incidents. According to Mr Hammon, he remained in his seat during the time that Ms Vimpany approached him and he did not stand up until after she left the office. Mr Hammon said that he considered Ms Vimpany's approach totally uncalled for and was no way to speak to a supervisor. Shortly after the incident with Ms Vimpany, Mr Hammon said that he went outside the office and saw Mr Singh, the Station Coordinator who was on duty earlier in the day. Mr Hammon told Mr Singh what had just happened. It was only then, that Mr Singh informed Mr Hammon that he had told Ms Vimpany and Ms Blake that they could leave early if all their work was done for the shift.
- 43 Given what had occurred, Mr Hammon decided to inform his manager and did so by email that afternoon. The email was written about 20 minutes after the incident and a copy was at p 3 of exhibit A8. Both in the email to the manager and in cross-examination, Mr Hammon said that he wanted an apology from Ms Vimpany.
- 44 As is often the case in matters such as this, Ms Vimpany's version of the events is diametrically opposed to that put by Mr Hammon. Ms Vimpany testified that she was working an overtime shift on 27 April at the Perth Station. She was working

with her colleague Ms Blake. Mr Singh was the Station Coordinator on the morning shift and they spoke with him about leaving early to catch a 3:30pm train, if all their duties had been performed. Ms Vimpany and Ms Blake were told by Mr Singh that if their work was completed, they could leave early. At about 3:20pm Ms Vimpany said she went into the station office to prepare to leave with Ms Blake. They entered by a side door, next to the crib room, which she said was locked. Mr Hammon came to the door and unlocked it. Ms Vimpany and Ms Blake entered the office. Ms Vimpany confirmed that she saw Messers Geson and Pontarolo in the office. She was not sure if the other CSA, Mr Singh was present. Both Ms Vimpany and Ms Blake took off their gear and got their bags ready to leave. As they did so, Mr Hammon was standing in the partitioned area. According to Ms Vimpany, the following exchange took place: T11.

He just opened the door and didn't acknowledge us, which I thought at the time was a bit unusual, and walked away. But we just - Jen walked around to the back of the office, hung up her radio, and I walked towards our bags. There was - and I walked towards the bags. Then she came back and joined me, we both took off our orange vests, folded up our vests, put them in our bags. We put our bags onto our shoulder, and as we were heading towards the door, that's when Dave turned around. He was in the partition area and he said, "And where do you think you're going?" In quite a loud voice.

When you say loud, what do you mean? --- Yeah, well he sort of said it loudly. Like, "Well, where do you think you're going?"

Okay. And you were a bit taken aback? --- We were taken aback and said, "The boss said we could go at 3.30."

And how did Mr Hammon react? --- Well he said, "I'm the boss now", still loudly, and stood looking at us. "I'm the boss now, you're not going anywhere. You're rostered till 4 o'clock."

Okay, "You're rostered till 4 o'clock." And what happened after that? --- He said, "You're rostered till 4 o'clock, so you get out there." And he pointed his hand in the direction of the door, "And don't come back in till 4 o'clock. Leave your shift at 4 o'clock."

And obviously I - you went back out onto the platform? --- We put our bags down and we went back out and stood outside, just on the platform outside the door.

- 45 Ms Vimpany said that both she and Ms Blake then went outside onto the platform. Ms Vimpany, later in cross-examination, said that Mr Hammon "definitely shouted" in the office and he "screamed" and described this as "very crazy, crazy talk":T26. Mention was also made of this in her examination in chief at T12. Whilst outside on the platform, during the first ten to fifteen minutes or so, Ms Vimpany and Ms Blake discussed Mr Hammon's behaviour. Ms Vimpany said that she went back into the office to pick up her bags at the end of the shift. Ms Blake was not with her as she had stopped to speak to a colleague outside the office. Ms Vimpany said she "did not go looking for Dave" but saw him in the office and went over to him and the following exchange is described at T13:

Okay. So you went and you picked up your bags, and you saw Dave sitting at his desk? --- I glanced around and saw him and I just thought - I didn't - I probably didn't even think. I put the bags down and I just went up and looked at his face, and I turned to the side and said, "Dave, why did you speak to Jen and I like that? We didn't do anything wrong."

Mm? --- I just wanted him to realise how it made us feel, and I didn't understand why.

And when you said that to Dave, what did he do? --- He said, "I didn't speak to you like that, Jan." I said, "But you did, Dave. You screamed at us."

And then? --- He stood and he pushed his chair up, and he stood and came into my face and shouted at me, "I did not scream at you, Jan."

Okay. And that's when you left the cubicle? --- And I said, "You did, Dave. Don't speak to me again", I said. And then I left, and I walked away. I nearly - and I bent down to pick my bags up, and as I did he said, "Just leave, Jan. Leave now and I'll wait for your email." And I said, "But I'm not going to write an email, just - just don't speak to us like that again."

Okay. So just to get a bit of clarity for me at this point, you went and picked your bags up and you spoke to Dave, and he stood up and he spoke to you back and you left. And to the best of your memory, Mr Geson and Mr Pontarolo were in the office at the time? --- As far as I know, yeah. Yeah, I can remember.

- 46 Ms Vimpany denied she had pointed her finger at Mr Hammon or spoke in a loud and aggressive manner to him. After she arrived home, Ms Vimpany testified that she received a telephone call from Mr Hammon in relation to a request to work an overtime shift. She said Mr Hammon sounded normal and friendly. No mention of the incident was made by Mr Hammon or anyone else, when Ms Vimpany returned to work after some days off. Subsequently, Ms Blake became aware that Ms Vimpany had been "written up" by Mr Hammon to management.
- 47 On 10 May 2013, Ms Vimpany received the Memorandum from Mr Heaysman, the Authority's Acting Passenger Services Manager, requesting a response to the complaint from Mr Hammon, (at p10 exhibit A8). The allegation was in the following terms:

On Saturday 27 April 2013, whilst working at Perth Station, it is alleged that at approximately 15:55 you "stormed" into the Station Coordinators' office area approaching the duty Station Coordinator (Dave Hammon) who was sitting at the computer. Once within close proximity (approx two feet) you then shook your finger in his face and shouted at him in an intimidating and threatening manner. This behaviour continued until such time as the Station Coordinator requested that you leave the area.

- 48 Whilst its origin was somewhat unclear, Ms Vimpany said she prepared a statement about the events on 27 April 2013, which was emailed from her daughter's email address. Although undated, Ms Vimpany said it was prepared on or about 13 May. A copy of the email was exhibit A9. However, this document was not provided as a part of Ms Vimpany's formal response to the Memorandum from Mr Heaysman. Ms Vimpany's formal response of 17 May 2013 was a one line comment "The alleged

allegations are false, it is not a true and correct account of what occurred on the day". It seems that the earlier fuller statement was sent to the Authority some time later, in connection with a grievance lodged by the Union on behalf of Ms Vimpany, against Mr Hammon. This grievance process seems to have been overtaken by the disciplinary process commenced by the Authority, earlier in time.

- 49 A further response by Ms Vimpany to the Authority was provided on 11 June 2013. This letter refers to allegations that Mr Hammon shouted at her and Ms Blake in an aggressive and intimidatory manner. No reference is made to the actual words alleged to have been used by Mr Hammon, as opposed to the content of exhibit A9. According to Ms Vimpany, the further statement of 11 June 2013 was prepared after she consulted the Union for assistance.
- 50 According to Ms Vimpany, it was the stress and anxiety of the "please explain" letter that caused Ms Vimpany to see a doctor and her being off work for a period of time. Additionally, the Form was lodged on 21 May (see exhibit R1) and a workers' compensation claim was made by Ms Vimpany as well. In this regard, Ms Vimpany made a statement to RiskCover on 2 July 2013. A copy of the statement was exhibit R2. The allegations against Mr Hammon are repeated in Ms Vimpany's statement to RiskCover.
- 51 Evidence was also given on behalf of the Union by Ms Blake. She referred to the first incident in the office with Mr Hammon in much the same terms as Ms Vimpany. She said that Mr Hammon spoke to them in a "loud, aggressive" tone: T43. Both Ms Vimpany and Ms Blake were then on the platform outside of the office. They discussed the situation and decided to go and speak to Mr Hammon "about the way he spoke to us...because he shouldn't have spoken to us like that...": T44. They considered that Mr Hammon was "out of line" by his manner: T50. Ms Blake did not go back into the office with Ms Vimpany as they were preparing to leave, as she stopped to talk to another employee outside. However, when Ms Vimpany came out of the office, and on the way to catch their train, Ms Blake testified that Ms Vimpany told her that she had spoken to Mr Hammon and "he had told her off, but she wasn't overly concerned, she wasn't upset or anything": T44.
- 52 Evidence was also led by the Union from Mr Olding and Ms Martin. However, that evidence did not go directly to the present issues in dispute in these proceedings and it is unnecessary for me to deal with it further.
- 53 The resolution of the factual contest as to the incident on 27 April 2013 turns on an assessment by the Commission of the credibility of the witnesses who gave evidence in this matter. I have carefully considered all of the oral testimony and the written evidence. I am satisfied that on 27 April 2013 at the Perth Train Station office both Ms Vimpany and Ms Blake entered the office at about 3:15-3:20pm and prepared to leave for the day. Unaware of the prior arrangement with the Station Coordinator on the morning shift, Mr Singh, Mr Hammon questioned Ms Vimpany and Ms Blake and informed them to continue working to their appointed finish time of 4:00pm.
- 54 I accept the testimony of Mr Hammon supported by Mr Pontarolo, that Mr Hammon has a strong tone of voice, being Scottish. To some extent, this was reflected in his evidence in the witness box. In particular, as to those present in the office at the time, I found Mr Geson to be an impressive witness. He no longer works for the Authority and therefore has no interest in the outcome of these proceedings. His recollection was Mr Hammon spoke to Ms Vimpany and Ms Blake normally, when requesting that they resume their station duties as rostered. This was also generally confirmed by Mr Pontarolo and Mr Singh. All three CSAs present in the office at the time, located only a short distance from the Station Coordinator partition, confirmed this. The office being an open plan office was of a size and shape that all witnesses said any person raising their voice or shouting, could be easily heard.
- 55 I am also satisfied that both Ms Vimpany and Ms Blake were not ambivalent about having to work to the end of their shift. They had been led to believe that they could finish work early by the previous Station Coordinator. It is only natural, that they would be somewhat disappointed that they could no longer leave early as planned. I accept on the evidence, that on leaving the office, both Ms Vimpany and Ms Blake may have "muttered" something and they had facial expressions reflecting that they were less than pleased with the decision made by Mr Hammon. This was the evidence of both Mr Hammon and Mr Geson, which evidence I accept.
- 56 Consistent with this state of affairs, both Ms Vimpany and Ms Blake then had time, on their own testimony, to reflect on Mr Hammon's direction to continue to work to 4:00pm, when they were on the platform outside the office. In my view, on all of the evidence, it is open to infer and I do infer, that both Ms Vimpany and Ms Blake were quite upset with Mr Hammon. Having discussed the matter, they both decided that they would confront Mr Hammon and raise the issue with him. This was the evidence of Ms Blake. They both decided to speak with Mr Hammon "because he shouldn't have spoken to us like that". I am therefore satisfied that Ms Vimpany entered the office at around 3:50pm with the purpose of confronting Mr Hammon as to the earlier exchange. I do not accept Ms Vimpany's evidence in chief, to the effect that she did not go looking for Mr Hammon and only went over to him, somewhat incidentally, after sighting him in the office.
- 57 In my view, both Ms Vimpany and Ms Blake were upset with Mr Hammon and I accept Mr Pontarolo's testimony, that when she entered the office, Ms Vimpany made a "beeline" for Mr Hammon, largely as described by the Authority's witnesses. I accept that Ms Vimpany did go up behind and to the side of Mr Hammon, and spoke to him in a strong and angry manner whilst pointing her finger at him. I accept that she spoke the words alleged. I accept that Mr Hammon was taken by surprise by Ms Vimpany's approach and responded to the effect that Ms Vimpany should leave the office. I also accept Mr Geson's testimony that Ms Vimpany did, on leaving the office, refer to Mr Hammon as an "ass" or a word to that effect.
- 58 Additionally, Ms Blake's testimony that when Ms Vimpany emerged from the office to go home, she was not upset or overly concerned is not consistent with Ms Vimpany's allegation that she had just been verbally abused and bullied by Mr Hammon, moments earlier. It is however, quite consistent with Ms Vimpany, having confronted Mr Hammon and having gotten her frustration and upset "off her chest", by speaking to Mr Hammon as she intended to do.
- 59 Importantly however, to my assessment of credit, is that shortly after the incident on 27 April, all three CSA witnesses, recorded the events they witnessed in writing. Their accounts of the events were formally recorded in emails to Mr Jordan, after 27 April, as referred to at pp 4-9 of the Agreed Bundle. In particular, Mr Geson testified that he made a handwritten note of the incident very shortly after it occurred, and he used that handwritten note to prepare his email to Mr Jordan.

- 60 In contrast, it is to be noted that Ms Vimpany was not going to do anything about the alleged bullying and intimidatory behaviour of Mr Hammon. It was only when she received the “please explain” Memorandum from the Authority of 8 May 2013, that matters seemed to take a different complexion for Ms Vimpany. It was not for a further one week after that, that Ms Vimpany put in writing her allegations against Mr Hammon. It is also to be noted, that there was some inconsistencies in the subsequent statements made by Ms Vimpany to the Authority, as to the events of 27 April 2013.
- 61 Accordingly, based upon the evidence and my findings, I am not satisfied that Mr Hammon conducted himself in an intimidating, threatening and aggressive manner as alleged. I am not persuaded that Mr Hammon entered Ms Vimpany’s personal space and yelled and screamed at her in the company of the Authority’s staff. I am not satisfied that Mr Hammon bullied, harassed or humiliated Ms Vimpany.
- 62 On the evidence however, I am satisfied that Ms Vimpany, when she did return to the office shortly prior to 4:00pm on 27 April, did shout at Mr Hammon and did engage with him in an inappropriate manner, pointing her finger at him and at his face whilst leaning over towards him. Such conduct was not appropriate conduct towards a supervisor.
- 63 Whilst in the proceedings there was reference to parties “self-resolving” interactions in the workplace in accordance with the Authority’s relevant policies, in my view, whilst this is to be encouraged, such self-resolution needs to be done in the appropriate manner and at the proper time and place. If Ms Vimpany and Ms Blake had been offended in any way by Mr Hammon’s earlier direction, the appropriate response would have been to request to meet Mr Hammon at a convenient time to all concerned, to discuss the matter.

Issue 3 – did any employee of the Authority act dishonestly in relation to the events of 27 April 2013?

- 64 Given the findings I have made above, there was a large gulf in the versions of events between Ms Vimpany and Mr Hammon, and others involved. This is not a case of there being subtle differences in descriptions of events that may be more nuanced in their assessment. Whilst it is possible that Ms Vimpany has, with the passage of time as of now, reconstructed events in her own mind to convince herself that events transpired as she said they did, regrettably, it is also open to conclude, and I do conclude, that both Ms Vimpany and Ms Blake were less than frank in their characterisation of the events which occurred on 27 April 2013, when they were first reported to the Authority, and in the subsequent investigation, earlier in 2013.
- 65 Four employees of the Authority, one of whom as I have already mentioned, no longer has any association with it, gave clear and consistent evidence as to the incident on 27 April, quite at odds with that given by Ms Vimpany. Their versions of the events, has been largely consistent, since their first reports in April and May 2013. It is open therefore to conclude, that Ms Vimpany in particular, has demonstrated a lack of candour in relation to these events.

Issue 4 – did the circumstances of the case warrant disciplinary action?

- 66 In the final result, the Authority, by letter of 17 October 2013 from Mr Italiano, imposed a penalty on Ms Vimpany of a reprimand. A reprimand is the lowest level penalty available under the disciplinary process set out in the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011. In the circumstances, the imposition of such a penalty was plainly appropriate. There is no warrant to disturb it. Furthermore, based on the evidence of the disciplinary process invoked, this was in accordance with the terms of the Agreement. Ms Vimpany and Ms Blake were given a full opportunity of being heard.
- 67 The investigation of the incident also appropriately sought input from all relevant witnesses. The fact that the Authority preferred the account of the Authority’s witnesses was a conclusion entirely open to it. Simply because both Ms Vimpany, supported in part by Ms Blake, presented one version of the events, that does not lead to the conclusion of equal probability, as submitted by the Union. The Authority, as any employer, is not required to adopt the investigative standards of the police. The investigation conducted was reasonable and fair. The conclusion reached was one fairly open in my view.
- 68 In any event, it is the evidence in these proceedings, which is finally determinative.

Conclusion

- 69 It is regrettable, and in my view, it was entirely unnecessary, that this matter has progressed to the point that it has. Had both Ms Vimpany and Ms Blake simply got on with their duties on 27 April 2013 after Mr Hammon’s initial direction to resume work, or attempted to “self-resolve” matters in an appropriate manner, none of the events set out in this decision would have occurred.
- 70 Accordingly, based upon the foregoing, the application is dismissed.

2014 WAIRC 00825

DISPUTE RE ALLEGED DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

FRIDAY, 1 AUGUST 2014

FILE NO/S

CR 3 OF 2014

CITATION NO.

2014 WAIRC 00825

Result	Application dismissed
Representation	
Applicant	Mr K Singh
Respondent	Ms J Rhodes of counsel

Order

HAVING heard Mr K Singh on behalf of the applicant and Ms J Rhodes of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00753

**DISPUTE RE ALLEGED DENIED PROCEDURAL FAIRNESS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2014 WAIRC 00753
CORAM	:	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	MONDAY, 14 JULY 2014
DELIVERED	:	WEDNESDAY, 23 JULY 2014
FILE NO.	:	CR 9 OF 2014
BETWEEN	:	STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		Respondent

CatchWords	:	Industrial law (WA) – Jurisdiction – Industrial matter – Public Sector Standard – Employment Standard – Investigation/enquiry regarding allegation against former employee – Notation on employee's file – Procedural fairness – Penalty – Employee not seeking re-employment – Employee did not take up opportunity to make submission or to meet investigator – Failure to pursue diligently
Legislation	:	<i>Interpretation Act 1984</i> s 5 <i>Industrial Relations Act 1979</i> s 7, s 7(1a), s 23(1), s 23(2a), s 44 <i>Public Sector Management Act 1994</i> s 76(5), s 80A, s 97(1)(a) <i>Public Sector Reform Act 2010</i> s 94 <i>Public Sector Management (Breaches of Public Sector Standards) Regulations 2005</i>
Result	:	Application dismissed
Representation:		
Applicant	:	Mr D Stojanoski of counsel
Respondent	:	Mr D Matthews of counsel

Reasons for Decision

- 1 The matter in dispute between the parties is set out in the Memorandum of Matters Referred for Hearing and Determination under s 44 of the *Industrial Relations Act 1979* (the IR Act) in the following terms:
1. Mr Joseph Munforti, a member of the applicant, was employed by the respondent as a teacher.
 2. On 5 August 2011, Mr Munforti ceased employment with the respondent.
 3. On 9 August 2011, the respondent wrote to Mr Munforti advising that it had been notified of an alleged incident said to have occurred on 10 March 2011 between Mr Munforti and a student. As Mr Munforti was no longer an employee of the respondent, the respondent did not at that time conduct an investigation, although it continued to make enquiries. Mr Munforti did not at that time have an opportunity to respond as he was not an employee.
 4. Subsequently, the respondent advised Mr Munforti that although he was not subject to a finding or possible penalty, the information obtained by the respondent lead to his employment record being marked "not to be

permitted future employment with the Department of Education without prior reference to the Director, Standards and Integrity Directorate”.

5. The applicant says that Mr Munforti has been denied procedural fairness and suffers a penalty in the form of the notation on his employment record.
6. The applicant seeks that the Commission order:
 - (1) THAT the respondent remove any caveats from Mr Munforti’s employment record.
 - (2) THAT the respondent agree that no penalty or finding has been made against Mr Munforti in these circumstances.
7. The respondent says that:
 - (1) The Commission has no jurisdiction to hear the matter.
 - (2) The notation on the file is not a prohibition on employment.
 - (3) A further investigation of the matter would be difficult because of the passage of time.
 - (4) The application ought to be dismissed.

Background

- 2 Mr Joseph Munforti, a member of the applicant, was employed by the respondent as a teacher. He resigned and ceased employment on 5 August 2011. Until that time, Mr Munforti had not been subject to any disciplinary proceedings in his employment with the respondent.
- 3 By letter dated 9 August 2011 (exhibit A1), Mr Geoff Davis, Manager, Investigative Services, Standards and Integrity of the Department of Education (the Department), advised Mr Munforti that the Department had been notified on 11 March 2011 of an alleged incident said to have occurred between Mr Munforti and a student on 10 March 2011. As Mr Munforti was no longer an employee, the respondent would not conduct an investigation pursuant to Part 5 of the *Public Sector Management Act 1994* (PSM Act), and therefore he would not be subject to any findings or penalty. The letter advised, however, that ‘in order for the Department to meet the broader expectations of the community, enquiries into this matter will be continued’.
- 4 By letter dated 26 March 2012 (exhibit A2), Mr Michael Cullen, Director, Standards and Integrity of the Department informed Mr Munforti that enquiries were ‘now complete and although you are not subjected to a finding or any possible penalty, the information obtained during the inquiry process is such that it is my intention to mark your employment record *‘Not to be permitted future employment with the Department of Education without prior reference to the Director, Standards and Integrity Directorate’*. The letter went on to say that prior to taking that course of action, the respondent was providing Mr Munforti with an opportunity to make a written submission in regards to the intended action noted above. It said that ‘[i]n accordance with procedural fairness requirements, I have enclosed a copy of the investigator’s report for your information. The material is provided to assist you in responding to the action I intend to take’. A copy of the Standards and Integrity Investigation Report (the report) (exhibit A4) was attached.
- 5 By letter dated 3 May 2012 (exhibit A3), Mr Cullen, in referring to his correspondence of 26 March 2012, noted that Mr Munforti was provided with an opportunity to respond to the proposed action and that on 5 April 2012, Mr Munforti had contacted the respondent and informed Ms Kristy Gulland, a Senior Investigator with the Standards and Integrity Directorate, of his interest in arranging an appointment to discuss the incident the subject of the report. He agreed to contact Ms Gulland prior to the close of business on 13 April 2012 to arrange a mutually convenient time for the meeting to occur, however, as at 3 May 2012, the date of the letter, Mr Munforti had not contacted Ms Gulland. The letter then went on to say that as a consequence, his employment record had been marked *‘Not to be permitted future employment with the Department of Education without prior reference to the Director Standards and Integrity Directorate’* (the notation).
- 6 There is no evidence that Mr Munforti has applied for and been refused employment with the respondent or that he has any intention of applying in the future.
- 7 The applicant says that:
 1. The notation constitutes a penalty imposed on Mr Munforti by the respondent and that there is a direct link between employment and the notation;
 2. The penalty has been imposed in circumstances where Mr Munforti was denied procedural fairness at each stage of the process;
 3. The penalty imposed is unlawful as the only penalties available are those set out in s 80A of the PSM Act;
 4. The notation constitutes a penalty because it is a detriment to Mr Munforti’s livelihood; alternatively,
 5. The notation affects Mr Munforti’s legitimate interests. If he applies for employment, there is a prejudice in the respondent’s mind. The notation is the same as saying that he will not be permitted future employment at all.
- 8 The respondent says that the matter is not an industrial matter in that while some matters of dispute between a person who is not a current employee of the employer and the employer may be industrial matters, not every such dispute is ‘really and truly a dispute of an industrial nature, susceptible of just resolution under the’ *Industrial Relations Act 1979* (the IR Act). The matter does not constitute a refusal to employ as Mr Munforti has not applied for and been refused employment. Rather, the issue relates to the process an employer adopts to gather information about an applicant for employment, and the presence in the mind of the employer of a reservation in relation to the person. That is not a matter properly for regulation by the Commission.
- 9 Further, the respondent says that the matter of recruitment and appointment of persons in the WA public sector is the subject of a Public Sector Standard. The IR Act, under s 23(2a), together with s 97(1)(a) of the PSM Act, excludes the Commission’s jurisdiction in relation to such a matter.

- 10 Alternatively, the respondent says that even if a penalty was imposed, Mr Munforti was afforded natural justice yet he failed to take up the opportunities provided to him.
- 11 The respondent also says that the matter is now stale as Mr Munforti resigned three years ago and the applicant has not dealt with the matter expeditiously. The respondent is entitled to have moved on in that time.

Issues and Consideration

Jurisdiction

- 12 The Commission has jurisdiction to enquire into and deal with any industrial matter (s 23(1) IR Act). An industrial matter is defined in s 7 of the IR Act. Relevant parts of that definition are:

... any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —

- (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
- (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
- (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
- (ca) the relationship between employers and employees;

...

and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute but does not include —

...

- 13 Section 7(1a) qualifies that definition in the following terms:

(1a) A matter relating to —

- (a) the dismissal of an employee by an employer; or
 - (b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,
- is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended.

- 14 In *Hotcopper Australia Ltd v Saab* (2002) 82 WAIG 2020, Anderson J, with whom Parker and Hasluck JJ agreed, said:

‘Industrial matter’ – s 7 and s 7(1)(1a)

19 *Prima facie* a claim by an employee (as distinct from an ex-employee) that he has not received a benefit provided for in the employment contract falls within the definition of ‘industrial matter’ in s 7 of the Act. It is a matter ‘relating to the ... rights ... of [the] employee’ within the general words of the definition and it is a matter relating to ‘the wages, salaries, allowances or other remuneration of ... [the employee] in respect of ... [his] employment’ within subpar (a) of the definition and is a matter squarely within the matters declared by s 7(1)(1a) to be ‘an industrial matter for the purposes of this Act ...’. Thus, a dispute concerning either the denial of a money entitlement provided for in the contract or the denial of an entitlement in a form other than money would be within the literal ambit of the definition of ‘industrial matter’ in s 7. So much was assumed by this Court in *Belo Fisheries v Froggett* (1983) 63 WAIG 2394 per Olney J at 2396 at least with respect to money entitlements. It would also plainly be a claim of the kind described in s 29(1)(b)(ii) and so referable to the Commission by the employee himself.

20 The question whether a dispute is an industrial matter, if it is a dispute between a former employer and an ex-employee, was answered in the negative by this Court in a series of decisions which may be referred to as the ‘Pepler’ line of cases, they being *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia* (1987) 68 WAIG 11; *Kounis Metal Industries Pty Ltd v Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch* (1992) 73 WAIG 14; *Coles Myer Ltd trading as Coles Supermarkets v Coppin & Ors* (supra); *The Federated Miscellaneous Workers Union of Australia (WA Branch) v Nappy Happy Hire Pty Ltd t/a Nappy Happy Service* (1994) 74 WAIG 1493 and *Sakal v T O’Connor & Sons Pty Ltd* (1995) 75 WAIG 1509. In these cases, it was held, in effect, that a claim for a monetary sum, whether it had accrued due under the contract or whether it was in the nature of a claim for damages for breach of contract, was not an industrial matter if the employment relationship had ended. The effect of these cases was, however, reversed by the enactment in May 1995 of s 7(1)(1a) which provides:

‘(1a) A matter relating to –

- (a) the dismissal of an employee by an employer; or
- (b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,

is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended.’

...

Was this claim an industrial matter?

- 26 It must be recognised that there is a limit to what is and what is not an industrial matter in the master/servant context for the purposes of the *Industrial Relations Act 1979* even although the definition of the term in s 7 would appear to be far-reaching in that context. Parliament cannot be taken to have intended that *any* matter relating in *any* way to the duties of employers as regards contractual benefits is a matter that may be dealt with by the Commission as an industrial matter, although it is possible to read the definition of industrial matter as expansively as that. Notwithstanding the enactment of s 7(1)(1a), the definition must be read down by reference to the scope and purpose of the Act as a whole 'and so read, must be confined to [matters] of an industrial nature': *Slonin v Fellows* (1984) 154 CLR 505. Otherwise, as Kennedy J pointed out in *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia (Pepler's Case)* (*supra*) at page 18, a vast range of powers would be available to the Commission which it could never have been thought appropriate to confer on it. Take, for example, a reference by an employee of a dispute with respect to a safety matter. The employee may fairly allege that his implied contractual entitlements include providing him with a reasonably safe workplace, and safe and suitable equipment, and that the failure to do so, being a matter relating to a benefit under the contract of service within the general words of the definition of industrial matter in s 7, is an industrial matter. Subject to s 7(3), it would be difficult to deny the employee's standing to refer the matter to the Commission under s 29(1)(b)(ii) and, again subject to s 7(3), it would be difficult to deny the Commission's power to deal with the matter by making appropriate orders in order to settle the dispute. But supposing the employee's reference included a claim that, because he had been denied the benefit of a safe workplace in breach of the implied agreement, he had suffered loss through injury. To my knowledge, it has not been suggested that a claim by an employee for damages for injuries sustained in the course of his employment, in consequence of a breach of the employer's obligation under the contract of employment to provide a safe working environment, is a matter which can be dealt with by the Commission, even although it would be within the reach of the literal words of the definition of industrial matter.
- 27 I think it is impossible to attribute to parliament an intention that the Commission should be a tribunal with power to deal with the full range of conflicts and causes of action that might possibly arise between master and servant, including between corporations and their highly-paid executives and top management. In my opinion, a line must be drawn at some point to mark out the boundary beyond which it was never intended that the Commission's powers to settle disputes should be exercised and I think that the line must be drawn by reference to the intrinsic nature and circumstances of the particular dispute, the question being whether it is or is not really and truly a dispute of an industrial nature, susceptible of just resolution under the Act.
- 15 Therefore, the Industrial Appeal Court drew a line dividing matters 'by reference to the intrinsic nature and circumstances of the particular dispute' and whether it is 'really and truly a dispute of an industrial nature'. At one point, matters were divided according to whether the employment relationship was ongoing or had ceased and was not to be re-established. However, the legislation now clearly provides that a number of different matters are industrial matters even though the employment relationship has not yet or will not come into existence, such as refusal to employ.
- 16 The issue of refusal to employ is clearly an industrial matter as (see s 7(1), 'industrial matter' (c) and *RGC Mineral Sands Ltd & Anor v Construction, Mining, Energy, Timberyards, Sawmills, Woodworkers Union of Australia WA Branch and Ors* (2000) 80 WAIG 2437; [2000] WASCA 162).
- 17 The conditions to apply in future employment may be included. The conditions which are to apply after the employment has ended are included. Unfair dismissal and denied contractual benefits claims are included even though the employment relationship has ended.
- 18 Even though the applicant says that the notation is effectively declaring that Mr Munforti will not be permitted to be employed at all, this is not the plain meaning of the notation. It says that he is not to be permitted to be employed without a particular thing occurring. As Mr Munforti has not sought employment with the respondent, the notation has not come into effect. Unless he does so, it may never come into effect. In that sense, it is hypothetical.
- 19 Therefore, there has been no refusal to employ. Nor does the notation contain a refusal to employ in the future.
- 20 The dispute is about the fairness of the respondent, the former employer, undertaking enquiries about an allegation of breach of discipline during the employment, without providing the employee with an opportunity to be heard; placing a notation on its employment records, requiring a particular thing to happen in the event that there is consideration given to employing Mr Munforti. It is also about whether the notation constitutes a penalty.
- 21 I will deal later with the issue of the respondent having a prejudiced mind as to any future employment, as asserted by the applicant. On its face, the notation is merely that the Director of Standards and Integrity is to have some input into any such decision.
- 22 There is no authority which provides that the definition of 'industrial matter' either includes or excludes the considerations an employer might have or not have in appointing employees, or any records it might make on the files of its former employees which might affect those former employees should they seek future employment.
- 23 Given the scope of the definition of 'industrial matter', I conclude that a dispute about the circumstances under which enquiries into conduct of a former employee relating to matters arising during the employment, resulting in an employer placing a note on the file of a former employee as to conditions for consideration of re-employment of the former employee, is a matter affecting or relating to the duties of employers or the rights of employees. It relates to matters occurring within the employment and goes to the prospect of re-establishing the employment relationship, the essence of the industrial matter. Accordingly, it falls within the definition of 'industrial matter'.

- 24 The respondent says that the matter relates to the recruitment or appointment of Mr Munforti and accordingly, s 23(2a) of the IR Act and s 97(1)(a) of the PSM Act exclude the Commission's jurisdiction from dealing with a matter where there are regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of Public Sector Standards. The Employment Standard is one which prescribes that the employer is required to apply principles of merit, equity and transparency in the process of making appointments to fill vacancies. The *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* set out a procedure to deal with such matters. As the Industrial Appeal Court said in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244; (2005) 86 WAIG 231, per Wheeler and Le Miere JJ:
- 53 The 'matter' in respect of which the procedure may be prescribed pursuant to s 97(1) is the matter of the 'breaching of public sector standards'. In the present case, there is a standard dealing with 'Recruitment, Selection and Appointment', and that is the 'matter' in respect of which the procedure is prescribed. That matter having been dealt with by the prescribing of a procedure pursuant to s 97(1)(a), it would follow, in our view, that the jurisdiction of the Arbitrator is therefore excluded in respect of it.
- 54 ... it excludes jurisdiction in relation to any 'matter' in respect of which a procedure is prescribed. That is, it excludes jurisdiction in relation to the 'matter', not in relation to particular allegations. The matter in this case is the breach of a very broad standard relating to the appointment of employees.
- ...
- 56 ... s 80E(7) must be read as excluding jurisdiction in respect of a matter, wherever there is a matter in respect of which a relevant standard has been prescribed and in respect of which procedures of the type described in s 97(1)(a) have been prescribed. In this case, as we have noted, a standard has been prescribed in relation to selection and appointment, and the result of the prescription of procedures pursuant to s 97 of that standard is that the jurisdiction of the Arbitrator is excluded in relation to the whole of that 'matter', regardless of the precise allegations of misconduct or unfair conduct which may be made in respect of it.
- 25 The issue before the Commission is not about whether the respondent will or will not appoint Mr Munforti according to the requirements of the Employment Standard. It is about whether the respondent's action in making the notation is fair in the circumstances and whether the notation constitutes a penalty against Mr Munforti. In those circumstances, it is not a matter to which s 23(2a) applies because it is not a matter, at this stage of the process, relating to the Employment Standard. Were Mr Munforti to apply for employment and the respondent rely upon the notation in a way which was not in accordance with the principles of merit, equity and transparency in particular, then that may be a matter which is beyond the jurisdiction of the Commission.
- 26 In those circumstances, I find that there is no jurisdictional impediment to the Commission dealing with the matter.

Merits

- 27 Neither party called any evidence during the hearing of this matter. A number of documents were received into evidence without objection. My consideration of the facts in this matter is therefore based on what is contained in the documents. The applicant says that Mr Munforti has been subject to a penalty. The PSM Act does not refer to a 'penalty' being imposed on an employee following a finding of a breach of discipline or at any other time. It refers to 'disciplinary action' (s 80A, PSM Act). The range of disciplinary actions which may be applied to an employee is set out. According to s 76(5) of the PSM Act, the Commissioner's Instructions may specify the disciplinary action that may be taken in respect of a former employee.
- 28 The *Interpretation Act 1984* sets out the meaning of terms used in written law in this state. It includes 'penalty', which 'means a fine, imprisonment, or other form of punishment, including the suspension or cancellation of a licence, registration or permit and disqualification from obtaining a licence, registration or permit' (s 5).
- 29 In common usage, penalty means:
1. a punishment imposed or incurred for a violation of law or rule.
 2. a loss or forfeiture to which one subjects oneself by non-fulfilment of an obligation.
 3. that which is forfeited, as a sum of money.
 4. consequence or disadvantage attached to any action, condition, etc. ...
- (*The Macquarie Dictionary*, (3rd ed, 1997))
- 30 The respondent advised Mr Munforti that there was an allegation against him, and although there would be no investigation under Part 5 of the PSM Act, the respondent would continue to make enquiries.
- 31 I note in passing that s 76 of the PSM Act was amended by s 94 of the *Public Sector Reform Act 2010* to insert a new subclause (4) in the following terms:
- (4) A former employee who —
- (a) may have committed a breach of discipline; and
 - (b) was an employee to whom this Part applied at the time of the suspected breach,
- is, in circumstances specified in the Commissioner's instructions, to be taken to be an employee for the purposes of this Part even though the person has ceased to be employed in the Public Sector by or under an employing authority.
- 32 This amendment came into effect from 28 March 2011. Therefore, there was nothing preventing the respondent from formally commencing or continuing an investigation of the allegation which was notified to the respondent on 11 March 2011. Mr Munforti was still an employee of the respondent for a further five months after the alleged incident, and four and a half months after the legislation was amended.

- 33 In any event, Mr Munforti was notified by the letter from the Manager, Investigative Services, Standards and Integrity on 9 August 2011 that the respondent intended to continue to make enquiries. He was not interviewed and, according to the report, he was not 'provided any opportunity to respond or provide evidence. As such, no finding can be made as to Mr Munforti's culpability or otherwise' (exhibit A4, [3.1]). The report also notes that 'the circumstances surrounding Mr Munforti requesting possession of the laptop from Brendon remain unclear given the inconsistencies in Mr Munforti's, Brendon's and Tyson's accounts' (exhibit A4, [3.2]). The report goes on to note '[w]hilst Mr Munforti's claims ...'. In this way, the report suggests that whilst Mr Munforti was not interviewed during this enquiry, he may have provided his version of events to the then school principal, Mr Trevor Hunter.
- 34 I note that the Initial Reporting Form which was attached to the report appears to have been completed by the 'reporting person', Mr Hunter, the school principal at the time. This form contains comments that Mr Munforti stated certain things. This raises an inference that Mr Munforti was interviewed by the school principal prior to the initial report of the incident being made.
- 35 I find that, notwithstanding that the report says that no conclusions can be reached, in fact conclusions have been reached. It says in a number of places that 'it is reasonable to conclude' (see exhibit A4, [3.2], [3.3], [3.4], [3.5] and [3.6.2]). Of particular concern is that at [3.6.1], [3.6.2] and [3.6.3] it records that:
- 3.6.1 Both Brendon and Tyson state Mr Munforti raised a closed fist at Brendon which is inconsistent with the statement of Harlen and slightly different to the information provided in the IRF by Mr Hunter which suggests Mr Munforti initially raised a clinched fist '*but almost immediately changed the action to that of an open hand as if preparing to slap the student.*' Whilst this difference is acknowledged, either action is considered to be an inappropriate action by a teacher towards a student.
- 3.6.2 It is reasonable to conclude that Mr Munforti did raise his hand, either open or closed as a result of the information stipulated in point 3.6 and that such action is considered to be threatening behaviour.
- 3.6.3 Mr Hunter's information which states Mr Munforti advised him that he raised his hand to convey his disgust to the student cannot be considered as mitigation for Mr Munforti's actions. Any form of threatening behaviour by a teacher towards a student is not acceptable conduct and contravenes *Relationships with others* within the Office of the Public Sector Standards *Code of Ethics*.
- 36 However, it notes under 4 – Issues Arising, [4.2]:
- As this matter was not managed under the provisions of Part 5 of the Act for valid reasons, Mr Munforti's account has not been obtained, considered or tested.
- 37 At [4.3] it notes:
- As this matter was not managed under the provisions of Part 5 of the Act for valid reasons, no findings can be made to Mr Munforti's culpability or otherwise.
- 38 Under the heading of 'Recommendation', the report says:
- 5.1 In light of the information collected to date, it would appear that Mr Munforti has acted in an aggressive and threatening manner towards a student. Should Mr Munforti have remained a Department employee, I would have recommended a formal allegation letter be issued to him seeking his response.
- 5.2 As Mr Munforti is no longer a Department employee, it is recommended that Mr Munforti's employment record number be marked '*Not to be permitted future employment with the Department of Education without prior reference to the Director Standards and Integrity.*'
- 39 The report is signed by Ms Gulland, Senior Investigator, Standards and Integrity, and dated 16 March 2012.
- 40 The report appears to be of an investigation into Mr Munforti's conduct, it contains conflicting comments in that it suggests that conclusions have been drawn but goes on to say that no conclusions have been drawn. It notes the conflict in the various accounts but concludes that whichever account is accepted, the conduct is inappropriate. It notes that Mr Munforti's account has not been obtained, considered or tested, but refers to an account given to Mr Hunter by Mr Munforti saying it cannot be considered as mitigation. It says that in light of the information collected 'it would appear that Mr Munforti has acted in an aggressive and threatening manner towards a student'. It notes that had he been continuing in employment, then a formal allegation would have been made against him, and recommends that the notation be made on his file.
- 41 It is difficult to reconcile:
1. What appears to be analysis of evidence, judgments as to acceptability of conduct and conclusions as to the conduct;
 2. A statement that if Mr Munforti had continued to be employed, a formal allegation would have been made against him;
 3. A recommendation that a notation be made; and
 4. The statement that no findings can be made as to Mr Munforti's culpability or otherwise,
- without forming the view that the notation is not a 'consequence or disadvantage attached to any action, condition', that is, a penalty. Had the report simply recorded the allegation and the various accounts, it may appear to be a record of an allegation. The repeated comments that 'it is reasonable to conclude', along with comments that either of raising a closed fist or 'an open hand as if preparing to slap the student ... is considered to be an inappropriate action by a teacher towards a student' (exhibit A4, [3.6.1]), followed by a comment that either 'is considered to be threatening behaviour' (exhibit A4, [3.6.2]), make the report appear to be one in which conclusions as to the conduct are drawn. In this context, the notation on the file is not merely a procedural step should Mr Munforti apply for employment, but is a consequence of those conclusions.
- 42 The letter to Mr Munforti dated 26 March 2012 invites him to make a written submission in regard to the 'intended action' of the Director of Standards and Integrity to mark his file. It says that the report 'is provided to assist you in responding to the

action I intend to take'. There is no invitation for him to respond to the allegation or make a submission regarding the substance of the report but rather in respect of the marking of the file.

- 43 Given those circumstances, it seems to me that the respondent has undertaken an unfair process which has the potential to result in the respondent ultimately imposing a penalty by way of not permitting Mr Munforti's future employment without prior reference to the Director Standards and Integrity, who has already seen a report which appears to reach conclusions about Mr Munforti's conduct, that he has acted in an aggressive and threatening manner towards a student, and at the same time says that his side of the story has not been obtained.
- 44 I am of the view that the report has the potential to affect Mr Munforti's interests in the future. The question arises as to what, if anything, ought to be done, or could practicably be done. There is no evidence that it has actually affected Mr Munforti and its future effect is hypothetical, depending on whether he seeks employment in the future.
- 45 Further, I note that whilst Mr Munforti was not invited to make submissions about the allegations, he was invited to make a written submission about the notation only after the report came down. He did not do so. He sought an opportunity to meet with the Senior Investigator, the author of the report, and Mr Munforti was to get back to her to arrange a mutually convenient time, but he did not do so.
- 46 This matter was the subject of an application filed by the applicant on 5 April 2013 (C 197 of 2013), 11 months after Mr Munforti was advised of the notation having been made. However, that file was closed on 6 November 2013, following the applicant's failure to advise the Commission of any need to keep the file open. A further application was filed on 4 April 2014, five months later. The applicant has not diligently pursued this matter.
- 47 After three years, it would not now be practicable for the respondent to investigate further, particularly regarding the recollections of the witnesses, all of whom appear to have been children. The matter is now stale. Having said that, I am surprised that, in all of the circumstances, there is no evidence to suggest that Mr Munforti has made any efforts to provide the respondent with his perspective on the matter such as to enable the respondent to properly reconsider its position, and if he has not done so, it may be appropriate for him to consider it. The respondent could then at least keep his correspondence on its file in case Mr Munforti ever needs to have resort to the respondent for possible employment in the future.

Conclusion

- 48 I find that the matter is an industrial matter and the Commission has jurisdiction to deal with it as it does not relate to a matter in respect of which there is a procedure referred to in s 97(1)(a) of the PSM Act.
- 49 The report appears to have reached conclusions about Mr Munforti's conduct, even though it says conclusions cannot be reached, which caused the respondent to make the notation without allowing Mr Munforti to make a submission about the allegations. It invited a submission about the intention to make the notation but not about the material which formed the basis for that notation. The invitation to make the submission about the notation is analogous to inviting a submission about a proposed penalty after findings of a breach of discipline or misconduct have been made. In that context, the notation has the appearance of a penalty.
- 50 However, Mr Munforti did not respond to the invitation to make a submission, did not follow-up about a time to meet the Senior Investigator, and the applicant has failed to pursue the matter in a timely manner. Further, there is no evidence that Mr Munforti has suffered or will suffer any detriment as there is no indication that he has sought or ever will seek to be employed by the respondent.
- 51 In those circumstances, the matter will be dismissed.

2014 WAIRC 00754

DISPUTE RE ALLEGED DENIED PROCEDURAL FAIRNESS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE WEDNESDAY, 23 JULY 2014
FILE NO/S CR 9 OF 2014
CITATION NO. 2014 WAIRC 00754

Result Application dismissed

Order

HAVING heard Mr D Stojanoski of counsel for the applicant and Mr D Matthews of counsel for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 00625

DISPUTE RE CLASSIFICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2014 WAIRC 00625
CORAM : COMMISSIONER S M MAYMAN
HEARD : TUESDAY, 23 JULY 2013, TUESDAY, 3 DECEMBER 2013, WEDNESDAY, 4 DECEMBER 2013
DELIVERED : FRIDAY, 18 JULY 2014
FILE NO. : CR 51 OF 2012
BETWEEN : UNITED VOICE WA
 Applicant
 AND
 THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Industrial Law (WA) - Application for classification as untrained teacher - Relevant principles to be applied - Work Value Principle - Seeking Teacher Registration Board limited authority to teach - Jurisdiction raised in the context of enforcement proceedings - Application dismissed - *Industrial Relations Act 1979* (WA) s 44, s 83(3)
Legislation : *Industrial Relations Act 1979* (WA), *Teacher Registration Act 2012* (WA), *School Education Act 1999* (WA), *Public Sector Management Act 1994* (WA)
Result : Application dismissed
Representation:
Applicant : Mr M Amati (as agent)
Respondent : Mr D Matthews (of counsel)

Case(s) referred to in reasons:

Springdale Comfort Pty Ltd t/as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

Crewe and Sons Pty Ltd and Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 2623

Reasons for Decision

- 1 This is an application filed pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) whereby Ms Wendy Spence, a member of the United Voice WA (the applicant) is employed as an education assistant by the Director General, Department of Education (the respondent).
- 2 The application of matters as referred by the Commission is as follows:
 1. The applicant will lead evidence to support our contentions that:
 - (a) The duties carried out by Ms Spence are teaching duties in that these are intrinsically part of the educational services for students with disabilities in government schools as provided by the respondent.
 - (b) Further, Ms Spence's duties and responsibilities - such as planning, assessing and reporting, as well as the managerial structure at the school - on specific activities, have been customarily differentiated from those pertaining to swimming instructors (or VacSwim), as these are provided for in the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011* due to essentially the substantive differences between such roles.
 - (c) The activities carried out by Ms Spence are consistent with the tenets of inclusivity in educational services found in the curriculum, as framed by the School Curriculum and Standards Authority; as well as embodied in the Schools Plus program of the respondent.
 - (d) The specific terms of employment - as an education assistant - of Ms Spence at Burbridge School are an anomaly, when compared with the past and present employing practices of the respondent in respect of swimming teachers in education support centres.

2. The applicant seeks relief as follows:
 - (a) A declaration that the duties and responsibilities of Ms Spence are teaching functions.
 - (b) A declaration that such duties are beyond the scope of the duties and responsibilities of an education assistant, as per Ms Spence terms of employment.
 - (c) An order that the respondent make an application to the Teacher Registration Board for a limited authority to teach; where Ms Spence is the nominee of that application.
3. The respondent says Ms Spence is, and at all times has been, employed pursuant to a contract of employment under which she is an education assistant and not a teacher.
4. The respondent opposes an order being made that it make or support an application for Ms Spence to have limited registration pursuant to section 17 *Teacher Registration Act 2012* because the respondent says Ms Spence has never held a teaching position (the term used within section 17(a)) within the Department and the respondent does not wish to offer Ms Spence a teaching position.
5. The respondent considers that any duties Ms Spence has carried out pursuant to her contract of employment in relation to the pool at Burbridge School were not sufficient for it to be said that she has ever held a teaching position and says that to be the holder of a teaching position within the Department, even pursuant to section 17 *Teacher Registration Act 2012*, a person must be capable of discharging the full duties of a teacher as set out in section 64(1) *School Education Act 1999* and clause 12(1) *Teachers (Public Sector Primary and Secondary Education) Award 1993*.
6. The respondent says that Ms Spence has at all times performed duties within her contract of employment as an education assistant, even when performing duties in relation to the pool at Burbridge School.
7. The respondent says, with particular relevance to this matter, that the job description form for a Level 3 education assistant makes it clear that Level 3 education assistants assist teachers in the delivery of education programmes which may include designing, implementing and maintaining behaviour management plans for students (which Ms Spence did) and that Level 3 education assistants undertake tasks with students within or outside the school that involve supervision of students without the presence of a teacher (which Ms Spence did). That is, the respondent says that Ms Spence has always acted within her contract of employment as an education assistant and has never carried out the duties of a teaching position.
8. Even if, which is not admitted, Ms Spence may have, alone, performed duties in relation to the pool at Burbridge School at some times which would normally have been performed by a teacher the respondent says:
 - (a) this should not have occurred;
 - (b) the performance of those duties did not make Ms Spence a teacher or make it accurate to say she was performing the duties of a teaching position to the extent or in the way that she was, or should be, a teacher; and
 - (c) Ms Spence will not in the future perform those duties alone as the current principal of Burbridge School, unlike some principals of Burbridge School in the past, insists that a teacher be present when students are in the pool.
9. The respondent opposes a declaration being made that the duties Ms Spence has performed in relation to the pool at Burbridge School are properly described as being those of a teaching position.
10. The respondent opposes a declaration being made that the duties Ms Spence performed in relation to the pool at Burbridge School were outside of her contract of employment as an education assistant.
11. The respondent says that the past employment of education assistants as untrained swimming teachers is not relevant to the present application for reasons in relation to which evidence will be led at hearing.
12. The respondent says that the position of swimming instructor under the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011* is not relevant to the present application for reasons in relation to which evidence will be led at hearing.
13. The respondent opposes an order being made that it make or support an application to the Teacher Registration Board that Ms Spence have limited registration as a teacher because:
 - (a) the respondent has never employed Ms Spence as anything other than an education assistant and there is a contract in place between the respondent and Ms Spence under which she is an education assistant;
 - (b) the respondent wishes to continue to employ Ms Spence as an education assistant pursuant to the contract of employment;
 - (c) the respondent has not used Ms Spence in a teaching position and, even if it had, which is denied, does not wish to use her in a teaching position in the future;
 - (d) the respondent does not wish to, using the language in section 17(a) *Teacher Registration Act 2012*, offer Ms Spence a teaching position because Ms Spence is, in the opinion of the respondent, not qualified to be employed in a teaching position; and
 - (e) there is nothing unfair about the respondent not making or supporting such an application.

Applicant

- 3 Ms Wendy Lorraine Spence gave evidence she was first employed at Burbridge School (the School) on 28 April 1998 as the swimming teacher when she was employed by the principal at the time, a Mr John Brigg (exhibit United Voice 1). It was the role of the witness to stand in for the swimming teacher Ms Margaret Owen while she was on long service leave.

Dear Wendy

Further to my recent telephone call I want to confirm that you are the recommended candidate for the swimming teacher's position at Burbridge School in term 2, 1998. Please confirm your acceptance of the offer of the position in writing.

The swimming teacher's position is four days a week - Mondays to Thursdays. The hours are 8:30am to 3.10pm. Staff meetings are every second Tuesday at 8:00am. The position commences on Monday 28 April and finishes on Thursday 2 July. You will be responsible to the principal of the school.

It would be very helpful to you and to us if you could spend some time shadowing Margaret Owen here at work before the end of this current term.

Yours faithfully

JOHN BRIGG

PRINCIPAL

- 4 The witness gave evidence that Ms Owen returned to the swimming teacher's job and Ms Spence spoke to the administrative staff, in particular the deputy principal, and went onto the relief list as the swimming teacher and as an education assistant. The witness gave evidence that she has been at the school since 1998.
- 5 The witness gave evidence that in 2005 Ms Owen's son became ill and Ms Owen went on further leave and a teacher went into the actual position in term 1. In term 2 Ms Spence was approached by Ms Cole the then principal at Koondoola Primary School, a satellite class of the School. The witness was asked if she would take on the role of swimming teacher commencing in term 2 which she accepted.
- 6 The duties of swimming teacher include developing Individual Education Plans (IEP's). The witness confirmed that she developed such plans as part of the children's health education aspect of the curriculum. The witness drew the Commission's attention to the respondent's swimming and water safety continuums. It was explained that these were usually applied during vacation swimming and in term swimming however in the case of children at the School these were children with special needs who were not capable of carrying out all the activities identified on the continuum therefore the activities required some modification (exhibit United Voice 2).
- 7 The witness was asked whether she modified programmes for her special needs students. Ms Spence answered in the affirmative describing a series of portfolio sheets she drew up for the students in 2006 detailing the specific skills reached. For example, Mitchell de Bettencor was identified as needing to:

Mitchell will be assisted to return his left arm to his hip (six times over the semester) ... Mitchell will participate in stretching and mobility activities in the water. He will be assisted and encouraged to explore and experiment with the water environment.

Wendy Spence

Swimming Teacher

(exhibit United Voice 5A)

- 8 The witness gave evidence that in October 2006 she was being paid as an untrained swimming teacher under the relevant teachers' award/agreement (ts 16). The witness had a performance management review meeting with the deputy principal. Following the meeting correspondence was received by the witness:

Dear Wendy,

...

You are an amazing school team member, Congratulations.

The meeting was very constructive. Your professionalism and dedication is seen within the swimming classes and around the school, especially the time you have put into Burbridge School's quiz night.

You came to the meeting prepared with your Learning Journal and Professional Learning Log and you were able to respond to review questions with ease.

You will stay as the school swimming teacher until the end of the year, which is excellent.

I would like you to research what professional development is out there for gross and fine motor movement, either in or out of the water for students with multiple disabilities. If it is applicable to the school and your position here I shall recommend that you attend.

Congratulations on what you have achieved and bring to the school culture.

I look forward to meeting with you next year.

Regards,

Lorraine Johnston

Deputy Principal

29 June 2007

(exhibit United Voice 6A)

- 9 Ms Alison Bridger gave evidence for the applicant. The witness is employed as an education assistant by the respondent at the School. Ms Bridger gave evidence that her daily tasks include getting students off the bus in the morning, walking them to class and implementing IEP's with the students. The witness gave evidence that she did not implement sports or carry out excursion planning. Ms Spence was responsible for at least seven students on occasions and sometimes she was one on one with difficult students. In cross-examination when asked about supervision the witness gave evidence that Ms Kriziotis introduced a system whereby whenever an education assistant was in the pool with the students a teacher should be present.
- 10 Mr Andre Hurdoyal, the current deputy principal gave evidence for the applicant. The witness gave evidence that he had been employed by the respondent since 1987 having been employed in special education for 23 years. The witness commenced working at the school in May 2012 and had observed Ms Spence on several occasions conduct swimming lessons. On these occasions the witness was an observer and at no stage did the witness give any instruction during the lesson. Ms Spence was in charge of swimming activities giving instructions to students and education assistants who were present.
- 11 In 2012, the witness gave evidence that he was the performance manager for Ms Spence. During this period Ms Spence did not complete her performance management targets as the pool was closed for renovations.
- 12 Ms Sarah O'Neill provided a witness statement on behalf of the applicant. Ms O'Neill is a classroom teacher in charge of a satellite class based at the School to allow students living north of the river to access a constructive education programme and the School facilities including the swimming pool. The statement provided by the witness outlined Ms Spence would write the swimming report though Ms Spence did not report directly to Ms O'Neill. It was Ms O'Neill's understanding that Ms Spence carried out her job on her own without supervision.
- 13 Ms Marie Smith gave evidence for the applicant. The witness is an untrained teacher employed by the respondent at Malibu School in Safety Bay. The witness gave evidence she has 26 years' experience as a swimming teacher being at Malibu School for 25 years. The witness gave evidence that she is paid as an unqualified swimming teacher and being paid at that level since 1989. The witness indicated she is on a different pay scale to a normal teacher and is paid pursuant to the teacher's agreement. The witness gave evidence that in 2003 she was given a WACOT number, an organisation that is now referred to as the Teacher Registration Board. The witness gave further evidence that in order to register to be able to teach the witness was required to register for limited registration. Ms Smith gave evidence that the qualifications she held were Austswim and Bronze Medallion (exhibit United Voice 18).
- 14 In cross-examination Ms Smith clarified that she had always been employed as a swimming teacher. Furthermore, Ms Smith gave evidence that when she first commenced she did not require limited registration with WACOT.
- 15 Ms Margaret Owen gave evidence for the applicant as a retired teacher. She was a swimming teacher at the School for approximately 21 years retiring from the position in 2007. The witness gave evidence that towards the latter part of the time that she was employed Ms Spence worked and assisted her in the swimming pool. Ms Owen provided a copy of her retirement speech, an aspect of the speech included:

Whereas I was a little reticent about taking a student into the deep water, Wendy was able to challenge students and we were ecstatic when a student through necessity, swam from a metre out in deep water to the rail. Call it survival, students who could not swim independently were very aware of their watery environment and given a "Ready, set, go" and a big cue of an indrawn breath, many could blow bubbles as we immersed their face. It is quite remarkable. Wendy taught me a lot.

(exhibit United Voice 19)

- 16 The witness gave evidence that she was two year trained but completed a Diploma of Art Studies and in 2003 she received a copy of correspondence from the respondent, in particular Mr Kim Ward, Acting Director the People and Organisational Development. Mr Ward directed the position of a swimming teacher was to be abolished. The letter in part read:

An assessment of the swimming program in education support schools has highlighted that the duties of swimming teachers has been predominately undertaken by unqualified teachers. As you may be aware unqualified teachers are employed up to a maximum of level 1.6 of the teachers' salary scale.

(exhibit United Voice 20)

- 17 The witness indicated that she was actually on a higher scale than the respondent was indicating. The correspondence went on to indicate that from the commencement of the 2003 school year the respondent would engage unqualified teachers to undertake the duties of swimming teachers in accordance with cl 38.6 of the *Government School Teachers' and School Administrators' Certified Agreement (2000)*. The witness confirmed that for her it meant that the respondent had to make a decision to employ an unqualified teacher as a swimming teacher. Ms Owen indicated that she sought assistance from her union and her pay was maintained at the same level and she continued her role as the swimming teacher (exhibit United Voice 20).

Applicant's Closing Submissions

- 18 The work, the abilities and the responsibilities required by Ms Spence or alternatively, the conditions under which the work came to be performed by Ms Spence at the School between 2007 and 2013 (this being the 'relevant period') is what the Commission is being asked to consider.
- 19 In addition, it is relevant to consider the instruments under which the applicant's member is employed by the respondent as an education assistant (including the level of pay she received) and, having regard for the circumstances and practices undertaken by the respondent organisation in which Ms Spence is employed.
- 20 Consistent with s 6 – Objects of the Act in particular, one of those being:
- (ca) to provide a system of fair wages and conditions of employment; and

- 21 The applicant submits that the respondent is required to follow the objects of the Act in particular s 6(ca). Further that evidence has been led in these proceedings including the presentation of exhibits (documentary) and oral evidence given by Ms Spence, Mr Andre Hurdoyal, Ms Marie Smith, Ms Alison Bridger, Ms Sarah O'Neill and Ms Margaret Owen which supports the applicant's case. The evidence as led ought to be sufficient to satisfy the Commission that the respondent has failed to comply with establishing a system of fair wages and conditions of employment as is required under s 6 of the Act.
- 22 Therefore the applicant submits the Commission is able to exercise its discretion and grant the relief as sought by United Voice WA and, if necessary issue any incidental orders that may be required to give proper effect to what is being sought by the applicant in [2] of these reasons.
- 23 At paragraphs 5 (a), (b) and (c) of the applicant's outline of submissions filed on 8 August 2013 in the Commission the applicant stated as follows:
5. The applicant will lead evidence to support our contentions that:
 - a) The duties carried out by Ms Spence are "teaching duties" in that these are intrinsically part of the educational services for students with disabilities in government schools as provided by the respondent;
 - b) Further, Ms Spence's duties and responsibilities - such as planning, assessing and reporting, as well as the managerial structure at the school - on specific activities, have been customarily differentiated from those pertaining to "Swimming Instructors" (or VacSwim), as these are provided for in the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011* (the "Teacher GA") due to essentially the substantive differences between such roles.
 - c) The activities carried out by Ms Spence are consistent with the tenets of "inclusivity" in educational services found in the Curriculum, as framed by the School Curriculum and Standards Authority; as well as embodied in the Schools Plus program of the respondent.
- 24 Relevant to its submissions the applicant referred to s 3 of the *Teacher Registration Act 2012* (WA) which defines 'teach' as follows:
- teach* means to undertake duties in an educational venue that include –
- (a) the delivery of an educational programme designed to implement a prescribed curriculum and the assessment of student participation in such an educational programme; or
 - (b) the administration of any such educational programme,
- but does not include duties of the kind undertaken -
- (c) by a teacher's aide or a teacher's assistant, or by a student teacher on practicum placement; or
 - (d) by a person employed or engaged to provide care at a child care centre but who is not employed or engaged to teach at that centre; or
 - (e) by an unpaid volunteer, unless the volunteer is undertaking duties of a kind, or to an extent, prescribed for the purposes of this paragraph; or
 - (f) by such persons, or in such circumstances, if any, as are prescribed.
- 25 In the view of the applicant, evidence was lead that:
- a) After working as an Education Assistant for Ms Margaret Owen, the then swimming teacher between 1998 and 2005; from 2006, following Ms Owen going on extended leave and then retiring in 2007, her duties were the same as those carried out by Ms Owen at the school.
 - b) These consisted in delivering the swimming program to the students and teaching them to swim, by applying a modified version of the Swimming and Water Safety Continuum, sanctioned under the School Curriculum and Standards Authority (UV 2 & 3); in addition to administering the hydrotherapy program.
- (Applicant's closing submissions – evidence of 20 December 2013)
- 26 Ms Spence stated that it was her responsibility to draw from the Swimming Instructor Handbook and Guidelines (exhibit United Voice 4) to modify the outcomes of the nine stages to suit each individual student on the basis of their specific abilities as per the scope of the Health & Physical Education, Learning Area Statement (exhibit United Voice 3). Ms O'Neill confirmed Ms Spence's evidence on this point (exhibit United Voice 17 [4]). These were then described and particularised by Ms Spence as part of the students' progress towards achieving specific outcomes or swimming skills and included as part of an on-going students' journal including photos (exhibit United Voice 5A), provided to the students' parents/caregivers.
- 27 Additionally, it is Ms Spence's uncontroverted evidence that she reported students' progress in the achievement of skills in the formal end-of-semester reports that went to parents/caregivers throughout the relevant period (exhibit United Voice 6C, E, F, H; also United Voice 7A, 8H, 8U and 8X). It was also the unchallenged deposition of Ms O'Neill that Ms Spence provided the swimming assessments for each of her students, which she would then insert into her own students' reports (exhibit United Voice 17 [5]).
- 28 Evidence tendered by Ms Spence supports her claim that she did not 'assist' anyone and did all of the aforementioned duties, as well as planning excursions, swimming carnivals and other swimming activities, including being responsible for the safety of the pool autonomously (exhibit United Voice 5B, D, E; United Voice 6E, G, I, J, K, L; United Voice 7A, F, G, H, I, J, K, L, M, N, O, P, Q; United Voice 8, B, C, D, E, J, M, N, O, P, Q, S, W, X & Y; United Voice 10B; United Voice 13A & B).

- 29 The applicant submits that Ms O'Neill's unchallenged evidence supports the autonomous nature of Ms Spence's duties and responsibilities at the school (exhibit United Voice 17, [6] and [7]). Further, Mr Hurdoyal – being the current Deputy Principal, confirms this evidence by saying '...Wendy was in charge of swimming activities and gave instructions to students and education assistants that were present...' (exhibit United Voice 16 [8]).
- 30 The applicant submitted that the evidence of Ms Spence did not support that the duties and responsibilities reflected within the JDF of an education assistant, Level 3 as employed by the respondent. The evidence was not challenged that when Ms Owen retired in 2007, she was replaced by Ms Spence as the swimming teacher at the school (exhibit United Voice 19). Ms Spence at the time picked up all of the relevant duties that Ms Owen had participated in as a swimming teacher at the school.
- 31 Unlike other education assistants at the school who reported directly to their classroom teacher Ms Spence reported directly to the Deputy Principal and on certain occasions to the Principal including being performance managed by the latter (exhibit United Voice 5C, 6A, 8A and 10A). Mr Hurdoyal, the current Deputy Principal at the school gave evidence to this effect that in 2012:

... was the performance manager for Wendy Spence. I negotiated a number of professional learning that are directly related to swimming. Ms Spence did not complete these performance management targets because the pool was closed for renovation purposes.

(exhibit United Voice 16 [10])

- 32 Ms Spence's evidence was that she commenced at the School some 15 years ago as the swimming teacher (exhibit United Voice 1) on a fixed term position. She holds current certificates for:
- Austswim Teacher of Swimming & Water Safety
 - Austswim Teacher of Aquatics to people with disabilities
 - Bronze Medallion
 - Resuscitation Certificate
 - Oxygen Resuscitation
 - Bronze star
 - Australia Swimming Level 1 coach.

Ms Spence has taught the School students to swim for the past 7 years.

- 33 It was submitted by the applicant that her specific terms of employment as an education assistant were an anomaly compared with the past and present employing practices of the respondent in respect of swimming teachers in education support centres when it was accepted that Ms Spence during the relevant period was paid at all times in accordance with the *Education Assistants' (Government) General Agreement 2013* (the General Agreement) or the relevant preceding agreements and the *Teachers' Aides' Award 1979* (the TA Award) and the *Miscellaneous Government Conditions and Allowances Award A 4 of 1992* save for the second semester in 2006. On occasions she relieved Ms Owen and Ms Spence was paid in accordance with the pay rates for untrained teachers as per the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011* (the Teachers' GA) (exhibit United Voice 8ZA). These pay sheets reflect that Ms Spence was paid the rate of an untrained teacher.
- 34 The applicant submitted that Ms Smith's evidence of permanent employment with the respondent as a swimming teacher at Malibu School as an education support teacher (exhibit United Voice 18) provided compelling evidence that her duties were quite similar if not the same as those of Ms Spence. Mr Amarti for the applicant during in examination-in-chief asked:

What do you mean by untrained teacher?

MS SMITH: I'm not a qualified teacher. I'm a qualified swimming teacher. I've had 25-26 years' experience, and I've worked at Malibu school for 25 of those years as a swimming teacher, and I am paid as a – what's called an unqualified teacher, which is a little bit of a different pay scale than a normal teacher that has – Bachelor of Education.

(ts 106)

- 35 The applicant submitted it has been the practice of the respondent to employ untrained teachers in Education Support Centres who have specialist swimming qualifications. These persons have not done any teaching studies (exhibit United Voice 20, 21 and 22). The applicant referred to the Acting Director, People and Organisational Development (Staffing) Mr Kim Ward who said:

In view of the inherent work requirements of the role of swimming teacher in education support schools, the Department intends to continue to employ unqualified teachers to undertake these positions.

(exhibit United Voice 20)

- 36 The applicant asserted that the refusal by WACOT in the past to consider the applications made by Ms Spence is that in the view of the applicant the respondent has asserted incorrectly that swimming teachers in Education Support Schools did not perform swimming teacher functions.

Legal considerations

- 37 Having regard for the objects of the Act the applicant submits that the Commission ought exercise its discretion and grant relief as sought in accordance with s 26(1)(a) of the Act. It is the view of the applicant that the Commission should have regard for the State Wage Case Principles [2012 WAIRC 00359]. In this regard the applicant referred the Commission to Principle 3.1.4, the relevant consideration being with respect to work value changes.

- 38 Further Principle 7.1 states that: '...application may be made for a wage increase under this Principle based in changes in work value...'. In 2005 Ms Spence became the swimming teacher at the school. It is not the view of the applicant that if the Commission were to issue orders it would do so as the enforcer (the submissions of the respondent). The applicant submits the orders sought would provide a fair level of pay on the basis of the work value of the duties performed.
- 39 The applicant seeks relief for Ms Spence as follows:
1. a Declaration that the duties and responsibilities of Ms Spence are 'teaching functions';
 2. a Declaration that such duties are beyond the scope of the duties and responsibilities of an education assistant;
 3. an Order that the respondent make an application to the Teacher Registration Board for a limited authority to teach; and
 4. any other incidental Orders the Commission considers necessary to give proper effect to the relief as sought.
- 40 The applicant hereby urges the Commission to issue the relief as sought.

Respondent

- 41 The respondent says Ms Spence is, and at all times has been, employed pursuant to a contract of employment under which she is an education assistant and not a teacher. The applicant seeks limited registration as an untrained teacher from the Teacher Registration Board. An untrained teacher is found in the General Agreement (in particular cl 7) the respondent considers such a person to be a teacher who does not have a training qualification as determined by the respondent. The payment of such a qualification is picked up in Schedule A Salaries and is similar in the award and is defined in the award at cl 5. While the respondent concedes there is an untrained teacher position it makes it clear it is a teaching position within the department. There seems to be at times a faint suggestion from Ms Spence that what the witness does is similar to teaching duties. For example it was suggested that IEP's are being drawn up by Ms Spence, she is assessing students and those assessments are going ultimately to parents. Further she reports directly to the Principal or Deputy Principal. The fact that Ms Spence operates autonomously in the respondent's view is not close to what is required in the scope of a teacher's duties.
- 42 The respondent concedes that perhaps what Ms Spence used to do is similar to what Ms Smith now does. The respondent does not accept that education assistants in 2014 are untrained teachers. Ten years ago that was not the case and the respondent has now considered that this was an error and has not repeated that since. Ms Spence has made two applications in the past and was then supported by the respondent at the time the then Principal of the school. At the time each of those applications was unsuccessful.
- 43 The applicant is seeking at this stage to make a further application as she did so back in 2007 to become an untrained teacher with limited authority to teach from the then WACOT. The respondent submits that this appears to be repeating the same error. The submission on the part of the respondent is that full-time equivalent teaching positions are highly sought after in public schools and in circumstances where full time equivalents (FTE) positions are available then they are sought after on behalf of a fully trained teacher into those positions. Someone who can go in front of a class of students and teach them as well as being available to go into a swimming pool.
- 44 The respondent submitted that they were not seeking to in any way devalue the work of Ms Spence and that at all times the respondent was very impressed with the work Ms Spence had undertaken.
- 45 Ms Penelope Vivienne White gave evidence on behalf of the respondent. Ms White is the Acting Manager of School Staffing Services for the respondent. In that role Ms White oversees a team of consultants who liaise with schools regarding their FTE's and teaching positions and considers the issues of redeployment. The witness gave evidence that she had been acting in that position for some 12 months and previously she was a staffing consultant. The witness gave evidence that she had perused the departmental files in relation to persons working as untrained teachers in the state system, particularly in the role of swimming teachers. To the best of her knowledge there were eight untrained teachers in permanent positions in education support schools employed by the respondent. From the records she had looked at, as far back as 1998 untrained teachers had obtained their permanency in that capacity prior to 2005 and no-one had been in that position with the respondent after 2005. The witness explained that the respondent had an obligation to permanent employees to retain them in employment. In the event the respondent was to offer permanency to unqualified personnel such as unqualified or untrained teachers then that would place the respondent in the position of not having a position for them because the person would not be able to fulfil the role of a teacher in circumstances where they were redeployed.
- 46 However, the untrained teacher does fill positions in remote and rural locations where the respondent does not have access to suitably qualified personnel for positions being advertised for a short term situation where a qualified teacher is not necessarily available particularly on short-term relief.
- 47 In cross-examination Ms White received an email from Ms Fiona Donaldson who was the acting Manager prior to the witness commencing:
- WACOT was getting the odd request for LAT's for Swimming Teachers. These positions are not actually teaching roles and are to be treated as non-teaching positions. The schools can convert FTE to employ people in these positions if they have it available.
- If they do not currently have a non-teaching position number at their school site, they can contact Ms Verna Craig on 9270 3093 and she will be able to help them with this. I have also let WACOT know that if they get any LAT request for Swimming Teachers to let us know and we will talk to the schools involved. Let me know if you have any curly ones that need clarification on.

(exhibit United Voice 25)

- 48 The witness explained he understood that LAT was a limited authority to teach and it was provided to them by WACOT for someone who did not have a qualification who obtained a limited registration. The witness acknowledged that there were positions held by untrained teachers in the respondent's staff whereby if a school did not want to utilise the person as a teacher they could convert FTE into their salary pool and employ a specialist in a role for doing something, a task that did not have to be a teacher's task.
- 49 The witness was recalled for the purpose of reading under oath a document, furthermore, the document was dated 2009:
- That Ms Spence be compensated as a swimming instructor as of Term 2 of 2005 (26 April 2005) until the end of her current contract. Should the school want to continue to employ Ms Spence as a swimming instructor they must ensure that she registers with the Western Australian College of Teaching for a Limited Authority to Teach and is paid the relevant Untrained Teacher rate.
- (exhibit United Voice 26)
- 50 Mr Lesley Lazarakis gave evidence his role being the Manager of Swimming and Water Safety for the respondent, a position he had held in either an acting or substantive capacity since April 2007 overseeing 8.25 FTE's. The objective of the branch is to conduct an interm swimming programme for pre-primary to year seven students and to conduct a VacSwim which is for all age students. Interm programmes are conducted during school terms principally during terms 1 and 4 taking account of good weather and during terms 2 and 3 at indoor pools. The witness gave evidence that about 50 outdoor metropolitan pools and about 30 indoor metropolitan pools were utilised for the programmes and overall there were 100 pools in the regional areas that were utilised. The programme for the purposes of children was free although schools have to pay for the pool entry. It is rare for a school not to participate in the VacSwim programme which is conducted during October and December holidays. It is a programme that is heavily subsidised by the government so that students pay approximately \$10 for 10 lessons and the programme is conducted by the Department of Education. The witness gave evidence that he was the manager overseeing both programmes. The structure being that there was a supervisor managing each particular centre. The centre being a work group not actually the physical centre then there were instructors, swimming instructors who actually teach the children.
- 51 The witness referred the Commission to 'Swimming Instructors' in cl 38 of the General Agreement. Swimming instructors in the interm and VacSwim programmes are employed as casual employees pursuant to the General Agreement negotiated between the Teachers General Agreement between the respondent and the union. The witness gave evidence that the respondent employs approximately 2,000 instructors in both programmes. Of those instructors approximately 1,000 are employed in the VacSwim programme and a further 1,000 in the interm swimming programme some of those persons cross over and teach in both programmes. The witness gave evidence that although he was familiar with the education support schools he indicated he did not have a role with the programmes that operated in the schools, nor did he participate in the interm swimming programmes although they may participate in the interm swimming programme as can any school that has pre-primary to year seven students.
- 52 In cross-examination the witness agreed that the principal of each school can decide whether or not the provision of health and education in safety or health and physical education in the swimming programme as part of a physical education programme is taken up. The witness indicated that the children's movements indicated they were beginning to move into the first level or the very basic levels of swimming and safety continuums.
- 53 Ms Joanne Kriziotis gave evidence for the respondent her current position is acting principal at the school, a position she has held for the last 18 months, a position she holds in a part-time capacity some three days per week and for the other two days a week the witness gave evidence she teaches at the school. The substantive principal is currently on maternity leave. The witness gave evidence that she is happy in terms of Ms Spence's employment as an education assistant and whilst she is aware that Ms Spence wishes to become an untrained teacher it is the view of the witness that she is opposed to the move from education assistant to untrained teacher as the school does not have a position. It was the submission of Ms Kriziotis that as an untrained teacher if Ms Spence was to be used in the classroom the school would be unable to use Ms Spence as a classroom teacher due to her lack of skill base including her lack of pedagogical knowledge. Ms Kriziotis acknowledged her limited knowledge of teaching. The witness gave evidence that the school was closed for a year and reopened in or around October 2013 during which time Ms Spence was carrying out duties that were consistent with the duties of an education assistant. The supervision of Ms Spence has varied from time to time prior to the witness being appointed as Acting Principal and there has been the use of teachers within the pool area, but the actual arrangements and the setup has varied. There have been four different Principals throughout the school during that period. The witness did not feel like she could comment regarding the arrangements over the complete period of time and that possibly in the past Ms Spence was in the pool without a teacher present however that has not been the case since the witness had become Acting Principal as it was Ms Kriziotis's view that swimming was just a small part of the child's education and could not be viewed in isolation. The witness in relation to Ms Spence having completed IEP's gave evidence that such documents were always completed in consultation with teachers and many corrections were made to the documents. Ms Kriziotis was asked in cross-examination what she considered a teacher to be in the context of Ms Spence.
- 54 Ms Kriziotis recognised the document that was noted for the purposes of the Commission was a submission that another teacher and Ms Kriziotis made to the Western Australian Education Awards in 2010 for Ms Spence for the extra duties that she had taken on as an education assistant through the school and as a person through the school. The witness read into transcript the following:
- Wendy Spence has worked at Burbridge School as an Education Assistant for the past 14 years. Since 2005, while still employed as an Education Assistant, she took over the role of swimming teacher for the school. During her time at Burbridge she has become an integral part of the team at this school for students with disabilities. Wendy is one of the most outstanding people I have had the pleasure of working with. Her skills and knowledge are excellent. Wendy is enthusiastic and motivated. She loves any project that requires a challenge and will see projects through from beginning to

end. In the time I have known her Wendy has coordinated and run 5 extremely successful quiz nights. She booked venues, sold tickets, organised advertising but most importantly arranged donation of prizes from over 200 businesses.

(exhibit United Voice 32)

- 55 The question was put to Ms Kriziotis that she actually wrote this letter to which she agreed Ms Spence had actually carried out the role of a swimming teacher. The witness agreed it had varied over time so the actual structure of what the Principal wanted at the time had varied.

Respondent's Closing Submissions

- 56 The respondent accepts that the relevant period for consideration by the Commission is that period of time up to the closure of the swimming pool for renovations which occurred in mid 2012 at the School.
- 57 On the evidence heard before the Commission the respondent submits there is no argument that the duties and responsibilities carried out by Ms Spence in relation to the swimming pool prior to its closure 'were teaching functions'. Whilst swimming may or may not be part of a student's Health and Physical Education curriculum the respondent submits it is not compulsory for a student to participate in swimming instruction within the Department of Education. Where swimming is taught to children by the respondent it is taught by swimming instructors engaged pursuant to cl 38 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011*. Some education support schools do have swimming pools and students at those schools do from time to time participate in pool sessions as was the case at the School at material times during the relevant period.
- 58 The respondent submits the fact that Ms Spence was referred to as a 'swimming teacher' in the past is neutral in relation to the Commission's consideration of this matter. The respondent submitted that Ms Kriziotis gave compelling evidence that what Ms Spence did in relation to swimming activities did not carry a weight or amount of activity to succeed as a discharge of a teaching function.
- 59 Ms Kriziotis gave evidence which was unchallenged that the duties carried out by Ms Spence in the pool were submitted to be those broadly reflected within the JDF of an education assistant. Ms Spence agreed herself in cross-examination that the activities she undertook were within the role of the relevant JDF. Furthermore, Ms Spence agreed that she worked under limited supervision and was expected to offer advice and expertise relating to her relevant area, that being swimming. Educational outcomes were determined by teachers whom she assisted by writing up IEP's and on occasion the discharge of her duties involved her carrying out activities within and outside the school which required her to supervise students without the presence of a teacher.
- 60 The respondent submitted:

Whether or not Ms Spence could be said to have discharged some of the functions under section 64 *School Education Act 1999* is irrelevant to this matter. The applicant seeks a declaration that Ms Spence's duties and responsibilities were teaching functions. Even if some of what Ms Spence did might correspond to section 64 the material question is whether Ms Spence, once her functions are reviewed and understood, was like a teacher or an education assistant. On that question there can be no dispute that Ms Spence was an education assistant and not like a teacher at all.

Additionally, although the evidence in any event would not support such a conclusion, a finding that Ms Spence was in fact performing teaching duties and should have been paid as an untrained teacher would be inappropriate for legal reasons as it would involve a finding that the respondent was in breach of the General Agreement and such a finding is within the exclusive jurisdiction of the industrial magistrate's court pursuant to section 83(3) *Industrial Relations Act 1979*.

(Respondent's closing submissions [13] and [14])

- 61 It is the respondent's submission that Ms Spence's circumstances do not meet the criteria for employment by the respondent as an untrained teacher. If it was held by the Commission that what Ms Spence did was 'teaching' then the respondent would be able to locate someone with teaching qualifications to carry out such a role. Because there would not be the need for constant work to be carried out in the pool there would be, in all likelihood, a person employed who could carry out both teaching functions in the pool as well as classroom functions.
- 62 The applicant may point out that there are some persons employed by the respondent in support schools who carry out a role as untrained teachers under the 'General Agreement'. Such persons have a limited authority to teach from the Board. Evidence the Commission heard in relation to these persons was minimal. What the applicant must accept however is that this was carried out in 2003 well before Ms Spence started undertaking a similar role. The respondent considers that it undertook this particular role with Ms Spence in error and that it has not repeated the error since 2003 and it does not wish to do so for good sound policy reasons explained by Ms White in her evidence and sound practical reasons explained by Ms Kriziotis.
- 63 The respondent submits that it would be unfair for Ms Spence be employed as an untrained teacher. It was suggested at the hearing there was a line drawn in the sand on education assistants working in pools at education support schools being employed as untrained teachers some years ago and prior to the period in which Ms Spence commenced at the school that she relies upon in this matter namely the School.
- 64 Whatever may have occurred in the past and however, different events may have led to expectations on the part of Ms Spence it is submitted that the respondent's position in terms of the employment of Ms Spence has at all times been that Ms Spence is appropriately employed as an education assistant and that at all times Ms Spence has been discharging education assistant duties. Furthermore, it is the respondent's position that it would be inappropriate to employ Ms Spence in a teaching position. Ms Spence is not being treated any differently and certainly not unfairly when compared to any other employee.

Conclusion

- 65 The Commission has listened carefully to the evidence given by each of the witnesses of the applicant; Ms Spence, Ms Bridger, Mr Hurdoyal, Ms O'Neill, Ms Smith and Ms Owen and considered the applicant's written evidence and submissions. It is the Commission's view that the evidence given by each of the witnesses was given clearly and to the best of their recollection. I consider each witness to be reliable, credible and honest.
- 66 In relation to the evidence given by each of the respondent's witnesses the Commission has listened carefully to Ms White, Mr Lazarakis and Ms Kriziotis and found each of their evidence as given to be reliable and credible. The Commission has also considered the respondent's written evidence and submissions.
- 67 Before the Commission can consider making any statutory findings consideration needs to be given to the jurisdictional issue raised by the respondent in their closing submissions of 10 December 2013 [13] and [14], those being:
13. Whether or not Ms Spence could be said to have discharged some of the functions under section 64 *School Education Act 1999* is irrelevant to this matter. The applicant seeks a declaration that Ms Spence's duties and responsibilities were teaching functions. Even if some of what Ms Spence did might correspond to section 64 the material question is whether Ms Spence, once her functions are reviewed and understood, was like a teacher or an education assistant. On that question there can be no dispute that Ms Spence was an education assistant and not like a teacher at all.
 14. Additionally, although the evidence in any event would not support such a conclusion, a finding that Ms Spence was in fact performing teaching duties and should have been paid as an untrained teacher would be inappropriate for legal reasons as it would involve a finding that the respondent was in breach of the General Agreement and such a finding is within the exclusive jurisdiction of the industrial magistrate's court pursuant to section 83(3) *Industrial Relations Act 1979*.
- 68 In response to the jurisdictional submission raised by the respondent the applicant submits that the dispute is properly before the Commission for determination, specifically:
- ... Principle 7.1 states that "... application may be made for a wage increase under this Principle based on changes in work value ...". We submit that this is consistent with the circumstances of Ms Spence at the school when, back in 2005, took over Ms Owen's duties and responsibilities as the swimming teacher at the school. Contrary to the claims of the respondent, in issuing the Orders the Commission would not be acting as an enforcer - which is within the jurisdiction of the Industrial Magistrate Court - but as determining the fair, equitable level of pay to which Ms Spence is entitled on the basis of the work value of the duties she performs.
- (Applicant's closing submissions [8])
- 69 The principles from the decision of the Industrial Appeal Court in *Springdale Comfort Pty Ltd t/as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 325, 330 reflect the onus of establishing that the Commission has jurisdiction lies with the party making such an application before the Commission. Once questions or issues of jurisdiction have been raised the jurisdictional issue is to be heard first and failure to do so is in breach of the Act. On my reading of the decision, there is no barrier to hearing the issues of jurisdiction and merit at the same time. What the decision does establish is that the jurisdictional aspect must be determined at first instance.
- 70 Whenever a point of jurisdiction is raised, albeit late, it is a matter that must be considered prior to any other matter being reflected upon. The work, skills and responsibilities being undertaken by Ms Spence being submitted by the applicant as teaching duties in her role as swimming teacher at the School:
- between 1998 and 2005; from 2006, after Ms Owen went on prolonged leave, then after she (Ms Owen) retired in 2007 Ms Spence's duties were the same as those carried out by Ms Owen at the School;
 - for a significant period prior to the Commission hearing the application the pool at the School was closed for renovations. During this time Ms Spence undertook standard education assistant duties in the classroom; in large part unrelated to the matter currently before the Commission
- (ts 79)
- 71 The Commission finds that the pool was closed for renovations mid-2012 and from six weeks into Term 4 in that year Ms Spence went back to her classroom duties. The relevant period being considered therefore in the matter before the Commission is the period from 2007 through to Term 4 in 2012.
- 72 The question the Commission has to consider is whether the respondent is in breach of cl 38 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011*. To answer such a question is not within the jurisdiction of the Commission but is solely contained within the jurisdiction of the magistrates' court pursuant to s 83(3) of the Act:
- 83(3) An application for the enforcement of an instrument to which this section applies shall not be made otherwise than under subsection (1).
- 73 Such principles are reflected in the decision of the Full Bench *Crewe and Sons Pty Ltd and Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 2623:
- If one looks at the Act and the law to which we have referred above, including *RRIA v. AMWSU* 69 WAIG 991, per Nicholson J., one can extract some principles [see also *RRIA v. AMWSU* 69 WAIG 1873 (Full Bench decision)].
- Section 44 should not, as far as possible, be read down in the power which it confers to settle disputes.
- Section 23 confers jurisdiction upon the Commission "Subject to this Act" to take cognisance of and enquire into industrial matters as defined in section 7 of the Act. The words "Subject to this Act" limit and govern the exercise of that jurisdiction in accordance with the provisions of the Act (see *RRIA v AMWSU* 69 WAIG 1873).

An industrial matter, as defined, which comes before the Commission by virtue of section 44(1) or section 44(1) and (7) enables the powers conferred by section 44 to be used by the Commission.

However, separate powers are conferred on the Commission by section 46 to be used accordingly.

In addition, no power of enforcement of an award is conferred on the Commission however constituted in relation to an award, only upon the Industrial Magistrate.

A matter which involves the determination of existing rights under an award and which therefore does not involve the application of section 26, because it involves the determination of existing prescribed legal rights, is not a matter which section 44 empowers in the arbitral function, unless it is in the course of addressing an industrial matter, but subject to what we say hereunder.

The arbitral function, however, does not involve a final determination of matters of right under the award.

A bald interpretive decision is precluded by the express existence of the power in section 46. However, in our opinion, in the course of a section 44 matter, unless the question is a bald interpretive matter, the Commission is entitled to interpret an award or any other document before it.

The recourse of interpretation removed from the arbitral process is not authorised by section 44.

A claim for payment based on matters of industrial policy as distinct from matters of legal entitlement is clearly one which might be dealt with under section 44.

A claim which arises clearly out of the contract of employment and the award is more likely to be a matter for enforcement. Thus, a claim for wages due and payable by an employer to an employee is a claim for the enforcement of an existing right as is a claim for the enforcement of a provision in an award.

If the claim involves a determination of what is payable in accordance with legal principle rather than what should be ordered as a matter of equity, good conscience and the substantial merits of the case, under section 26, then the matter is more likely to be a matter of enforcement or interpretation.

Section 44 should not be read down if the matter before it is a dispute as such requiring arbitration proceeded by conciliation. Interpretation of documents and awards is permissible and indeed necessary in the course of that process.

- 74 This is not an interpretive matter. If the Commission looks to the relief sought by the applicant as per the amended memorandum of matters referred in particular:
- (a) A declaration that the duties and responsibilities of Ms Spence are teaching functions.
 - (b) A declaration that such duties are beyond the scope of duties and responsibilities of an education assistant, as per Ms Spence terms of employment.
 - (c) An order that the respondent make an application to the Teacher Registration Board for a limited authority to teach; where Ms Spence is the nominee of that application.
- 75 In order for the Commission to issue a declaration as required by the applicant that the duties and responsibilities of Ms Spence are teaching functions the Commission in the first instance would be required to make a finding that during the relevant period being considered Ms Spence had in fact performed teaching duties therefore should be paid as an untrained teacher. It is the view of the Commission that to do so would be inappropriate as it would involve a conclusion being reached by the Commission that the respondent had, during the relevant period, breached the provisions of the General Agreement. To do so is outside the arbitral powers of a single Commissioner and within the judicial decision of the industrial magistrate pursuant to s 83(3) of the Act.
- 76 The Commission makes no statutory consideration in relation to the evidence submitted. The Commission concludes that it is appropriate in the circumstances to dismiss the application. An order dismissing the application will now issue.

2014 WAIRC 00622

DISPUTE RE CLASSIFICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

THE DIRECTOR GENERAL
DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

COMMISSIONER S M MAYMAN

DATE

FRIDAY, 18 JULY 2014

FILE NO/S

CR 51 OF 2012

CITATION NO.

2014 WAIRC 00622

Result	Application dismissed
Representation	
Applicant	Mr M Amati (as agent)
Respondent	Mr D Matthews (of counsel)

Order

HAVING HEARD Mr Amati (as agent) on behalf of the applicant and Mr Matthews (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred by it under the *Industrial Relations Act 1979* hereby orders –

THAT the application be, and is hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 34/2013	18/10/2013	Dispute re decision made as to the outcome of a disciplinary process	Concluded
State School Teachers' Union of W.A. (Incorporated)	Governing Council of Challenger Institute of Technology	Scott A/SC	C 12/2014	24/04/2014	Dispute re termination of employment	Discontinued
State School Teachers' Union of W.A. (Incorporated)	Director General, Department of Education	Scott A/SC	C 19/2014	20/06/2014	Dispute re alleged non-compliance with agreed terms of deed	Discontinued
The Australian Nursing Federation Industrial Union of Workers Perth	The Minister for Health incorporated as the Board of the hospitals formerly comprised in the Metropolitan Health Service Board and incorporated as the Board of the WA Country Health Service, under sec	Mayman C	C 203/2013	31/05/2013 12/07/2013 20/11/2013	Dispute re proposed forced introduction of on-call staff	Dismissed
United Firefighters Union of Australia West Australian Branch	Fire and Emergency Services Commissioner Wayne Gregson Department of Fire and Emergency Services, Department of Commerce Representatives	Mayman C	C 16/2014	23/05/2014	Dispute re alleged breach of Good Faith Bargaining	Discontinued
United Voice WA	The Department of Education	Mayman C	C 21/2014	N/A	Dispute re employment status	Dismissed
United Voice WA	The Director General of the Department of Education	Harrison C	C 240/2013	6/02/2014 1/04/2014	Dispute re redeployment of employee	Concluded

CORRECTIONS—

2014 WAIRC 00913

WESTERN AUSTRALIA POLICE INDUSTRIAL AGREEMENT 2014
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 COMMISSIONER OF POLICE

PARTIES**APPLICANT**

-v-

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
 COMMISSIONER S J KENNER
DATE WEDNESDAY, 6 AUGUST 2014
FILE NO PSAAG 5 OF 2014
CITATION NO. 2014 WAIRC 00913

Result Agreement registered
Representation
Applicant Ms D Southcott and with her Mr B Parkin
Respondent Ms A Wyllie and with her Mr P Kelly

Correcting Order

HAVING heard Ms D Southcott and with her Mr B Parkin on behalf of the applicant and Ms A Wyllie and with her Mr P Kelly on behalf of the respondent, and there being an error in the order of 31 July 2014, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the order of 31 July 2014 deposited in the office of the Registrar on 31 July 2014 be and is hereby corrected in the terms of the attached Schedule.

(Sgd.) S J KENNER,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

SCHEDULE

1. **Clause 27 – Travelling Allowances: Delete subparagraph (ii) of paragraph (a) of subclause (6) of this clause and insert the following in lieu thereof:**
- (ii) Provided that when an employee departs from Headquarters before 0800 hrs and does not arrive back at Headquarters until after 2300 hrs on the same day the employee shall be paid at the appropriate rate prescribed in Items F4 to F8 of Schedule F.

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00924

APPEAL AGAINST DECISION OF EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 STEVEN LOCKWOOD

PARTIES**APPLICANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
DATE MONDAY, 11 AUGUST 2014
FILE NO/S APPL 52 OF 2013
CITATION NO. 2014 WAIRC 00924

Result Order issued
Representation
Applicant Mr J Raftos, of counsel
Respondent Mr D Matthews, of counsel
Intervener Mr AV McCarthy, of counsel for The West Australian Newspapers Ltd and Channel Seven Perth Pty Ltd

Order

HAVING HEARD Mr J Raftos, of counsel on behalf of the applicant, Mr D Matthews, of counsel on behalf of the respondent and Mr AV McCarthy, of counsel on behalf of The West Australian Newspapers Ltd and Channel Seven Perth Pty Ltd;

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

- (1) THAT references to the names of the children who give evidence in these proceedings or who are referred to in these proceedings, be anonymised in the reason for decision and final orders to issue in these proceedings.
- (2) THAT the publication of the names of the children referred to in (1) above or any matter likely to lead members of the public to identify those children be suppressed.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 00621

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KRISTY MILLS	APPLICANT
	-v-	
	QANTAS AIRWAYS LTD, QANTAS CENTRE	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 17 JULY 2014	
FILE NO/S	B 31 OF 2014	
CITATION NO.	2014 WAIRC 00621	
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 25th day of June 2014 the Commission issued an Order [2014] WAIRC 00548 in preparation for the hearing of this matter; and

WHEREAS by email on the 15th day of July 2014 the respondent's representative provided a copy of a further agreed Minute of Proposed Orders to the Commission; and

WHEREAS the Commission is of the opinion that the issuing of this 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 this Order supersedes the Order issued on the 25th day of June 2014 [2014] WAIRC 00548 which is hereby rescinded.
2. THAT by the 28th day of July 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 18th day of August 2014.
3. THAT by the 1st day of September 2014 the applicant file and serve any witness statements upon which she intends relying at the hearing of this matter.
4. THAT by the 13th day of November 2014, the respondent file and serve any witness statements or documents upon which it intends relying at the hearing of this matter.
5. THAT 14 days prior to the hearing the applicant file and serve her outline of submissions.
6. THAT 7 days prior to the hearing the respondent file and serve its outline of submissions.
7. THAT this matter be listed for hearing on a date to be fixed.
8. THAT there be liberty to apply.

[L.S.]

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

2014 WAIRC 00755

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WAYNE MCNICKLE	APPLICANT
	-v- GIDGE RURAL	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 23 JULY 2014	
FILE NO/S	B 86 OF 2014	
CITATION NO.	2014 WAIRC 00755	

Result	Change of Respondent's name
Representation	
Applicant	Mr W McNickle
Respondent	Mr B McKay

Order

WHEREAS this application was lodged in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS at the conference held on 18 June 2014 the respondent made application to change the respondent's name;
AND WHEREAS the applicant did not object to changing the name of the respondent;
AND WHEREAS the Commission formed the view that it was appropriate to amend the respondent's name;
NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the name Bruce McKay Aqua Pump & Irrigation be deleted and Gidge Rural be inserted in lieu thereof.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 00760

DISPUTE RE TERMINATION OF EMPLOYMENT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00760
CORAM	:	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 16 JULY 2014
DELIVERED	:	FRIDAY, 25 JULY 2014
FILE NO.	:	CR 11 OF 2014
BETWEEN	:	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE GOVERNING COUNCIL OF KIMBERLEY TRAINING INSTITUTE Respondent

CatchWords	:	Application to amend the Memorandum of Matters Referred for Hearing and Determination – Inclusion of additional grounds – Scope of the Commission's inquiry
Legislation	:	<i>Industrial Relations Act 1979</i> s 44, s 44(9)
Result	:	Application granted in part
Representation:		
Applicant	:	Mr M Amati
Respondent	:	Mr D Anderson of counsel

Reasons for Decision

- The applicant seeks to amend the Memorandum of Matters Referred for Hearing and Determination (the Memorandum) to expand on the grounds upon which it seeks to rely. The respondent says that the applicant has had an opportunity to respond to the Commission's draft Memorandum and failed to raise the issues at that time. The respondent also says that it is not

appropriate for the Commission to consider some of the matters the applicant wishes to raise. The respondent also seeks an opportunity to respond to any amendments allowed.

Background

- 2 On 14 April 2014, the applicant filed an application seeking '[a] very urgent section 44 conference – for an order quashing a decision by the employing authority to dismiss Mr James (Alex) Petticrew'.
- 3 The grounds on which the application was made were cited as:

The respondent's disciplinary process against Mr Petticrew is alleged to have been unfair, oppressive and unduly prejudiced; as well as unlawful, including that it has been carried out by the respondent in a summary manner.
SEE ATTACHED SCHEDULE
- 4 Schedule A to the application sets out the background to the matter and elaborates on the grounds for the application. It sets out interim relief sought should agreement not be reached in conference as including an order that Mr Petticrew be reinstated, on full salary, until the matter is heard and determined. The remainder of the interim orders sought relate to discovery.
- 5 The final orders sought include a declaration that the whole of the disciplinary process is null and void and of no effect, and orders that the respondent's decision to dismiss Mr Petticrew on 9 April 2014 be quashed and that he be reinstated; that the respondent be prevented from re-instigating any further disciplinary process in respect of the allegations; that the documents generated by the respondent in relation to the matter be expunged from Mr Petticrew's personnel file, enclosed in another file marked 'Privileged and Strictly Confidential' and be opened only in the presence of Mr Petticrew, and any other orders that the Commission may consider necessary and just.
- 6 The Commission convened conferences in this matter on 16 April 2014, 1 May 2014 and 9 May 2014.
- 7 On 12 May 2014, Ms Karen Dickinson, the Managing Director of Kimberley Training Institute, wrote to Mr Petticrew, informing him that:

[A]ll previous findings made against you in relation to the above disciplinary matter are hereby withdrawn. I have made this decision after considering legal advice recently received by Kimberley Training Institute from the State Solicitor's Office.

As a consequence of my rescinding the findings made against you, you are hereby re-instated at your substantive position of Lecturer Maritime Security effective immediately and I confirm that your continuous service has been maintained.
- 8 However, the letter also noted that the disciplinary process would continue and had not been discontinued as a result of the decision to rescind the findings. Ms Dickinson advised that she had made a decision to delegate her responsibilities under the respondent's disciplinary policy to her colleague, Ms Julie Kean, and had sought Ms Kean's assistance in conducting the disciplinary process from that point and that she, Ms Dickinson, would no longer be involved. It was noted that Ms Kean had not been involved in the disciplinary matter to date and therefore, she would be able to deal with the matter. In the meantime, Mr Petticrew was directed to remain at home on full pay and not attend the Kimberley Training Institute campus unless formally instructed or invited.
- 9 By letter dated 15 May 2014, Ms Kean wrote to Mr Petticrew, noting the background to the matter and advising that it was her intention to continue the disciplinary process related to the suspected breach of discipline, and she set out the approach she was intending to take. She also set out the evidence and particulars, inviting Mr Petticrew to respond.
- 10 On 30 May 2014, a further conference was convened at which time the applicant sought that the disciplinary process cease and not be re-instituted on a number of grounds, including its deleterious effect on Mr Petticrew's health, that some of the evidence put to the applicant is tainted because it has been commented on by a third party, and for other reasons. The applicant sought that the matter be referred for hearing and determination. The respondent agreed that the disciplinary process would be put on hold whilst the matter is heard and determined. The parties discussed, at great length, the scope of the matter to be referred for hearing and determination. It was my understanding that ultimately there was agreement that the matter for determination was quite limited in its scope. The Commission was to draft a Memorandum of Matters to be Referred for Hearing and Determination and forward that to the parties for their comment. Other procedural matters were also discussed.
- 11 The Commission was in the process of finalising a draft Memorandum when, on 5 June 2014, the applicant filed 'Applicant's Memorandum of Matters' setting out the background and the grounds for its particulars to be included in the Memorandum. This document was of approximately three pages in length.
- 12 By email dated 9 June 2014, the Commission, through the Associate, forwarded to the parties a draft Memorandum prepared by the Commission for the parties' comments. The email noted:

Mr Amati (the applicant's representative), the Commission is in receipt of your 'Applicant's Memorandum of Matters'. Whilst the A/Senior Commissioner has seen the document, she has asked that the attached document be forwarded to the parties in any event.
- 13 The draft Memorandum provided by the Commission was significantly briefer than that provided by the applicant, and referred to both the applicant's and the respondent's positions as the Commission understood them. It relied on the Commission's understanding of the position reached in discussions in the conference on 30 May 2014. It did not, however, contain all of the grounds set out in the Applicant's Memorandum of Matters filed on 5 June 2014.
- 14 The respondent responded to the Commission's draft Memorandum of Matters to be Referred by email dated 19 June 2014, setting out a couple of proposed variations to the Memorandum. By email dated 23 June 2014, the applicant's representative responded with some minor changes to paragraphs 4 and 8 of the Commission's draft Memorandum and an amendment to the declarations and orders sought. The respondent replied with some proposals for changes.
- 15 After taking account of the parties' responses to the draft Memorandum, the Commission finalised the Memorandum and it was issued by the Commission on 24 June 2014, in the following terms:
 1. Mr James Alex Petticrew, a member of the applicant, is employed by the respondent as a Lecturer Maritime Security at Kimberley Training Institute in Broome.

2. The respondent alleges that on 24 February 2014 Mr Petticrew breached discipline.
3. On 28 February 2014, the respondent began a disciplinary process in respect of the alleged breach of discipline by Mr Petticrew.
4. On 24 March 2014, the respondent informed Mr Petticrew that he had breached discipline and that he would be dismissed; proceeding to dismiss Mr Petticrew effective from 9 April 2014.
5. On 12 May 2014, after a conference between the parties before the Commission, the respondent wrote to Mr Petticrew advising that the findings against him were withdrawn and he was reinstated to the substantive position of Lecturer Maritime Security.
6. On 15 May 2014, the respondent wrote to Mr Petticrew, informing him the respondent intended to continue the disciplinary process relating to the alleged breach of discipline.
7. The applicant says that:
 - (1) The disciplinary process in relation to the alleged breach of discipline on 24 February 2014 was flawed.
 - (2) Having regard to the flawed process and the impact the disciplinary process is having on Mr Petticrew's health, it is harsh, oppressive and unfair to continue the disciplinary process.
8. The applicant seeks that the Commission:
 - a) Declare that the respondent's stated intention to recommence the disciplinary process in light of the previous flawed process, recession [sic] of the dismissal and reinstatement is unduly harsh, oppressive and unfair;
 - b) Order that the respondent is prevented from proceeding with any disciplinary process against Mr James Alex Petticrew regarding the incident said to have occurred on 24 February 2014.
9. The respondent says that:
 - (1) The disciplinary process in relation to the alleged breach of discipline on 24 February 2014 was flawed.
 - (2) It should be allowed to continue its investigation of the matter either by recommencing the existing disciplinary process at a particular stage to overcome errors or flaws in the existing disciplinary process or by declaring the existing disciplinary process null and void and commencing a new disciplinary process to resolve the allegation and, if necessary, impose the appropriate penalty.
 - (3) That this application ought to be dismissed.
- 16 It is noted that the applicant had not, until that point, sought to include the detail which it had previously sought in its own draft Memorandum filed on 5 June 2014. The applicant says that it assumed those matters would be included, however, they were not.
- 17 On 25 June 2014, the matter was listed for hearing and determination for 16 July 2014.
- 18 On 30 June 2014, six days after the issuing of the Memorandum, the applicant's representative, Mr Amati, telephoned the Commission expressing concern that the Memorandum had not included the detail contained in paragraph 6(a) to (h) of the document filed by the applicant on 5 June 2014, and did not wish to be prevented from putting all of those matters to the Commission during the hearing. He was advised by the Associate, in an email dated that day, that the Memorandum had been finalised, taking account of the parties' responses to the draft. The email went on to note:

It is suggested that the applicant foreshadow, with as much notice as possible to the respondent, and perhaps seek the respondent's consent, to make variations on the day of the hearing.
- 19 By email dated 2 July 2014, the applicant did, in fact, foreshadow seeking to make the amendments to the Memorandum in accordance with paragraph 6(a) to (h) of its document filed on 5 June. The respondent objected to those amendments at that point and there was an exchange of emails between the parties.
- 20 The changes, which the applicant seeks to make, include additional grounds for its application by the inclusion of the following:
 - a. Mr Petticrew having already been subjected to documented prolonged acute stress and anxiety, since February – the time at which the disciplinary process was initiated by the respondent;
 - b. Mr Petticrew having forthrightly admitted with contrition the words uttered and that such words did not represent a material threat to Master (JB) at any time;
 - c. As a matter of fact, Master (B) does not attend that class at all – so no 'intention' may be ascribed to his behaviour; except it being reactive and thoughtless, regrettably.
 - d. Mr Petticrew having given an unqualified undertaking to the respondent that it will refrain from voicing any such utterances in the future;
 - e. the alleged misdemeanour being at the 'lower-end' of the scale;
 - f. the evidence upon which the respondent has said to rely – as this was enclosed in a further correspondence to Mr Petticrew on the 15th May 2014 – being overtly contradictory; as well as irretrievably tainted;
 - g. Mr Petticrew having absolute [sic] no responsibility whatsoever for the botched disciplinary process implemented by the respondent, notwithstanding the rescission of its effects.
 - h. The sought Order would be a general deterrent for ensuring that other employees are not dealt with unfairly and oppressively by well-established public sector employees which operate within a complex set of statutory regimes to which they are compelled to comply.

- 21 It is quite common for circumstances to change between the time an application is filed and a matter is referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979* (the Act). This is partly because, during the conciliation process, some matters which were originally referred have been resolved. This is envisaged by s 44(9) of the Act. It is part of the reason why a Memorandum of Matters is prepared following conciliation, to set out the dispute as it stands at that point.
- 22 The question in this case is whether, and to what degree, the matter before the Commission should traverse matters which would be for the respondent to determine, should it not be prevented from continuing the process. The matters which the applicant seeks to add to its grounds include matters which would have the effect of requiring the Commission to step into the shoes of the employer and make a decision as to Mr Petticrew's conduct, the circumstances under which the conduct occurred, the effect of that conduct, whether and to what extent Mr Petticrew has acknowledged his behaviour and the undertakings he has given, the severity of that conduct, and any appropriate penalty. The effect of this would be to not only prevent the respondent undertaking the further investigation which it intended to do, but would obviate the need for the respondent to manage that process for itself and exercise its responsibilities, and the Commission would be doing those things in lieu of the employer.
- 23 The respondent says it should have an opportunity to undertake the whole of the process.

Consideration and Conclusion

- 24 In *Civil Service Association of Western Australia Incorporated v Director General of Department for Community Development* [2002] WASCA 241, the Industrial Appeal Court commented on the appropriateness or otherwise of the Public Service Arbitrator (the Arbitrator) conducting an investigation into the facts of an allegation as opposed to the employing authority doing so. Anderson J, with whom Parker and Hasluck JJ agreed, said:
- 20 I do not consider that this was appropriate. If an employing authority suspects that there may have been an actionable breach of discipline, and there are reasonable grounds for that suspicion, the authority ought to be allowed to carry out its statutory duty to conduct an investigation to see whether there was in truth an actionable breach of discipline. *Prima facie* it would not seem to be a proper exercise of jurisdiction by the Public Service Arbitrator to stop the employing authority from doing so on the basis of the Public Service Arbitrator's own investigation of the facts. No doubt it is perfectly proper for the Public Service Arbitrator to stop baseless disciplinary proceedings. However, I think the judgment as to whether the proceedings are or are not baseless should be made by reference only to the matters alleged in the complaint.
- 21 As it happens, I think that in the end this is exactly what the Arbitrator did in fact do in this case. Although the Arbitrator summarised Mr H's evidence, it appears from her reasons for decision that she looked only at the conduct that was 'alleged in respect of ... [Mr H] ...', as she put it, in order to determine whether she should put a stop to the investigations, which she did. There is little or no indication in her reasons that her decision to do so was based on the evidence given by Mr H. It would have been better if at the outset the Arbitrator had declined to hear that evidence.
- 25 That matter involved an application to the Arbitrator to, in effect, order that the employer cease its investigation at least partly on the ground that the alleged conduct of Mr H was not undertaken in the course of his employment and therefore, the employer was not entitled to enquire into that conduct.
- 26 The matter before the Commission in this case is one where the employer has already completed the investigation process, made findings and imposed a penalty. The applicant then filed the application, alleging, amongst other things, procedural flaws. During the course of conciliation, the respondent acknowledged that the process was flawed, withdrew the findings and penalty, and, as a consequence, reinstated Mr Petticrew.
- 27 Therefore, there are differences between the factual matrix and the stage of the process reached of this matter and that in the *Civil Service Association of Western Australia Inc v Director General of Department for Community Development*. However, the principle espoused by Anderson J appears apposite; that is, that the Commission ought not to undertake its own investigation of the facts, but ought to consider whether there are grounds to prevent the employer from carrying out its statutory duty to conduct an investigation. Where this application seeks to stop the respondent from continuing that investigation for reasons going to the process undertaken by the respondent, I am of the view that this ought to be the scope of the Commission's inquiry, rather than the facts of the alleged conduct, or the appropriate findings and, if any, the penalty. Those things might ultimately be the subject of consideration if the Commission decides against ordering the respondent to cease the process, it proceeds, makes findings and imposes a penalty, and the applicant or Mr Petticrew refer the matter of the penalty, such as harsh, oppressive or unfair dismissal, to the Commission.
- 28 Therefore, the matter before the Commission ought to be limited to deciding whether or not to order the process to cease on grounds relating to that process and to the effects on Mr Petticrew.
- 29 In that context, the Memorandum ought to be amended to cover those matters set out in paragraphs 6(a), (g) and (h). Paragraph 6(f) in so far as it relates to the evidence being 'irretrievably tainted' is also to be included, however, that part relating to the evidence being contradictory is not to be included. Those matters set out in paragraphs 6(b), (c), (d) and (e), and (f) in so far as it deals with the evidence being contradictory, require the Commission to consider what the Industrial Appeal Court in *Civil Service Association of Western Australia Inc v Director General Department for Community Development* said it ought not to do; that is, to conduct its 'own investigation of the facts' regarding the allegations.
- 30 Accordingly, the Memorandum is to be amended to include paragraph 6(a), (g) and (h), and part of (f), of the Applicant's Memorandum of Matters filed on 5 June 2014. Attached is a draft which includes those amendments.
- 31 The respondent is to file and serve on the applicant any consequential amendments it wishes to have included in the Memorandum as to its position in response to those matters, within seven days of the date of these Reasons. The Commission will then formally amend the Memorandum.
- 32 The parties are to advise, as soon as possible, as to their availability for the hearing to be reconvened, and whether they wish to rely on witness statements to deal with any necessary evidence in chief.

DRAFT AMENDED SCHEDULE TO MEMORANDUM OF MATTERS REFERRED FOR HEARING AND DETERMINATION

1. Mr James Alex Petticrew, a member of the applicant, is employed by the respondent as a Lecturer Maritime Security at Kimberley Training Institute in Broome.
2. The respondent alleges that on 24 February 2014 Mr Petticrew breached discipline.
3. On 28 February 2014, the respondent began a disciplinary process in respect of the alleged breach of discipline by Mr Petticrew.
4. On 24 March 2014, the respondent informed Mr Petticrew that he had breached discipline and that he would be dismissed; proceeding to dismiss Mr Petticrew effective from 9 April 2014.
5. On 12 May 2014, after a conference between the parties before the Commission, the respondent wrote to Mr Petticrew advising that the findings against him were withdrawn and he was reinstated to the substantive position of Lecturer Maritime Security.
6. On 15 May 2014, the respondent wrote to Mr Petticrew, informing him the respondent intended to continue the disciplinary process relating to the alleged breach of discipline.
7. The applicant says that:
 - (1) The disciplinary process in relation to the alleged breach of discipline on 24 February 2014 was flawed.
 - (2) Having regard to the flawed process and the impact the disciplinary process is having on Mr Petticrew's health, it is harsh, oppressive and unfair to continue the disciplinary process.
 - a) Mr Petticrew having already been subjected to documented prolonged acute stress and anxiety, since February – the time at which the disciplinary process was initiated by the respondent;
 - (3) The evidence upon which the respondent seeks to rely is irretrievably tainted.
 - (4) Mr Petticrew has no responsibility for the flawed disciplinary process implemented by the respondent, notwithstanding the rescission of its effects.
 - (5) The sought Order would be a general deterrent for ensuring that other employees are not dealt with unfairly and oppressively by well-established public sector employers which operate within a very complex set of statutory regimes to which they are compelled to comply.
8. The applicant seeks that the Commission:
 - a) Declare that the respondent's stated intention to recommence the disciplinary process in light of the previous flawed process, rescission of the dismissal and reinstatement is unduly harsh, oppressive and unfair;
 - b) Order that the respondent is prevented from proceeding with any disciplinary process against Mr James Alex Petticrew regarding the incident said to have occurred on 24 February 2014.
9. The respondent says that:
 - (1) The disciplinary process in relation to the alleged breach of discipline on 24 February 2014 was flawed.
 - (2) It should be allowed to continue its investigation of the matter either by recommencing the existing disciplinary process at a particular stage to overcome errors or flaws in the existing disciplinary process or by declaring the existing disciplinary process null and void and commencing a new disciplinary process to resolve the allegation and, if necessary, impose the appropriate penalty.
 - (3) That this application ought to be dismissed.

2014 WAIRC 00914

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

PARTIES

APPLICANT

-v-

THE GOVERNING COUNCIL OF KIMBERLEY TRAINING INSTITUTE

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE THURSDAY, 7 AUGUST 2014
FILE NO/S CR 11 OF 2014
CITATION NO. 2014 WAIRC 00914

Result Consent order rescinded

Order

WHEREAS on the 30th day of May 2014 the Commission issued consent orders that the respondent cease its disciplinary process regarding Mr Alex Petticrew, pending the hearing and determination of this matter; and

WHEREAS at a conference convened on the 29th day of July 2014 the applicant withdrew its objection to the respondent restarting the disciplinary process; and

WHEREAS by email on the 6th day of August 2014 the applicant confirmed it had no objection to the rescinding of the consent order issued on the 30th day of May 2014 [2014] WAIRC 00444;

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

THAT the consent order issued on the 30th day of May 2014 [2014] WAIRC 00444 be, and is hereby rescinded.

[L.S.]

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

2014 WAIRC 00624

APPLICATION ON THE COMMISSION'S OWN MOTION CONCERNING NEGOTIATIONS FOR AN ENTERPRISE BARGAINING AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COMMISSION'S OWN MOTION

PARTIES

APPLICANT

-v-

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS), THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 18 JULY 2014

FILE NO.

PSAC 16 OF 2014

CITATION NO.

2014 WAIRC 00624

Result

Recommendation issued

Recommendation

WHEREAS the Public Service Arbitrator (the Arbitrator) is aware:

1. That the Health Services Union of Western Australia (Union of Workers) (the Union) and the Minister for Health have been negotiating for some months for an industrial agreement for clerical, administrative, technical and health professional employees in the public health sector;
2. That there has been industrial action taken by the Union at Sir Charles Gairdner Hospital and Royal Perth Hospital on Tuesday, 15 and Thursday, 17 July 2014 respectively;
3. That further industrial action is scheduled for Tuesday, 22 and Thursday, 24 July 2014 respectively at other State public hospitals;
4. That the industrial action to date has resulted in the cancellation of elective surgery and has affected other patient services; and

WHEREAS on Thursday, 17 July 2014 the Arbitrator directed the Registrar to undertake an investigation of those matters and as a result the Arbitrator, of her own motion, convened a conference between the Union and the Minister for Health at 11 am on Friday, 18 July 2014; and

WHEREAS the Arbitrator, having heard as to the status of the parties' negotiations for a new agreement, the impact of industrial action and the parties' respective positions, formed the view that recommendations should issue to prevent the deterioration of industrial relations while the dispute is subject to conciliation and possible arbitration;

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

1. THAT by close of business Monday the 21st day of July 2014 the Union provide to the Minister's representatives and the Arbitrator its grounds for seeking the level of increases to rates of pay and to particularise its arguments which go beyond grounds of pay equity in comparison with other employees in the sector.
2. THAT a conference be convened on Tuesday the 22nd day of July 2014, at 10.30 am at which the Union will elaborate on those grounds.

3. THAT a further conference be convened on Thursday the 24th day of July 2014 at 10.30 am at which the Minister's representatives will respond to the particulars of the Union's grounds, and not merely rely only on compliance with the Government Wages Policy to do so;
4. THAT stoppages planned by the Union for Tuesday the 22nd day of July and Thursday the 24th day of July 2014 not proceed on the basis that the parties are in discussions before the Arbitrator, with a view to resolving the dispute;
5. THAT the parties refrain from making statements to the media other than to confirm that the dispute is before the Arbitrator.

[L.S.]

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

2014 WAIRC 00758

**APPLICATION ON THE COMMISSION'S OWN MOTION CONCERNING NEGOTIATIONS FOR AN ENTERPRISE
BARGAINING AGREEMENT**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS), THE
MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE
HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY
COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE

THURSDAY, 24 JULY 2014

FILE NO.

PSAC 16 OF 2014

CITATION NO.

2014 WAIRC 00758

Result

Recommendation issued

Recommendation

WHEREAS on Tuesday the 22nd day of July 2014, the Public Service Arbitrator (the Arbitrator) reconvened the conference in this matter, at which conference, the Health Services Union of Western Australia (Union of Workers) put forward and elaborated on its grounds for seeking the level of increases in rates of pay as part of the negotiations for a new agreement; and

WHEREAS the conference reconvened at 10.30 am on Thursday the 24th day of July 2014 at which conference representatives of the Minister indicated that they had put forward a proposal to the Minister for instructions as to a way to progress the matter, however, due to the processes for seeking and receiving such high level instructions, they had not had sufficient time to obtain the instructions. They are optimistic of receiving those instructions by late on Tuesday the 29th day of July 2014; and

WHEREAS given the short time frames since the conference convened on Tuesday the 22nd day of July 2014 and the requirement of the Government's process for the Minister to respond as to a way forward, the Arbitrator is of the opinion that it is appropriate and may be of assistance to the resolution of the dispute and may provide a means for an agreement to be reached, to allow further time for the Minister to respond;

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

1. THAT a further conference be convened on Wednesday the 30th day of July 2014 at 10.30 am, at which the Minister's response is to be provided.
2. THAT in the meantime there be no escalation of industrial action.

[L.S.]

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

2014 WAIRC 00817

APPLICATION ON THE COMMISSION'S OWN MOTION CONCERNING NEGOTIATIONS FOR AN ENTERPRISE BARGAINING AGREEMENT

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COMMISSION'S OWN MOTION **APPLICANT**

-v-

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS), THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 30 JULY 2014

FILE NO. PSAC 16 OF 2014

CITATION NO. 2014 WAIRC 00817

Result Recommendation issued

Recommendation

WHEREAS on Wednesday the 30th day of July 2014 the Public Service Arbitrator (the Arbitrator) reconvened the conference in this matter, at which conference the Minister for Health provided his response; and

WHEREAS the parties agreed that the matter of the level of increases in rates of pay to be contained in a new agreement is to be subject of an application for an order pursuant to s 42G of the *Industrial Relations Act 1979*; and

WHEREAS the Arbitrator is aware that some industrial action is still ongoing, and that the issue of the operative date for any increase in rates of pay is still the subject of dispute; and

WHEREAS the Arbitrator is of the view that, given that the matter of the level of increases in rates of pay is to be the subject of arbitration, and all other matters appear to be agreed, that it is not desirable that any industrial action continue, and that it would be beneficial to the industrial relations between the parties if the Minister were to agree that the operative date of the 1st day of July 2014 apply to the agreement and that the first payment in accordance with Public Sector Wages Policy of 2.75% now be payable;

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

1. THAT the Minister for Health agree to an operative date for the agreement of the 1st day of July 2014.
2. THAT the Minister for Health now apply increases in rates of pay by 2.75% from that date.
3. THAT any and all residual industrial action cease.

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

[L.S.]

2014 WAIRC 00819

APPLICATION ON THE COMMISSION'S OWN MOTION CONCERNING NEGOTIATIONS FOR AN ENTERPRISE BARGAINING AGREEMENT

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COMMISSION'S OWN MOTION **APPLICANT**

-v-

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS), THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 30 JULY 2014

FILE NO. PSAC 16 OF 2014

CITATION NO. 2014 WAIRC 00819

Result Recommendation amended

Recommendation

WHEREAS this is an application made on the Commission's Own Motion pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS at a conference convened on the 30th day of July 2014 the Commission issued a Recommendation in this matter, which was reduced to writing [2014] WAIRC 00817; and

WHEREAS by email on the 30th day of July 2014 the respondent requested an amendment to the preamble to that Recommendation and the applicant agreed to such a request; and

WHEREAS the Commission is of the opinion that it is appropriate to amend the preamble to the recommendations;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that paragraph 2 of the preamble to the recommendations be amended to read:

"WHEREAS the parties agreed that the matter of the level of increases in rates of pay to be contained in a new agreement is to be subject of arbitration".

[L.S.]

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

2014 WAIRC 00616

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JOSH MCDUGALL	APPLICANT
	-v-	
	CHAMFORD INTERIORS MEGAN & BEN DAVEY THE TRUSTEE FOR THE TERPSTRA DAVEY DISCRETIONARY TRUST ABN 77 409 692 927	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 16 JULY 2014	
FILE NO.	U 203 OF 2013	
CITATION NO.	2014 WAIRC 00616	

Result	Direction issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr P Brunner of counsel

Direction

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

WHEREAS the Commission issues these directions for the purposes of the hearing of the application for an extension of time to file an application pursuant to s 29(1)(b)(i) of the Act;

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

1. THAT the applicant file and serve:
 - (a) an outline of submissions; and
 - (b) witness statements constituting all of the evidence in chief of his witnesses,
 by no later than the 28th day of July 2014.
2. THAT the respondent file and serve:
 - (a) an outline of submissions; and
 - (b) witness statements constituting all of the evidence in chief of its witnesses,
 by no later than the 11th day of August 2014.
3. THAT any further evidence in chief will require leave of the Commission.
4. THAT there shall be liberty to apply.

[L.S.]

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Labor Party (WA Branch) Enterprise Agreement 2013 AG 11/2014	11/08/2014	Western Australian Municipal Administrative, Clerical and Services Union	Australian Labor Party WA Branch	Acting Senior Commissioner P E Scott	Agreement registered
Beehive Montessori School (Enterprise Bargaining) Agreement 2013 AG 13/2014	6/08/2014	The Independent Education Union of Western Australia, Union of Employees, Beehive Montessori School	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Department of Health Medical Practitioners (Clinical Academics) AMA Industrial Agreement 2013. PSAAG 6/2014	15/08/2014	The Minister for Health incorporated as the Board of the hospitals formerly comprised in the Metropolitan Health Service Board under s 7 of the Hospitals and Health Services Act 1927 (WA)	The Australian Medical Association (Western Australia) Incorporated	Acting Senior Commissioner P E Scott	Agreement registered
Greens (WA) Inc. Staff Agreement 2014 - The AG 10/2014	11/08/2014	Western Australian Municipal Administrative, Clerical and Services Union	The Greens (WA)	Acting Senior Commissioner P E Scott	Agreement registered
Lance Holt (Enterprise Bargaining) Agreement 2013 AG 12/2014	6/08/2014	The Independent Education Union of Western Australia, Union of Employees, Lance Holt School, United Voice WA	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Western Australia Police Industrial Agreement 2014 PSAAG 5/2014	31/07/2014	Commissioner of Police	Western Australian Police Union of Workers	Commissioner S J Kenner	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2014 WAIRC 00619

DECLARATION PURSUANT TO SECTION 42H

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS: (A) THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, THE PEEL HEALTH SERVICES BOARD, THE WA COUNTRY HEALTH SERVICE AND (B) THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY

APPLICANT

-v-

UNITED VOICE WESTERN AUSTRALIAN BRANCH

RESPONDENT**CORAM**

COMMISSIONER J L HARRISON

DATE

WEDNESDAY, 16 JULY 2014

FILE NO/S

APPL 74 OF 2012

CITATION NO.

2014 WAIRC 00619

Result

Discontinued

Representation**Applicant**

Mr M Warner and Mr N Fergus

Respondent

Mr M Ritter SC and Mr S Dane

Order

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

The Commission convened a conference on 5 December 2012.

On 9 July 2014 the applicant filed a Notice of Withdrawal or Discontinuance form.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

NOTICES—Appointments—

2014 WAIRC 00927

Designation of Officers

Sections 93(I)

Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and

Pursuant to section 93(I) of the *Industrial Relations Act 1979*, I **DESIGNATE** the person nominated being ANDREW DORES to be the REGISTRAR to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 1 September - 19 September 2014 inclusive.



SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER
REGISTRAR
DEPARTMENT OF THE REGISTRAR

6 August 2014

2014 WAIRC 00930

Designation of Officers

Sections 85(9) and 99D

Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and

Pursuant to sections 85(9) and 99D of the *Industrial Relations Act 1979*, I **DESIGNATE** the person nominated, being Sally Leeanne Anderson to be the CLERK OF THE COURT for the WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 1 September – 3 October 2014 inclusive.



SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER
REGISTRAR
DEPARTMENT OF THE REGISTRAR

6 August 2014

2014 WAIRC 00929

Designation of Officers
Sections 81D and 99D
Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and

Pursuant to sections 81D and 99D of the *Industrial Relations Act 1979* I **DESIGNATE** the person nominated, being Sally Leeanne Anderson to be the CLERK OF THE INDUSTRIAL MAGISTRATES COURT of Western Australia to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws for the period 1 September – 3 October 2014 inclusive.



SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER
REGISTRAR
DEPARTMENT OF THE REGISTRAR

6 August 2014

2014 WAIRC 00928

Designation of Officers
Sections 93(IAC) 99D (2) and 99D (3)
Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and

Pursuant to section 93(IAC) of the *Industrial Relations Act 1979*, I **DESIGNATE** the person nominated, being Sally Leeanne Anderson, AS A DEPUTY REGISTRAR to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 1 September - 3 October 2014 inclusive.



SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER
REGISTRAR
DEPARTMENT OF THE REGISTRAR

6 August 2014

2014 WAIRC 00926

Designation of Officers
Sections 93(I) and 99D
Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and

Pursuant to sections 93(I) and 99D of the *Industrial Relations Act 1979*, I **DESIGNATE** the person nominated being SUSANE HUTCHINSON to be the REGISTRAR to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 22 September - 3 October 2014 inclusive.

Further, pursuant to Section 33 of the *Public Sector Management Act 1994* SUSANE HUTCHINSON will also be the acting Chief Executive Office of the Department of the Registrar for the period 22 September - 3 October 2014 inclusive.



SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER
REGISTRAR
DEPARTMENT OF THE REGISTRAR

6 August 2014

PUBLIC SERVICE APPEAL BOARD—

2014 WAIRC 00762

APPEAL AGAINST THE DECISION TO CHANGE THE CONDITION OF SUSPENSION MADE ON 7 FEBRUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GARY EDWARD HARLEN

APPELLANT

-v-

THE WA DEPT. OF MINES AND PETROLEUM

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON - CHAIRPERSON
MR G LEE - BOARD MEMBER
MS M ANDREWS - BOARD MEMBER**DATE**

MONDAY, 28 JULY 2014

FILE NO

PSAB 4 OF 2014

CITATION NO.

2014 WAIRC 00762

Result	Discontinued
Representation	
Appellant	In person
Respondent	Ms R Hartley (of counsel)

Order

This is an appeal to the Public Service Appeal Board (the Board) pursuant to s 80I of the *Industrial Relations Act 1979*.

A hearing listed on 7 May 2014 was vacated on 30 April 2014 at the request of the parties.

The appellant advised the Board on 4 July 2014 that he did not wish to proceed with the matter and on 16 July 2014 he filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2014 WAIRC 00761

APPEAL AGAINST THE DECISION OF THE RESPONDENT TO TAKE DISCIPLINARY ACTION MADE ON 9 OCTOBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GARY EDWARD HARLEN

APPELLANT

-v-

THE WA DEPT OF MINES AND PETROLEUM

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON - CHAIRPERSON
MR G LEE - BOARD MEMBER
MS M ANDREWS - BOARD MEMBER**DATE**

MONDAY, 28 JULY 2014

FILE NO

PSAB 24 OF 2013

CITATION NO.

2014 WAIRC 00761

Result	Discontinued
Representation	
Appellant	Mr A Monisse (of counsel) and Mr G Harlen
Respondent	Ms R Hartley (of counsel)

Order

This is an appeal to the Public Service Appeal Board (the Board) pursuant to s 80I of the *Industrial Relations Act 1979*.

The Board convened a scheduling conference on 3 February 2014 and following this conference the application was adjourned pending the outcome of other proceedings.

The appellant advised the Board on 4 July 2014 that he did not wish to proceed with the matter and on 16 July 2014 he filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

RECLASSIFICATION APPEALS—

2014 WAIRC 00921

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00921
CORAM	:	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	TUESDAY, 5 AUGUST 2014
DELIVERED	:	MONDAY, 11 AUGUST 2014
FILE NO.	:	PSA 16 OF 2012
BETWEEN	:	DEBORAH BARNETT Applicant 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 EMPLOYER Respondent

CatchWords	:	Reclassification appeals – Work value – Statement of Principles – Principle 7 – Team leadership – Classification increase of two levels sought – Complexity of duties – BiPERS assessment tool
Result	:	Application dismissed
Representation:		
Applicant	:	Ms P Marcano as agent
Respondent	:	Ms M Muccilli and with her Mr J Ross

Reasons for Decision

- 1 The history of this matter includes that the position of Technician (Physics) in the Medical Engineering and Physics Department of Royal Perth Hospital was classified as Level 3/4 prior to 4 October 2006. At that time it was reclassified to Level 5 and retitled Senior Technical Officer.
- 2 In October 2010, there was a request to reclassify to Level G7 and to change the title to Team Leader. This request was successful in part, in that it was to be reclassified to Level G6 and the title became Team Leader.
- 3 The applicant seeks that the position be reclassified to Level G7 on grounds that the increase of one level does not reflect the very significant degree of change which has applied to the position. She says the respondent has failed to recognise that the scope of work has broadened to encompass a number of other areas not previously within the purview of this role. Where it was previously limited to the Vascular Laboratory duties, it now encompasses, for example, Radionuclide Laboratory duties. Compliance testing and quality assurance duties add to the level of duties and responsibilities. It is said that these require additional expertise and experience. The Team Leader duties are also claimed as a demonstration of the significant net addition to work value.

- 4 The test to be applied for a reclassification based on increased work value is:
- 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
- ...
- 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.

2012 State Wage Order [2012] WAIRC 00359
(Schedule 2, 7. Work Value Changes)

- 5 I recognise the development of the role undertaken by the applicant over a number of years. She clearly has an excellent capacity to grow in the role allocated to her. As noted during the hearing, reclassification relates only to the requirements of the position, not to how well or otherwise it is performed or the personal qualities of the incumbent. The question to be answered, in this case, is whether there has been demonstrated such a significant net addition to work value such as to warrant an increase in the classification by two levels. There is no question that the position warranted an increase of one level. Part of the consideration in this matter is whether the requirements of the position mean that it ought properly to be classified at Level G7.
- 6 Each position, except a generic position, comprises a unique bundle of duties and responsibilities undertaken in a particular context. A position as Team Leader or Supervisor or Manager, of itself, does not attract a particular classification level. Rather, the particular responsibilities, the number of positions reporting to the position and many other factors also go into the assessment. For example, there are many Level G5 positions, as well as lower and higher level positions, which, as part of the combination of duties and responsibilities, have staff supervision responsibilities. Those responsibilities may be for a very small number of positions or a very large number. I am unable to ascertain that the aspect of team leadership justifies an increase of more than one level in this case.
- 7 As to the remainder of the claim, the evidence demonstrates that the position has taken on additional responsibilities but they are not subject to end of line responsibility and sign-off. Further, the position now deals with a broader range of functions which require knowledge and skills beyond the previous scope of the position, and this might have led to increased complexity. However, I am not satisfied that the additional requirements are higher level requirements. They may simply be of the same level as those previously. Nor am I satisfied that the addition of these requirements creates significantly increased complexity.
- 8 As to the BiPERS assessment, I note firstly, that this is a tool to be used to assist in the determination of the appropriate level of a position. It is not determinative. As to the particular scores, the applicant challenges those allocated by the consultant in respect of Scope of Activities, Interpersonal Skills and Influence on Results. As to the last of these, I am of the view that, when taken with the size of the agency as is required by the BiPERS tool, the score of 52 is not demonstrated to be in error. Even if the other two aspects were wrongly scored by the consultant, they would not take the total score to within the Level G7 score. Further, I am satisfied that the consultant's scores are correct.
- 9 The degree of change in a number of the claimed changes is difficult to distinguish when compared with the changes which justified the reclassification to Level G5. Other changes demonstrate an increase in skill and responsibility and are accounted for in the reclassification to Level G6. I am satisfied that this position is correctly classified at Level G6.

2014 WAIRC 00922

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DEBORAH BARNETT	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 11 AUGUST 2014	
FILE NO	PSA 16 OF 2012	
CITATION NO.	2014 WAIRC 00922	

Result Application dismissed

Order

HAVING heard Ms P Marcano on behalf of the applicant and Ms M Muccilli and with her Mr J Ross for the respondent, 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.

[L.S.]

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

2014 WAIRC 00757

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ALISON MORCOMBE	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 23 JULY 2014	
FILE NO	PSA 29 OF 2011	
CITATION NO.	2014 WAIRC 00757	

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 24th day of January 2012, the 4th day of April 2012 and the 30th day of April 2014 the Public Service Arbitrator (the Arbitrator) convened conferences for the purpose of conciliating between the parties; and

WHEREAS following the latter conference, the parties reached agreement on the matter; and

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

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

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 00827

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2014 WAIRC 00827
CORAM	: ACTING SENIOR COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
HEARD	: THURSDAY, 31 JULY 2014
DELIVERED	: FRIDAY, 1 AUGUST 2014
FILE NO.	: PSA 57 OF 2013
BETWEEN	: TERESA ONG Applicant 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 appeal – Work value – Increased complexity – Whether change demonstrated sufficient to warrant higher classification considered – Chiefs and Deputies Case considered
Result	:	Application dismissed
Representation:		
Applicant	:	Ms C Drew as agent
Respondent	:	Mr J Ross and with him Mr R Gabelish

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings

taken from transcript as edited by the Commission)

- 1 The applicant seeks the reclassification of the position of Area Chief Medical Imaging Technologist from Level P5 to Level P6. The position was last reclassified in around November 2006 to its current level.
 - 2 It is important to acknowledge the significant role the applicant has played in a number of areas and her professionalism in that approach. As Mr Ross says, her personal attributes are worthy of note.
 - 3 The real issue, in this particular case, is whether there has been a demonstrated change that constitutes a significant net addition to work value. Change of itself is not the criterion, but whether the change constitutes a significant net addition to work value by reference to the level of skills and responsibilities required of the position.
 - 4 The applicant acknowledges that there are aspects of the position where she has previously undertaken work of a similar general nature, such as accreditation and policy involvement, but she says that in some of those aspects, there is more complexity to that work than previously.
 - 5 The evidence does not demonstrate that there is a higher level of complexity such as to warrant a higher level of skills and responsibility. I am unable to discern that the things now required of this position are of a higher level of skill and responsibility than was previously required in this position. I note, for example, the human resources work is said to be new, but it appears that that work is not of a higher level than the P5 work; on the contrary, I would have thought the sorts of requirements of that aspect of this position are of a lower level. Likewise, the level of skill and responsibility involved in project management. Whilst project management requires the applicant to utilise her technical skills, the project management itself is not of a higher level. The fact that the position of Assistant Manager PACS/RIS is Level G8, (whether that work has been undertaken by a person filling that position is neither here nor there) shows the level to be attributed to the skills and responsibilities for that work. Change by way of a broader range of roles and responsibilities does not constitute increased work value, rather it is the level of the skills and responsibilities attached to any additional work and responsibility which is significant.
 - 6 The difficulty for this case is that I am not satisfied that the breadth of this role and the changes actually require an increased level of skill and responsibility.
 - 7 The conflict in the evidence between that of Ms Ong and Ms Baxter, and the hearsay evidence created some difficulty in making findings which demonstrate there is this additional level of skill and responsibility.
 - 8 Even if the work value increase had been demonstrated such as to justify an increase in the level of the position, I express my reservations about dealing with this position in isolation given the benchmarks set in the Chiefs and Deputies case (*Board of Management, Royal Perth Hospital and Others v Hospital Salaried Officers Association of Western Australia (Union of Workers)* (1992) 72 WAIG 614). There is quite clearly a distinction between the requirements of positions which deal with a dispersal of worksites as compared with the requirements of tertiary facilities. That, I think, is a matter which would need to be dealt with on a more comprehensive basis, rather than simply on the basis of an isolated position.
 - 9 In those circumstances, acknowledging the changes which have occurred and the work that Ms Ong has put into the position, I am unable to find that the changes warrant a higher level of classification.
 - 10 Accordingly, the application must be dismissed.
-

2014 WAIRC 00828

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	TERESA ONG	
	-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	FRIDAY, 1 AUGUST 2014	
FILE NO	PSA 57 OF 2013	
CITATION NO.	2014 WAIRC 00828	
Result	Application dismissed	

Order

HAVING heard Ms C Drew on behalf of the applicant and Mr J Ross and Mr R Gabelish for the respondent, 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.

[L.S.]

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

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

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

Application Number	Matter	Commissioner	Dates	Result Concluded
APPL 143/2010	Request for mediation in relation to reinstatement of accrued leave entitlements	Harrison C	10/11/2010 9/03/2012	