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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 00973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAPE AUSTRALIA T/A CAPE MARINE & OFFSHORE PTY LIMITED (ABN 31 114 949 003) **APPELLANT**
	-and-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD (ABN 43 638 379 092) **RESPONDENT**
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
DATE	FRIDAY, 29 AUGUST 2014
FILE NO.	FBA 6 OF 2014
CITATION NO.	2014 WAIRC 00973
Result	Appeal discontinued by leave

Order

WHEREAS on 14 March 2014, the appellant filed a notice of appeal to the Full Bench; and

WHEREAS on 26 August 2014, the appellant filed a notice of application for leave to discontinue this appeal; and

WHEREAS on 26 August 2014, the respondent's solicitors informed the Full Bench that the respondent consents to the appeal being discontinued;

NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and reg 103A of the *Industrial Relations Commission Regulations 2005*, hereby orders —

THAT the appeal be and is hereby discontinued by leave.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Cancellation of registration—

2014 WAIRC 00998

APPLICATION TO CANCEL THE REGISTRATION OF THE FEDERATED MILLERS AND MILL EMPLOYEES' UNION OF WORKERS OF WESTERN AUSTRALIA

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 00998
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S M MAYMAN
HEARD	**:**	THURSDAY, 21 AUGUST 2014
DELIVERED	**:**	WEDNESDAY, 10 SEPTEMBER 2014
FILE NO.	**:**	FBM 6 OF 2014
BETWEEN	**:**	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Applicant AND THE FEDERATED MILLERS AND MILL EMPLOYEES' UNION OF WORKERS OF WESTERN AUSTRALIA Respondent

CatchWords	**:**	Industrial law (WA) - Application to cancel the registration of an organisation on grounds that the number of employees and members of the organisation would not entitle it to registration and the organisation is defunct
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 53, s 73, s 73(12), s 73(12)(a), s 73(12)(b), s 73(12a), s 73(13) *Industrial Relations Commission Regulations 2005* (WA) reg 37, reg 76, reg 76(3)
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr R J Andretich (of counsel)
National Union of Workers	:	Mr P Richardson
Respondent	**:**	No appearance
Solicitors:		
Applicant	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers [2004] WAIRC 11936; (2004) 84 WAIG 2190

Reasons for Decision

THE FULL BENCH:

The application and the requirements of the Act

1 This is an application to cancel the registration of The Federated Millers and Mill Employees' Union of Workers of Western Australia (the union). The application was brought by the Registrar before the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act).

2 Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under s 73(12) in every case where it appears to her that there are sufficient grounds for doing so. Section 73(13) also provides that proceedings for the cancellation of the registration of an organisation, or any of its rights under the Act, shall not be instituted otherwise than under s 73.

3 Pursuant to s 73(12) of the Act, the Full Bench is required to cancel the registration of an organisation if it is satisfied on the application of the Registrar that:

(a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under section 53 or section 54, as the case may be; or

(b) the organisation is defunct; or

(c) the organisation has, in the manner prescribed, requested that its registration be cancelled.

4 Whilst it is not clear from the application as to which subparagraph of s 73(12) of the Act that the application is brought, the evidence set out in the statutory declaration made by the Registrar, Susan Ivey Bastian, on 16 May 2014, and the submissions made on her behalf by Mr Andretich, made it plain that the application was made pursuant to s 73(12)(a) and s 73(12)(b) of the Act.

5 Regulation 76 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) provides for the procedure that the Registrar must comply with when an application to cancel the registration of an organisation is made under s 73(12) of the Act. Regulation 76 provides:

(1) Where an application is made by the Registrar under section 73(12) of the Act to cancel the registration of an organisation or association it is to be made in triplicate to the Full Bench in the form of Form 23.

(2) The application is to state clearly the grounds on which it is made and the application is to be accompanied by a statutory declaration setting out the facts on which the Registrar relies.

(3) The application is to be served on the organisation or association the registration of which is sought to be cancelled.

(4) Where the respondent organisation or association intends to oppose the application, it must give notice of that objection in an approved form within 14 days of being served with the application, and otherwise the provisions of regulation 15 apply with respect to any such objection.

(5) Where the respondent organisation or association intends to admit the facts (or any of them) on which the Registrar relies, it must, within 14 days of being served with the application, advise the Registrar in writing accordingly.

(6) After the expiration of the time prescribed in subregulations (4) and (5) the Registrar is to ascertain from the President a date for hearing the application and, as soon as practicable after setting a hearing date, is to notify the organisation or association of the hearing.

6 Where a Full Bench is satisfied on the application of the Registrar that an organisation has, in the manner prescribed, requested that its registration be cancelled, the Full Bench is required by the use of the mandatory word 'shall' in s 73(12) of the Act to cancel the registration of the organisation: ***The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers*** [2004] WAIRC 11936; (2004) 84 WAIG 2190.

7 As required by reg 76, the Registrar filed an application on 16 May 2014, together with a statutory declaration made by her. Her statutory declaration sets out the grounds and the facts upon which the application is made.

8 Whilst reg 76(3) of the Regulations requires that the application be served on the organisation the registration of which is sought to be cancelled, it is apparent from the matters set out in the statutory declaration of Ms Bastian, together with correspondence and other documents on the Commission file, that although the organisation's registration is current, it has no officers or members nor an office upon which the Registrar could serve a copy of the application. In these circumstances, the Full Bench is of the opinion that the requirement to serve the application on the organisation should be waived pursuant to reg 37 of the Regulations. In any event, a copy of the application was served upon Mr Charles Donnelly, the general secretary of the National Union of Workers (NUW). The reason why the application was served upon the NUW is that a letter was received by the Registrar on 30 March 2012 under the hand of Mr Donnelly in which the NUW made a request that the Registrar give consideration to making an application on her own motion to cancel the registration of the union. In the letter dated 26 March 2012, Mr Donnelly drew the following facts to the attention of the Registrar:

(a) The union was the Western Australian Branch of the federally registered employee organisation known as The Federated Millers and Manufacturing Grocers Employees Association of Australasia (the Federal union). This fact had been communicated to the registry of the Commission by the union since at least February 1985.

(b) On 1 June 1992, the Australian Industrial Relations Commission deregistered the Federal union as a consequence of its members approving an amalgamation with the NUW. Attached to the letter of Mr Donnelly was a copy of the declaration made by the Australian Industrial Relations Commission.

(c) The amalgamated NUW commenced operation on the same day.

(d) Despite no accompanying or subsequent applications being made under the Act to reflect the abovementioned amalgamation, since 1 June 1992 employees who were members of the union have been members of the NUW.

(e) Since 27 March 2006, if not prior to that date, all employees who were or are members of the NUW have been subject to the Federal jurisdiction.

(f) Whilst the NUW continues to have members employed within workplaces that would fall within the constitution of the union, they are members of the NUW and as such, the union has no real members.

(g) The union is effectively defunct. A search of applicable records illustrates that it has failed to meet its reporting obligations under the Act since at least 1996.

9 In support of the Registrar's application, Mr Donnelly later made a statutory declaration on 3 April 2013 in which he set out the facts which are referred to in his letter dated 26 March 2012. In the statutory declaration Mr Donnelly also stated that:

(a) The union is effectively defunct.

(b) A search of available records illustrates that it has failed to meet its reporting obligations under the Act since at least 1996.

(c) The board of management of the union does not meet and would not have done so since 1992 and to the best of his knowledge and belief the union has no members and has no assets.

(d) Any assets of the union that existed would have been assumed by the amalgamated NUW as part of the amalgamation that occurred in 1992.

10 Attached to Mr Donnelly's letter was a letter to the Registrar of the Commission from the former secretary of the union, H G Truslove, dated 22 February 1985 in which it was stated that it had been the practice of the union from at least 1971 to file a nil financial return because its Branch was the sole custodian and administrator of all the funds of the union. Also attached to Mr Donnelly's statutory declaration were financial statements which showed that as at 30 June 1992 the union had total assets of $753 and a net deficiency of $1365.

11 In the statutory declaration made by the Registrar she states that a search of the records of the union held by the Commission indicates that the union has failed to comply with its reporting obligations under the Act since 1992 and that the last financial return by the union submitted was the return ending on 30 June 1992, but the named organisation for which the return was prepared and audited was the National Union of Workers Food Branch (WA) and not the union. She also stated that the union last submitted an officers and membership return in 1993 which was relevant to the National Union of Workers Food Branch (WA) and not the union.

12 In the circumstances of this matter set out in the statutory declarations made by the Registrar and Mr Donnelly, the Full Bench was satisfied that the number of members of the union would not entitle it to registration under s 53 of the Act which requires an organisation to consist of not less than 200 employees and that the organisation is defunct. In these circumstances the Full Bench was required to grant the application.

13 After hearing from Mr Andretich on behalf of the Registrar and Mr Richardson on behalf of the NUW, the Full Bench made the following order on 21 August 2014:

> THAT the registration of The Federated Millers and Mill Employees' Union of Workers of Western Australia be and is hereby cancelled as and from the 21st day of August 2014.

2014 WAIRC 00961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-and-
	THE FEDERATED MILLERS AND MILL EMPLOYEES' UNION OF WORKERS OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 21 AUGUST 2014
FILE NO.	FBM 6 OF 2014
CITATION NO.	2014 WAIRC 00961

Result	Application granted
Appearances	
Applicant	Mr R J Andretich (of counsel)
National Union of Workers	Mr P Richardson
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on Thursday, 21 August 2014, and having heard Mr R J Andretich (of counsel) on behalf of the applicant, Mr P Richardson on behalf of the National Union of Workers and no appearance on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

> THAT the registration of The Federated Millers and Mill Employees' Union of Workers of Western Australia be and is hereby cancelled as and from the 21st day of August 2014.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2014 WAIRC 00960

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2014 WAIRC 00960
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 30 JULY 2014
DELIVERED	**:**	THURSDAY, 21 AUGUST 2014
FILE NO.	**:**	M 75 OF 2013
BETWEEN	**:**	GLEN RODNEY DUSENBERG

CLAIMANT

AND

G & A LOMBARDI PTY LTD (ACN 009 007 687)

RESPONDENT

Catchwords	**:**	Alleged contravention of the *Fair Work Act 2009* and the Road Transport and Distribution Award 2010, constituted by the employer's failure to pay its employee two weeks' pay in lieu of notice of termination; whether the employee's conduct amounted to serious misconduct therefore allowing the employer to terminate the employment relationship without notice; claim for 30 minutes' pay conceded.
Legislation	**:**	*Fair Work Act 2009* Fair Work Regulations 2009
Instruments	**:**	Road Transport and Distribution Award 2010 [MA000038]
Result	**:**	Claim succeeds in part
Representation		
Claimant	**:**	In Person
Respondent	**:**	Mr M Dunbar (General Manager) appeared on behalf of the Respondent

REASONS FOR DECISION

Background

1 G & A Lombardi Pty Ltd (ACN 009 007 687) (the Respondent) employed Mr Glen Rodney Dusenberg (the Claimant) as a transport worker between April 2011 and November 2012. At all material times the Claimant was employed on a full time basis, Monday to Friday inclusive. The terms and conditions of his employment were governed by the Road Transport and Distribution Award 2010 [MA000038].

2 On 22 November 2012, the Claimant's employment was terminated. The Respondent says that it terminated the Claimant's employment without notice because of his serious misconduct. The Claimant says that he was not given any reason for his termination and in any event denies serious misconduct.

3 Subsequent to his dismissal, the Claimant contacted the Respondent, claiming that he was owed $2,016.00 (nett), being two weeks' pay in lieu of notice. He also claimed $13.50 in unpaid wages. It suffices to say that the Respondent did not pay him the amounts claimed.

Claim

4 The Claimant claims two weeks' pay in lieu of notice and $13.50 (nett) in unpaid wages.

5 The Respondent disputes the claim for two weeks' pay in lieu of notice. It says that the Claimant's conduct disentitled him to notice of termination or payment in lieu thereof.

6 The claim for unpaid wages is accepted by the Respondent.

Issue

7 The main issue to be determined is whether the Claimant should have been given two weeks' notice of termination, or alternatively, been paid in lieu thereof.

Legislation

8 Section 117(2) of the *Fair Work Act 2009* (FW Act) provides:

> "***117 Requirement for notice of termination or payment in lieu***
>
> …
>
> *Amount of notice or payment in lieu of notice*
>
> *(2) The employer must not terminate the employee's employment unless:*

*(a) the time between giving the notice and the day of the termination is at least the period (the **minimum period of notice**) worked out under subsection (3); or*

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	***Period***
1	*Not more than 1 year*	*1 week*
2	*More than 1 year but not more than 3 years*	*2 weeks*
3	*More than 3 years but not more than 5 years*	*3 weeks*
4	*More than 5 years*	*4 weeks*

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given."

9 The operation of section 117 of the FW Act is limited by section 123 of the FW Act, which provides:

"***123 Limits on scope of this Division***

Employees not covered by this Division

(1) This Division does not apply to any of the following employees:

(a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;

(b) an employee whose employment is terminated because of serious misconduct;

(c) a casual employee;

(d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;

…"

10 Section 123(1)(b) of the FW Act enables an employer to terminate an employee's employment without having to provide the required period of notice or payment in lieu thereof, if the termination occurs by reason of the employee's serious misconduct. The Respondent relies on that provision in denying this claim.

11 The Fair Work Regulations 2009 (FW Regulations) define "serious misconduct" in regulation 1.07:

"1.07 Meaning of serious misconduct

*(1) For the definition of **serious misconduct** in section 12 of the Act, serious misconduct has its ordinary meaning.*

(2) For subregulation (1), conduct that is serious misconduct includes both of the following:

(a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;

(b) conduct that causes serious and imminent risk to:

(i) the health or safety of a person; or

(ii) the reputation, viability or profitability of the employer's business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

(a) the employee, in the course of the employee's employment, engaging in:

(i) theft; or

(ii) fraud; or

(iii) assault;

(b) the employee being intoxicated at work;

(c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

(4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3)(b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or

taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform."

12 The Respondent alleges that the Claimant's conduct at the time of his dismissal fell within the meaning of "serious misconduct" as is defined in regulations 1.07(2)(a), 1.07(2)(b)(i) and 1.07(3)(c).

Onus and Standard of Proof

13 The Respondent bears the onus of proving, on the balance of probabilities, that the Claimant committed the serious misconduct it alleges, thereby disentitling the Claimant to payment in lieu of notice.

14 If serious misconduct, within the meaning of regulation 1.07(3)(c) of the FW Regulations is proven, then the Claimant bears the onus of proving, on the balance of probabilities that in the circumstances, his conduct was not such that it made his continued employment during the period of notice unreasonable.

Was There Serious Misconduct?

15 On the morning of 22 November 2012, the Claimant was in the yard of the Respondent's premises. He had used a prime mover to transport a side tipper trailer weighing approximately 8.8 tonnes to a wash bay at the rear of the premises. Having positioned the trailer proximate to the wash bay, the Claimant disconnected the trailer from the prime mover and then used a seven tonne forklift to shift the trailer into its correct position within the bay.

16 The forklift was coupled to the trailer by the use of a "pod" positioned on the forklift tines. The pod provided the insertion point for the king pin on the trailer's coupling assembly.

17 There is no dispute about the fact that whilst the Claimant attempted to position the trailer into the wash bay, he lost control of the operation. At that point, the forklift was at right angles to the trailer with its rear wheels off the ground. Rather than lowering the tines of the forklift and desisting in what he was doing, the Claimant made the conscious decision to continue to manoeuvre the trailer into the wash bay. Clearly, what he did at the time was not safe. The forklift could have toppled over at any time. When cross-examined about the incident, the Claimant conceded that what he did was unsafe.

18 Mr Michael Dunbar, the Respondent's General Manager, witnessed the incident as he approached the forklift. Mr Dunbar says that as he got closer to it, he saw another employee, Mr Christopher Harvey, positioned between the trailer and a solid fence. In Mr Dunbar's view, Mr Harvey was at risk of injury. Consequently, Mr Dunbar yelled at the Claimant and told him to stop. Mr Dunbar alleges that the Claimant refused to do so. Concerned with what had occurred, Mr Dunbar determined that he should immediately dismiss the Claimant.

19 The Claimant denies that Mr Harvey was between the fence and the trailer. He says that Mr Harvey was between one and two metres away to the right of the forklift and trailer. He also denies that he ignored Mr Dunbar's demand to stop. He says that a demand to stop was never made.

20 It is common ground that Mr Dunbar went to the side of the forklift and told the Claimant that his employment was terminated, and that he should leave and not return. The Claimant testified that he was not told at that time, the reason for his dismissal. His evidence was that Mr Dunbar went to him and said:

"F… off, don't come back to these premises again".

21 Mr Dunbar explained in his evidence that he terminated the Claimant's employment with immediate effect because of the Claimant's disregard for safety that day, and that was against a background of his previous conduct demonstrating lack of care. Another reason for the Claimant's dismissal was his failure, on that day, to obey a lawful instruction.

22 The Respondent is required to prove that the Claimant's conduct on 22 November 2012 constituted serious misconduct warranting his instant dismissal.

23 There are two primary factual issues in dispute about the events that occurred on 22 November 2012. The first is whether the Claimant refused to obey Mr Dunbar's direction to stop and the second is whether Mr Harvey was between the fence and the trailer.

24 There is no evidence about those issues other than that which comes from the Claimant and Mr Dunbar. Mr Harvey was not called to give evidence. The Claimant says that he was unable to call Mr Harvey because he was unaware of his whereabouts. The Respondent on the other hand, decided not to call him because it was of the opinion that he might not give accurate evidence of the events of 22 November 2012 in light of the fact that he too was, for reasons unconnected with the events of 22 November 2012, dismissed from his employment. In light of the explanations given, no adverse inference can be drawn from the failure to call him to give evidence.

25 The factual issues in dispute require resolution. Sometimes when an issue in dispute is to be decided on the conflicting evidence of one witness against the other, it may not be possible to prefer the evidence of one witness over another. However in this instance that is not so. For the reasons that follow, I prefer the evidence of Mr Dunbar.

26 In respect to the disputed facts, being Mr Harvey's location and the Claimant's refusal to obey an order, I find that the events occurred as Mr Dunbar has described them. In the circumstances, each of those events alone warranted summary dismissal.

27 The failure to obey Mr Dunbar's instruction comes within the meaning of "serious misconduct" as provided by regulation 1.07(2)(a) and 1.07(3)(c) of the FW Regulations. The manoeuvring of the trailer whilst Mr Harvey stood between it and the fence also constitutes "serious misconduct" within the meaning of regulation 1.07(2)(b)(i) of the FW Regulations. The latter was conduct that caused serious and imminent risk to the health or safety of a person.

28 Even if the Respondent had not been able to satisfy me of those factual issues, the undisputed evidence nevertheless establishes "serious misconduct". The Claimant's own evidence was that in manoeuvring the trailer using a forklift, he lost control of that operation and that the rear tyres of the forklift lifted off the ground. He conceded that the event was unsafe. The forklift could have toppled over. The conclusion that he put his own safety at risk is self-evident. His version of events also supports a

finding that Mr Harvey was also at risk of being injured given his proximity to the forklift. Had the forklift toppled over, which was entirely possible, the Claimant and Mr Harvey would have been at risk of significant injury or even death. On the Claimant's evidence alone, serious misconduct within the meaning of regulation 1.07(2)(b)(i) of the FW Regulations, is clearly established.

29 In the circumstances the requirement under section 117 of the FW Act that the Respondent give the Claimant notice of termination, or payment in lieu of that notice, did not apply because of the provisions of section 123(1)(b) of the FW Act. Given that one of the grounds giving rise to a finding of serious misconduct is that the Claimant's conduct was such as to cause serious and imminent risk to the health or safety of a person, the Claimant is unable to invoke the provisions of regulation 1.07(4) of the FW Regulations.

Other Incidents

30 Mr Dunbar testified that his decision to terminate the Claimant was taken against the background of other incidents in which the Claimant demonstrated a lack of care and/or disregard for safety. The Claimant admitted being involved in the incidents but says that they occurred as a result of factors outside of his control and/or, by reason of deficiencies in the Respondent's operation.

31 The incidents complained of are as follows.

1. Prime Mover Running off the Road

32 The Respondent contends that in wet conditions the Claimant drove a prime mover without a trailer attached in an unsafe manner causing it to run off the road and go through a fence on the side of the road. The unsafe manner alleged was that the Claimant was following too closely behind another vehicle.

33 The Claimant admits the incident but says he was forced to swerve and run off the road when the vehicle in front of the vehicle he was driving gave him a late indication. In the circumstances he was forced to take evasive action to avoid a collision.

2. Faymonville Trailer

34 When the Claimant took a newly arrived Faymonville Trailer to Forrestfield to be weighed, he caused it to hit the weigh bridge thereby damaging the trailer. The trailer needed to be repaired prior to it being picked up by the Respondent's customer.

35 The Claimant testified that the incident occurred because of his lack of experience and training in driving such a trailer with a different steering mechanism. He said that only minor damage was done to the ladder of the trailer.

3. Reversal of Trailer into Workshop

36 When the Claimant reversed a trailer into the Respondent's workshop at Abernethy Road Forrestfield he caused it to hit a concrete pillar. The trailer and the wall were damaged as a consequence.

37 The Claimant testified that the incident occurred because the Respondent failed to provide a spotter to assist him when reversing the vehicle. When cross-examined, the Claimant conceded that having identified the risk of there being a blind spot, he made a conscious decision to reverse the trailer without a spotter. He said that he had requested a spotter, but was not provided with one, and because he had to get the job done he reversed the vehicle despite the risk of doing so without assistance.

38 The Claimant testified that only minor scrapings were caused to the trailer in that incident. He was challenged about that and shown exhibits 1 and 2, which are photographs depicting the cracking of a concrete wall. The Claimant denied causing such damage. Mr Dunbar's evidence was that he inspected the damage caused to the wall soon after the occurrence. He says that the photographs of the damaged wall taken soon after the event (exhibits 1 and 2) accurately depict the damage caused by the Claimant.

39 Mr Dunbar said that he spoke to the Claimant about the incident and warned him about his lack of care. The Claimant denies having had such a conversation or receiving a warning of any type.

4. Big Wheels

40 The Claimant drove a prime mover with a trailer to Big Wheels Truck Alignment next door to the Respondent's premises. In the process, he misjudged his angles and caused his vehicle to hit a cement pillar. He said the impact was at low speed causing paint to be scraped off the trailer.

41 When cross-examined, the Claimant was shown photographs (exhibits 3.1 to 3.4) which Mr Dunbar later testified were taken immediately after the incident. The Claimant denied the extent of the damage shown in the photographs and suggested that the photography distorted the extent of the damage caused.

5. Fuel Tank Rupture

42 When moving a trailer to Roadwest Transport Equipment and Sales Pty Ltd, an associated company of the Respondent, the Claimant caused the prime mover he drove pulling the trailer to clip a pod on a forklift, rupturing the prime movers' fuel tank. Mr Dunbar suggested that the incident occurred as a result of the lack of care shown by the Claimant. When cross-examined, the Claimant explained that he did not see the yellow pod which he clipped. He agreed that he did not get out of his vehicle to check what was behind his vehicle before he started reversing.

Overview of the Five Incidents

43 The Claimant testified that he was never given any verbal or written warnings about the incidents that he was involved in. Whilst I accept that he was not given written warnings about those incidents, I do not accept that he was not given a verbal warning or at least spoken to about those incidents, or some of them.

44 It is more probable than not that given the number of incidents in which he was involved and the extent of the damage caused by him that he would have at some stage been verbally warned about his conduct. The extent of damage caused in the Big

Wheels incident (as evidenced in exhibits 3.1 to 3.4), supports the conclusion that such would have been the subject of a warning given as Mr Dunbar suggests.

45 In that regard, I find it probable that Mr Dunbar spoke to the Claimant about those incidents and in particular about the Big Wheels incident. I accept Mr Dunbar's evidence in that regard. For those reasons, Mr Dunbar's evidence is preferred over that of the Claimant.

46 The Claimant's credibility is adversely affected by what he said about the damage he caused at Big Wheels. His evidence is inconsistent with the damage depicted in the photographs (exhibits 3.1 to 3.4), which I accept are true photographs of the damage caused.

Conclusion

47 The Claimant's conduct as exemplified by the various incidents described above, prior to the incident of 22 November 2012, indicate inadequate care, control and/or attention to safety. Although none of those incidents alone or in combination would have warranted his summary dismissal, clearly the incident on 22 November 2012 did.

48 Although Mr Dunbar terminated the Claimant's employment by reason of what occurred on 22 November 2012, against the background of the earlier incidents, it was clearly the case that he was justified in immediately terminating the Claimant's employment as he did, based solely on the events which occurred on 22 November 2012.

49 In the circumstances, the Claimant was not entitled to notice of termination or payment in lieu thereof. His sole entitlement is that of $13.50 (nett) for the half hour's work that he performed which remains unpaid.

50 I propose to make an Order for judgement in favour of the Claimant in the sum of $13.50 (nett), exclusive of tax. The Respondent will be liable to remit to the Australian Taxation Office the appropriate tax payable with respect to the payment for the half hour's work performed. The Claim is otherwise dismissed.

G. CICCHINI
INDUSTRIAL MAGISTRATE

2014 WAIRC 00995

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2014 WAIRC 00995
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 9 JULY 2014
DELIVERED	**:**	WEDNESDAY, 10 SEPTEMBER 2014
FILE NO.	**:**	M 38 OF 2011
BETWEEN	**:**	UNITED VOICE WA
		CLAIMANT
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		RESPONDENT

Catchwords	**:**	Failure to comply with Clause 10.3 of the Education Assistants' (Government) General Agreement 2010; whether the Claimant should be permitted to reopen its case to lead evidence of multiple breaches.
Legislation	**:**	*Industrial Relations Act 1979*
Instruments	**:**	Education Assistants' (Government) General Agreement 2010
Cases Referred to In Judgement	**:**	***United Voice WA v Director General, Department of Education*** [2014] WAIRC 00324
Result	**:**	Application to reopen refused
Representation		
Claimant	**:**	Mr S Millman (of Counsel), instructed by Slater & Gordon Lawyers, appeared for the Claimant
Respondent	**:**	Mr D Matthews (of Counsel), instructed by the State Solicitor for Western Australia, appeared for the Respondent

REASONS FOR DECISION

Background

1 I do not propose to repeat the history of this Claim, which is set out in *United Voice WA v Director General, Department of Education* [2014] WAIRC 00324 at paragraphs 1 - 4.

2 In my written reasons for decision, delivered on 16 April 2014, I said at paragraph 16:

> "*Given the circumstances, it is incumbent upon the Claimant to provide evidence of each particular alleged breach of Clause 10.3 of the Agreement. Given that the Respondent has agreed that a breach of Clause 10.3 of the Agreement has occurred, constituted by various omissions, it is not appropriate to close the door on the Claimant's ability to provide further evidence with respect to each alleged contravention.*"

3 I followed by inviting the parties to consider reaching agreement with respect to the alleged contraventions of Clause 10.3 of the *Education Assistants' (Government) General Agreement 2010* (the Agreement). I indicated that if an agreement could not be reached, a further hearing would need to be conducted to enable the receipt of evidence which would go to the proof of each breach of Clause 10.3 of the Agreement. The hearing was adjourned to 9 July 2014 for directions.

4 When the hearing resumed on 9 July 2014, the Respondent submitted that the Claimant should not be permitted to call further evidence, and advanced reasons for that submission. I acknowledged at that time that my view that the Claimant ought to be permitted to lead further evidence, was arrived at in the absence of full legal argument on the issue. With the agreement of both parties, I further adjourned the hearing in order to facilitate the receipt of written submissions with respect to that issue.

Submissions

Respondent

5 The Respondent submits that a careful reading of the transcript for each day of hearing reveals that the issues at trial were not limited to the construction of Clause 10.3 of the Agreement, and the imposition of penalties with respect to the admitted breaches. The Respondent pointed out that this Court expressly rejected a split trial scenario in which the issue of the construction of Clause 10.3 was to be determined as a first step. The Court held that all of the evidence was to be heard and the issues determined in one trial (Transcript-18 April 2012, pages 4 to 8).

6 The Respondent says that the transcript reveals that on 30 May 2012, the Claimant's representative opened on the basis that the Court would hear all outstanding claims not admitted, and then pending such determination, reconvene to receive submissions on penalties (Transcript-30 May 2012, page 18).

7 The Respondent also observes that the Claimant's representative is recorded (Transcript-30 May 2012, page 19) as saying in opening that it would seek to establish the Respondent's non-compliance with Clause 10.3 and arrive at the number of breaches by mathematical calculation. The Respondent contends the Claimant chose to run its case on the basis of establishing its interpretation of Clause 10.3 and then asking this Court to work out, as a matter of logic and mathematical calculation rather than evidence, the number of breaches.

8 It is submitted that what is now occurring is that the Claimant is seeking to reopen the hearing to lead further evidence to address problems it now encounters, as a result of the way it chose to run its case. The Court should therefore not allow the Claimant to reopen the hearing to address the flaw. It would, in the circumstances, be unfair to allow the Claimant to reopen.

9 Counsel for the Respondent concluded his submissions by saying:

> "*To summarise the cases, the equation is one of whether the principle of finality of proceedings is overcome by the need to avoid injustice. In this case the claimant has chosen to run its case in a certain way. Having learned at a later time that this cannot produce the results it wants in relation to penalty, the claimant now seeks to reopen its case to lead further evidence in an attempt to increase the quantum of the penalties available to this Court. It is respectfully submitted that this is not an appropriate basis upon which to allow a party to reopen its case.*"

Claimant

10 The Claimant advances three reasons, as to why it should be permitted to call further evidence. Those reasons are:

- what is proposed is that contemplated by the proceedings up until this point;
- it is consistent with the objects of the *Industrial Relations Act 1979*; and
- if it were not permitted to proceed in the way sought, all that would happen is that new proceedings would be commenced.

11 In support of its first reason, the Claimant points out that the issue now raised by the Respondent has not previously been advanced in this Court, nor on appeal. Further, the Claimant refers to my findings delivered on 16 April 2014 (supra) in support of its position.

12 As to its second reason, the Claimant asserts that the statutory requirements under which this Court operates, requires the Court to ensure that cases are dealt with justly. In view of the decision of the Western Australian Industrial Appeal Court (*Director General, Department of Education v United Voice WA* [2013] WASCA 287), the Claimant should not be prevented from leading further evidence. Indeed, the Claimant submits that the avoidance of injustice would require it. In short, because of the way the hearing has progressed, the Claimant has not yet put its evidentiary case for breach of Clause 10.3 of the Agreement.

13 The Claimant supports its third point by asserting that it will be prevented from seeking penalties for what has been determined to be a breach of Clause 10.3 of the Agreement. In those circumstances, it would be perverse if the matter was not properly concluded. Further, given that the issues will not have been finally resolved, it is highly likely that the Claimant would commence new proceedings which could not be the subject of objection, based on res judicata or issue estoppel.

14 If the Claimant were to be prevented from calling further evidence it would be inconsistent with the objects of the *Magistrates Courts Act 2004* and the *Industrial Relations Act 1979*, and would offend against the principles of good case management.

Conclusion

15 Following the receipt of submissions, I have re-read the transcript of the proceedings which were conducted on 18 April 2012 and 30 May 2012. That has revealed that my prior recollection of how the case was run, was incorrect.

16 Indeed, the case was run as Counsel for the Respondent suggests. The Claimant was aware that proof of the contravention or contraventions of Clause 10.3 of the Agreement was in issue. In the circumstances the Claimant could have, and should have, called witnesses to prove each alleged breach of Clause 10.3 of the Agreement. Rather, it made the conscious decision not to call witnesses in the belief that the Court could find the alleged breaches proven, by mathematical calculation.

17 Having chosen that path, the Claimant finds itself in difficulty with respect to proving the alleged breaches, and seeks to reopen.

18 If it were permitted to do so, it would be unfair because it would be given a second opportunity to prove the case that it could have proven in the first instance. The Claimant took its course as a matter of tactic and now seeks to rectify a potential flaw in its approach.

19 Regulation 5 of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (the Regulations) requires this court to ensure that cases are dealt with justly. That applies to both parties. If the Claimant is permitted to reopen it would not be in keeping with the requirements of Regulation 5(2) of the Regulations, which requires that cases are dealt with efficiently, economically and expeditiously. Significant delay may well result.

20 The Respondent has admitted a singular breach of Clause 10.3 of the Agreement. In light of what I said in my reasons delivered 16 April 2014, the effect of that admission is somewhat problematic. It is not clear as to what I should make of the admission. Despite that, it remains the case that I can deal with all outstanding issues based on the evidence that is before me. The issues joined by the parties are capable of resolution on that evidence.

21 I will now hear from the parties as to the Orders to be made.

G CICCHINI
INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2014 WAIRC 00971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PENELOPE RUBY ARCHER
	APPLICANT
	-v-
	STARICK SERVICE INC.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 28 AUGUST 2014
FILE NO/S	B 136 OF 2013
CITATION NO.	2014 WAIRC 00971

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr D Jones as agent

Order

HAVING heard the applicant on her own behalf Mr D Jones 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 application be and is hereby discontinued.

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

2014 WAIRC 00976

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOEL PIETER BAARSPUL
	APPLICANT
	-v-
	BARRY J. ULLOCK
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 29 AUGUST 2014
FILE NO/S	B 117 OF 2014
CITATION NO.	2014 WAIRC 00976

Result	Application discontinued
Representation	
Applicant	Mr J P Baarspul
Respondent	Mr B J Ullock

Order

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

AND WHEREAS on 16 July 2014 and 12 August 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 21 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,
[L.S.] Commissioner.

2014 WAIRC 00614

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00614
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 25 FEBRUARY 2014
DELIVERED	**:**	TUESDAY, 15 JULY 2014
FILE NO.	**:**	B 103 OF 2013
BETWEEN	**:**	AMIR BAHRAMI
		Applicant
		AND
		MR TONY ROSS
		TRIDENT AUSTRALASIA PTY LTD
		Respondent

Catchwords	**:**	Industrial law (WA) – Contractual benefits claim – Claim for outstanding salary, superannuation and a salary rate increase – Whether the applicant was re-employed – Existence of a contract of employment – Principles applied – Contractual terms – Conditions precedent – Conduct – Work was performed – Application upheld – Order made
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii) *Minimum Conditions of Employment Act 1993* (WA)
Result	**:**	Application upheld. Order Issued

Representation:

Applicant	:	In person
Respondent	:	Ms N Ross

Case(s) referred to in reasons:

Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256

Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523

Gange v Sullivan (1966) 116 CLR 418

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Rudi's Enterprises Pty Ltd v Jay (1987) 10 NSWLR 568

Taylor v Johnson (1983) 151 CLR 422

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd (2012) 92 WAIG 709

Reasons for Decision

1 The applicant, Mr Bahrami, was employed as a Lead Structural Engineer at Trident Australasia Pty Ltd, an offshore and engineering service provider. During his employment, Mr Bahrami was based in Perth and was responsible for conducting engineering tasks and calculations in regards to Trident's various projects. Mr Bahrami commenced work with Trident on 19 February 2009 as a casual employee, and his employment ended in May 2010. Mr Bahrami claims that he started with Trident again in July 2010, and the employment ended on 30 July 2010. The re-employment of Mr Bahrami by Trident is in dispute.

2 Mr Bahrami says that in about July 2010 he entered into a verbal contract of employment with Trident, and then provided engineering services in relation to the company's "East Udang Project" in Indonesia. Mr Bahrami claims he has been denied benefits due to him under his contract of employment in the form of his outstanding salary for work conducted during the month of July 2010 in the sum of $15,639, which includes 10 per cent superannuation, and a salary rate increase of $2 per hour since July 2009, which was never implemented and which amounts to $1,963. The total amount claimed by Mr Bahrami is $17,602.

3 Trident opposes Mr Bahrami's claim. Trident contends that there was no oral or written contract entered into by the parties during the period of the claim. It says that Mr Bahrami left his employment with Trident on 16 May 2010 to take up employment in Melbourne with another employer and Mr Bahrami was paid in full for his services up to the time of his departure. It says that in about July 2010 Mr Bahrami travelled back to Perth, and made enquiries with Trident about work opportunities, which Trident endeavoured to provide, but which did not eventuate. Trident says that any offer of employment was subject to conditions, which were not fulfilled.

4 Whether Mr Bahrami is entitled to the benefits he claims, depends on whether a contract of employment existed between the parties during the relevant period, and if so, the terms of that contract.

Evidence

5 Mr Bahrami's letter of employment of 18 February 2009 stated that he was casually employed as a Lead Structural Engineer and remunerated at a base rate of $78 per hour. From his commencement in February 2009, Mr Bahrami said that he usually worked 38 hours per week, sometimes more and sometimes less, and his hours of work depended on the demand of the company and if he was available at the time. While the contract referred to "casual" employment, the evidence was that Mr Bahrami was regularly and continuously employed by Trident throughout the relevant period.

6 In the time leading up to Mr Bahrami's departure from Trident in May 2010, the company was experiencing financial distress and was involved in litigation. During 2010 Trident held meetings and told its employees that the company was experiencing serious financial difficulties due to non-payment by its clients for services rendered. At a meeting held in May 2010, Mr Ross, Trident's Commercial Manager, said that he informed employees that the company was being forced to close down.

7 Mr Bahrami testified that in 2010, the demand for his work declined, and Mr Bahrami stopped being called into work as regularly. In these circumstances, Mr Bahrami decided to seek new employment opportunities. He was successful in obtaining employment as an engineer with another employer in Melbourne and he commenced his new employment on 24 May 2010. Around this time, Mr Bahrami said that he told Mr Pezhhan, the Engineering Manager, and Mr Halvorsen, the President of Trident, that he had found a new position. It is not in dispute that Mr Bahrami left his employment with Trident at this time.

8 On 21 June 2010 Mr Bahrami took a week of unpaid leave from his new position in Melbourne, and travelled to Perth to visit his family. During that week, Mr Bahrami said that he contacted Mr Pezhhan and Mr Ross. Mr Bahrami stated that he got the impression from Mr Pezhhan and Mr Ross that Trident's business was improving due to new opportunities that had arisen.

9 Mr Bahrami's evidence was that Mr Ross told him that two projects called "Lima" and "East Udang" were contracted or about to be contracted to Trident and a loan sought by Trident for a vessel was imminent, and he was told that Trident wanted someone experienced to help service the projects. Mr Bahrami said that Mr Ross assured him that things were getting better, and Mr Bahrami said he had no reason to doubt this. Mr Bahrami testified that around this time, verbal offers of employment were made to him a number of times. This is disputed by Trident.

10 At a meeting in or around July 2010, Mr Bahrami said that Mr Ross referred again to the projects and informed him that Trident's financial circumstances were getting much better and his services were required. Mr Bahrami decided to resign from his employment in Melbourne, to return to Trident.

11 According to Mr Bahrami, he started his re-employment with Trident on 1 July 2010 at the East Perth office and commenced engineering support work on the East Udang Project, located in Indonesia. Mr Bahrami contends that he and Mr Ross orally agreed that Mr Bahrami would continue in July 2010 under the same terms as his previous contract. Mr Bahrami said he was also expecting some new terms regarding his relocation to Jakarta for two months to assist the Group Operations Manager with the project. Mr Bahrami testified that his understanding, following discussions with Mr Ross, was that following his two months in Jakarta, he would return to Trident as a permanent employee. Mr Bahrami said that the rate of pay was not discussed, but he understood that he would continue under the terms of his previous contract.

12 Mr Bahrami accepted that the relocation to Jakarta was one of the conditions of the employment offer, but in the end he was asked to work at Trident's premises in Perth, and according to Mr Bahrami, Trident tried, but never committed to sending him to Jakarta in July 2010. Mr Bahrami said that Trident did not ask him to relocate to Indonesia and tickets, work permits and accommodation arrangements were never made, so he stayed in Perth and performed work on the project. Mr Bahrami's evidence was that he never said he would not go to Indonesia.

13 While waiting for the arrangements to be made in relation to the Jakarta relocation, Mr Bahrami said that he stayed in Perth for the whole of July 2010 and performed full time engineering services such as calculations, project management, time scheduling for projects and normal engineering duties. Mr Bahrami said that he submitted time sheets for the month of July to Mr Pezhhan.

14 As an example of the work performed, Mr Bahrami tendered a proposed project schedule he submitted for the project on 11 July 2010 titled "Engineering, Procurement, Construction and Installation of Pipeline for Offshore Production Facility of Udang Fault Block Development" which shows the project stages from 17 May 2010 to mid-December 2010.

15 On 30 July 2010 Mr Ross called a group meeting, and employees were informed that Trident's financial situation was worse than expected. Mr Bahrami said that he was told that the loan was not coming, contracts were not being paid, the company was engaging in litigation and Trident was unable to pay employees. As such, employees were told to vacate the premises, and Mr Bahrami left. Mr Bahrami said that he was promised that Trident would provide payment for work performed, and "lay-off" letters would be provided in a month.

16 Mr Bahrami referred to a letter dated 18 August 2010, tendered as exhibit A1, which is addressed to Mr Bahrami, and signed by Mr Ross and Ms Robinson, the Dual Financial Controller, which provides:

> …
>
> Amir,
>
> Re: Settlement of Outstanding Payroll Funds
>
> We regretfully write with respect to the recent decision to close Trident East Perth offices, due to financial crisis brought on by outstanding debtors.
>
> …
>
> The attached pay slip information relates to your final salary amount payable and we confirm that the amount payable will be paid to you as soon as possible. We sincerely appreciate your patience and understanding regarding this delay.
>
> …

17 Furthermore, the letter of 18 August 2010 encloses a payslip with a pay date of 31 July 2010, for the period 1 July to 31 July 2010. Under the heading "Earnings and Hours" the payslip states that the hourly pay total is $15,639 for 200.50 hours. Mr Bahrami said the payslip reflects the hours of work that he performed during July 2010.

18 On 30 August 2010 Mr Bahrami emailed the company asking for payment for the work performed. On 31 August 2010, Ms Robinson replied by email, and apologised for the delay in payment and said that the company had been experiencing delays in receiving expected funds, and as a consequence, was not yet in a position to pay Mr Bahrami for July 2010. The email states that "please know that [Mr Ross] and I are doing all we can to ensure we maintain true to the words spoken on the 30/7/10."

19 The email chain set out in full is as follows:

> **From:** Amir Bahrami [amir.auk@gmail.com]
>
> **Sent:** Tuesday, 31 August 2010 6.28 PM
>
> **To:** Joanne Robinson
>
> **Subject:** Re: Layoff letter and the last payment
>
> Hi Jo
>
> Thanks for understanding my position. But what was that the company contacted me for? Was it the job in Indonesia? But at the time when Eilert was explaining to me, it was quite clear that it will reach no where, and it did. Otherwise the company should have the money at least to pay the employees! None obviously expected me to take part in this project on my own expense, or would they? However, I was willing to cooperate by working from home, but Eilert was expecting me to go to Indonesia on my own expense and at the end of the day it was not clear who was going to reimburse the costs. Anyways, there is no news for new opportunities for me, I have to go to the centrelink to officially inform my unemployment. I am sure as a proof they need a layoff latter or some document to show that my contract has been

terminated and I have no further income from Trident. Since I don't have such document, I don't know what would be centrelink's reaction. Please advise in this regards.

Amir

On Tues, Aug 31, 2010 at 11:47 AM, Joanne Robinson <Joanne.Robinson@tridentaustraliasia.com> wrote:

Hi Amir,

Thank you for asking – it has been rather stressful here over the last few weeks, but we continue to do all we can…

I am sorry I did not get back to you yesterday – I was away with the flu.

Apologies for the delay in payment. We have actually experienced delays in receiving the funds we expected to receive and as a consequence, we are not yet in a position to pay you for July 2010.

I have heard, however, that the Company did contact you several times about further work, but that you chose to not take it. I can certainly understand your position.

I wish the best for you too and please know that Tony and I are doing all we can to ensure we maintain true to the words spoken on the 30/7/10. We do not intend to do the wrong thing by anybody.

Please bare with us and good luck for all your future opportunities!

Jo

Jo-Anne Robinson | Financial Controller | Trident Australasia Pty Ltd

…

From: Amir Bahrami [mailto:amir.auk@gmail.com]

Sent: Monday, 30 August 2010 2.24 PM

To: Joanne Robinson

Subject: Layoff letter and the last payment

Hi Joanne

Hope everything is going fine for you. In our last company meeting 30/07/2010, Tony asked us to be patient for a month so that the company can arrange for our payment and a lay off letter on its comfort. Although my contract has not been renewed for the second year, but the fact that the company had payed me up to May this year, indicates that the contract is automatically continued for the second year without any change in its conditions. The fact that the company hasn't call me for working since the a.m. meeting concludes that either there is no suitable activity in the company or the company doesn't need my services any longer, so may I respectfully ask you to arrange for the layoff letter and the last payment please. I beleive that some of our former colleagues who had similar conditions has received these before (Tobi, Mehran).

I thank you in advance and wish the best for you.

Amir Bahrami

20 Mr Bahrami testified that he then contacted Mr Ross to ask for payment. On 31 August 2010, Mr Ross replied by email, tendered as exhibit A1, which I set out as follows:

Amir, as previously advised we will pay you when we have something to pay you with.

Toby and mehran were paid in part you will receive yours when we are able to

I will forward you a letter tomorrow

We also continue to work without pay it is rather a shame that the work others are doing in an attempt to make payment as we have done in the past is not recognised or appreciated

I continue to put petrol in my car as I have done now for six months to go to work every day in an attempt to make sure everyone gets paid eventually.

…

From my perspective we attempted to get work with udani, we were advised you were not prepared to go to indonesia but were prepared to work from home . That I believe is a fact.

Udani has still not paid us now going back some 3 months and I have now refused to continue to allow eilert to support him.

Please also keep in mind we undertook a lot of work in iran and still await payment, you certainly did not suffer there.

As we have all found out life is pretty tuff .

I can assure you we will not be beaten.

Thanks and regards

…

21 On 6 September 2010, Mr Ross wrote another email to Mr Bahrami, which I set out in full as follows:

> Amir, I do not understand why we are going down the path we are. Our commitment to make payment as and when we can is validated by the fact of Trident making part payments to Toby and Mehran. We can only share what we have to share , your turn will no doubt come.
>
> We have been trying to get agreement to undertake 2 projects as you well know.
>
> Those being East Udang and Lima
>
> We have not been paid for east Udang now for 3 months , we are attempting to get paid for the engineering that was undertaken but at this point in time have not recd payment of $170.000. I have refused to allow Eilert to return to Indonesia until such time as we get paid this is putting pressure on the relationship between Peter and Udani .
>
> It was originally planned that you and Eilert would be mobilized to Jakarta to work on the East Udang Project . You were originally delayed from going to Indonesia on the basis of us seeking a commitment to have your services paid , you were repeatedly advised by me of these circumstances , Eilert as I am led to believe requested your and Hamid Pezhan's attendance to Indonesia should we be successful with our negotiations with Udani, this never occurred notwithstanding you then deemed it impossible to go to Indonesia in the event we were successful.
>
> This is putting significant pressure on everyone I hope to conclude the impasse with Udani via a conference call to be held at 2.00pm today.
>
> Peter Cox is in transit to Jakarta where he is hoping to execute a contract for FEED for the Lima Project this has been dragging on since your departure , we are confident that Peter will execute a contract which will allow a significant scope of work be undertaken accordingly. Should this occur you will be invited to assist with this undertaking it is up to you whether or not you accept to do this.
>
> We still await payment for all of the engineering undertaken over the last 8 months for our friends in Tehran still outstanding $200,000.
>
> We are still awaiting confirmation of financing which would allow us to make a commitment with the barge out of China.
>
> There was suppose to be a significant meeting in Tehran on Sunday relative to the Hengam project, this not so surprising did not occur , as you well know we are owed $15million
>
> We continue with litigations with Nexus to have unpaid invoices made to the value of $2,650,000.
>
> The liquidators are attempting to have $40 million paid by Nexus this is also ongoing with our assistance for which we receive no compensation.
>
> We continue to litigate with Kim Heng with no compensation .
>
> Joanne and I have recd no payment since your departure , yet we have paid what we can to Mehran and Toby and small payment s for us to continue operations this provides confirmation of our commitment made to you and others.
>
> I have now not recd payment for some 6 months. I Am not a director of this company but chose to sacrifice any payment owed to me to my detriment to allow payment to you and others over the last 6 months.
>
> I do not understand why there is such anger directed at us given the above ref circumstances .
>
> From my understanding there was an agreement / understanding the engineering team was brought back on the basis of being paid when we recd payment (I ref Bahangarsar, not withstanding we have endeavoured to pay the engineers at every available opportunity.
>
> I am sorry this is turning into a bitter war of words it is certainly not my intention, I apoligise for not sending you your letter, I completely forgot about it.
>
> We remain committed to pay you when we can
>
> Regards

22 Mr Bahrami said that he understood he was going to be paid and referred to an email of 13 September 2010 which states:

> Dear Mr. Tony Ross
>
> Following my email 6 Sep. in response to your email on the same date, I would like to add the followings:
>
> It is obvious that you are trying to build a case on this basis that my denial to go to Indonesia caused some difficulties to the company. As I mentioned before, according to my contract, any change of place should be subjected to a previous agreement. Our original arrangement was based on a gentleman talk between me and you, concluding that I would go to Indonesia for 2 months to provide engineering services to Udang project, provided that the company offers me a permanent staff position with fare remuneration for my services. I stayed working in the company for more than a month, while the offer were never made by the company. I should remind you that once you came upstairs (2/7/2010) and in front of everyone assured me that you would provide the offer and a new contract for me. Hamid Pezhhan (engineering director of the company and my manager) were amongst those who were present at that day . Personally you repeated this promise to me at least one more time. I was still ready to go to Indonesia, but you never committed to buy me a ticket, regardless of Eilert (the project manager) who was insisting of my presence in Indonesia. I should insist that I was not idle during this time and was working hard on every assignments regarding this project including preparation of deliverable lists for engineering and operation and time schedule for the project, presentations for the project manager, etc. I even have taken part in a few Skype meetings with the client and sub sea equipment contractor.

> The fact that you admitted in your letter that you ceased Eilert's services in Indonesia due to Udani's lack of commitment, contradicts your claim of being put under pressure due to my denial to go to Indonesia. How could the company be put under pressure due to my denial to further contribute to an already dead project?
>
> Yet you did not show proper commitment in the form of change of employment conditions for me, as it was a natural and legal pre-requisite to my acceptance of change of work location.
>
> In my numerous email correspondences with you, I didn't ask for what I didn't go. I asked for the hours I worked which had happened before I denied to go to Indonesia. Sure you were happy with these hours of commitment of mine, as you have never advised otherwise. Yet you are pushing on this point trying to condemn me, while you are responsible for that by not providing decent offers as it should be done based on previous agreements and Para. 4 of Clause 4 of our contract.
>
> regards
>
> Amir Bahrami

23 Mr Ross responded by email on 13 September 2010 as follows:

> Sorry amir I do not understand why this debate is continuing.
>
> I have said we will pay you for your services when we receive some funds.
>
> …
>
> The fact is we had no ability to commit anyone due to not being able to get an agreement with east udang, it has been proven in the past that we could ill afford to commit without a guarantee of payment, it is unfortunate what has occurred I cannot change the history of events and I am not about to apoligise for anything nor am I looking to continue this debate .
>
> I conclude by thanking you for your time and your initial understanding which some how changed over a period of time.
>
> Best regards

24 As to the 10% superannuation claimed by Mr Bahrami as a denied contractual benefit, tendered as part of the exhibit A1 bundle is the contract of employment dated 18 February 2009, and under the heading "Superannuation" it states:

> In addition to your base hourly rate, the Company will contribute to your superannuation fund in accordance with the statutory contributions prescribed under applicable superannuation guarantee legislation or 10% whichever is the greater.
>
> …

25 In regards to the salary rate adjustment claimed by Mr Bahrami, tendered as exhibit A2 is a letter dated 4 August 2009 addressed to Mr Bahrami from Mr Cox, the Managing Director of Trident. The letter states that as of 1 July 2009, Mr Bahrami's hourly rate of $78 per hour, would be adjusted to $80 per hour, and the new rate would be reflected when the July salary payments were made in August. The letter states that a discretionary bonus was paid to Mr Bahrami on 30 June 2009, as acknowledgement of his loyalty.

26 Mr Bahrami testified that he made enquiries about why the pay rise had not been implemented, and was told that it was a mistake that it had not been paid, and the pay rise would be corrected in the next pay. After that enquiry, Mr Bahrami said that he forgot about the issue.

27 Trident has a different view in regards to Mr Bahrami's re-employment. It says that the terms and conditions in Mr Bahrami's contract did not rollover when he was re-employed by Trident in July 2010; rather the employment relationship severed when Mr Bahrami resigned to pursue another employment opportunity in Melbourne. It says that another employment contract never eventuated.

28 Mr Ross agreed that the parties had discussions in July 2010 about potential opportunities for Mr Bahrami to join Trident for the East Udang Project, should the company be successful in securing the project. However, Trident says that a formal offer of employment was not made to Mr Bahrami. This was because it was made clear to Mr Bahrami that an offer was conditional on Trident securing and being paid for the East Udang Project, and Mr Bahrami temporarily relocating to Jakarta.

29 The respondent says that given Trident did not get the contract for the East Udang Project, and Mr Bahrami decided that he would be unwilling to relocate to Jakarta, no offer of employment was made. Trident says that given there was no contract of employment, Mr Bahrami has no entitlement to be paid for the month of July 2010.

30 Mr Ross' evidence was that there was no offer of employment, orally or in writing. Mr Ross said that he did not recollect, at any time, verbally offering employment to Mr Bahrami. Mr Ross said that he did have written and verbal discussions with Mr Bahrami that they may be opportunities at Trident, subject to commitment from clients. Mr Ross said that it was never agreed that Mr Bahrami's contract would be rolled over, and had a contract eventuated, it would have been a fresh contract for each of the East Udang and Lima Projects.

31 It was Mr Ross' understanding that Mr Bahrami would surrender his position in Melbourne, only upon being formally offered a position with Trident, initially for the East Udang Project, which did not eventuate, and then for another project called "Lima", which did in fact eventuate but Mr Bahrami decided that he would be unwilling to relocate to Jakarta. Mr Ross stated that in or around April 2010 Trident was pursuing the Lima Project and the company was awarded the FEED engineering contract in November 2010.

32 In regards to the East Udang Project in particular, Mr Ross said that Trident provided some engineering services on the basis that it would eventually be paid, but, over time it became obvious that its client would not commit and the project never eventuated. A draft employment offer had been prepared specifically for the East Udang Project however the company says it was never offered to Mr Bahrami because he refused to relocate to Jakarta, and primarily because the project did not eventuate. According to Mr Ross, Mr Bahrami made his intentions known that even though he initially stated he would be willing to go to

Jakarta, he withdrew his willingness which meant that if Trident had been successful with the East Udang Project, there would not be a position for Mr Bahrami.

33 An email of 11 August 2010 from Mr Bahrami to Mr Halvorsen was included in the exhibit R1 bundle, which states:

> **From:** Eilert Halvorsen [eilert@optus.ap.blackberry.net]
>
> **Sent:** Wednesday, 11 August 2010 11.52 PM
>
> **To:** Tony Ross; Peter Cox
>
> Subject: Udang
>
> In confidence Amir has unfortunately declined a support engineering option in Jakarta and I have a similar message from Hamid even for a short 7-10 day preparatory mission.
>
> Eilert Halvorsen | Group Operations Manager | Trident Australasia
>
> …
>
> **From:** Amir Bahrami <amir.auk@gmail.com>
>
> **Date:** Wed, 11 Aug 2010 20:32:10 +0800
>
> **To:** <eilert@optus.ap.blackberry.net>
>
> **Subject:** Re: Udang
>
> Hi Eilert
>
> I don't know what you mean by "us"? If it is Trident, I am not sure much has been left of it. Tobi is in Technip now, Pratiush rathers to do cleaning than going back there, Hamid is looking for another job and I have already lost a permanent position in Melbourne on Trident! I personally am very pissed off of it, since I have worked the last week of June and the whole Jully on Udang, lost my job in Melbourne and even was not paid.
>
> Apart from the complaint, for some of which I can't blame anyone but myslef, I won't be taking part in anyfurther activity unless I know who is going to pay, and how much I am going to be paid and for how long. Going to Indonesia is out of question for me for the moment, as I will lose anything that might possibly come. I don't know about your plan for Udang project, but I may do part of the analyses and reports from home, provided that all the necessary date is available and for a certain price. If it suits you we may go on.
>
> Best regards
>
> Amir
>
> On Wed, Aug 11, 2010 at 8.04 PM, Eilert Halvorsen <eilert@optus.ap.blackberry.net> wrote:
>
> Amir, the Udang contract got signed today. I am in Jakarta at the moment but urgently need some engineering support. It is possible Quantum will be terminated and for us to pick up on this work (if we feel we can). There is a lot to do for sure but its always better if we are in control and do as much as we can ourselves and also get paid for it.
>
> Let me know your thoughts.
>
> Eilert Halvorsen | Group Operations Manager | Trident Australasia
>
> …

34 During cross examination, the Udang proposed project schedule submitted by Mr Bahrami on 11 July 2010, was put to Mr Ross. Mr Ross at T62 said that while he was not aware of that schedule, he said that Trident was providing initial upfront services, as it always does, for gratis for Trident to "get its foot in the door", as this is how the industry operates.

35 In regards to the letter dated 18 August 2010, Trident said that it was a mistake to have issued the letter, but Ms Robinson said she did so to assist Mr Bahrami in his claim for unemployment benefits. Mr Ross said he was not happy about signing the letter, as he was of the opinion it was not quite right, but he did so in good faith to genuinely provide assistance. Mr Ross' evidence was that during this time staff were being let go, it was a stressful period, and this was one of a set of standard letters that were issued.

36 Ms Robinson's evidence was that the enclosed payslip was based on the hours Mr Bahrami had told her he worked during July 2010, and she provided Mr Bahrami with the payslip to help him. Ms Robinson's evidence was that Mr Bahrami was coming and going during the month of July, and at that time there were projects in place, but there was no structured day to day work. Ms Robinson was unable to comment on whether Mr Bahrami performed engineering work in July 2010, as she could only comment on the company's financial affairs. Mr Ross testified that he did not see Mr Bahrami in the office at the time, but he was frequently going backwards and forwards to Tehran or interstate to try and recover funds from non-paying clients.

37 In regards to the time sheets that Mr Bahrami said he submitted to his Engineering Manager, the company said that there was no formal record of such time sheets. Mr Ross said that there was no way that Mr Pezhhan could have approved the time sheets because Mr Pezhhan was not employed by Trident from May 2010 and there was nothing on the company system that suggested Mr Pezhhan was an employee. During cross-examination, an email dated 1 July 2010 sent from Mr Pezhhan with the words "Engineering Director Trident Australasia" was shown to Mr Ross, and Mr Ross said that from May 2010 Mr Pezhhan was on the premises as an unemployed contractor. Mr Pezhhan was not called to give evidence in the proceedings.

38 Similarly, the company said the email of 31 August 2010 from Ms Robinson apologising for the delay in payment, and the email from Mr Ross of 6 September 2010 was another mistake. The company said that this can be explained by the fact that Mr Bahrami had been grouped into a pool of employees, which the correspondence was intended for, and there was a lot going

on at the time, and the correspondence was sent when Mr Bahrami had no entitlement to the July payment. It was Ms Robinson's evidence that she wrote the email of 31 August 2010, when she did not know what people were entitled to at that point. Similarly Mr Ross wrote the emails of 31 August 2010 and 13 September 2010 when he was not aware who were contractors and who were employees.

39 In relation to the salary rate adjustment, and the letter of 1 July 2009, the company said that it searched its records but could find no reference to that letter, and was not aware of the increase to the hourly rate of pay from $78 to $80 per hour. Ms Robinson was however, given a bonus spreadsheet, and that is how she implemented the bonus payment.

Consideration

40 I have carefully considered the oral and documentary evidence in this matter. It is for Mr Bahrami to establish that the benefit he has claimed was a benefit under his contract of employment and that it has been denied to him: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704. It is first necessary for Mr Bahrami to establish that at the material time, he was engaged under a contract of employment with Trident. In many cases, whether a contract comes into existence can be ascertained from the terms of an offer of employment on the one hand, and an acceptance of the offer of employment, on the other. The offer and acceptance may be written, oral or both. Additionally, there may be cases where the existence of a contract may be inferred from the conduct of the parties. In *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd* (2012) 92 WAIG 709 I said at par 12 as follows:

> 12. In contractual parlance, not all commercial transactions fit neatly within the traditional rules of offer and acceptance. To ascertain whether an enforceable agreement has been reached in a particular case, courts and tribunals often need to consider whether the conduct of the parties, with or without the spoken word, considered objectively, evinces an intention that the parties intended to be contractually bound*: Integrated Computer Services Pty Ltd v Digital Equipment Corp (Australia) Pty Ltd* (1988) 5 BPR 11110; *Gibson v Manchester City Council* [1978] 1 WLR 520; [1979] 1 WLR 294. Also, an agreement may be inferred from the conduct of the parties where an offer and acceptance cannot be immediately identified: *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523; *Vroon BV v Fosters Brewing Group Ltd* [1994] 2 VR 32.

41 Whether it can be inferred that the parties did, from their conduct, intend to form a contract involves an objective assessment, in terms of how an ordinary bystander would regard the conduct: see Carter JW, 'Formation of Contract' in *Contract Law in Australia* (6th ed, 2013) 44; *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256; *Taylor v Johnson* (1983) 151 CLR 422. For example, in *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523, the New South Wales Court of Appeal held that the relationship between a firm of architects and landowners was contractual, based on a course of conduct over some months where the architect performed services and the owners took the benefit of the work, despite the absence of a signed written contract.

42 In this case, Mr Bahrami returned to Perth. It was the case that he preferred to live in Perth for family reasons. He left his full time employment in Melbourne, following his discussions with Mr Ross and also his communication with Mr Pezhhan. In his discussions with Mr Ross, Mr Bahrami had the impression that the situation was improving for Trident. They discussed the Udang and Lima Projects in Indonesia. Mr Bahrami was given the impression by Mr Ross that the work for these projects was firming up and they would be placed under contract, or contracts would be signed in the not too distant future. Mr Bahrami was, understandably, in view of prior events, cautious as to the viability of Trident's business operations in Western Australia. Whilst Mr Ross testified that it was usual for contractors in the oil and gas industry to do preliminary work, prior to contracts being signed, without payment, that does not necessarily mean that employees of contractors are not entitled to be paid for the work that they perform.

43 There was no question on the evidence, that Mr Bahrami undertook considerable work in relation to the Udang Project. As a part of exhibit A1, was a detailed proposed project schedule. This schedule set out in great detail, the staged development of the project over the timeframe from May to December 2010. Mr Bahrami's said that he was engaged primarily working from home on this activity, although he did attend the Trident office in East Perth on occasions. This was confirmed by Ms Robinson. The work involved in the preparation of this project schedule was obviously extensive. There was no evidence led from Trident to challenge that Mr Bahrami was performing this work in relation to the Udang Project. Additionally, there was evidence that Mr Bahrami did submit time sheets for his work performed in July 2010 to Mr Pezhhan. Although Trident disputed that Mr Pezhhan was still an employee of Trident at this time, the documentary evidence suggested that he was.

44 Furthermore, and of considerable significance, was the evidence of Trident's own company records. Trident's letter of 18 August 2010 to Mr Bahrami, with an attached payslip, refers to work performed by him for Trident in the period 1 to 31 July 2010. Whilst Mr Ross and Ms Robinson tried to explain this as a mistake, because of the "chaotic" circumstances in the company office at the time, the fact is that these records are entirely consistent with Mr Bahrami's evidence. There was no other evidence to contradict it, led from Trident. The payslip in exhibit A1 corresponded with Mr Bahrami's testimony as to the work he said he performed in July 2010.

45 Having regard to all of the evidence in this matter, the weight of it is in favour of the existence of an employment contract between Mr Bahrami and Trident in the course of July 2010. From all of the evidence, in my view, a reasonable bystander would conclude that Mr Bahrami was not going to perform the work that he undertook for nothing. This is in the context of the invitation to Mr Bahrami to return to Trident to assist with the Udang Project. I also accept that on the evidence, the terms and conditions which most recently applied, and which only recently were terminated, would logically continue, as proposed by Mr Bahrami. I interpose here to observe that Mr Ross did prepare a draft employment agreement, in contemplation of Mr Bahrami returning to work for Trident. Whilst I do not place too much weight on it, its terms were almost identical to the contract originally entered into between the parties in February 2009. This tends to demonstrate that the same terms of engagement were also in Mr Ross' mind at around the time of his discussions with Mr Bahrami, about the Indonesian work.

46 The work that Mr Bahrami was principally engaged in involved preliminary engineering works for the Udang Project and other engineering duties. Also I am satisfied that as a consequence of a meeting on or about 30 July 2010 at the Trident East Perth office, Mr Ross told all employees that the financial position of the firm was worse than expected. Employees were not able to be paid. "Lay-off" letters would be sent to employees and they would be paid monies owed to them, as and when the company was in a position to make payments. Additionally, subsequent requests by Mr Bahrami to Trident for payment were met with the same response. These requests were made in August and September 2010. Whilst Trident suggested that all of these communications were in error, that is difficult to accept as an ongoing explanation, as far forward as 13 September 2010. At no stage in the responses by Trident was it asserted that Mr Bahrami was not an employee of the company in July 2010, or that for any other good reason, he had no entitlement to payments. In all of the subsequent communications, Trident acknowledged payments were due and owing to staff, and they would be made when the company was in a position to do so.

47 The further issue remains as to whether, as Trident contended, that in any event, if Mr Bahrami was offered employment by Trident in July 2010, that his employment was subject to two conditions; they being that the Udang Project would receive final approval and that secondly, Mr Bahrami was prepared to travel to Indonesia for a short period, early in the project.

48 As a matter of contract, parties may agree that the formation of a contract, or the performance of its terms, is subject to the fulfilment of certain conditions. In the case of a condition precedent, "the existence of the contract, or the obligation of one party (or both parties) to perform is subject to the prior occurrence of a specified event": LexisNexis, *Halsbury's Laws of Australia* (at 13 March 2014) [110-2415]. In the case of a condition precedent to the formation of a contract, which was contended by Trident in this case, clarity of expression is required: LexisNexis, *Halsbury's Laws of Australia* (at 13 March 2014) [235-310] citing *Gange v Sullivan* (1966) 116 CLR 418 and *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568.

49 In this case, I am not able to conclude on all of the evidence, that it was a clear condition precedent that Mr Bahrami not be employed at all, unless and until the Udang Project received final approval. The fact is that Mr Bahrami did substantial work on the preliminary engineering activity, as supported by his testimony and the documentary evidence. Also, as I have mentioned earlier, just because it may have been the custom for contractors in this industry to do some unpaid work for a client at the outset, to finally win work, that does not mean that employees of contractors are engaged on that same basis. It would be against the law of the State to do so in any event (see the *Minimum Conditions of Employment Act 1993*).

50 As to the issue of Mr Bahrami's relocation to Indonesia for a short period, I accept on the evidence that this was discussed between Mr Bahrami and Mr Ross. Mr Bahrami accepted that this would be required for about two months, following which he would relocate back to Perth. However, the arrangements were not made by Trident, in order for this to occur. In view of Mr Bahrami's prior experience with Trident, in not being paid, Mr Bahrami was not, understandably, prepared to travel unless he had appropriate commitments in relation to payment of travel costs. Regardless of this, Mr Bahrami worked for Trident in Perth during July 2010 on the preliminary engineering works for the Udang Project, among other things, as the evidence clearly showed.

51 Whilst considerable reliance was placed by Trident on an email from Mr Bahrami to Mr Halvorsen, the Group Operations Manager of Trident, dated 11 August 2010, in which Mr Bahrami said he was not prepared to go to Indonesia, this must be seen in the context of prior events. As I have mentioned, in particular, his non-payment for July 2010 and the then seeming uncertainty over the Udang Project proceeding at all. Equally importantly, however, the 11 August email was well after the work performed by Mr Bahrami for Trident in July 2010. It is difficult to see how any such understanding as to temporary relocation to Indonesia, after July 2010, could affect an entitlement to payment for work performed prior to that time. In the ordinary course of events, if the employment relationship had continued, the failure of Mr Bahrami to travel to Indonesia as agreed may well have provided a basis for Trident to terminate the employment. It does not afford a defence to the present claim however.

52 As to Mr Bahrami's claim for an increase in his rate of pay from $78 per hour to $80 per hour, exhibit A2 was clear. As noted above, it is a letter from the Managing Director of Trident, Mr Cox, to Mr Bahrami. The letter, in the first part, referred to the payment of a bonus of $4,022 to Mr Bahrami effective on 30 June 2009. This was not disputed by Trident. The second part of the letter refers to a review of Mr Bahrami's terms and conditions of employment "against current market rates and trends within the same industry". Based on this review, effective from 1 July 2009, Mr Bahrami's hourly rate of pay was to increase to $80 per hour, and would be paid effective from 1 July 2009, and be payable in the August 2009 pay period. Mr Bahrami's evidence was that he never received the rate of pay increase.

53 Ms Robinson's evidence was that she had no record of the letter. However, the fact was that there was no dispute that the bonus payment referred to in the letter was paid. Furthermore, there could be no doubt that the Managing Director of Trident clearly had the authority to make a decision to increase Mr Bahrami's hourly rate of pay, and his letter of 4 August 2009 to Mr Bahrami, was clear evidence of it. The payslips and evidence in exhibit A1 show that Mr Bahrami was paid at the rate of $78 per hour for his period of employment and not the higher rate. I am therefore satisfied that Mr Bahrami's claim in this regard is made out.

54 Finally, Mr Bahrami claimed to be due a superannuation contribution not paid to him for July 2010. In accordance with the prior contract, the terms of which I am satisfied were adopted for work in July 2010, Mr Bahrami was entitled to superannuation contributions "in accordance with the statutory contributions prescribed under applicable superannuation guarantee legislation or 10%, whichever is the greater", as set out above. Mr Bahrami's payslip for July 2010 provided for a superannuation contribution of $1,563.90. I am satisfied that this amount was due under Mr Bahrami's contract at the higher rate than the superannuation guarantee legislation. Therefore it may be recoverable as a contractual benefit in this jurisdiction. I am satisfied that this benefit has been denied.

Conclusion

55 Having regard to all of the evidence, I am satisfied that Mr Bahrami has established on balance, that he has been denied by Trident contractual benefits in the total sum of $17,602 gross, in relation to salary and superannuation contributions. An order will be made in Mr Bahrami's favour.

2014 WAIRC 00932

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00932
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 25 FEBRUARY 2014; WRITTEN SUBMISSIONS WEDNESDAY, 30 JULY 2014; FRIDAY, 1 AUGUST 2014
DELIVERED	**:**	TUESDAY, 12 AUGUST 2014
FILE NO.	**:**	B 103 OF 2013
BETWEEN	**:**	AMIR BAHRAMI
		Applicant
		AND
		TRIDENT AUSTRALASIA PTY LTD
		Respondent

Catchwords	**:**	Industrial law (WA) – Contractual benefits claim – Contractual debt – Speaking to the minutes – Financial position of the respondent – Equity, good conscience, and substantial merits – Interests of the persons immediately concerned – Payment in instalments – Order made
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 26(1)(a), 26(1)(c), 33(3)
Result	**:**	Order issued

Representation:

Applicant	**:**	In person
Respondent	**:**	Ms J Robinson

Case(s) referred to in reasons:

Bahrami v Mr Tony Ross Trident Australasia Pty Ltd [2014] WAIRC 00614

Reasons for Decision

1 On 15 July 2014 the Commission published its reasons for decision and minute of proposed order, upholding Mr Bahrami's claim for denied contractual benefits against Trident Australasia: [2014] WAIRC 00614.

2 Shortly after the publication of the decision, on the afternoon of 15 July 2014, Trident requested that the order be issued, reflecting a time payment schedule of twelve equal payments commencing on 5 August 2014. This was opposed by Mr Bahrami, who requested that the full amount of the order be paid by the end of July 2014. Accordingly, as the parties could not agree on any payment terms, my Associate re-listed the application for 29 July 2014, a date convenient to both the Commission and the parties.

3 On 28 July 2014 at about 10:00am, Mr Ross of Trident contacted my Associate to re-schedule the proceedings, because of a health matter. The Commission considered the request and rather than vacate the hearing date, provided the opportunity to the respondent to be represented by another officer of the company. The company did not wish to do this so instead, the Commission gave the parties leave to make any written submissions they wished to, in relation to a time to pay arrangement. By email of 28 July 2014 at 10:35am, Mr Ross informed my Associate that Trident would respond to the minute of proposed order in writing. Accordingly, Trident was given until close of business 30 July 2014 to file a written submission and Mr Bahrami a reply by close of business 1 August 2014.

4 On 30 July 2014 at 11:55am, an email was received by my Associate from Ms Robinson, the Financial Controller of Trident. In it, Ms Robinson referred to difficulties experienced by Trident's office with an electricity failure and difficulties with telephone and IT connections. Ms Robinson said as the Financial Controller of Trident, and who has been in that position for approximately seven years, she is able to address the issue of financial inability to pay. However, Ms Robinson indicated that she thought it more appropriate that the order be addressed by Mr Ross, rather than her. It is not clear why this is so given Ms Robinson's clear understanding as to the financial position of the business.

5 Ms Robinson also said in referring to a telephone conversation with my Associate on the morning of 30 July "That being said, following our conversation, you have made it clear you need a response to the minute by this afternoon without exception, and I offer the attached "informal" statement under duress." That is false. No duress was applied to any person of Trident and the Commission agreed to the parties providing written submissions on the morning of 28 July 2014. Furthermore, by 30 July, Trident had had the minute of proposed order for about two weeks. Indeed, on the afternoon of 15 July, after the reasons for decision and minute of proposed order were published, Mr Ross made it clear at that early stage, that Trident would be seeking a time to pay by twelve equal instalments commencing 5 August 2014. The suggestion therefore that the requirement to provide a submission, in writing by email, by 30 July, in some way involves "duress", is completely untenable.

6 Furthermore, after Ms Robinson's email to my Associate on 30 July at 11:55am, a further email was received from Mr Ross at 12:01pm by my Associate. It seems that Mr Ross spoke with Ms Robinson after her conversation with my Associate, when the previously confirmed requirement for a written submission was reiterated. Mr Ross states "I advise that I take full exception to the rudeness and absolute contempt Ms Robinson received from your associate. Recent events as outlined to the commissions (sic) representative I spoke to yesterday in the absence of the commissioners (sic) associate …"

7 Mr Ross then goes on to set out at length, various health matters personal to him and then continues "Trident take (sic) full exception to our treatment and in particular the rude and arrogant attitude emanating from the associate given all of the recent, unusual and unique circumstances. Should we not be provided with an extension for legitimate and exceptional circumstances I will lodge a formal complaint accordingly. I am sure this sort of treatment would not be given and or tolerated to less fortunate, foreign and or indigenous personnel." This communication is petulant, is offensive and once again, is false. It reflects poorly on the management of Trident.

8 In any event, the letter of 30 July 2014 from Ms Robinson refers to severe financial strain on the business of Trident Australasia, leading to staff leaving the firm in 2010. There was evidence of this in the substantive proceedings. Ms Robinson goes on to say that "Since 2010 and the release of staff, the Company has fought litigation, and the legal costs have amassed amounts far greater than any successful legal win thus far". Ms Robinson further goes on to say "the Company has no assets and operates as a simple Pty Ltd entity. It has one sole Shareholder, being Cox Energy Pty Ltd (a non-operating entity) and that is owned solely by Mr Peter Cox. It currently does not have any cash at bank." Further reference is made to the company not trading insolvent and receiving funds transfers from Mr Cox to cover small creditor payments as and when they arise.

9 Ms Robinson says that the company effectively is continuing to operate to enable it to litigate in the various proceedings in which it is engaged. Indeed, from the evidence in the substantive matter, and the content of Ms Robinson's letter of 30 July 2014, it seems that Trident is predominantly engaged in litigation. Ms Robinson further goes on to state that she personally has almost two years in unpaid wages due to her and has not received superannuation or other entitlements either.

10 In terms of the minute of proposed order, Ms Robinson submits that the company's accounts have not regarded Mr Bahrami's claim as a contingent liability. It will however now be included in the company accounts as an "awarded debt", and therefore current in nature. Accompanying Trident's submission was a copy of financial statements for the year ended 30 June 2014, and the company's tax return for the same period. An extract from the company's business cheque account was also attached. I regard these materials as evidence of the profits or financial position of Trident, and thus the material is not to be disclosed, except otherwise to the Commission, in accordance with s 33(3) of the Act.

11 Mr Bahrami says in his submission that he should receive the full amount of the order in the sum of $17,602 by no later than the end of August 2014. Mr Bahrami submitted that he has already suffered a delay in payment of monies owing to him for four years; there should be no further delay. Mr Bahrami does not accept the contentions of Trident in relation to instalments over a twelve month period. Furthermore, Mr Bahrami submitted that "financial hardship" has been Trident's excuse to deny him and others, their wages and superannuation since about July 2010. Regardless of this, Mr Bahrami notes that Trident has continued its operations to the current time. Mr Bahrami submitted that Trident is not bankrupt and has employees.

12 It would appear from the materials before the Commission, that Trident is principally engaged in litigation with clients and former clients in relation to which it has expended a large sum of legal fees in the course of the last two years. It is not entirely clear as to the source of the funds for the payment of those legal fees, as it is apparent that it is not derived from ordinary trading revenue. Presumably, the funds for the payment of very significant amounts of money for legal fees, comes from the same source identified by Ms Robinson in her letter. There is also reference to payroll and consultancy costs in the 2013 and 2014 financial years, reflecting payment of salary and salary on-costs over those periods. Those payments are substantial and dwarf the sum of money awarded to Mr Bahrami in these proceedings.

13 In all of the circumstances, the Commission is not persuaded that it should grant Trident's request that it be given a 12 month period over which to pay the monies owing to Mr Bahrami. Mr Bahrami rightly observes that he has not received the monies which he maintained were originally owing to him for some four years. The Commission is required, under s 26(1)(a) of the Act, to act according to equity, good conscience and the substantial merits of the case. The Commission is also to have regard, under s 26(1)(c) to the interests of the persons immediately concerned, whether directly affected or not.

14 However, the Commission does recognise the financial position of Trident. Accordingly, the Commission will order that the contractual benefits due and owing to Mr Bahrami be made in two equal instalments commencing on 1 September 2014. Additionally, as Mr Ross was clearly not Mr Bahrami's employer, it will be deleted from the order to now issue.

2014 WAIRC 00933

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMIR BAHRAMI
	APPLICANT
	-v-
	TRIDENT AUSTRALASIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 12 AUGUST 2014
FILE NO/S	B 103 OF 2013
CITATION NO.	2014 WAIRC 00933

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms J Robinson

Order

HAVING heard Mr A Bahrami on his own behalf and Ms J Robinson on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

(1) ORDERS that the name "Mr Tony Ross" be deleted from the name of the respondent;

(2) DECLARES that the respondent is indebted to the applicant as a denied contractual benefit in the sum of $17,602 gross;

(3) ORDERS that the respondent pay to the applicant the contractual debt due and owing in two equal monthly instalments in the sum of $8,801 gross commencing on 1 September 2014.

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

2014 WAIRC 00957

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MEGAN BASKWELL
	APPLICANT
	-v-
	ELIZABETH WIESE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 20 AUGUST 2014
FILE NO/S	U 76 OF 2014
CITATION NO.	2014 WAIRC 00957

Result	Application dismissed
Representation	
Applicant	Mr C McIntosh of counsel
Respondent	Mr J Burke 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 18th 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 15th day of 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 dismissed.

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

2014 WAIRC 00980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRANT CLATWORTHY
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 2 SEPTEMBER 2014
FILE NO/S	U 132 OF 2014
CITATION NO.	2014 WAIRC 00980

Result	Application dismissed
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Ms R Hartley 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 12th day of August 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and

WHEREAS on the 27th day of 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 dismissed.

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

2014 WAIRC 00979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICK EDWARD CONNOR
	APPLICANT
	-v-
	THE TRUSTEE FOR THE FANCHETTI FAMILY TRUST T/A FUSHA HAIR AND BEAUTY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 SEPTEMBER 2014
FILE NO/S	U 119 OF 2014
CITATION NO.	2014 WAIRC 00979

Result	Order issued
Representation	
Applicant	Mr PE Connor
Respondent	No appearance

Order

NOW HAVING HEARD from the applicant and there was no appearance on behalf of the respondent, the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

1. THAT the matter will be listed for 30 September 2014 at 10:00 am and a hearing notice will be distributed by the Commission;
2. THAT there is liberty to apply for either party at short notice.

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

2014 WAIRC 00975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00975
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 26 AUGUST 2014
DELIVERED	**:**	FRIDAY, 29 AUGUST 2014
FILE NO.	**:**	U 171 OF 2013
BETWEEN	**:**	PHILLIP DIGNEY Applicant AND THE BLACK COCKATOO PRESERVATION SOCIETY OF AUSTRALIA Respondent

CatchWords	**:**	Industrial Law – Claim of perceived bias – Principles – Conciliation – Jurisdiction referred – Application of perceived bias dismissed s 29(1)(b)(i)
Legislation	**:**	*Industrial Relations Act* 1979 (WA)
Result	**:**	Application of perceived bias dismissed
REPRESENTATION:		
Applicant	**:**	Mr S Banovich (of counsel)
Respondent	**:**	Mr G Dewhurst

Case(s) referred to in reasons:

Bartlett v Aboriginal Alcohol and Drug Service (Inc) (2009) 90 WAIG 290

Ebner v Official Trustee in Bankruptcy [2000] 205 CLR 337

McCarthy v Sir Charles Gardiner Hospital (2004) 84 WAIG 1304

Vakauta v Kelly [1989] 167 CLR 568

Case(s) also cited:

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

Reasons for Decision

Introduction

1 This is a s 29(1)(b)(i) application lodged by Mr Phillip Digney (the applicant) on 17 October 2013 under the *Industrial Relations Act 1979* (WA) (the Act). The application was lodged against The Black Cockatoo Preservation Society of Australia (the respondent).

2 The applicant alleged he was constructively dismissed by the respondent and was forced to resign effective as of 26 September 2013 following a series of events that occurred after the applicant lodged bullying complaints against members of the respondent's board.

3 The respondent submits the applicant was not dismissed but was employed on a six month contract. As no funds were available, the position could not be filled. The applicant was stood down for inappropriate behaviour which was subject to investigation until he resigned. On 23 May 2014 the respondent submitted an amended Notice of Answer outlining that the applicant was employed as a contractor. On 24 August 2014 the respondent submitted a further amended Notice of Answer. That document suggested:

> 1) The society engaged the applicant as a contractor ***upon his own request*** and was afforded all the conditions and he was paid on an ABN basis.
>
> 2) The society informs the applicant and the WAIRC that we no longer will participate in mediation sessions and attend the WAIRC for the following reasons.
>
> a. The applicant was engaged by the society as a contractor. Contractors are not represented by the WAIRC.
>
> b. All employees of the Black Cockatoo Preservation Society of Australia are covered under the national system employer for the purpose of section 14(1)(a) of the Fair Work Act 2009. Because it is a constitutional corporation within the meaning of section 51 of the Commonwealth constitution. Therefore the WAIRC will [sic] does not have jurisdiction to deal with the applicants claim. This is because the WAIRC is established under a state industrial law and section 26 confirms the Fair Work Act will apply to the exclusion of all state industrial laws which would otherwise apply to a national system employer.
>
> (extract from amended Notice of Answer)

4 The Western Australian Industrial Relations Commission (the Commission) listed a number of conciliation conferences between November 2013 and May 2014. No settlement was able to be reached between the parties and on 31 July 2014, I considered conciliation may be exhausted and authorised a for mention hearing to be listed to enable the applicant and the respondent to clarify their respective positions and assess how the application should be progressed. The hearing was listed for 26 August 2014.

For Mention Hearing

5 With respect to the for mention hearing both the applicant and the respondent each acknowledged that conciliation had been exhausted pursuant to s 32 of the Act in light of the correspondence that had been exchanged subsequent to the last conference held before the Commission on 27 May 2014. Mr Dewhurst submitted that he would like the jurisdictional aspect of the respondent's amended Notice of Answer as filed on 24 August 2014 and outlined in 2(a) and (b) to be listed for hearing as soon as practicable.

6 The Commission therefore finds with respect to this application, conciliation with a view to settling the application prior to further hearing has been concluded.

7 The Commission therefore finds with respect to this application a jurisdictional hearing will be listed as soon as is practicable having regard for the available dates of the advocates.

Preliminary Matter of Bias

Respondent's Submissions

8 Shortly after the notice of hearing for mention was listed correspondence dated 1 August 2014 was received from Mr Dewhurst, a member of the respondent's board, on behalf of the board members advising:

> 1) The BCPSA has formally completed negotiations.
>
> 2) Respectfully the BCPSA asks you, Commissioner Mayman, to recuse yourself from the matter U171 of 2013 for making comments that are reflected as being unfair, biased and not in the spirit of equality. As a board of volunteers we are feeling that we are not being treated equally by you and feel intimidated and that we are being pressured into making a payment to the applicant.

9 Mr Dewhurst also identifies in the letter of 1 August 2014 that the applicant is under a federal award suggesting this is a matter that had earlier been raised. The correspondence suggests (relating to the applicant):

> This then brings him into line with our other employees under the Federal Award.

10 The correspondence further states:

> 3) Further, if this matter should go any further we request that the jurisdiction matter is dealt with in the first instance. As this is a clear case that this matter is in the wrong jurisdiction and we should not be before the WAIRC.
>
> (extract from exhibit 3)

11 At the for mention hearing Mr Dewhurst gave submissions from the bar table and then gave evidence. The respondent submissions in large part involved detailing the respondent's own correspondence dated 1 August 2014 (exhibit 3).

Facts Relied upon by the Respondent

12 At first instance the respondent relied on a number of matters that had allegedly occurred over the course of four conciliation conferences:

> (a) During the first conference in front of the applicant and his counsel I am alleged to have said 'you will be paying this man money';
>
> (b) During the first conference I am alleged to have said 'The money would be paid out of the grants';
>
> (c) When I was asked by a board member why I was (as the Commissioner) urging for an offer to be made from the respondent I am alleged to have responded 'That's just the way it is';

(d) We (the respondent) were of the opinion Mr Digney (the applicant) was giving you (the Commissioner) a fair bit of information and we did not get that time in return;

(e) I (as the Commissioner) said at the final conference following the filing of an amended Notice of Answer on 24 May 2014 'The jurisdiction and the merit may be heard together';

(f) Mr Dewhurst submitted in evidence he felt hesitant when I put my hand on 'the yellow book' (the Act); and

(g) Mr Dewhurst gave evidence at the last conference that he would, in dealing with jurisdiction, need to call a large number of witnesses. In response I raised the issue of public interest.

Respondent's Evidence

13 Mr Glenn Dewhurst gave evidence and recalled in his correspondence of 1 August 2014 that he had earlier raised the issue of the applicant being under the federal jurisdiction with the Commission. Mr Dewhurst in evidence recalled the email exchange regarding jurisdiction between himself and my Associate; Ms Rayma Allison (exhibit one) which involved a reference to the issue of jurisdiction. That exchange of emails was not with myself and for clarity purposes I will reflect the exhibit in these reasons:

> **From:** Glenn Dewhurst [mailto:dewy3@bigpond.com]
>
> **Sent**: Wednesday, 13 November 2013 5:12 PM
>
> **To**: Rayma Allison; sbanovich@mkilegal.com.au
>
> **Subject**: RE: U171/2013 Digney v. the Black Cockatoo Rehabilitation Centre (Kaarakin)
>
> Hi Rayma
>
> Could you please assist us by letting us know what jurisdiction does this matter sit in.
>
> Is it the State or Federal fair work legislation.
>
> Kind Regards
>
> Glenn Dewhurst
>
> **President/Black Cockatoo Preservation Society of Australia**
>
> **From:** Rayma Allison
>
> **Sent**: Thursday, 14 November 2013 5:38 PM
>
> **To**: 'Glenn Dewhurst';
>
> **Re:** RE: U171/2013 - Digney v. the Black Cockatoo Preservation Society of Australia [Scanned]
>
> Dear Mr Dewhurst
>
> I am unable to assist you in this matter as the Commission is not permitted to give any advice to parties. I suggest you seek external advice regarding your query.
>
> Yours sincerely
>
> Rayma Allison
>
> Associate to Commissioner Mayman

(exhibit one)

14 Mr Dewhurst explained that he had been seeking the information in November 2013 in relation to the applicant's status as a contractor and following the email from my Associate, the respondent sought legal advice. Mr Dewhurst gave evidence his solicitor Mr Penrose was not interested in this aspect of the case rather he thought the respondent should make an offer to the applicant to settle the claim.

15 In cross-examination Mr Dewhurst was asked in relation to the comment allegedly made by myself 'you will be paying this man money' whether that was the respondent's opinion and whether the respondent was now interpreting a comment and taking the matter out of context. Mr Dewhurst agreed he did speak with his counsel in the presence of the Commissioner on the benefits of reaching a compromise.

16 In re-examination the respondent emphasised the applicant was employed as a contractor. Mr Dewhurst recalled the applicant and his counsel being present when the alleged comment was made by me 'you will be paying this man money', an aspect denied by Mr Banovich in his submissions.

Applicant's Submissions

17 Counsel for the applicant submitted pursuing the bias issue is, in the mind of the applicant, artificially extending the matter and raising costs unnecessarily. The evidence and submissions of the respondent in this matter appear:

> to be largely opinion based and is arguably inadmissible. I'm well aware of course that the strict rules of evidence are not strictly applied in this honourable Commission, however, we would like that taken into account and consideration to be applied in – in your findings.

(ts 18)

18 A number of the quotes allegedly made by the Commissioner were, in the view of the applicant, made with the objective of the applicant and the respondent reaching a compromise. The quotes themselves have been taken out of context by the respondent in these proceedings. By its very nature the core of conflict is not well accepted by either party which is well recognised by the Commission.

19 The concerns the applicant does have relate to the manner in which the respondent appears to have used these proceedings to discourage genuine conciliation.

Conclusion

Credibility

20 In all matters such as this the Commission has to make judgements about the credibility of the witness evidence. Mr Dewhurst was the only person to have given evidence. I have no reason to believe that he is not generally telling me what he considers to be the truth of the matter.

21 The Commission finds the earlier exchange in the conciliation process referred to by the respondent regarding jurisdiction in exhibit 3 related to an exchange of emails with my Associate. The Commission finds that issue of jurisdiction was not raised with the Commission until after the amended Notice of Answer was filed in the Registry on 23 May 2014.

22 I turn now to the alleged facts relied upon by the respondent to ground the issue of bias:

(a) The terminology used by the applicant as a comment allegedly made by me in the course of the first conference 'you will be paying this man money' is not a use or practice of words with which I am familiar. Given it was alleged to have been said at the first conciliation conference between the applicant and the respondent in November 2013, some nine months ago, the first conference in these proceedings my practice would have been to outline the procedure the parties could expect within the conciliation process. As I recall Mr Dewhurst was alone at that conference and the applicant was assisted by counsel which ultimately led to the early adjournment of the conference to enable Mr Dewhurst to bring at least one member of the board with him to the next conference as assistance. What I cannot appreciate is ever using such words in practice. The Commission finds this is not a matter relating to bias.

(b) The second allegation I am alleged to have made is that I said 'the money would be paid out of the grants'. Firstly, it is of no business of a Commissioner where money is drawn from and therefore why would I make such a comment. What does occur from time to time is that when a conciliation conference is divided a Commissioner may be instructed by one side (the applicant) to express the applicant's view to the other side (the respondent) through the Commissioner. This may have been what occurred on this occasion. It is not the Commissioner's view that is being expressed it is the Commissioner being instructed by the applicant. Similarly, the respondent may instruct the Commissioner to put their view to the applicant. Once again it is not the Commissioner's view being put to the applicant it is the respondent's view. If you recall in these conferences a lot of time was spent in divided conference. The Commission rejects this as being an issue relating to bias.

(c) The comment I am alleged to have made to a board member 'that's just the way it is' is not a comment I recall having made. However, if the comment was made and in the process created some incorrect emphasis or impression, I apologise.

(d) The respondent was of the view that the applicant was providing considerable information to the Commissioner in the course of divided conferences. Whenever conferences are divided and I return from having been with the applicant or alternatively with the respondent as the Commissioner I broadly summarise what has been said during the course of the divided period, subject to any confidentialities that may be specified. The assertion that as the respondent you did not get the time back is unrealistic. As a Commissioner I certainly do not time divisions within conferences but I am generally conscious about time management between parties. Over the course of four conciliation conferences as the respondent neither yourself nor your counsel raised the issue with me. The Commission finds this is not a matter that goes to the centre of bias.

(e) The assertion that I as the Commissioner had said at the final conference following the filing of an amended Notice of Answer on 24 May 2014 that the issue of jurisdiction and the merit may be heard together is true. I did mention that matter and refer to a decision in ***Bartlett v Aboriginal Alcohol and Drug Service (Inc)*** (2009) 90 WAIG 290 where it was said in relation to procedure:

> On my reading of *Springdale Comfort* 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 as a preliminary point.

The Commission finds such a reference as referred to by the respondent to be unrelated to the matter of bias as raised by the respondent.

(f) Mr Dewhurst submitted in evidence he felt hesitant when the Commissioner put her hand on 'the yellow book' (the Act). What can I say other than I often rest my hand in conference rooms on a number of books, one of which is the Act as those are the books taken down into the conference room which are referred to from time to time. The Commission finds in this circumstance there to be no link with bias.

(g) Mr Dewhurst gave evidence at the last conference that he would, in dealing with jurisdiction, need to call a large number of witnesses. In fact Mr Dewhurst identified he needed to call an overwhelming number of witnesses (my emphasis). In response I did carefully outline the issue of public interest with the respondent (with the respondent's counsel present) to ensure the court's time in hearing the jurisdictional question heard from necessary witnesses. The Commission finds in this circumstance there to be no link with bias.

Legal Principles

23 What is conciliation? Conciliation is a process under the Act involving a Commissioner attempting to assist persons to resolve a dispute. It should be noted that the Commission pursues conciliation as far as is possible and attempts arbitration only as a last resort. Conciliation is not like a court hearing, the conciliator may provide information to assist the applicant and the respondent and help them negotiate an outcome they can agree on.

24 The test to be applied in matters such as perceived bias is not subjective. It is objective. The respondent as the party asking that I excuse myself on the grounds of bias is required to establish that the Commission, as presently constituted, might not

resolve issues with a fair and unprejudiced mind. The test does not rely on what the person alleging bias may believe or indeed may understand, see the Full Bench decision in ***McCarthy v Sir Charles Gardiner Hospital*** (2004) 84 WAIG 1304:

> The test does take account of the fact that an unprejudiced and impartial mind is not necessarily one which has not thought about the issues in dispute or formed any preliminary views or inclinations of mind or conclusions about those issues (***Vakauta v Kelly*** [1989] 167 CLR 568 at 576, Dawson J).
>
> In this case, the appellant was clearly required to establish that the reasonable apprehension would be that the Commissioner's mind was so prejudiced in favour of a conclusion already reached that it would not be altered irrespective of the arguments made and of any arguments made or adduced.

25 In the decision of their Honours in ***Ebner v Official Trustee in Bankruptcy*** [2000] 205 CLR 337 it was said of the notion of apprehended bias:

> Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

26 The Commission finds in these proceedings the respondent has not voiced a balanced connection between U 171/2013 and the 'feared deviation from the course of deciding the case on its merits'. Where bias is perceived it must be reasonably and objectively held and the Commission considers in this instance that it is not so. The Commission has an obligation to carry on where it believes that there has been no perceived bias demonstrated and on this occasion the Commission finds objectively perceived bias has not been grounded by the respondent. A minute will issue dismissing the respondent's application for perceived bias.

27 At the conclusion of the hearing the applicant raised the issue of costs in relation to the respondent's submissions relating to perceived bias. That is a matter on which further submissions will need to be received from each party. The Commission will list a hearing to enable further submissions to be received.

28 Additionally, as earlier found, the jurisdictional matter will be listed at the parties earliest convenience. The applicant and the respondent will be contacted for available dates.

2014 WAIRC 00981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP DIGNEY
	APPLICANT
	-v-
	THE BLACK COCKATOO PRESERVATION SOCIETY OF AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 SEPTEMBER 2014
FILE NO/S	U 171 OF 2013
CITATION NO.	2014 WAIRC 00981

Result	Order issued
Representation	
Applicant	Mr S Banovich (of counsel)
Respondent	Mr G Dewhurst

Order

HAVING heard Mr S Banovich (of counsel) on behalf of the applicant and Mr G Dewhurst on behalf of the respondent the Western Australian Industrial Relations Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the respondent's request that this matter be referred for reallocation on the grounds of perceived bias be, and is hereby dismissed.

2. THAT the application for costs by the applicant against the respondent for the perceived bias application be listed for further submissions before the Commission at a time convenient to the parties.

3. THAT a jurisdictional hearing be listed as soon as practicable having regard for the available dates of the advocates.

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

2014 WAIRC 00977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT** **-v-** THE MINISTER FOR HEALTH IS INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AND HAS DELEGATED ALL THE POWERS AND DUTIES AS SUCH TO THE DIRECTOR GENERAL OF HEALTH **RESPONDENT**
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 2 SEPTEMBER 2014
FILE NO/S	B 180 OF 2014
CITATION NO.	2014 WAIRC 00977

Result	Application dismissed

Order

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

WHEREAS on the 28th day of 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 dismissed.

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

2014 WAIRC 00978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT** **-v-** THE MINISTER FOR HEALTH IS INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AND HAS DELEGATED ALL THE POWERS AND DUTIES AS SUCH TO THE DIRECTOR GENERAL OF HEALTH **RESPONDENT**
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 2 SEPTEMBER 2014
FILE NO/S	U 180 OF 2014
CITATION NO.	2014 WAIRC 00978

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 28th day of 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 dismissed.

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

2014 WAIRC 00955

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JIN HU
	APPLICANT
	-v-
	MCC MINING (WESTERN AUSTRALIA)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 19 AUGUST 2014
FILE NO/S	B 97 OF 2014
CITATION NO.	2014 WAIRC 00955

Result	Discontinued
Representation	
Applicant	Ms Jin Hu
Respondent	Mr J Lilleyman (CCI)

Order

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

AND WHEREAS on 24 June 2014 and 18 August 2014 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was reached between the parties;

AND WHEREAS this matter was discontinued by the Commissioner;

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 00982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEANETTE MALCOLM
	APPLICANT
	-v-
	DR ATEF SABA, (SABA FAMILY TRUST)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 2 SEPTEMBER 2014
FILE NO/S	U 144 OF 2014
CITATION NO.	2014 WAIRC 00982

Result	Application discontinued
Representation	
Applicant	Ms J Malcolm
Respondent	Ms V Saba

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00954

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE MCNICKLE
	APPLICANT
	-v-
	GIDGE RURAL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 18 AUGUST 2014
FILE NO/S	B 86 OF 2014
CITATION NO.	2014 WAIRC 00954

Result	Application discontinued
Representation	
Applicant	Mr W McNickle
Respondent	Mr B McKay

Order

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

AND WHEREAS on 18 June 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 14 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,
[L.S.] Commissioner.

2014 WAIRC 00956

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00956
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 7 AUGUST 2014
DELIVERED	**:**	TUESDAY, 19 AUGUST 2014
FILE NO.	**:**	U 133 OF 2014
BETWEEN	**:**	DEBRA LEE SMALLSHAW
		Applicant
		AND
		THE MINISTER FOR CORRECTIVE SERVICES
		Respondent

Catchwords	**:**	Industrial law (WA) – Termination of employment – Application filed outside the 28 day time limit – Application for an extension of time – Section 23(3)(d) of the *Industrial Relations Act 1979* (WA) and the *Prisons Act 1981* (WA) – Principles applied – Commission's jurisdiction excluded – Not unfair to not accept claim out of time – Application dismissed – Order made
Legislation	:	*Industrial Relations Act 1979* (WA) ss 23(3)(d), 29(2), 29(3), 44(9) *Prisons Act 1981* (WA) ss 13, 98(1)(a), 98(1)(d), 106(2), 106(2)(f), Pt X
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr G Galant as agent
Respondent	**:**	Ms I Rizmanoska and with her Mr N Cinquina

Case(s) referred to in reasons:

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

Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services (2013) 93 WAIG 1439

Case(s) also cited:

The Western Australian Government Railways Commission v The Australian Railways Union, Western Australian Branch (1990) 70 WAIG 1283

Western Australian Fire Brigades Board v The Fire Brigade Employees Industrial Union of Workers of Western Australia (1981) 61 WAIG 852

Reasons for Decision

1 Debra Lee Smallshaw was employed as a prison officer at Casuarina Prison. She commenced employment as a prison officer under the Prisons Act 1981 in 2006. In October 2013 Ms Smallshaw was charged with two serious disciplinary offences under ss 98(1)(a) and (d) of the Prisons Act. As a consequence of the laying of the charges, Ms Smallshaw was suspended from duty on full pay on 6 November 2013, pending the hearing and determination of the disciplinary charges. The charges were heard on 17 December 2013.

2 At the hearing of the disciplinary charges, Ms Smallshaw admitted the conduct complained of. As a consequence, the charges were found proven, and penalties of a reprimand and a requirement to resign, under threat of dismissal, were imposed under s 106(2) of the Prisons Act. On 20 January 2014, the Chief Executive Officer of the Department validated the penalties as required by the legislation. Ms Smallshaw subsequently resigned on 2 March 2014.

3 The present proceedings were commenced on 17 June 2014, by which Ms Smallshaw said that the actions of the Minister were unfair and she claims to be reinstated. Self-evidently, the application is considerably out of time and requires the Commission to form the view that it would be unfair to not accept the application outside of the 28 day time limit required by s 29(2) of the Industrial Relations Act 1979.

4 In support of her claim, Ms Smallshaw contended that both prior to and since the date of the termination of her employment, she has suffered a number of personal traumas, that have had a significant psychological impact on her. Ms Smallshaw has been treated for depression and anxiety. Medical reports, tendered as exhibits A2 and A3 refer to Ms Smallshaw's mental health condition and its treatment. Additionally, Ms Smallshaw has been involved in proceedings in the Family Court, regarding the custody and care of her grandson.

5 Accordingly, Ms Smallshaw submitted that she has not been in an emotional state to pursue her unfair dismissal claim, until recently. Ms Smallshaw also contended that she went to her Union shortly after her forced resignation, but it declined to assist her. For all of these reasons, Ms Smallshaw submitted that it would be unfair for the Commission to not accept her application out of time.

6 For the Minister, it was contended that the application should not be accepted out of time. First and foremost, it was submitted that by s 23(3)(d) of the Act, the Commission has no jurisdiction to hear Ms Smallshaw's claim. This is because on the submission of the Minister, the Prisons Act regulates the discipline of prison officers and also provides an appeal to the Prison Officers Appeal Tribunal. Thus, the submission was that the circumstances of the present matter fall squarely within the exclusion of the Commission's jurisdiction set out in s 23(3)(d) of the Act.

7 Alternatively, the Minister submitted that applying the principles in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, Ms Smallshaw has not established good reason for the delay. Further, it was contended that Ms Smallshaw did not take the option to challenge the penalty imposed on the disciplinary charges, on appeal to the Prison Officers Appeal Tribunal. The Minister also submitted that as Ms Smallshaw resigned, albeit as a consequence of her forced resignation under s 106(2)(f) of the Prisons Act, there was no "dismissal" to attract the Commission's jurisdiction.

8 The relevant principles as to whether the Commission should exercise its broad discretion under s 29(3) of the Act, to accept an unfair dismissal application out of time, are set out in *Malik*. In this case, EM Heenan J, at pars 73-74, observed that:

> 73 In a case like the present, where the applicant belatedly wishes to institute a claim for relief under s 29, there will be no unfairness in rejecting a late application if the application could not succeed. Hence, unfairness must involve, as a minimum at least, the Commission being satisfied that some prospect of success would be denied to the applicant if he could not pursue his late claim. If there is some prospect of success to be lost by denying an extension of time, it would then become necessary to evaluate the position having regard to the length of the delay, its effects upon the respondent and the public interest in the due expedition and finalisation within an acceptable period of legal and industrial processes. Fairness, in this sphere, has a legislative starting point in the choice by Parliament that 28 days is a sufficient period in the public interest for the commencement of such a claim. The longer the delay the more difficult it will be to show unfairness, but even in instances of long delay there may be particular circumstances which reveal that it would be unfair not to accept a late referral. But this point in balancing conflicting interests was never reached in the present case because of the finding by the Full Bench that the application at first instance did not have merit (see his Honour President Sharkey at [91] and Commissioner Kenner at [115]).
>
> 74 The principles enunciated by Marshall J in ***Brodie-Hanns v MTV Publishing Ltd*** (1995) 67 IR 298 are apposite. In that case his Honour was considering the jurisdiction under s 170EA of the *Industrial Relations Act 1988* (Cth), as it then was, to grant an extension of time. His Honour said, after examining previous applicable authority:
>
> "I agree, with respect, that those principles are appropriate to be applied in the circumstances of this matter.
>
> Briefly stated the principles are:

1 Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.

2 Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.

3 Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.

4 The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.

5 The merits of the substantive application may be taken into account in determining whether to grant an extension of time.

6 Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

I agree, with respect, with that formulation of the principles and their application in the present case. See also ***Clark v Ringwood Private Hospital*** (1997) 74 IR 413 (AIRC). However, counsel for the applicant/appellant citing the decision in ***Kornicki v Telstra - Network Technology Group*** [Print P3168, 22 July 1997] submits that the language of s 29(3) suggests that considerations of fairness towards an applicant are central to the exercise of the discretion and that, at least in the federal sphere, such a test was intended to convey an approach to the exercise of the Commission's discretion more generous to applicants than that which previously prevailed. I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.

9 It could never be unfair in my view, to not accept an unfair dismissal application out of time, if the application had no prospect of success because the Commission had no jurisdiction to deal with the matter. So it is in this case.

10 In *Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services* (2013) 93 WAIG 1439, I discussed the operation of Part X of the Prisons Act, and the associated regulations, concerning the discipline of prison officers. That case involved a claim by a probationary prison officer that he was unfairly dismissed, on a matter referred by the Commission for arbitration under s 44(9) of the Act. Whilst in that particular case, I ultimately reached the view that for a probationary prison officer, the jurisdiction of the Commission was not ousted, I discussed the general operation of s 23(3)(d), in the context of the comprehensive regime for the discipline of prison officers in Part X of the Prisons Act. Although lengthy, my discussion of these matters at pars 5 to 18 of my reasons is directly relevant to this matter. I said:

5 The terms of the Prisons Act and the Prisons Regulations set out a detailed scheme for the appointment, duties, discipline and discharge of prison officers. Part II of the Prisons Act deals with the establishment of prisons. Under Part III, powers in relation to officers are set out. By s 6, officers, other than prison officers, may be appointed as employees under Part 3 of the Public Sector Management Act 1994 (WA). By s 7, the chief executive officer of the Department as the Commissioner for Corrective Services, is responsible for the management, control, and security of all prisons and the welfare and safe custody of all prisoners. The chief executive officer has overall responsibility to the Minister, for the proper operation of every prison throughout the State. By s 12, the duties of officers are set out. Every officer is required to comply with the Prisons Act and Regulations, all rules, standing orders, other laws relevant to the functions of a prison officer and orders and directions of the chief executive officer. Officers also have responsibilities to maintain the security of the prison where they work and make appropriate reports and maintain records in relation to relevant matters.

6 The engagement of prison officers is set out in s 13. The Minister may engage prison officers as employees, subject to any relevant award or industrial agreement of this Commission, and subject to other terms and conditions as determined by the Minister. A prison officer, on engagement, is required to swear an oath of engagement under s 13(2). The chief executive officer has the power to dismiss a prison officer, with the consent of the Minister, if he or she is convicted of an offence that relates to the performance of their duties or fitness to hold office. By s 14, the powers and duties of prison officers are set out. These include the obligation to maintain the security of the prison where the officer serves, and obligations to obey all lawful orders given to him or her by superior officers, including the chief executive officer.

7 By Part V of the Prisons Act, the chief executive officer is empowered to make rules for the management, control and security of prisons. These include the management of prison officers and other officers of the Minister. Additionally, provision is made for the designation of senior officers as superintendents, who have the charge and superintendence of a prison and management and control of officers and prisoners as necessary, for the good government, good order and security of the prison of which he is superintendent. This includes the issuing of standing orders binding on officers and prisoners.

8 Part X deals with the discipline of prison officers. For the purposes of Part X a "prison officer" is defined in s 96 as follows:

96. Term used: prison officer

For the purposes of this Part —

prison officer means —

(a) a person engaged to be a prison officer under section 13; and

(b) a person engaged as a prison officer prior to the coming into operation of section 13 and deemed to be a prison officer for the purposes of this Act by Schedule 2.

9 As mentioned by s 13, read with reg 3 of the Regulations, persons may be appointed by the Minister as a prison officer. Upon engagement, by reg 3(4), a prison officer is to serve a period of probation of nine months. It thus appears that a probationary prison officer is a person engaged as a "prison officer" for the purposes of ss 13 and 96. Accordingly, in my view, the terms of Part X of the Prisons Act, in relation to the discipline of prison officers, applies equally to probationary prison officers.

10 The terms of Part X provide a comprehensive regime for the regulation of disciplinary matters for prison officers. By s 97, all prison officers are to observe the Prisons Act and Regulations, prison rules and standing orders. Section 98(1) (a) to (e) set out a range of disciplinary offences to which Part X applies, including a breach of duty imposed by the Act, Regulations, rules or standing orders; disobeying or disregarding a lawful order; negligence or carelessness in the performance of duties; misconduct in relation to the performance of duties or fitness to hold office; and the commission of an act of victimisation under the Public Interest Disclosure Act 2003 (WA).

11 By s 99, a charge of a disciplinary offence is to be laid in writing by an authorised officer and validated by a superintendent. The charged officer is required to admit or deny the charge. If the charge is denied, a superintendent is required to hold an inquiry under s 100 in accordance with the procedure in reg 30 of the Regulations. This provides for the making of submissions and the calling of evidence in the usual way. A charged officer may be represented by the Union or another person, but not a legal practitioner. Where a charge is proved or the prison officer admits the charge, a range of penalties may be imposed under s 102, from a caution to a fine.

12 If a prison officer, or the person laying the charge, is aggrieved by a finding or penalty, he may appeal to the chief executive officer under s 103. The chief executive officer may confirm, dismiss or vary the charge or penalty as the case may be. In the case of more serious charges, a superintendent may refer the matter directly to the chief executive officer who, under s 106, is empowered to hear the charge. If the charge is upheld, a range of penalties may be imposed, from a caution through to dismissal.

13 A prison officer, who is aggrieved by a decision of the chief executive officer under s 106, may lodge an appeal under s 108, to the Prison Officers Appeal Tribunal, constituted under s 107. On such an appeal, the Tribunal may confirm, modify, or reverse any suspension, finding or penalty appealed against. The Tribunal may also make such other orders as it thinks fit.

14 The terms of the Regulations also make provision for a rank structure for prison officers in reg 4. The discharge of prison officers, and the notice prior to termination of service of prison officers, is set out in regs 5 and 6. Relevantly, for present purposes, in relation to Mr Sell, who was a probationary prison officer, reg 5(4) provides as follows:

(4) Where the chief executive officer is of the opinion during or at the end of the period of probation of a prison officer that the prison officer is unsatisfactory in the performance of his duties or unsuitable to be a prison officer, the chief executive officer may discharge that prison officer.

15 By reg 5(5), the chief executive officer may extend the period of probation of a prison officer beyond that of the initial mandatory nine months prescribed by reg 3(4).

16 In dealing with this preliminary issue, it is necessary to refer to s 23(3)(d) of the Act which is in the following terms:

23. Jurisdiction of Commission

…

(3) The Commission in the exercise of the jurisdiction conferred on it by this Part shall not —

…

(d) regulate the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any employee or any one of a class of employees if there is provision, however expressed, by or under any other Act for or in relation to a matter of that kind and there is provision, however expressed, by or under that other Act for an appeal in a matter of that kind;

17 Section 23(3)(d) is a clear statement of legislative intention that the Commission shall not exercise its powers in relation to the specified subject matter, if there is "provision, however expressed", for that same subject matter, including a right of appeal, prescribed by other legislation. This provision is clearly intended to prevent matters within the prescribed subject matter, from being dealt with in more than one jurisdiction.

18 Given the terms of Part X of the Prisons Act, when read with the relevant Regulations, the argument is compelling that such provisions satisfy the terms of s 23(3)(d) of the Act. That is, Part X regulates the suspension, discipline, dismissal, termination and reinstatement in employment of a prison officer. There is provision in Part X for appeals in such matters. In my view therefore, the Commission's unfair dismissal jurisdiction in ss 23A and 29 of the Act, is ousted in relation to the dismissal and claim for reinstatement of a prison officer. This equally applies to an application under s 44 of the Act by a Union on behalf of a prison officer. Such an application seeks the exercise of powers by the Commission, to regulate the matters the subject of the prohibition on the exercise of the Commission's jurisdiction, in s 23(3)(d) of the Act. The terms of s 23(3)(d) do not discriminate in relation to how a matter is referred to the Commission. It is the powers of the Commission to regulate these matters that are excluded in such cases.

11 I adopt and apply this approach to the present matter. For the reasons I set out above, I conclude that the claim by Ms Smallshaw is unable to be brought before the Commission. The Commission's jurisdiction is excluded by s 23(3)(d) of the Act. There being no jurisdiction, the claim by Ms Smallshaw has no prospect of success. It therefore could not be unfair to not accept Ms Smallshaw's claim out of time.

12 Thus, despite the personal difficulties experienced by Ms Smallshaw, which the Commission readily accepts have been very distressing for her, the Commission has no option but to dismiss the application. The order will also reflect the proper name of her former employer as The Minister for Corrective Services, under s 13 of the Prisons Act.

2014 WAIRC 00958

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA LEE SMALLSHAW
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 20 AUGUST 2014
FILE NO/S	U 133 OF 2014
CITATION NO.	2014 WAIRC 00958

Result	Application dismissed
Representation	
Applicant	Mr G Galant as agent
Respondent	Ms I Rizmanoska and with her Mr N Cinquina

Order

HAVING heard Mr G Galant as agent for the applicant and Ms I Rizmanoska and with her Mr N Cinquina on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the name of the respondent be amended by deleting "Department of Corrective Services" and inserting in lieu thereof "The Minister for Corrective Services".

(2) THAT the application be and is hereby dismissed.

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

2014 WAIRC 00967

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DARRYL KELLY SMITH
	APPLICANT
	-v-
	ELECTRICAL DISTRIBUTORS OF WA PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 26 AUGUST 2014
FILE NO/S	B 33 OF 2014
CITATION NO.	2014 WAIRC 00967

Result	Application dismissed
Representation	
Applicant	Mr S Edwards as agent
Respondent	Mr J Moore

Order

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

WHEREAS the application was set down for a hearing on the 25th day of July 2014; and

WHEREAS immediately prior to the hearing on the 25th day of July 2014 the Commission convened a conference; and

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

WHEREAS on the 22nd day of 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 dismissed.

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

2014 WAIRC 00992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FAY VELLIOS
	APPLICANT
	-v-
	KAREN AND RAY WARDROP
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 SEPTEMBER 2014
FILE NO/S	U 104 OF 2014
CITATION NO.	2014 WAIRC 00992

Result	Application dismissed

Order

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

WHEREAS by email on the 2nd day of September 2014 the applicant advised that she wished to withdraw the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 00968

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY DAVID VIDICH
	APPLICANT
	-v-
	ATM ENTERPRISES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 27 AUGUST 2014
FILE NO/S	U 120 OF 2014
CITATION NO.	2014 WAIRC 00968

Result	Order issued
Representation	
Applicant	In person
Respondent	No requirement to appear

Order

HAVING heard the applicant on his own behalf and there being no requirement for the respondent to appear 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 for want of jurisdiction.

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

2014 WAIRC 00953

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMSON YOHANNIS
	APPLICANT
	-v-
	ACTION INDUSTRIAL CATERING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 18 AUGUST 2014
FILE NO/S	U 125 OF 2014
CITATION NO.	2014 WAIRC 00953

Result	Application discontinued
Representation	
Applicant	Mr S Yohannis
Respondent	Mrs K Irvine

Order

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

AND WHEREAS on 11 August 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 13 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,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Margaret Louise Blades	West Australian Symphony Orchestra Pty Ltd (ACN: 081 230 284)	B 28/2014	Chief Commissioner A R Beech	Discontinued
Naomi Williams	Gloria Cassidy Union Secretary Disabled Workers Union of WA	B 55/2014	Chief Commissioner A R Beech	Discontinued
Naomi Williams	Gloria Cassidy Union Secretary Disabled Workers Union of WA	U 55/2014	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters referred—

2014 WAIRC 00918

DISPUTE RE ALLEGED BULLYING

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, 8 AUGUST 2014
FILE NO/S CR 6 OF 2014
CITATION NO. 2014 WAIRC 00918

Result Application discontinued
Representation
Applicant Mr C Fogliani
Respondent Mr R Farrell

Order

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

THAT the application be and is hereby discontinued by leave.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Minister for Health	Scott A/SC	PSAC 35/2013	4/10/2013 14/11/2013	Dispute re reconfiguration of metropolitan services	Concluded
The Civil Service Association of Western Australia Incorporated	Public Sector Commission	Mayman C	PSAC 18/2012	1/05/2013 20/08/2013	Dispute re clause 47 & 48 of the Public Service and Government Officers General Agreement 2011	Discontinued

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Government Officer's (Insurance Commission of Western Australia) General Agreement 2014 PSAAG 8/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated AND another	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Department of Corrective Services Youth Custodial Officer's General Agreement 2014 PSAAG 9/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated AND ANOTHER	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Social Trainers General Agreement 2014 PSAAG 10/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated and another	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Department of the Attorney General Jury Officers Agreement 2014 PSAAG 11/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated and another	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Country High School Hostels Authority Residential College Supervisory Staff General Agreement 2014 PSAAG 12/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated and another	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Family Resource Employees General Agreement 2014 PSAAG 13/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated and another	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
School Support Officers (Government) General Agreement 2014 PSAAG 14/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated and another	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Electorate and Research Employees General Agreement 2014 PSAAG 15/2014	(Not applicable)	The Civil Service Association of Western Australia Incorporated and others	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Public Service and Government Officers General Agreement 2014 PSAAG 7/2014	16/09/2014	The Civil Service Association of Western Australia IncorporateD and others	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00972

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANJA ROSSOUW

APPLICANT

-v-

PETA BENNETT INVESTMENTS PTY LTD

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE THURSDAY, 28 AUGUST 2014
FILE NO. B 135 OF 2014
CITATION NO. 2014 WAIRC 00972

Result Direction issued

Direction

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

WHEREAS on the 5th day of August 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the Commission proposed that Directions be issued for the preparation for the hearing of the matter and heard from the parties by email;

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

1. THAT the parties engage in informal discovery by the 8th day of September 2014.
2. THAT the parties file and serve witness statements constituting the whole of the evidence in chief of the witnesses by the 22nd day of September 2014.
3. THAT any further evidence in chief will require leave of the Commission.
4. THAT the parties file a Statement of Agreed Facts by the 24th day of September 2014.
5. THAT the parties file and serve written outlines of submissions by the 29th day of September 2014.

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

2014 WAIRC 00434

DISPUTE RE ALLEGED BULLYING

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	TUESDAY, 27 MAY 2014
FILE NO.	C 6 OF 2014
CITATION NO.	2014 WAIRC 00434

Result	Direction issued
Representation	
Applicant	Mr K Singh
Respondent	Mr R Farrell

Direction

HAVING heard Mr K Singh on behalf of the applicant and Mr R Farrell of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent file and serve a notice of answer within 21 days of the date of the referral under s 44(9) of the Act.

(2) THAT the parties have liberty to apply on short notice.

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

2014 WAIRC 00974

DISPUTE RE PROCEDURAL FAIRNESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 29 AUGUST 2014
FILE NO	PSACR 30 OF 2013
CITATION NO.	2014 WAIRC 00974

Result	Order issued

Order

HAVING heard Mr S Harben of counsel on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the applicant provide to the respondent by 4.00 pm on Monday the 1st day of September 2014 all documents relevant to the private practice income sought by Mr Duncan-Smith as part of this application.

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

2014 WAIRC 00991

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, 5 SEPTEMBER 2014
FILE NO.	U 111 OF 2014
CITATION NO.	2014 WAIRC 00991

Result	Direction issued

Direction

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

WHEREAS on the 11th day of August 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference, the matter was not resolved and the Commission proposed that Directions issue for preparation for the hearing of the matter and heard from the parties by email;

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

1. THAT the parties engage in informal discovery by the 17th day of September 2014.

2. THAT the parties file and serve witness statements constituting the whole of the evidence in chief of the witnesses by the 26th day of September 2014.

3. THAT any further evidence in chief will require leave of the Commission.

4. THAT the parties file a Statement of Agreed Facts by the 30th day of September 2014.

5. THAT the parties file and serve written outlines of submissions by the 3rd day of October 2014.

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

2014 WAIRC 00986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BELINDA PINKER
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 4 SEPTEMBER 2014
FILE NO/S	U 114 OF 2014
CITATION NO.	2014 WAIRC 00986

Result	Directions issued
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Mr D Anderson (of counsel)

Directions

THE COMMISSION has heard from Mr D Stojanoski (of counsel) for the applicant and Mr D Anderson (of counsel) for the respondent and in order to expedite the hearing and the parties have agreed to a number of directions. Accordingly, the Commission in accordance with the powers conferred on it under the *Industrial Relations Act 1979* hereby directs -

1. THAT the hearing be set down for 4 days at a date to be determined by the Commission;
2. THAT discovery is to be informal;
3. THAT the parties file in the Commission an agreed statement of facts no later than 7 days prior to the date of the hearing;
4. THAT the applicant file in the Commission and serve on the respondent any signed witness statements upon which it intends to rely no later than 14 days prior to the date of the hearing;
5. THAT the respondent file in the Commission and serve on the applicant any signed witness statements upon which it intends to rely no later than 7 days prior to the date of the hearing;
6. THAT the applicant file in the Commission and serve on the respondent an outline of submissions no later than 5 working days prior to the date of the hearing;
7. THAT the respondent file in the Commission and serve on the respondent an outline of submissions no later than 3 working days prior to the date of the hearing;
8. THAT the parties have liberty to apply at short notice.

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

PUBLIC SERVICE APPEAL BOARD—

2014 WAIRC 00245

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 7 JANUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL - DEPARTMENT OF THE ATTORNEY GENERAL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G BROWN - BOARD MEMBER
	MR N CINQUINA - BOARD MEMBER
DATE	TUESDAY, 1 APRIL 2014
FILE NO	PSAB 2 OF 2014
CITATION NO.	2014 WAIRC 00245

Result	Direction issued
Representation	
Appellant	Mr M Shipman
Respondent	Mr D Matthews of counsel and with him Mr S Brown

Direction

HAVING heard Mr M Shipman on behalf of the appellant and Mr D Matthews of counsel and with him Mr S Brown on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT each party shall give an informal discovery by 15 April 2014.

(2) THAT the matter be listed for hearing for 3 days on dates to be fixed.

(3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2014 WAIRC 00814

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 7 JANUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00814
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD
		COMMISSIONER S J KENNER - CHAIRMAN
		MR G BROWN - BOARD MEMBER
		MR N CINQUINA - BOARD MEMBER
HEARD	**:**	TUESDAY, 1 APRIL 2014, WEDNESDAY, 7 MAY 2014, THURSDAY, 8 MAY 2014
DELIVERED	**:**	WEDNESDAY, 30 JULY 2014
FILE NO.	**:**	PSAB 2 OF 2014
BETWEEN	**:**	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		Appellant
		AND
		DIRECTOR GENERAL - DEPARTMENT OF THE ATTORNEY GENERAL
		Respondent

Catchwords	:	Industrial law (WA) – Appeal against the respondent's findings of breach of discipline – Appeal against the respondent's decision to impose penalties – Disclosure of a conflict of interest – Honest dealings with an employer – Conflict of interest policy – Written reprimand and a fine – Application to disqualify an Appeal Board member on the grounds of apprehended bias dismissed – Appeal allowed in part – Orders made
Legislation	:	*Public Sector Management Act 1994* (WA) s 80
Result	:	Upheld in part. Order issued
Representation:		
Counsel:		
Appellant	:	Mr M Shipman and with him Ms L Kennewell
Respondent	:	Mr R Andretich and with him Mr S Brown
Solicitors:		
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

British American Tobacco Australia Services Limited v Laurie (2011) 242 CLR 283

Esteem Holdings Pty Ltd as Trustee for the Esteem Trust v Caratti [2012] WASC 260

Livesey v The New South Wales Bar Association (1983) 151 CLR 288

R v Magistrates' Court at Lilydale ex parte Ciccone [1973] VR 122

Re JRL; Ex parte CJL (1986) 161 CLR 342

Case(s) also cited:

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2010) 90 WAIG 127

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority (2012) 92 WAIG 891

Winzer v Department of Planning (2010) 90 WAIG 1793

Reasons for Decision

KENNER C:

1 The appellant Ms Nikoloska is a level 3/4 public servant employed as a Supervising Customer Service Officer at the Perth Magistrates Court. On 30 April 2013 Ms Nikoloska was charged with breaches of discipline under s 80 of the Public Sector Management Act 1994. The allegations related to her attendance at a hearing at the Perth Magistrates Court on 14 and 15 January 2013 whilst on annual leave. She was in attendance to support her father, who is a friend of the then accused, who was on trial. It was contended that Ms Nikoloska failed to lodge a conflict of interest declaration in accordance with the Department's relevant policy. It was further contended that Ms Nikoloska also attended court on 20 February 2013 to hear a reserved judgement, and absented herself from work for a short period, without approval.

2 Further allegations were also made. The first was that in a meeting on 27 February 2013, Ms Nikoloska failed to be honest in responses to questions put to her by her manager, as to whether she knew the accused person, Mr Jakimovski. Finally, it was contended that Ms Nikoloska also inappropriately accessed the Department's records database in connection with Mr Jakimovski's matter. As a result of an investigation into these matters, by letter of 22 October 2013, Ms Nikoloska was informed by the Director General of the Department that save for the allegation concerning access to the database, the allegations had been established. Penalties of a fine of one day's pay and a reprimand were imposed.

3 The Association now appeals against both the findings and the penalties imposed. It seeks orders that the findings of breaches of discipline and the penalties imposed be quashed.

A preliminary issue

4 The day prior to the appeal being heard, counsel for the Association informed the Associate to the Appeal Board that he had been contacted by counsel for the Department. Counsel for the Department had inadvertently mentioned the subject matter of this appeal to a member of the Appeal Board, Mr Cinquina, whilst discussing an unrelated matter. On the basis of that contact, which was alleged by the Association to concern "matters pertaining to settlement negotiations" in respect of this appeal, the Association made an application that Mr Cinquina disqualify himself on the grounds of apprehended bias.

5 At the commencement of the hearing of the appeal, the Appeal Board invited the parties to address the issues. Counsel for the Association informed the Appeal Board that he received a telephone call from counsel for the Department to inform him that he had inadvertently raised the subject of the appeal when speaking to Mr Cinquina about another matter concerning Mr Cinquina's employer, the Department of Corrective Services. The discussion apparently mentioned terms of a possible settlement that the parties had been negotiating.

6 Counsel for the Department informed the Appeal Board that at the time, he was preoccupied in getting instructions and had contacted Mr Cinquina in relation to another matter. Being so preoccupied, and not recognising momentarily Mr Cinquina's employer as the Department of Corrective Services, and not the Department of the Attorney General, counsel then mentioned this appeal and made a comment in the form of a "one-line statement, 'she will accept this'": T5. As soon as Mr Cinquina recognised the matter, he informed counsel for the Department that he was a member of the Appeal Board and the conversation ceased. Counsel for the Department then telephoned counsel for the Association to inform him of the contact with Mr Cinquina.

7 The Appeal Board briefly adjourned to consider the application. Mr Cinquina, having considered the matter and the submissions of counsel, declined to disqualify himself and has asked me to express his reasons for so concluding.

8 The relevant principles in relation to disqualification of a member of a court or tribunal on the grounds of apprehended bias are well settled. The test in such cases is whether, having regard to all of the circumstances, the parties or the public might entertain a reasonable apprehension that Mr Cinquina might not bring an impartial or unprejudiced mind to the resolution of the present appeal: *Livesey v The New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 349-350. The underlying principle is, of course, that justice must not only be done, but must be seen to be done: *Re JRL* at 349-350. Additionally, a decision maker should also not lightly disqualify themselves from a matter: *British American Tobacco Australia Services Limited v Laurie* (2011) 242 CLR 283; *Esteem Holdings Pty Ltd as Trustee for the Esteem Trust v Caratti* [2012] WASC 260 per EM Heenan J at par 15.

9 In the case of communications between one party (or their counsel or agent) and a judicial officer, such communications may give rise to a disqualification. The general rule is that communications should not take place in the absence of the other party: *Re JRL* at 346. The question is not whether such representations have in fact worked to the disadvantage of the other party, but whether they may do so: *Re JRL* at 349-350; *R v Magistrates' Court at Lilydale ex parte Ciccone* [1973] VR 122. Also relevant, is the nature of the communication and the bearing it may have on the issues to be determined in the case at hand: *Re JRL*.

10 In this case, Mr Cinquina says the communication from counsel for the Department arose in the manner outlined by him. The contact was made to discuss an unrelated matter. Counsel for the Department, then, inadvertently, made mention of this appeal and as soon as Mr Cinquina heard the name of the appellant, he immediately stopped counsel and informed him that he was on the Appeal Board hearing the matter. The reference to the present case, according to Mr Cinquina, was fleeting at best. Mr Cinquina says that no mention was made of the merits of the case. No matters were mentioned by counsel that could have a bearing on the determination of the appeal. Accordingly, Mr Cinquina considered, for these reasons, there was no basis for him to disqualify himself. To the extent that it is necessary for me to do so, in view of the relevant principles outlined above, I agree with Mr Cinquina's decision.

Allegation 1 – Absence without leave

11 This allegation was abandoned by the Department at the commencement of the appeal. Therefore, it is not necessary to consider it further.

Allegation 5 – Failure to disclose conflict of interest

12 The Department has a Conflict of Interest and Outside Work Interests policy. A copy of it was annexure 10 to the Investigation Report tendered as exhibit R1. Paragraph 1 of the Policy is headed "Intent" and provides as follows:

> 1. To ensure employees are aware of, disclose and avoid any actual potential or perceived conflict of interest in relation to their employment with the Department. In addition the approval and management requirements under which employees may be permitted to undertake other paid or unpaid outside work interests.

13 Paragraphs 3 and 4, under the heading "Policy" provides as follows:

> 3. A conflict of interest may occur when an employee has private, personal interests or associations that are in conflict, appear to conflict or could potentially conflict, with their public duties.
>
> 4. The perception of a conflict of interest is also important to consider because public confidence in the integrity of the Department is critical.

14 Examples of potential conflicts of interest, in the context of the above, are set out in the Policy and include, relevantly for present purposes, par 11.8 which is in the following terms:

> 11.8 If you are, or someone with whom you have an association (such as a family member or friend) is a party (eg. accused, defendant, witness, juror, litigant) to civil or criminal proceedings in any Australian court or tribunal jurisdiction;

15 In this case, there is no question that Ms Nikoloska was aware of the Policy. The issue arising on the appeal is whether it had application to her circumstances and furthermore, whether Ms Nikoloska, as she says, sought advice from her manager and was informed that she was not required to make a declaration of interest.

16 In order to deal with these issues, it is necessary to outline the factual background. Ms Nikoloska testified that she was approached by her father in about late December 2012 to accompany him to court and to act as a support for him. Her father's friend, Mr Jakimovski, was appearing in court as an accused person. Mr Nikoloska, Ms Nikoloska's father, gave evidence that he asked his daughter to assist him. In accordance with Macedonian culture, it is the eldest daughter in a family who is generally turned to in order to provide such assistance. Mr Nikoloska does not have a good command of English, and required his daughter's help to understand the procedures of the court. Ms Nikoloska told her father that she would have to check with her supervisor as to whether she could go with him to court.

17 Subsequently Ms Nikoloska approached her supervisor, Ms Etrelezis, on about 3 January 2013. She said she took a copy of a conflict of interest form with her. Ms Nikoloska told Ms Etrelezis that she had been asked by her father to go to court with him as a support person, as he is from a non-English speaking background. Ms Nikoloska testified that she told Ms Etrelezis that she had no association with the accused person, who was a friend of her father's. According to Ms Nikoloska, after discussing the matter, Ms Etrelezis told her that there would be no need to complete a conflict of interest declaration, as she had no direct association with the accused person.

18 Ms Etrelezis gave evidence and confirmed that Ms Nikoloska did go to see her and ask about going to court and requested leave for this purpose. Ms Etrelezis recalls that Ms Nikoloska mentioned that she was going to court to assist her father on the day in question. Ms Etrelezis said that she was then training in the position of Acting Registry Manager and had not by that point, received formal training in the application of the Policy. However, Ms Etrelezis testified that she did not recall Ms Nikoloska having a copy of a conflict of interest form with her, nor raising the Policy with her. If the Policy had been raised, Ms Etrelezis said she would have remembered. It is to be noted however, that Ms Etrelezis did have some difficulty with her recall about these matters as she experienced a significant personal trauma around this time, which she said affected her memory.

19 On about 11 January 2013, Ms Nikoloska said she spoke with a co-worker at work, Ms Fraser, regarding taking leave on 14 and 15 January. Ms Fraser asked Ms Nikoloska what she was going to do and at the time, Ms Etrelezis was present at the conversation. Ms Nikoloska said she initially hesitated in telling Ms Fraser why she was taking leave and looked towards Ms Etrelezis, who gave her permission to comment on the matter. Ms Nikoloska told Ms Fraser that she was going to court to support her father. This conversation was generally confirmed on the evidence of Ms Fraser.

20 Shortly before the court case on 14 January, Ms Nikoloska said that she spoke to another colleague Ms Cousins. Ms Nikoloska told Ms Cousins that she was going to court with her father. Ms Cousins then raised the question of a conflict of interest form. Ms Cousins, in her testimony, confirmed that she saw Ms Nikoloska on this morning. She asked Ms Nikoloska whether she wanted to go out for coffee however, Ms Nikoloska said she could not as she was attending court with her father. Ms Cousins testified that she told Ms Nikoloska she thought she should complete a conflict of interest form. Ms Nikoloska responded to the effect that she had spoken to her manager and she did not need to do so. Ms Cousins said she told Ms Nikoloska that in her opinion, she should still lodge a form.

21 In relation to this particular allegation, it is clear from Ms Nikoloska's evidence, as early as her conversation with her father when he requested she attend court to assist him, that she would need permission to do so. The question of a potential conflict of interest was clearly on her mind, as, on Ms Nikoloska's own version, when she went to see Ms Etrelezis, she took a copy of a conflict of interest form with her. It is also common ground that it was disclosed by Ms Nikoloska to both her supervisor and co-workers, that she was attending court on 14 and 15 January to provide support to her father. It is also apparent from the evidence generally, including that from Mr Pugh, one of Ms Nikoloska's supervisors, that whether or not conflict of interest forms need to be completed, is surrounded by some ambiguity. Certainly on the evidence of witnesses for the Department at least, the view seemed to be that "if in doubt, complete a conflict of interest".

22 In my view, it is of some significance that Ms Nikoloska's version of events was to an extent, corroborated by the evidence of Ms Cousins, who said that Ms Nikoloska did refer to seeing her manager about the need to complete a conflict of interest declaration. It is to be noted that these events occurred well before any allegations of inappropriate conduct by Ms Nikoloska. There would be no apparent motive for Ms Nikoloska to not otherwise accurately describe to Ms Cousins what occurred. Furthermore, Ms Etrelezis did suffer a personal trauma which she said substantially affected her memory around the time of these events. Ms Etrelezis also testified that she was, at the time that Ms Nikoloska went to see her, undertaking training in a new position and had not been familiarised with the Policy.

23 On balance, having considered all of the evidence in relation to this issue, I prefer Ms Nikoloska's version of events. I accept on balance, that she sought guidance from her manager as to whether a conflict of interest declaration would be required in the circumstances. She understood that it would not be necessary.

24 Additionally, it is to be observed that the terms of par 11.8 of the Policy, citing an example of where an association may give rise to a potential conflict of interest, would arguably, not strictly have applied in Ms Nikoloska's case. There is no question that Ms Nikoloska was not a family member or friend of Mr Jakimovski, who was the accused in question. The association was with her father. It is open to interpretation, whether a friend of Ms Nikoloska's father, even a longstanding friend, could be described as having had "an association" with Ms Nikoloska for the purposes of par 11.8. There is a respectable argument that no such association existed in this case. No doubt however, with the benefit of hindsight, and as an abundance of caution, a conflict of interest declaration probably should have been made.

25 However, I am satisfied that Ms Nikoloska did seek guidance and understood that she was not required to complete a conflict of interest declaration in the circumstances she was dealing with.

Allegations 2 and 4 – Failure to be honest in dealings with employer

26 On 27 February 2013 Ms Nikoloska was asked to attend a meeting with her manager Ms Halden and a supervisor Mr Pugh. The meeting was to discuss "feedback" received online by the Department in relation to the criminal trial which took place on 14 and 15 January 2013. The online feedback was received from a victim's advocate.

27 A copy of the online feedback was annexure 7 to the Investigation Report. The "Feedback Type" on the document referred to it as a "Complaint". It clearly was. It also clearly related to Ms Nikoloska. The online complaint was in the following terms:

> **What happened and who was involved (maximum 400 words):**
>
> I recently attended the Perth Magistrates Court in my capacity as a victim's advocate in the case of Jakimovski & Gerasimovski. I noted that one of your customer services officers, a lady whom I believe is named Katarina, sat in on proceedings periodically, both during the trial itself (on the 14th and 15th January), and during the delivery

> of the verdict (on 20th February). My concern relates to this woman being present during proceedings as a support person for the accused whilst she was on duty as an agent of the court. Further, this lady know [sic] my clients well and made it clear during her presence that her alliance rested with the now convicted Mr Jakimovski. Whilst this lady said nothing specifically derogatory when she was present, her general demeanour and mocking tone when she spoke to her family and friends in our presence contributed to an atmosphere in which my clients and I felt uncertain and somewhat concerned about the impartiality of the process. I believe her presence represented a serious conflict of interest. As the only support person for the victims in this case, your staff member will likely be aware that I am the person raising this issue. Further, she was present when I made a complaint to the court support person/security about the behaviour of an older woman present during proceedings (who I learned later was your staff member's mother). It is for this reason that I request that my name and the name of the organisation for which I work not be revealed to your staff member. I believe this is important for my clients' and my privacy and security.
>
> **What is the clients preferred resolution?**
>
> That the staff member's awareness be raised as to the importance of remaining impartial in this process. Some assurance that her position was not used to give Mr Jakimovski an unfair advantage throughout the course of this case.

28 Ms Nikoloska testified that at the meeting on 27 February with Ms Halden and Mr Pugh, she was told that a complaint had been received online. Ms Nikoloska testified that she was not made aware of the purpose of the meeting prior to it taking place, and it did not occur to her that the meeting would have anything to do with her attending court on 14 and 15 January to support her father. Ms Nikoloska testified that the first thing she was asked by Ms Halden was "do you know the accused". She said "yes" because he is her father's friend. Ms Halden then showed her a print out with Mr Jakimovski's name on it. Ms Nikoloska confirmed that "yes that is Mr Jakimovski": T17.

29 Ms Halden then asked Ms Nikoloska whether she had completed a conflict of interest form and she replied that, in words to the effect, "No I spoke to Ms Etrelezis and she said I did not have to complete it": T18.

30 In cross-examination it was put to Ms Nikoloska that her response as she described it in evidence in chief was inconsistent with her written response to the allegations provided to the Investigator, which was annexure 4 to the Investigation Report. In her written response to questions posed to the Investigator, Ms Nikoloska said that Ms Halden and Mr Pugh's questions were directed to establishing "the depth and degree of my relationship with Mr Jakimovski and to identify if I had any serious or meaningful association with him. I responded to the line of questioning with a true and accurate response, being 'I did not know him'".

31 Further in her written response, Ms Nikoloska said that when supplementary questions were asked by Ms Halden, it became clear that they were asking whether "I had knowledge of him [Mr Jakimovski] and how I came to have this knowledge". Ms Nikoloska also denied that Ms Halden asked her on two occasions, whether she recognised the name "Jakimovski": T37.

32 Ms Halden in her evidence said that at the start of the meeting on 27 February, she said she had some "feedback" on Mr Jakimovski and wished to talk to her about it. Ms Nikoloska said she did not know the person and Ms Halden thought that she had probably mispronounced the name. Ms Halden had a printout of names of persons appearing in court and showed the name to Ms Nikoloska. She asked Ms Nikoloska if she recognised the name and according to Ms Halden, Ms Nikoloska said "I don't know him": T87. At this point Ms Halden said she was somewhat taken aback and mentioned the two-day trial on 14 and 15 January and it was at that point that Ms Nikoloska said "he's a friend of my father's": T87. According to Ms Halden, Ms Nikoloska had a normal demeanour during the course of this conversation.

33 In cross-examination, Ms Halden accepted that she gave no prior notice to Ms Nikoloska as to the purpose of the meeting and Ms Nikoloska was not shown a copy of the complaint. Ms Halden did say she mispronounced Mr Jakimovski's name at first. The questioning also in relation to the name, occurred right at the beginning of the meeting, and Ms Halden accepted that this exchange with Ms Nikoloska, as to the knowledge of Mr Jakimovski, occurred very quickly over a few seconds: T93.

34 Both Ms Halden and Mr Pugh provided statements to the investigator in July 2013, which did contain assertions that Ms Nikoloska was at least initially, quite firm that she did not know Mr Jakimovski.

35 The resolution of this issue turns on whose evidence on this point is to be preferred. Additionally, it appears common ground, that the exchange at the beginning of the meeting on 27 February occurred very quickly and after the first two or so questions, Ms Nikoloska acknowledged knowing Mr Jakimovski but as her father's friend. There are also the two written statements that Ms Halden and Mr Pugh provided to the Investigator in July 2013, which were generally consistent with the tenor of their testimony in these proceedings.

36 Whilst Ms Nikoloska denied that she attempted to mislead Ms Halden, in my view her initial answers to the questions, at least in the first few seconds of the interview, were inappropriately hesitant. The questions asked were not complex but simple questions as to whether "she knew Mr Jakimovski". There is no doubt that Ms Nikoloska clearly knew who he was, as a long term friend of her father. I have also no doubt however, that given the failure of the Department to notify Ms Nikoloska as to the subject matter of the request to meet, the questions put by Ms Halden would have taken Ms Nikoloska by surprise. In my view, that was unnecessary. It was plain that the "online feedback" was a complaint, of a potentially serious nature, which suggested partiality by those attending court on the days in question. It would have been far better in my view, for Ms Halden or Mr Pugh, to have informed Ms Nikoloska prior to the meeting, as to its purpose and to disclose the substance of the complaint. In my opinion, that would have been a fairer way of dealing with the matter, because of the nature of the allegations contained in the online feedback form.

37 Despite this, in the final analysis, the questions asked by Ms Halden were simple and required a simple answer to the effect "yes I know of him but he is my father's friend and not mine". The exchange between Ms Nikoloska and Ms Halden was very

quick and after a short time, Ms Nikoloska disclosed her knowledge of Mr Jakimovski. Nonetheless, Ms Nikoloska was not completely frank in her immediate response. In my view, it was open to conclude that in not immediately disclosing the knowledge, a breach of the Department's Code of Conduct and the Public Sector Code of Ethics was established.

Conclusion

38 On the basis of the evidence before the Appeal Board, I am satisfied that the appeal against allegation 5 is made out and that the finding should be quashed. The appeal against allegations 2 and 4 is not made out and the findings should stand.

39 In terms of penalties, the Department imposed two penalties, they being a reprimand and a fine of one day's pay. In view of the circumstances of the conduct of Ms Nikoloska on 27 February 2013, taken in context, I consider disciplinary action in the form of a reprimand would be more appropriate. I also conclude on the evidence that the degree of knowledge of the Policy, and appropriate responses of employees to possible conflicts of interest is in need of clarification. Accordingly, I would recommend that the staff of the Department, if they have not done so already, undergo refresher training in relation to this Policy and the circumstances of its application.

MR BROWN:

40 I agree with the reasons of Commissioner Kenner and have nothing further to add.

MR CINQUINA:

41 I also agree with the reasons of Commissioner Kenner and have nothing to add.

2014 WAIRC 00832

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 7 JANUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL - DEPARTMENT OF THE ATTORNEY GENERAL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G BROWN - BOARD MEMBER
	MR N CINQUINA - BOARD MEMBER
DATE	MONDAY, 4 AUGUST 2014
FILE NO	PSAB 2 OF 2014
CITATION NO.	2014 WAIRC 00832

Result	Upheld in part. Order issued
Representation	
Appellant	Mr M Shipman of counsel and with him Ms L Kennewell
Respondent	Mr R Andretich of counsel and with him Mr S Brown

Order

HAVING heard Mr M Shipman of counsel and with him Ms L Kennewell on behalf of the appellant and Mr R Andretich of counsel and with him Mr S Brown on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the appeal be and is hereby allowed in part.

(2) THAT the finding by the Department in relation to allegation 5 be and is hereby quashed.

(3) THAT the penalty of a fine of one day's pay imposed by the Department on Ms Nikoloska be and is hereby quashed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2014 WAIRC 00970

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 23 JUNE 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVONNE SIEGWART
	APPELLANT
	-v-
	EDUCATION DEPARTMENT OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS C PORTER - BOARD MEMBER
	MR G SUTHERLAND - BOARD MEMBER
DATE	THURSDAY, 28 AUGUST 2014
FILE NO	PSAB 8 OF 2014
CITATION NO.	2014 WAIRC 00970

Result Appeal dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 27th day of August 2014 the appellant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

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

RECLASSIFICATION APPEALS—

2014 WAIRC 00989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00989
CORAM	**:**	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 3 SEPTEMBER 2014
DELIVERED	**:**	FRIDAY, 5 SEPTEMBER 2014
FILE NO.	**:**	PSA 21 OF 2012
BETWEEN	**:**	MICHAEL PLATTEN 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 appeal – Work value – Increased complexity – Technological advances – Health professional
Legislation	**:**	*Industrial Relations Act 1979* s 80E(2)(a)
Result	**:**	Reclassification granted
Representation:		
Applicant	**:**	Ms P Marcano as agent
Respondent	**:**	Mr J Sheppard and with him Mr J Ross

Reasons for Decision

(Given extemporaneously at the conclusion of

the proceedings as edited by the Commission)

1 The applicant seeks the reclassification of the position of Senior Medical Scientist at PathWest from Level P2 to Level P3 and a change in title to Medical Scientist in Charge pursuant to s 80E(2)(a) of the *Industrial Relations Act 1979.* The basis of the claim is that there has been a significant net addition to work value since it was last reclassified in 2006.

2 The aspects relied upon include, amongst other things, the requirement for higher level skills and knowledge; for consultation on specialist cases; increased complexity in IHC cases; advances in technology, and increased autonomy. The position is said to be a 'peak expert'. There is also a claim of increased work volume and increased supervisory responsibilities. The position is said to align with several positions at Level P3.

3 The evidence of increased work load and supervisory responsibilities in this case do not add sufficiently to the work value of the position such as to make any difference to its level of classification.

4 As to the level of complexity and technological developments, I think it is important to note that this is a common theme in reclassification claims, and that it must be said that these are issues applicable across the sector and the workforce generally. To justify a claim of increased work value, there must be something beyond the normal level of development that occurs due to the cumulative effect of technological change.

5 The key to this matter seems to me to be the claim that the position not merely 'applies advanced procedures and techniques, both routine and complex', as set out in the existing job description form, but is said now to develop and review new procedures and practices. I also accept Dr Spagnolo's evidence that the clinical aspects of the position have increased exponentially, that there is a requirement to exercise judgment at a much higher level and to provide advice to clinicians in a way that is significantly different from the requirements of the position in 2006.

6 I note that end of line responsibility for functions regarding the laboratory is held by the Scientist in Charge position. However, I find that there has been significant change in this position in what one might call the scientific and technical aspects of the position as opposed to the organisational aspects.

7 There has been a significant net addition to the work value of the position as a health professional, relating to the skills, experience and decision-making aspects of the role (see *State Wage Order* [2012] WAIRC 00359, Schedule 2, 7. Work Value Changes). The position does not merely do more of the same as was previously done, but exercises judgment at a higher level and provides advice of a clinical nature. In that context, the position meets the requirements for a Level P3 position.

8 In the circumstances, then I am satisfied that the claim ought to be granted.

2014 WAIRC 00988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL PLATTEN
	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	FRIDAY, 5 SEPTEMBER 2014
FILE NO	PSA 21 OF 2012
CITATION NO.	2014 WAIRC 00988
Result	Reclassification granted

Order

HAVING heard Ms P Marcano on behalf of the applicant and Mr J Sheppard and with him Mr J Ross on behalf of 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 granted.

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

[L.S.]

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

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

Application Number	Matter	Commissioner	Dates	Result
APPL 20/2014	Request for mediation re alleged overpayments	Beech CC	N/A	Did not proceed

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Keynet Holdings Pty Ltd t/as TL&N Transport	Sims Group Australia Holdings Ltd T/as Sims Metal Management	Kenner C	RFT 14/2014	22/07/2014	Dispute re alleged breach of Owner-Drivers (Contracts and Disputes) Act 2007	Discontinued