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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL MAGISTRATE—Claims before—

2014 WAIRC 01059

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2014 WAIRC 01059
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 3 SEPTEMBER 2014
DELIVERED : WEDNESDAY, 24 SEPTEMBER 2014
FILE NO. : M 117 OF 2013
BETWEEN : LUKE TERRENCE JONES

CLAIMANT

AND

MIDWEST AUTO GROUP PTY LTD (ACN 124 354 721)

RESPONDENT

Catchwords : Small Claim as provided for in section 548 of the *Fair Work Act 2009*; Claim for \$9,963.17, plus interest, for unpaid wages; Alleged contravention of section 45 of the *Fair Work Act 2009*; Alleged non-compliance with the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*.

Legislation : *Fair Work Act 2009*

Instruments : *Vehicle Manufacturing, Repair, Services and Retail Award 2010* [MA000089]

Result : Claim not proven

Representation

Claimant : Mr Luke Jones, in person

Respondent : Mr R Gifford of the Motor Trade Association of WA (Inc.), by leave, appeared for the Respondent

REASONS FOR DECISION

Background

- 1 By written agreement dated 5 March 2010, Midwest Auto Group Pty Ltd (ACN 124 354 721) (the Respondent) employed Luke Terrence Jones (the Claimant) to work as a vehicle salesperson at its Geraldton car yard to commence on 8 March 2010. The Claimant thereafter remained in the Respondent's employment until 24 February 2012.
- 2 The written agreement contained provisions with respect to the Claimant's remuneration. Those provisions provided inter alia that:
 - he would be paid a retainer of \$26,000.00 per annum, inclusive of superannuation; and

- he would be paid a commission on :
 - o all vehicles which he sold that were delivered,
 - o aftercare products he sold, and
 - o any finance contract written up as a consequence of his sale.
- 3 Notwithstanding those contractual arrangements as to remuneration, the Respondent was nevertheless obliged, by section 45 of the *Fair Work Act 2009* to pay the Claimant his minimum weekly wage entitlement in accordance with the applicable Modern Award, being the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* [MA000089] (the Award).
- 4 The weekly amount payable by way of retainer was below the applicable weekly minimum wage. Accordingly, commissions earned by the Claimant were added to the retainer payable so as to satisfy the Respondent’s obligation to pay him the minimum weekly wage required by the Award.
- 5 Where commission had not been earned and payable during the particular weekly pay period, the Respondent would “top up” the retainer, so that the Claimant was paid the minimum weekly wage prescribed by the Award. The Respondent later clawed back the “top up” payments made from the Claimant’s commissions subsequently earned. I was informed by the Respondent’s Manager that such is in keeping with industry practice. I observe that there appears to be no apparent contractual or other legal foundation for that practice.
- 6 The Respondent concedes that during the Claimant’s employment, it was obliged by Clause 33.4 (within *Clause 33 – Classification and minimum weekly wages*) of the Award, to pay him the following weekly minimum wage:
- 8 March 2010 to 6 September 2010 - \$603.90 per week (Level 4);
 - 7 September 2010 to 30 June 2011 - \$663.60 per week (Level 6); and
 - 1 July 2011 to 21 September 2011 - \$686.20 per week (Level 6).
- 7 It appears from the available evidence (see exhibit 6), that the Respondent did in fact pay the Claimant the applicable minimum weekly wage for each week of his employment. Whether in doing so it was lawfully entitled to claw back the “top up” payments made from commissions the Claimant subsequently earned, is something which I will comment upon later.

The Claim

- 8 The Claimant’s Claim is predicated on the number of hours worked. In essence, he says that he was not paid for all hours worked. From 8 March 2010 to 28 October 2010 he worked from 8.00am to 6.00pm, Monday to Friday, and 8.00am to 1.00pm on Saturdays. Thereafter, his finish time on weekdays changed to 5.30pm. It will be obvious that he initially worked a 55 hour week, and thereafter, a 52.5 hour week.
- 9 The Claimant asserts that the weekly minimum wage payable to him was for 38 hours worked, and that all hours worked in excess of that attracted additional payment at the applicable hourly rate. The Respondent on the other hand, contends that its obligation was to pay him the minimum weekly wage, irrespective of the hours worked, and that any claim based on hours worked is erroneous.
- 10 The Claimant has limited his Claim to only part of the period of his employment (8 March 2010 to 21 September 2011). He claims that during that period, he was underpaid \$9,963.17, calculated as follows:

Total hours worked	4,066.50
Total wage entitlement	\$ 68,084.34
Commissions paid	\$ 23,625.51
Total wages paid	\$ 34,495.66
Total underpayment	\$ 9,963.17

- 11 The Respondent’s position is reflected in paragraphs 10 and 11 of its Particulars of Defence:

“10. ...the Claimant’s earnings entitlement under the Award, may be calculated as follows:

	\$
<i>Period on Level 4: 26 weeks @ \$603.90/wk</i>	<i>= 15701.40</i>
<i>(8 March 2010 - 6 September 2010)</i>	
<i>Period on Level 6: 43 weeks @ \$663.60/wk</i>	<i>= 28534.80</i>
<i>(7 September 2010 - 30 June 2011)</i>	
<i>Period on Level 6: 11.364 weeks @ \$686.20/wk</i>	<i>= 7797.98</i>
<i>(1 July 2011 - 21 September 2011)</i>	
<i>Total (80.364 weeks)</i>	<i><u>52034.18</u></i>
<i>Total retainer + commission received</i>	<i>= 58121.17</i>
<i>Earnings entitlement (as above)</i>	<i>= <u>52034.18</u></i>
	<i><u>6086.99</u></i>

11. Compared with his actual earnings over that period, constituted as retainer and commission, of \$58121.17, he was accordingly paid in advance of the Award over the period of his employment to the extent of \$6086.99.”

Determination

- 12 The “hours” provision is contained in Clause 37 of the Award - *Ordinary hours of work and rostering*. Clause 37.2 of the Award provides that the ordinary hours of work of an employee will be an average of 38 hours per week, on not more than five days in any week. Clause 37.1 however, specifically provides that the Clause does not apply to a person principally employed to perform vehicle sales.
- 13 The Award makes special provisions for people employed principally to sell vehicles (see Clause 44 - *Special provisions - persons employed principally to sell vehicles*). That Clause specifically provides for the following:
- Clause 44.1 - Hours of work - full-time employment
 - Clause 44.2 - Hours of work - part-time employment
 - Clause 44.3 - Casuals
 - Clause 44.4 - Payment for work on public holidays and days off
 - Clause 44.5 - Work on a Sunday
 - Clause 44.6 - Travelling expenses
 - Clause 44.7 - Meal allowance
 - Clause 44.8 - Use of motor vehicles
 - Clause 44.9 - Payment of commission
 - Clause 44.10 - Calculation of wages
- 14 Relevantly, Clause 44.1 provides:
- “Hours of work - full-time employment***
- (a) A vehicle salesperson will be allowed one and a half days free of duty per week or by mutual agreement three full days per fortnight.”*
- 15 Clause 44 of the Award does not otherwise stipulate the ordinary hours to be worked by full-time employees. There is no specific limit on the number of ordinary hours a vehicle salesperson may be required to work, or to be on duty, except that the employee’s work cannot extend over more than five and a half days per week.
- 16 Clause 10.2 of the Award, within Clause 10 - *Types of employment*, provides that unless specified otherwise in the Award, employment will be by the week. That notion of “weekly employment” is adopted in Clause 44 of the Award. In Clause 44.2(a)(ii) reference is made to a “weekly wage”. Other provisions within Clause 44 refer to a salesperson’s “weekly rate”. It is obvious that a vehicle salesperson’s remuneration is payable by the week, at the weekly rate. Clause 33 of the Award - *Classification and minimum weekly wages* provides for payment of a weekly wage according to classification. Clause 33.4 makes provision for the payment of a minimum weekly wage at the specified weekly rate therein. That provision sets out an hourly rate derived from the weekly rate, by dividing the rate by 38. The hourly rate of pay is used to calculate payment for those employees (not vehicle salespersons) who work more than the 38 hours prescribed by Clause 37, and for the purposes of working out the payment of leave entitlements and the like.
- 17 Given that the Claimant’s hours of work were not limited to 38 hours per week, the hourly rate could have no application to his remuneration. Payment at an hourly rate was, and is, irrelevant to him and other vehicle salespersons. If it was intended that a vehicle salesperson’s weekly work hours comprise only 38 hours, then their exclusion from the application of Clause 37 of the Award would not have occurred. Further, if it was intended that vehicle salespersons be paid at an hourly rate for all hours worked in excess of 38 hours, then Clause 44 of the Award would have said so. Significantly, it does not.
- 18 The Award treats those whose primary function it is to sell vehicles differently to others covered by it. Such is apparent from Clause 26 - *Meal and rest breaks*, Clause 28 - *Overtime rates*, Clause 37, and of course, Clause 44 itself. The specific exclusion of Clause 37 means that there are no hours of work specified, other than the limitation achieved by Clause 44.1(a). Therefore, it is not possible to calculate a weekly wage based on an hourly rate. The salesperson’s engagement and remuneration is on a weekly basis.
- 19 It follows therefore, that the Claimant’s Claim for payment at an hourly rate, for all hours worked in excess of 38 hours per week, is not maintainable. Over the relevant period he was paid each week, at least that to which he was entitled.
- 20 Whether the Respondent, in making weekly payments, was entitled to claw back “top up” payments made from commissions earned, is somewhat doubtful. Indeed, the particular claw back or “negative top up” as it is sometimes referred to, which occurred on 7 March 2012 and which resulted in the Claimant receiving less than his full annual leave payment (see exhibit 6), is, on the face of it, somewhat suspect. Having made those observations, I recognise that I am not called upon to determine those issues, and therefore, will not address them further.
- 21 The Claimant has failed to prove his case.

G CICCHINI**INDUSTRIAL MAGISTRATE**

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—**2014 WAIRC 01062**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JOANNE BLANKENDAAL	APPLICANT
	-v-	
	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMALLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 25 SEPTEMBER 2014	
FILE NO/S	U 1 OF 2013	
CITATION NO.	2014 WAIRC 01062	

Result	Discontinued
Representation	
Applicant	Ms E Hadrys (as agent)
Respondent	Mr M Aulfrey (of counsel)

Order

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

On 13 February 2013 the Commission convened a conference for the purpose of conciliating between the parties and following the conference the matter was adjourned pending the outcome of other proceedings.

On 30 July 2014 the Commission was advised that the applicant was not proceeding with the matter and on 15 August 2014 a Notice of Withdrawal or Discontinuance was filed.

The respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2014 WAIRC 01045

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CARLYN CONDER	APPLICANT
	-v-	
	LOWER GREAT SOUTHERN FAMILY SUPPORT ASSOCIATION (KNOWN AS ILINK)	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	U 100 OF 2014	
CITATION NO.	2014 WAIRC 01045	

Result	Application dismissed for want of prosecution
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Order

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

WHEREAS the matter was set down for a hearing of the issue of jurisdiction on the 4th and 5th day of September 2014; and

WHEREAS by email on the 7th day of August 2014 the applicant's counsel advised that they were no longer acting for the applicant; and

WHEREAS on the 8th day of August 2014 the Commission wrote to the applicant requesting her "to contact the Commission within 7 days (i.e. by 15 August 2014) and confirm your intention to proceed with your application, and that you are intending to appear and prosecute your claim on 4 and 5 September 2014. If you do not contact the Commission by 15 August 2014, and advise of that intention, it is likely that the hearing will be cancelled, and the application may be dismissed"; and

WHEREAS by the 15th day of August 2014 the applicant had not contacted the Commission and the hearing was cancelled; and

WHEREAS on the 27th day of August 2014 the Commission wrote to the applicant directing her “to advise the Commission, in writing, by close of business Wednesday 10 September 2014 of any reason why your application should not be dismissed”; and

WHEREAS by the 10th day of September 2014 the applicant had not contacted the Commission;

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

THAT this application be, and is hereby dismissed for want of prosecution.

[L.S.]

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

2014 WAIRC 01046

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SHANE CONDER	APPLICANT
	-v-	
	LOWER GREAT SOUTHERN FAMILY SUPPORT ASSOCIATION (KNOWN AS ILINK)	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	U 101 OF 2014	
CITATION NO.	2014 WAIRC 01046	

Result Application dismissed for want of prosecution

Order

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

WHEREAS the matter was set down for a hearing of the issue of jurisdiction on the 4th and 5th day of September 2014; and

WHEREAS by email on the 7th day of August 2014 the applicant’s counsel advised that they were no longer acting for the applicant; and

WHEREAS on the 8th day of August 2014 the Commission wrote to the applicant requesting him “to contact the Commission within 7 days (i.e. by 15 August 2014) and confirm your intention to proceed with your application, and that you are intending to appear and prosecute your claim on 4 and 5 September 2014. If you do not contact the Commission by 15 August 2014, and advise of that intention, it is likely that the hearing will be cancelled, and the application may be dismissed”; and

WHEREAS by the 15th day of August 2014 the applicant had not contacted the Commission and the hearing was cancelled; and

WHEREAS on the 27th day of August 2014 the Commission wrote to the applicant directing him “to advise the Commission, in writing, by close of business Wednesday 10 September 2014 of any reason why your application should not be dismissed”; and

WHEREAS by the 10th day of September 2014 the applicant had not contacted the Commission;

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

THAT this application be, and is hereby dismissed for want of prosecution.

[L.S.]

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

2014 WAIRC 01064

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GLEN EMSLIE	APPLICANT
	-v-	
	THE ROMAN CATHOLIC BISHOP OF BUNBURY	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 24 SEPTEMBER 2014	
FILE NO/S	U 148 OF 2014	
CITATION NO.	2014 WAIRC 01064	

Result	Application discontinued
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Ms J Maccarone

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
 AND WHEREAS on 19 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 23 September 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 01054

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JAMIE FINDLAY	APPLICANT
	-v-	
	GND ELECTRICS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	U 136 OF 2014	
CITATION NO.	2014 WAIRC 01054	

Result	Application discontinued
Representation	
Applicant	Mr J Findlay
Respondent	Mr G Snedker (of counsel)

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
 AND WHEREAS on 31 July 2014 the Commission convened a conference for the purpose of conciliating between the parties;
 AND WHEREAS at the conclusion of the conference agreement was reached between the parties;
 AND WHEREAS on 8 September 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 00985

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2014 WAIRC 00985
CORAM	: COMMISSIONER S M MAYMAN
HEARD	: MONDAY, 9 JUNE 2014, FRIDAY, 20 JUNE 2014
DELIVERED	: THURSDAY, 4 SEPTEMBER 2014
FILE NO.	: B 166 OF 2013
BETWEEN	: TROY PATRICK FRANSE Applicant AND ALFRESCO CONCEPTS PTY LTD Respondent

CatchWords	:	Industrial law - Alleged denied contractual benefits - Principles applied - Witness credibility - Implied terms of contract - <i>Industrial Relations Act 1979</i> (WA), s 7, s 26(1)(a), s 29(1)(b)(ii)
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	Application granted in part
Representation:		
Applicant	:	Mr P Mullally (as agent)
Respondent	:	Mr G Jahn (of counsel)

Case(s) referred to in reasons:

Belo Fisheries v Froggett (1983) 63 WAIG 2394

BP Refinery Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20

Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (NSW) (1981-82) 149 CLR 337

Dyers v The Queen (2002) 210 CLR 285

Jones v Dunkel (1959) 101 CLR 298

Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services v Jeremy Freeman (2014) 94 WAIG 803

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

Secured Income Real Estate (Australia) Ltd v St. Martins Investments Pty Ltd (1979) 144 CLR 596

Reasons for Decision

- 1 This is an application filed pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the Act) in which Mr Troy Patrick Franse (the applicant) alleges that between 4 July 2011 and 11 February 2013 he was denied contractual benefits by Alfresco Concepts Pty Ltd (the respondent) namely:
 - a 1% bonus amounting to a sum of \$14,536;
 - a fully maintained company vehicle including fuel to the value of \$20,000; and
 - interest on the above sums from 11 February 2013 pursuant to statute.
- 2 In the event the respondent was unable to provide the vehicle it is the view of the applicant an implied term of the contract was that a motor vehicle allowance (MVA) of \$15,000 per annum would be provided by the respondent to the applicant. The respondent opposes the applicant's claims and submits the application should be dismissed.

Statement of Agreed Facts

- 3 Agent for the applicant and counsel for the respondent jointly submitted a statement of agreed facts on 6 June 2014:
 - The applicant was an employee of the respondent.
 - The applicant was employed as the respondent's manager.
 - The applicant was paid a base salary of \$80,000.
 - The applicant was employed between 4 July 2011 and 11 February 2013.
 - The respondent wrote a letter of offer to the applicant dated 11 June 2011.
 - The applicant and the respondent signed a formal contract of employment dated 4 July 2011.
 - On 15 March 2013 the applicant and the respondent signed a letter confirming that the applicant had received all his entitlements upon termination of his employment.
 - The applicant and the respondent are in dispute about the applicant's claim for a bonus payment and a car allowance payment.
- 4 The Western Australian Industrial Relations Commission (the Commission) thanks the parties for their assistance in formulating the statement as submitted.

Applicant's Submission

- 5 Mr Franse was a full-time permanent employee of the respondent who, between 4 July 2011 and 11 February 2013, was engaged to carry out duties as the manager to the respondent. The offer of employment was by letter dated 11 June 2011. A formal contract of employment was signed on 28 September 2011 which the applicant states incorporated the offer of employment.
- 6 The applicant asserts that he was to receive a bonus of 1% on a quarterly basis and that the respondent was to provide a fully maintained company vehicle and fuel to the value of \$15,000. In the particulars of claim filed by the applicant on 4 June 2014 the turnover of the respondent's business was, during the applicant's employment, claimed to be:

\$3,853,601.34 and the bonus that ought to have been paid by the respondent to the applicant at the rate of 1% was \$38,536.

(applicant's further and better particulars of claim [6])

- 7 In breach of the employment contract, specifically relating to the bonus payment, the respondent paid the applicant \$24,000. The applicant asserts some \$14,536 remains outstanding. No motor vehicle was provided by the respondent and in accordance with the contract and in the absence of a motor vehicle the applicant submits a MVA of \$15,000 per annum is payable. No MVA was paid throughout the applicant's employment therefore the applicant claims \$20,000 is outstanding.
- 8 In addition to the \$14,536 bonus claimed as liable and the \$20,000 MVA claimed, a total of \$34,536, the applicant claims interest on the sums owed in accordance with statute from 11 February 2013, the day the applicant was terminated.
- 9 It is not in dispute that the applicant was offered employment with the respondent on terms as set out in in the correspondence issued by the respondent dated 11 June 2011:

June 11th 2011

Dear Troy

Letter of Offer

We propose to employ you as Manager of Infresco. The role, including your role and responsibilities is outlined in the attached document. We propose a **3 month trial period**, after which time we can sit down and evaluate the role.

Remuneration will be as follows:

SALARY \$80,000 pa

After a 3 month trial period, the package will include the following:

- A fully maintained company vehicle, including fuel (value approx \$15,000)
- A mobile phone
- Bonus of 1% of Infresco's turnover. (The turnover in 2009/10 was approximately \$2million, so the bonus would be approx \$20,000 a year). This will be paid on a quarterly basis.
- Superannuation (9% SGC) will be paid on base salary only

This represents a total package of approximately \$120,000

The position requires a person who is dynamic and innovative, who will be able to progress Infresco in the marketplace for many years to come.

Please consider the role that we have offered. The requirement of your time, energy and enthusiasm will be paramount in fulfilling this role. If you think you are unable to meet these criteria, please advise me.

Finally there will be a confidentiality clause and a restraint of trade clause which will need to be signed.

Kind regards

Henry Kowalewski

(exhibit Franse 1)

- 10 The applicant submitted that when he and the respondent met and discussed the letter of offer (exhibit Franse 1) that letter together with (exhibit Franse 2) became the terms and conditions of his employment. The respondent suggests there was a further meeting on 7 October 2011 where an additional letter was presented (exhibit Alfresco 2). The applicant testified that he had never seen that correspondence of 7 October 2011. It is common ground that that letter was attached to the respondent's response as part of the Form 5, the respondent's Notice of Answer filed on 18 November 2013.
- 11 The applicant denies there was a meeting on 7 October 2011. The applicant gave evidence that the correspondence therefore has no contractual or binding effect upon the employment relationship. The applicant submits that there was a meeting on 28 September 2011 whereby the employment contract was signed by both parties (exhibit Franse 2).
- 12 Mr Troy Franse gave evidence that he commenced work with the respondent on 4 July 2011. The applicant initially met the respondent at trade shows and at the time was running his own business; an outdoor furniture store. The applicant had a conversation with the respondent on a number of occasions. The applicant had been importing furniture for approximately 10 years and got the impression that it was appropriate to put his resume to the respondent. At the time the applicant was looking at concluding his own business in Osborne Park. The applicant was on the market for taking up further employment if it was available. The respondent called the applicant and suggested they talk. Mr Kowalewski came to the applicant's shop in Osborne Park together with his daughter Ms Kowalewski on one occasion and on another occasion they had a meeting at the respondent's office in Canningvale. This was on or around 11 June 2011. It was at that stage that the letter of offer (exhibit Franse 1) was presented to the applicant.
- 13 The applicant gave evidence that he took the letter of offer to discuss it with his wife, called Mr Kowalewski and confirmed that he would accept the position. Due to the fact that the applicant was closing his business in Osborne Park the applicant confirmed with the respondent that he required time off during September and it was agreed the applicant would accept the position and would commence on 4 July 2011.
- 14 The applicant gave evidence that on 4 July 2011 (exhibit Franse 2) he took away the employment agreement to receive advice. The applicant gave evidence that he did not sign the document (exhibit Franse 2) until his probationary period had concluded which was a period of some three months. At that point the applicant had a meeting with Mr Kowalewski and Ms Meakins, the respondent's ex-business partner. The date of the meeting was 28 September 2011. At the meeting the applicant was informed he was doing his job well and the respondent informed the applicant he was happy to proceed to employ him on the terms of the letter of offer (exhibit Franse 1) together with the employment agreement (exhibit Franse 2).
- 15 The applicant gave evidence that he had discussions with the respondent regarding the question of the motor vehicle early on in his employment. It was while he and the respondent were driving one day. Mr Kowalewski mentioned to the applicant that they would have to start looking for a new vehicle and it was at that point the applicant informed him:

Well, I have a perfectly good ute. I don't believe we need to - you need to go to the expense of buying another vehicle, I'm happy to drive my vehicle to and from work and use it as necessary at work, which our - and I did say, however, You

know, I would like - that way you could put the vehicle component as part of my bonus. And this was - this was still during the probation period.

(ts 33)

The applicant gave evidence that the respondent agreed to that proposition however at no stage throughout the applicant's employment was an MVA paid. The applicant gave evidence that the ute that was allegedly offered by the respondent to the applicant was not available because at the time the respondent's son-in-law Riccardo, was driving the vehicle:

The production staff actually started at 6 am in the morning; between 6 am and 7 am in the morning. I started work at 8.30; Riccardo was working with the installer and hence he had the ute and it was used for installing which meant that they would have to get into the factory and deliver stock to site.

(ts 34)

- 16 It was suggested to the applicant that the circumstances changed in that Riccardo the installer left and the ute was then used for pickups and deliveries.
- 17 The applicant gave evidence in relation to the bonus that only part of the bonus was paid to him during his employment, in total \$24,000. Over a period of time the applicant was led to believe that he was there to help build the business however there appeared to be delays, there were random payments with the bonus, and it was certainly not paid on a quarterly basis. The applicant's employment was terminated on Monday 11 February 2013. The applicant came to work on the Monday and was informed that the respondent was downsizing and the applicant was no longer required.
- 18 Mr Kowalewski informed the applicant that he would be entitled to one week's pay in lieu however he would provide the applicant with two week's pay in lieu. The applicant gave evidence that after numerous emails and phone calls at some stage in March he met with Mr Kowalewski who advised the applicant that everything would be paid however he still to this day has not paid the applicant everything he owes with the exception of a week in lieu and the applicant's holiday pay. The applicant had not yet received the MVA or the bonus he considers he is owed.
- 19 In cross-examination the applicant confirmed that the respondent encouraged the development of product in Indonesia. Furthermore, the applicant was supervising up to four staff and while there were ebbs and flows in sales there was a constant flow of work which was demonstrated in the figures. The applicant's gross weekly wage was \$1,575.
- 20 The applicant in cross-examination was asked to consider an extract from exhibit Franse 1, in particular the words 'after a 3 month trial period, the package will include the following'. The applicant confirmed that the aspects listed were not to be provided before or during but after the conclusion of the first three months of employment, in particular:
- a fully maintained company vehicle, including fuel (value approx \$15,000)

(exhibit Franse 1)

- 21 The applicant was given a mobile phone after the three month period. Prior to that date the applicant used his own phone. Counsel for the respondent questioned the applicant regarding the meeting on 7 October 2011 to which the applicant replied he had never been to such a meeting nor had he ever seen the correspondence dated 7 October 2011 (exhibit Alfresco 2), until such time as the respondent submitted the Notice of Answer.
- 22 Mr Jahn submitted the motive of the respondent in not paying the final entitlements to the applicant was simple in that the applicant held confidential information, keys and a mobile phone belonging to the respondent. This was denied by the applicant. As soon as the property was returned the respondent would make-good the payments. Agent for the applicant noted that there had not been any communication forwarded to the applicant seeking such information. For example, there had been no correspondence throughout the history of this matter, which advised that the applicant had not been paid because he did not return the information or alternatively, did not return the mobile phone, the keys, the truck or the car. At no stage was anything mentioned until such time as the parties were before the Commission.
- 23 In re-examination the applicant was asked about his capacity as a manager. In response he considered that under the circumstances he was carrying out his work in a fair and reasonable manner. The applicant was asked to clarify the conversation that had taken place between himself and Mr Kowalewski regarding the use of his vehicle. The applicant confirmed that he had informed the respondent he had a perfectly good vehicle that he was prepared to use in the business provided the respondent paid the MVA outlined in the letter of offer. That, in the applicant's view, was the agreement reached during the ride in the car.

Applicant's Conclusions

- 24 The applicant is required to establish the existence of a contract within which the terms and conditions can be identified as a benefit. Furthermore, the matter as referred must be able to be considered as an 'industrial matter' as defined in s 7 of the Act.
- 25 The applicant asserts that the respondent encouraged him to take up the position of manager given the financial advantage of a 1% bonus and a fully maintained company vehicle including fuel to the value of \$15,000. The applicant submitted that as an implied term of the contract of employment in the event the respondent was unable to provide a motor vehicle as agreed a MVA of \$15,000 per annum would be provided. Such terms have been reflected in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (NSW) (1981-82) 149 CLR 337.
- 26 The applicant submitted the Commission should find in the applicant's favour consistent with the decision in *Belo Fisheries v Froggett* (1983) 63 WAIG 2394.
- 27 Agent for the applicant submitted that the application ought be viewed based on the credibility of each of the person's evidence including the interrelationship of the evidence, in particular the oral evidence of documents produced in the proceedings as made by the respondent in the initial offer of 11 June 2011 (exhibit Franse 1). General evidence is accepted by both parties that they had met at trade shows, had discussions in the lead up to the commencement of the applicant's employment on 4 July 2011.

- 28 With respect to exhibit Franse 1 it is the applicant's submission that it is in two parts, firstly, it offers the employment, provides that there will be a three month trial period in the usual terms of three months' probation. The second part of the letter is the remuneration package. The applicant submits this involved a package of \$120,000 which was offered to the applicant and accepted by him when he commenced employment on 4 July 2011. There was to be a probationary period of three months but once that probationary period was completed the package commenced together with the contract (exhibit Franse 2).
- 29 Much was made of the signing of the employment agreement and agent for the applicant submitted Mr Franse was not swayed in his cross-examination as to how he came into possession of the agreement. Evidence was that it was given to the applicant on 4 July 2011 and that he needed time to look at it, both to show it to his wife and to take it away to allow a member of his family to consider the legal terms. Much later the applicant signed that document at a meeting with the employer held on 28 September 2011 and signed in the presence of Ms Meakins at the respondent's office. Regardless of whether it was signed on 4 July or 28 September 2011 both the respondent and the applicant were left with the probationary clause that provides that the applicant will be employed on a three month probationary period at the end of which the respondent may offer the applicant permanent employment or extend the probationary period for a further period. Contrary to that view the respondent is asking the Commission to disregard the offer of 11 June 2011 (exhibit Franse 1) and suggests that the permanent employment offered can have different terms and conditions from those upon which this contract is based. The respondent at no stage says there was any change to the formal contract between the parties, that is whether it be exhibit Franse 2 or exhibit Alfresco 1. The terms and conditions outlined in the employment contract which was handed to the applicant on 4 July 2011 were not changed and if there were to be terms and conditions with respect to bonuses, salary or allowances that were to be amended then surely they would be added to a schedule but the document (exhibit Franse 2) is void of a schedule and void of amendments. Accordingly, the applicant urges the Commission in the absence of a schedule to read the offer as exhibit Franse 1 which seems to fit together with exhibit Franse 2 in spite of the evidence of the respondent. The respondent's suggestion was that a contract of employment was made on 7 October 2011 and the respondent extended the probationary period for a further period of 12 months.
- 30 Agent for the applicant submitted it was said by the respondent in evidence:
- At the end of the probationary period I discussed his performance with him. I came up with an alternative offer which didn't have the 1 per cent bonus.
- Later on the respondent said:
- I extended the probationary period for 12 months.
- 31 If you consider what the respondent has said that is the documentary evidence of exhibit Alfresco 2 leaving aside the fact that the applicant's evidence is that he did not receive the letter, exhibit Alfresco 2 in the final paragraph reflects:
- I will review your package in 12 months, allowing you time to develop your management skills. You will maintain the title of manager, but I will work very closely with you building your skill levels.
- (ts 153)
- 32 Agent for the applicant submitted that nowhere does it state there will be an extension of the probationary period. The second option was to offer permanent employment and the applicant submitted that the employment offered can only be changed if the applicant and respondent expressly agreed to variation and changes which of course is always part of the contract but the applicant had provided no such express agreement and the respondent does not point to such agreement except to say that he gave him a letter dated 7 October 2011 (exhibit Alfresco 2).
- 33 The position of the applicant, given within the terms of exhibit Franse 2 and exhibit Alfresco 1, returns to the original offer made by the respondent, that being exhibit Franse 1. It was that offer of employment that was made subject to the three month probationary period, the salary, the bonus and the remuneration that commenced in accordance with that offer and the employment contract. With respect to the MVA the applicant emphasises that the respondent's evidence should be rejected with regard to exhibit Alfresco 2.
- 34 Turning to exhibit Alfresco 5, those being the incentive payments the respondent says he recorded from his diary a week prior to the matters being heard before the Commission. The applicant's agent submitted they had had some time to compare the document with other financial records of the company and analyse the figures in particular with exhibit Franse 5 and exhibit Franse 7 together with the respondent's sales figures from 4 October 2011. It is from 4 October 2011 to 30 June 2012 (exhibit Franse 7 and exhibit Franse 5) that gives the balance of the period to the end of the applicant's employment, that is from 1 July 2012 until 11 February 2013.
- 35 In essence, the applicant submitted that the level of turnover is not reflected accurately and there is significant variance between the respondent's records therefore, the Commission ought to look quite critically at the evidence that the respondent has given with respect to the way exhibit Alfresco 5 has been prepared. The applicant asks the Commission to draw down on the credibility of the respondent's submissions and questions whether in fact he has paid \$32,000 to the applicant and not \$24,000 that the applicant suggests the respondent has already paid. When you consider exhibit Franse 8 the variances that occur between exhibit Alfresco 5, exhibit Franse 7 and exhibit Franse 5 they state the turnover each month is significant (at its highest \$51,000 a month). The agent for the applicant suggests that exhibit Alfresco 5 is not a truthful statement. Therefore, it was suggested that the applicant's more credible figure was \$24,000 given the number of variances during the applicant's employment (exhibit Franse 8).
- 36 Some doubt is drawn on the credibility of the \$32,000 figure having being paid to the applicant, as Mr Franse was never asked whether he had received \$32,000 when he was in the witness box. The respondent was asked by the agent for the applicant:

And not only have you not discovered this document or discovered your diaries, you did not put this document in front of the applicant this morning, did you? --- No, I haven't, no.

(ts 93)

- 37 With respect to the MVA the position of the applicant is that he owned a motor vehicle and discussed early on in his employment with the respondent there was no need to purchase another vehicle to satisfy the offer of 11 June 2011. In that conversation it is said by the applicant that the respondent did not need to purchase another vehicle rather to simply provide the applicant with the MVA as specified in exhibit Franse 1. It is common ground that no vehicle was ever provided. A photograph of a mazda ute has been submitted in evidence (exhibit Alfresco 4). This vehicle was submitted as being available for the applicant's use, although the applicant did not take it home as he had his own car. The applicant submitted that there was an oral variation to the contract which is denied by the respondent on two bases; firstly, that exhibit Alfresco 2 talks about the company car and secondly, what was raised by counsel for the respondent and the respondent's daughter in evidence that the applicant had never raised the issue of the MVA in that the applicant had not asked for the allowance at any particular time of his employment. What was raised in evidence by the applicant was that he presumed the cash that was being provided from time to time, that is the \$24,000 that came to the applicant over a period of time, the applicant understood to be a combination of the bonus payment and MVA. As was correctly pointed out by the respondent the bonus was unrelated to the MVA.

Respondent

- 38 Mr Henry Kowalewski gave evidence as the director of the respondent. Mr Kowalewski gave evidence he had been director of the respondent for approximately eight years.
- 39 The relationship between the applicant and the respondent came about as a result of his attendance at trade shows. The applicant was there showing his stand of furniture and there were discussions regarding a number of issues between the respondent and the applicant and eventually the respondent indicated he was looking for some relief in his business. The applicant indicated that he could perhaps fill the role of manager. The applicant provided the respondent with his references indicating he was able to do the job and as a result the respondent provided the applicant with a letter of offer dated 11 June 2011 (exhibit Franse 1). That letter was provided to the applicant prior to his commencement with the business.
- 40 The proposal was to put the applicant on as manager to manage the entire company based on a three month trial. At the end of the three month trial there would be a review to see how the applicant had operated. The remuneration was a base salary of \$80,000 per annum, a fully maintained company car after three months, a mobile phone, a 1% bonus based on the turnover of the company, superannuation which in total would represent a package worth some \$120,000. The respondent gave evidence he had not offered so generous a package before but it was to try and build incentives into the applicant's package as they were in need of a manager at the time and it was to ensure that the applicant would be involved in assisting production in the respondent's business.
- 41 Mr Kowalewski gave evidence that at the conclusion of the three month probationary period he had a meeting with the applicant in the office. His daughter Ms Kowalewski bought in a document that she had typed:

October 7th 2011

Dear Troy

Letter of offer

As the 3 month trial period is now complete it allows me to assess your ability's and performance to formulise a salary package.

- Performance Troy it would appear you have great experience and knowledge in the outdoor furniture sales, the role as Manager of Infresco requires a broader skills and experience which I believe if you work hard and develop you may be able to be carry out this role in 12 months.
- Ability There are a few points that you as a manager will need to develop.
 - 1/ Sales, you have a good sales technique and are able to win clients confidence, product knowledge needs to be developed over time.
 - 2/ Staff delegation and control, this area requires a fair bit of work at this point. I will work with you closely which will allow you time to develop.
 - 3/ Organisational skills, you are able to file and find items in a very organise manner but must follow up in more detail with customers, advertising dead line, production line operations and staff issues.
 - 4/Production and time managment (sic), this area needs a lot of work,

Please consider the role that we are offering as we see you have a great potential in the future to carry out the role of Manager but at this point we wish to keep you on and develop your skills. As you know this role is very dynamic and we see you being a big part of Infresco.

Considering the above and on your acceptance of the salary package. I would offer the following

1/ I will maintain my original offer of \$80,000.00 per year.

2/ Superannuation of 9% paid on base salary

3/ Company car this will be our mazda ute it will be fully maintained; note (it is not to be used for your Invisage business)

I will review your package in 12 months allowing you time to develop your management skills. You will maintain the title of manager but I will work very closely with you building your skill levels.

Best Regards

Henry Kowalewski

(exhibit Alfresco 2)

- 42 The respondent gave evidence the meeting with the applicant was a 'closed-door' conference. At that stage he considered the applicant's salesmanship skills were good however his delegation and control required a little more work. Organisational

skills were very good and production and management required a lot more work. The point of employing the applicant as a manager and the nature of the document, that is exhibit Alfresco 2, was to maintain his wage at \$80,000 per year with 9% superannuation, to provide a company car and to extend the probationary period for a further period of some 12 months to allow for the work needed to up-skill the applicant to managerial level, allowing for a further review in 12 months' time. The applicant would receive a company car to bring to and from work.

- 43 The respondent gave evidence the applicant accepted the role in a verbal capacity. When Mr Kowalewski was asked whether the bonus of 1% continued as outlined in exhibit Franse 1 he responded that was not part of the new offer. The bonus was up to the respondent, if he wanted to offer an incentive he would do so. Mr Kowalewski gave evidence he was bending over backwards to develop an employee who would develop into a manager.
- 44 Thereafter the respondent gave evidence he had regular meetings with the applicant. The respondent agreed he did not make any MVA payments. He also gave evidence that he did not pay a bonus however, agreed that the \$32,000 he gave the applicant was over and above his \$80,000 wage and it was the respondent's method of providing an incentive to nurture the applicant to a certain level. Mr Kowalewski indicated that the MVA and the bonus were not combined.
- 45 When asked to explain the difference between an incentive and a bonus the respondent asked the Commission to consider an incentive as almost 1.2% of the actual turnover figure, the difference between the two is that a bonus is a structured percentage that must be followed rigorously. The respondent advised with respect to the payments that:

He wasn't guaranteed every month. It was up – it was – I paid it every month. If I elected not to, I wouldn't, but I did.

(ts 86)

- 46 The respondent gave evidence that exhibit Franse 3 was drawn up as a standard letter and was done in all circumstances with employees to demonstrate that there were no further payments outstanding. The respondent indicated that in this circumstance the applicant's holiday pay was paid the following day:

15 MARCH 2013

ATTENTION: HENRY KOWALESKI

INFRESCO

CANNINGVALE WA

TO WHOM IT MAY CONCERN,

I, TROY PATRICK FRANSE, OF 150A GRAND PROMENADE BEDFORD, CONFIRM THAT I HAVE RECEIVED ALL FINANCIAL ENTITLEMENTS OWED TO ME IN RELATION TO MY EMPLOYMENT AT INFRESCO.

TROY P FRANSE (0409 31 38 31)

(Signed)

HENRY KOWALESKI

(Signed)

(exhibit Franse 3)

The respondent gave evidence that it was common practice to provide such documents to employees when they left the respondent's business.

- 47 In cross-examination the respondent indicated he had made 15 incentive payments to the applicant the last of which was \$2,400. These payments had been made in cash generally at the end of each month. The last month a payment was made was January 2013. A February payment was not made because the company's turnover was not good. Prior to that 14 cash payments were made. When asked by the agent for the applicant where he had retrieved the figures used in exhibit Alfresco 5 the respondent answered they had been drawn a week earlier from his diary. Agent for the applicant then asked:

So why wasn't this particular document, Alfresco 5, which came into existence a week ago, discovered to the applicant?--
- Your - the only discovery that was asked for was the - our turnover figures.

No. This is a relevant document. You say that it reflects extracts from your diary. There was a much earlier agreement that there would be mutual [discovery] between the parties, why was this not discovered to the applicant? --- In return to that, the applicant advised us that we have paid some \$24,000. Where is the schedule for that?

Could you answer the question, Mr Kowalewski? --- Sorry, yes. Yes. I couldn't - I couldn't do it in regards to - I didn't - I didn't - I didn't understand that I had to put it in.

(ts 92)

- 48 Counsel for the respondent was asked why the document was not produced during discovery to which he answered that it was only produced by the respondent a week earlier and he himself was unaware that it actually existed. The respondent gave evidence that he paid an additional \$32,000 in incentives:

And not only have you not discovered this document or discovered your diaries, you did not put this information in front of the applicant this morning, did you? --- No, I haven't, no.

No. And why not? If you say, "I made a payment to you of \$2,500 in October or November 2011" why wouldn't you put that to him? --- Probably because I wasn't aware that I had to.

The applicant has said, on oath, that he was paid \$24,000, is the \$32,000 that you're asserting now in addition to that or part of the - is 24 part of this?---Twenty-four is - I paid - above the \$80,000 ---

Yes? --- - - - salary I paid an additional \$32,000 in incentives.

(ts 93, 94)

- 49 The respondent explained he paid the incentives to the applicant in cash rather than by EFT as the applicant did not want his wife to know. The respondent would have a certain number of cash jobs come in each month and he would keep that money aside, put it through the books and then pay the applicant in cash.

50 The respondent gave evidence he did not ask the applicant to sign the adverse review when they met nor did he obtain a written acknowledgement from the applicant. The respondent gave evidence that exhibit Alfresco 2, the letter of 7 October 2011 was a fresh offer of employment to the applicant. After three months of employment the respondent said he was not going ahead with the offer he initially made to the applicant, he was going to replace it with the new offer. In essence the respondent gave evidence he had discarded the initial offer, as made by way of exhibit Franse 1 and exhibit Franse 2. It was put to the respondent by the applicant's representative that even though the letter of 7 October 2011 did not refer to either a bonus or an incentive the respondent indicated he made 15 incentive payments after 7 October 2011 and before the applicant was terminated which appeared to be more consistent with the offer of 11 June 2011 (exhibit Franse 1) than the offer of 7 October 2011 (exhibit Alfresco 2). It was put to the respondent:

Yes. But the original offer, the original offer was what got him to the employment relationship, correct? --- Correct, yes.

Your case is that I can throw that in the bin after three months? --- No, not at all.

And – and write it up again? --- No.

Make another offer? --- No, it's – it was to be reviewed after three months, which it was.

(ts 112, 113)

51 When asked whether the applicant accepted the offer of 7 October 2011 the respondent gave evidence that the applicant had continued working with the respondent and specifically agreed to work under the conditions specified by respondent.

52 Ms Amanda Leanne Kowalewski gave evidence for the respondent. Ms Kowalewski worked for the respondent as the office manager working in the area of human resources, administration and production. Her relationship with the respondent is as his daughter. Ms Kowalewski had been acting in the position as office manager for some two years and claimed a fairly good understanding of the business.

53 The witness examined exhibit Alfresco 1 indicating she was familiar with the document but did not see the applicant sign the document. It was Ms Kowalewski's evidence that she was given a copy of the document on 4 July 2011 when her father gave her a copy of the document to file. The witness also looked at exhibit Alfresco 2 and advised that she had seen a copy of the document and that she had typed it out in October 2011 several days before the meeting on 7 October 2011. The witness did not hear the conversation between the applicant and her father on that day as she was answering phones. She was aware of some of the terms being provided. For example, the witness gave evidence that she was aware that a motor vehicle was being provided but the applicant was not taking it home after work on a regular basis nor was he making regular use of the vehicle. It was the witness' evidence that the applicant used his own vehicle. Ms Kowalewski gave evidence that the applicant was not entitled to a MVA and she was not informed by the respondent to pay the same. Furthermore there were no employees in the business that would take the vehicle home or would have full control of the vehicle after work to return in the morning nor were there any employees who received MVA's.

54 In cross-examination the witness was shown a series of GST records from 4 October 2011 until 28 June 2012 (exhibit Franse 7). The witness was also shown exhibit Alfresco 5 a document Ms Kowalewski had not seen before it was presented in proceedings. It was put to the witness that the GST turnover in exhibit Alfresco 5 was portrayed as \$190,000. The witness reluctantly confirmed, adding that this was an area she was not involved in. Agent for the applicant asked her to compare that rate of \$190,000 with the rates reflected in exhibit Franse 7 as to whether the figures were one and the same. The witness broadly acknowledged same with a '--Mm hmm.' (ts 138).

55 The witness gave evidence that the applicant signed his contract of employment (exhibit Franse 2) on the day he commenced employment with the respondent, 4 July 2011. Ms Kowalewski added she did not see the applicant sign the contract of employment.

Respondent's Conclusions

56 Counsel for the respondent submitted in conclusion that considering the submissions and evidence there had been a number of differences of opinion between the parties. The respondent had offered the applicant a three month trial employment period after which he was to sit down and evaluate the applicant's position. The respondent and the applicant assessed the letter of offer (exhibit Franse 1). The respondent submits the applicant conveniently says that the meeting of 7 October 2011 did not take place.

57 The respondent submits that at the meeting of 7 October 2011 an offer was made and after the three month trial period ended it was up to the respondent to determine two options; either to employ the applicant on a permanent basis or to further extend the probationary period. The respondent indicated the applicant would have to improve his management skills to allow the respondent to gain confidence in the applicant's ability, given the representations that had been made in order for the letter of offer (exhibit Franse 1) to be materialised to its full extent. Unfortunately, on 7 October 2011 from the point of view of the applicant the offer was in essence changed. The amended offer in part says:

Please consider the role that we are offering as we see you have a great potential in the future to carry out the role of Manager.

(exhibit Alfresco 2)

58 On 7 October 2011 the three month probationary period was extended to a 12 month probationary period. Counsel for the respondent indicated that the role the applicant was employed to carry out was the role of manager. Both Mr Kowalewski and his daughter have both said there was a meeting between the two parties, although Ms Kowalewski has stated in evidence she was not aware of the content of the meeting.

59 Counsel for the respondent did concede that the employment agreement (exhibit Franse 2) had some deficiencies. One of the deficiencies was there was no detail as to the salary.

- 60 In examining the entitlement claimed with respect to the MVA the applicant claims a fully maintained company vehicle in exhibit Franse 1 including fuel to the value of approximately \$15,000 yet in exhibit Alfresco 2 one of the provisos specifically provides for a company car. The applicant did not take a vehicle home because it was not available to him in that other employees were using it at the time and at no stage did the applicant raise the issue with the respondent. Furthermore, the Commission heard in evidence from both Ms Kowalewski and Mr Kowalewski that at no stage were either of the witnesses asked for payment of a MVA. In other words the applicant at no stage made an enquiry about an MVA even when his employment was terminated. The non-payment of the MVA was raised because the applicant was in breach of his employment agreement and the respondent wrote asking the applicant to stop contacting the employees of the respondent attempting to encourage employees business (exhibit Franse 6).

Conclusion

- 61 It is the view of the Commission that the outcome of these proceedings rests primarily on the issue of credibility between the evidence given by the witnesses for the applicant and the respondent and, in particular, the documentation associated with that evidence.
- 62 The Commission is required to assess the credibility of witnesses and in so doing it did not notice anything particular about the applicant which would lead it to conclude that he tried to deliberately mislead the Commission. From time to time it became apparent that he had a different story to the respondent but there was nothing which suggested that the Commission ought consider what he said as other than a truthful version of the events. The evidence called on his behalf appears to be evidence, in large part, the Commission should accept. I am inclined when considering the issue of credibility to conclude that the evidence of Mr Franse to be that of a truthful person.
- 63 The evidence of the respondent is, in the Commission's view, somewhat more challenging, particularly that of Mr Kowalewski. I am inclined to the view that he was attempting to provide justification for a document (referring to exhibit Alfresco 2) together with a meeting Mr Kowalewski held with the applicant on 7 October 2011 that seemingly came into existence after the applicant's employment concluded. Mr Kowalewski's evidence on this matter should be treated with some caution and I so do. In evidence, Mr Kowalewski suggested, referring to exhibit Alfresco 2, that he had extended the applicant's probationary period to 12 months. Having regard to cl 3 of exhibit Franse 1 which states the Company may:

- 3.1.2. extend the probationary period for a further period.
together with exhibit Alfresco 2:

I will review your package in 12 months allowing you time to develop your management skills.

- 64 The Commission finds that Mr Kowalewski's credibility on this issue cannot be accepted and that the applicant's probationary period was not extended beyond the three month period. The Commission finds that exhibit Alfresco 2 did not form part of the applicant's contract of employment.
- 65 With respect to the evidence given in relation to the bonus the applicant and the respondent are at variance with respect to the amounts received in that the applicant claims to have received \$24,000 and the respondent claims to have paid \$32,000 in incentives.
- 66 Considering the terms relied upon by the respondent in exhibit Alfresco 2, where the bonus had been removed from the applicant's package the bonus payments continued on a monthly basis with the exception of the final month of the applicant's employment. Agent for the applicant submitted the respondent's credibility was in doubt over several issues; firstly the respondent's failure to provide relevant material for discovery. The figures reflected in exhibit Alfresco 5 were not produced from the respondent's diary until one week prior to the hearing and were not provided to the applicant. Secondly, the turnover variance of those figures between the respondent's GST sales figures as reflected on a month to month basis throughout the applicant's employment was significant. That variance was analysed by the applicant (see exhibit Franse 8) and one month the variance was as high as \$51,221.20. Throughout the employment of the applicant, each month experienced substantial variances suggesting the credibility of the respondent on this matter was somewhat in doubt, particularly if he had relied on the figures as reflected in exhibit Alfresco 5. Counsel for the respondent neglected to ask of the applicant whether he had received \$32,000 or \$24,000 in bonus payments when the applicant was in the witness box. Having regard however to the reasoning in *Dyers v The Queen* (2002) 210 CLR 285 in the High Court where their Honours restricted the application of *Jones v Dunkel* (1959) 101 CLR 298 it is the case now that the Commission can only act on the basis of the evidence called.
- 67 The Commission having regard for the various views accepts the applicant's evidence in that he received \$24,000 in bonus payments from the respondent, rather than the \$32,000 suggested by the respondent. The Commission finds there is \$14,536 outstanding in bonus payments owed by the respondent in accordance with exhibit Franse 1.
- 68 The Commission finds that the respondent by letter (exhibit Franse 1) offered to employ the applicant. With respect to the company motor vehicle the Commission finds that at no stage did the applicant access the entitlement that:

After a 3 month trial period, the package will include the following as entitled to:

A fully maintained company vehicle, including fuel (value approx \$15,000)

(exhibit Franse 1)

- 69 The applicant's evidence is he was driving his own vehicle to and from work and the company vehicle was not available for his own purposes as it was being used by other employees. The applicant gave evidence he discussed and reached agreement with the respondent to use his own vehicle in return for the MVA to save the respondent the purchase cost of a new vehicle. Further, the applicant had no access to any MVA throughout his employment. The respondent's evidence was that a mazda utility was available (exhibit Alfresco 4) for use by the applicant and the applicant at no stage throughout his employment requested his MVA. If it appears from the written contract that a term is to be implied, there are conditions which any

proposed term must satisfy. In the decision of the High Court *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* their Honours referred to the majority judgment in *BP Refinery Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 adopted by Mason J. with the concurrence of the other members of the Court in *Secured Income Real Estate (Australia) Ltd v St. Martins Investments Pty Ltd* (1979) 144 CLR 596. Those conditions are:

- (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.
- 70 The Commission finds that from the applicant's written contract (exhibit Franse 1) that after the three month probationary period an implied term of the applicant's contract, in the absence of a motor vehicle, a \$15,000 MVA would apply. The applicant was denied that contractual benefit and accordingly the applicant is owed \$20,000 by the respondent.
- 71 The conclusion reached about Mr Kowalewski's evidence is that with the exception of those matters already referred to the Commission accepts that Mr Kowalewski presented a true version of the events. The evidence of Ms Kowalewski is evidence that can be regarded as satisfactory. In all other regards it is clear on the assessment of credibility that the weight of evidence should lay with the applicant. The Commission has considered the submissions and the evidence of the respondent and the applicant.
- 72 With respect to the offer of employment, engagement and commencement date the evidence is agreed the applicant and the respondent met at trade shows. The applicant was offered the job of manager by letter (exhibit Franse 1) on 11 June 2013 and he commenced on 4 July 2013. The terms of his employment contract comprised of exhibit Franse 1 and exhibit Franse 2 the employment contract was signed some weeks later.
- 73 The Commission finds the applicant was an employee of the respondent employed as the respondent's manager and paid a base salary of \$80,000. For the applicant's claim to be successful a number of aspects must be recognised. The claim must relate to an industrial matter under s 7 of the Act and the claimant must be an employee. These matters were not in dispute. In this matter the applicant was employed between 4 July 2011 and 11 February 2013. Further, the Commission finds the respondent wrote a letter of offer to the applicant dated 11 June 2011 and the applicant and the respondent signed a formal contract of employment. Although the date of signature by the applicant varied on the evidence both parties recognise exhibit Franse 2 was ultimately signed and the commencement date of employment of 4 July 2011 is agreed.
- 74 In an application for contractual benefits under s 29(1)(b)(ii) of the Act such as this, the responsibility rests with the applicant to found that the subject of the claim is a benefit to which the applicant was entitled under his contract of employment. It is for the Commission to determine the terms of the contract of employment and to determine whether the claim establishes a benefit which he has been denied under his contract of employment, having regard for the obligations on the Commission to act according to s 26(1)(a) of the Act:
- shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;
- 75 In having regard for the applicant's claim the Commission has considered the decisions of *Belo Fisheries v Frogget* and *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.
- 76 A further question necessary to answer in considering a s 29(1)(b)(ii) claim is to determine whether or not any of the applicant's terms or conditions in his contract of employment was the subject of either an award or order. In response to this consideration the Commission finds in the negative.
- 77 The applicant sought interest on the amounts owed 'in accordance with statute' (applicant's further and better particulars of claim filed 4 June 2014). The submissions in hearing were taken no further. The Commission has considered the applicant's submission having regard for the decision of the Full Bench in *Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Noich Tree Services v Jeremy Freeman* (2014) 94 WAIG 803 at [54] where it was said:
- The Full Bench, however is unable to deal with this application as the Commission is not empowered to make an award of interest on awards of compensation made pursuant to s 23A(6) of the Act.
- 78 For these reasons the applicant's request for interest on compensation to be awarded in this matter is dismissed.
- 79 The Commission finds the applicant has been denied contractual benefits. Accordingly, the Commission will issue an order (in minute form) requiring the respondent to pay to the applicant the sum of \$34,536 (less applicable taxation) within 21 days of the final order issuing.

2014 WAIRC 01035

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TROY PATRICK FRANSE	APPLICANT
	-v-	
	ALFRESCO CONCEPTS PTY LTD	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	B 166 OF 2013	
CITATION NO.	2014 WAIRC 01035	

Result	Order issued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr G Jahn (of counsel)

Order

HAVING HEARD from Mr P Mullally as agent on behalf of the applicant and Mr G Jahn of counsel on behalf of the respondent, the Western Australian Industrial Relations Commission (the Commission) pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. DECLARES that the respondent denied the applicant benefits under his contract of employment.
2. ORDERS that the respondent pay the applicant \$34,536 (less applicable taxation) within 21 days of this order issuing.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 01040

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JANE GIBSON	APPLICANT
	-v-	
	JOONDALUP DRIVE MEDICAL CENTRE	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	B 90 OF 2014	
CITATION NO.	2014 WAIRC 01040	

Result	Application discontinued
Representation	
Applicant	Mr S Bowler (of counsel)
Respondent	Mr C Chenu (of counsel)

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) 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 no agreement was reached between the parties;
AND WHEREAS on 3 September 2014 the applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 01038

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANGELA KEELY HUDSON	APPLICANT
	-v-	
	CHIEF EXECUTIVE OFFICER CITY OF ROCKINGHAM	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	B 127 OF 2014	
CITATION NO.	2014 WAIRC 01038	

Result	Application discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr B Taylor (as agent)

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*;
AND WHEREAS on 28 July 2014 the Commission convened a conference for the purpose of conciliating between the parties;
AND WHEREAS at the conclusion of the conference agreement was reached between the parties;
AND WHEREAS on 18 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 01101

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	DAVID BRIAN KAPELI	
	-v-	RESPONDENT
	DRIFT CONSTRUCTION	
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 3 OCTOBER 2014	
FILE NO/S	B 171 OF 2014	
CITATION NO.	2014 WAIRC 01101	

Result	Application dismissed
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Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
WHEREAS by email on the 14th day of September 2014 the applicant advised that the matter is resolved and that he wished to withdraw his application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 01104

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	DAVID BRIAN KAPELI	
	-v-	RESPONDENT
	DRIFT CONSTRUCTION	
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 3 OCTOBER 2014	
FILE NO/S	U 171 OF 2014	
CITATION NO.	2014 WAIRC 01104	

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 14th day of September 2014 the applicant advised that the matter is resolved and that he wished to withdraw his application;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01103

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION VICTOR JOHN LITTLE	APPLICANT
	-v- SPECIALIST ABORIGINAL MENTAL HEALTH SERVICE	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 3 OCTOBER 2014	
FILE NO/S	U 10 OF 2014	
CITATION NO.	2014 WAIRC 01103	

Result	Dismissed
Representation	
Applicant	No appearance
Respondent	Mr M Aulfrey (of counsel)

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act).
 A conference listed by the Commission on 17 March 2014 was vacated at the applicant's request and the applicant was given additional time on several occasions to obtain advice about his application.
 On 11 July 2014 the applicant requested the matter be adjourned for a further period due to health issues and he was required to contact the Commission by 31 August 2014 to advise his intentions in relation to this matter but he did not do so.
 When the matter was listed for a show cause hearing on 3 October 2014 the applicant was advised that non-attendance by him at these proceedings will result in an order being issued dismissing the application for want of prosecution.
 The applicant did not attend the show cause hearing on 3 October 2014 nor did he advise the Commission as to any reason why he was unable to attend the hearing.
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be and is hereby dismissed.

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

2014 WAIRC 01079

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SOLOMON MWALE	APPLICANT
	-v-	
	MR JONATHAN THROSSELL (CEO) SHIRE OF MUNDARING	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	TUESDAY, 30 SEPTEMBER 2014	
FILE NO/S	U 157 OF 2014	
CITATION NO.	2014 WAIRC 01079	

Result	Application dismissed
Representation	
Applicant	Mr S Mwale on his on behalf
Respondent	Mr B Taylor as agent

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 2nd day of September 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 22nd day of September 2014 the applicant filed a Notice of Discontinuance in respect of the application;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 01060

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KIRI RAMANUI-HIRAMA	APPLICANT
	-v-	
	AUTISM ASSOCIATION OF WESTERN AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 25 SEPTEMBER 2014	
FILE NO/S	U 59 OF 2014	
CITATION NO.	2014 WAIRC 01060	

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

Order

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

On 9 May 2014 the Commission convened a conference for the purpose of conciliating between the parties and at the conclusion of the conference the parties reached an agreement in relation to this application.

On 13 August 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 01039

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	WILLIAM VANDERMARK	
	-v-	
	BLAKJACK FABRICATIONS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	B 102 OF 2014	
CITATION NO.	2014 WAIRC 01039	

Result	Application discontinued
Representation	
Applicant	Mr W Vandermark
Respondent	No appearance

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS on 11 August 2014 a conference was convened;
AND WHEREAS the applicant attended the conference however there was no appearance on behalf of the respondent;
AND WHEREAS on 10 September 2014 the applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 01066

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	PATRICK WANDERA	
	-v-	
	CITY OF SUBIACO	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 25 SEPTEMBER 2014	
FILE NO/S	U 170 OF 2014	
CITATION NO.	2014 WAIRC 01066	

Result	Application dismissed
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Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
WHEREAS on the 15th day of September 2014 the applicant filed a Notice of Discontinuance in respect of the application; and
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,
Acting Senior Commissioner.

[L.S.]

2014 WAIRC 01037

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JOELENE WASHINGTON-KING	APPLICANT
	-v- FIONA WOOD FOUNDATION	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	B 172 OF 2014	
CITATION NO.	2014 WAIRC 01037	

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS on 15 September 2014 the applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 01036

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KAREN YOUNG	APPLICANT
	-v- STEPHEN MICHAEL BAKER ALL CREATURES GREAT AND SMALL VET CENTRE	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 22 SEPTEMBER 2014	
FILE NO/S	U 141 OF 2014	
CITATION NO.	2014 WAIRC 01036	

Result	Application discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr D Heldsinger (of counsel)

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
AND WHEREAS on 13 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 18 July 2014 the applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

CONFERENCES—Matters arising out of—**2014 WAIRC 00990**

DISPUTE RE CLAUSE 38 - TRADE UNION TRAINING LEAVE
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

PARTIES**APPLICANT**

-v-

COMMISSIONER OF POLICE, WA POLICE, DIRECTOR GENERAL DEPARTMENT OF
 COMMERCE

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR
 COMMISSIONER S J KENNER

DATE

FRIDAY, 5 SEPTEMBER 2014

FILE NO

PSAC 15 OF 2014

CITATION NO.

2014 WAIRC 00990

Result	Order issued
Representation	
Applicant	Ms J O'Keefe
First respondent	Mr T Clark
Second respondent	Ms C Pickering

Order

HAVING heard Ms J O'Keefe on behalf of the applicant, Mr T Clark on behalf of the first respondent and Ms C Pickering on behalf of the second respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

[L.S.]

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

2014 WAIRC 00307

DISPUTE RE DISRUPTION OF TRANSPORT SERVICES
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 THE PUBLIC TRANSPORT AUTHORITY

PARTIES**APPLICANT**

-v-

THE WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND
 SERVICES UNION OF EMPLOYEES

RESPONDENT**CORAM**

COMMISSIONER S J KENNER

DATE

TUESDAY, 15 APRIL 2014

FILE NO/S

PSAC 11 OF 2014

CITATION NO.

2014 WAIRC 00307

Result	Order issued
Representation	
Applicant	Mr R Farrell
Respondent	Mr G Upham

Order

WHEREAS by application filed on 15 April 2014 the Public Transport Authority sought an urgent compulsory conference under s 44 of the Industrial Relations Act 1979 in relation to a proposed stop work meeting to be held by the Union on Wednesday 16 April 2014 from 12 noon to 1pm;

AND WHEREAS the Arbitrator convened an urgent compulsory conference at 12 noon today. At the conference, the Arbitrator was informed that the proposed unauthorised stop work meeting to be held on 16 April 2014 is anticipated to have attending all or a majority of Train Controllers employed by the Authority who are rostered for duty on 16 April 2014. The employees concerned have notified their manager that they intend to absent themselves from duty to attend the stop work meeting. The Authority informed the Arbitrator that the unauthorised absence of Train Controllers rostered for duty on 16 April 2014, will require the Authority to cease its urban passenger rail network services for a substantial period of time, including both prior to and after the scheduled stop work meeting;

AND WHEREAS the Authority has sought, unsuccessfully to date, an assurance from the Union that employees such as Train Controllers, required for the essential operations of the Urban Rail Network, not attend the stop work meeting. The Union has failed to provide that assurance;

AND WHEREAS the Union informed the Arbitrator that the purpose of the stop work meeting to be held on 16 April 2014 is to enable all members of the Union, employed as salaried staff by the Authority, to discuss a range of significant issues concerning the present enterprise bargaining negotiations. In addition, issues in relation to the interpretation of the current industrial agreement are also to be raised, in relation to which, offers and counter offers have passed between the parties;

AND WHEREAS the Union also informed the Arbitrator that in its view, there are other non-salaried employees who may be able to "act up" in the positions of Train Controller. Additionally, some Train Controllers may not be members of the Union. Thus, according to the Union, necessity for any shutdown of the urban rail network could be avoided. The Union was unable to provide to the Arbitrator, the assurance previously sought by the Authority, in relation to continuity of its operations;

AND WHEREAS the Arbitrator has had regard to the issues raised by the parties in the conference. It is noted that there are a number of substantive issues in dispute between the parties concerning the present enterprise bargaining agreement negotiations in relation to which, members of the Union have a significant interest;

AND WHEREAS the Arbitrator is also aware of the potential for a significant disruption to the Authority's urban passenger rail network and its impact on the travelling public, along with significant costs that will be incurred by the Authority in taking steps to mitigate any adverse effect of such a stoppage. The Arbitrator also notes that given the current issues in dispute, and the terms of cl 63 of the Public Transport Authority Salaried Officers Agreement 2011, normal work is required to continue whilst any matters under the Agreement remain in dispute, unless to do so would place at risk the health and safety of the employees concerned, which in this case, is not a relevant consideration;

NOW THEREFORE the Arbitrator, having regard for the public interest and the interests of the parties directly involved, pursuant to the powers vested in him under s 44 of the Industrial Relations Act, 1979 hereby makes the following orders –

- (1) THAT each of the employees of the Authority employed in the salaried position of Train Controller who are rostered for duty on Wednesday 16 April 2014 remain on duty for the duration of their rostered shift and do not attend the stop work meeting called by the Union for Wednesday 16 April 2014 from 12 noon to 1pm.
- (2) THAT the Union and each of its officials take all reasonable steps to bring to the attention of the employees the terms of this order including but not limited to:
 - (a) Placing a copy of this order on a noticeboard(s) in the vicinity of where the Train Controllers work;
 - (b) Distributing a copy of this order electronically or by other means so that the Train Controllers will be aware of its terms; and
 - (c) Counselling the Train Controllers to comply with the terms of this order.
- (3) THAT this order will operate until midnight Wednesday 16 April 2014.
- (4) THAT the compulsory conference is otherwise adjourned to a date and time to be fixed by the Arbitrator.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00309

DISPUTE RE DISRUPTION OF TRANSPORT SERVICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE PUBLIC TRANSPORT AUTHORITY

PARTIES

APPLICANT

-v-

THE WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND
SERVICES UNION OF EMPLOYEES

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 16 APRIL 2014
FILE NO/S PSAC 11 OF 2014
CITATION NO. 2014 WAIRC 00309

Result	Order issued
Representation	
Applicant	Mr R Farrell
Respondent	Mr G Upham

Order

WHEREAS by application filed on 15 April 2014 the Public Transport Authority sought an urgent compulsory conference under s 44 of the Industrial Relations Act 1979 in relation to a proposed unauthorised stop work meeting to be held by the Union on Wednesday 16 April 2014 from 12 noon to 1pm;

AND WHEREAS the Arbitrator convened an urgent compulsory conference at 12 noon on 15 April 2014. At the conference, the Arbitrator was informed that the proposed unauthorised stop work meeting to be held on 16 April 2014 is anticipated to have attending all or a majority of Train Controllers employed by the Authority who are rostered for duty on 16 April 2014. The employees concerned have notified their manager that they intend to absent themselves from duty to attend the stop work meeting. The Authority informed the Arbitrator that the unauthorised absence of Train Controllers rostered for duty on 16 April 2014 will require the Authority to cease its urban passenger rail network services for a substantial period of time, including both prior to and after the scheduled stop work meeting. This will cause substantial disruption to the urban passenger rail network. The Union informed the Arbitrator that the parties are presently in dispute in relation to bargaining for a new industrial agreement and related issues;

AND WHEREAS as a consequence of the matters raised before the Arbitrator, on 15 April 2014, the Arbitrator made an order requiring employees of the applicant employed in the salaried position of Train Controller who are rostered for duty on Wednesday 16 April 2014 to remain on duty for the duration of their rostered shift and not attend the stop work meeting called by the Union for Wednesday 16 April 2014 from 12 noon to 1pm;

AND WHEREAS the compulsory conference was relisted at 9.30am on 16 April 2014 at the urgent request of the Authority, on the basis that it had been informed that the Train Controllers concerned have indicated that they will attend the stop work meeting despite the order of the Arbitrator made on 15 April 2014;

NOW THEREFORE the Arbitrator, having regard for the public interest and the interests of the parties directly involved, pursuant to the powers vested in him under s 44 of the Industrial Relations Act, 1979 hereby makes the following orders –

- (1) THAT employees of the Authority engaged in the position of Train Controller whose names appear in Schedule A to this order be and are hereby joined as parties to these proceedings.
- (2) THAT order (1) of the order of the Arbitrator of 15 April 2014 be and is hereby varied to include those employees whose names appear in Schedule A to this order.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00430

DISPUTE RE DISRUPTION OF TRANSPORT SERVICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE PUBLIC TRANSPORT AUTHORITY

PARTIES

APPLICANT

-v-

THE WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND
SERVICES UNION OF EMPLOYEES

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 23 MAY 2014
FILE NO. PSAC 11 OF 2014
CITATION NO. 2014 WAIRC 00430

Result	Recommendation issued
Representation	
Applicant	Mr R Farrell
Respondent	Mr G Upham

Recommendation

WHEREAS the Arbitrator made orders in relation to these proceedings on 15 and 16 April 2014 concerning a proposed unauthorised stop work meeting to be held by the Union to discuss a range of issues in dispute between the parties as to the proper interpretation of Public Transport Authority Salaried Officers Agreement 2011;

AND WHEREAS as a consequence of those orders, further compulsory conferences have been convened by the Arbitrator between the parties to further address the issues in dispute. Those issues have their origin in application C 35 of 2012 which related to a dispute between the parties as to the interpretation of certain provisions of the Agreement;

AND WHEREAS following the earlier proceedings in application C 35 of 2012 the parties conferred in an endeavour to reach an agreement concerning the disputes as to the interpretation of the Agreement. An interim resolution was reached on the basis that the status quo would be preserved on a without prejudice basis, until the expiry of the Agreement, at which time the issues would be further progressed between the parties;

AND WHEREAS as a result of those further discussions between the parties, by letter dated 26 March 2014 from the Authority to the Union, the Authority advanced a Settlement Proposal addressing the various issues in dispute including, amongst others, the appropriate rate of payment for overtime worked on Saturdays by non-operational employees; the appropriate rate of payment for overtime and public holiday penalties for aggregated employees; and the appropriate rate for payment of long service leave for aggregated employees;

AND WHEREAS as a consequence of a further compulsory conference before the Arbitrator on 23 May 2014 approaches to the resolution of the interpretation issues in dispute between the parties were discussed. The most contentious issue for the Union, upon which the initial Settlement Proposal was rejected, was the proposal for penalties for overtime and for public holidays for aggregated employees to be calculated on their ordinary rate of pay and not the aggregated rate of pay;

AND WHEREAS the Arbitrator, having canvassed various options for resolution with the parties, informed them that a recommendation would be made in an endeavour to resolve the present matters in dispute;

NOW THEREFORE the Arbitrator pursuant to the powers conferred on it under s 44 of the Industrial Relations Act, 1979, hereby recommends –

- (1) THAT subject to (2) below the terms of the Settlement Proposal be resubmitted by the Authority to the Union and that its terms be accepted by the Union.
- (2) THAT as to par 3 of the Settlement Proposal regarding penalties for overtime and public holidays for aggregated employees, it not apply to existing employees of the Authority.

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

[L.S.]

2014 WAIRC 00584

DISPUTE RE DISRUPTION OF TRANSPORT SERVICES
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE PUBLIC TRANSPORT AUTHORITY

PARTIES

APPLICANT

-v-

THE WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND
SERVICES UNION OF EMPLOYEES

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 4 JULY 2014
FILE NO/S PSAC 11 OF 2014
CITATION NO. 2014 WAIRC 00584

Result	Consent order issued
Representation Applicant	Ms J Allen-Rana
Respondent	Ms P Branson

Consent Order

WHEREAS the Arbitrator made orders in relation to these proceedings on 15 and 16 April 2014 and issued a recommendation on 23 May 2014 concerning a dispute between the parties in relation to the proper interpretation of provisions of the Public Transport Authority Salaried Officers Agreement 2011;

AND WHEREAS the background to the dispute is briefly set out in the earlier orders and recommendation issued by the Arbitrator;

AND WHEREAS the Arbitrator has now been informed that the parties have adopted the terms of the Arbitrator's recommendation of 23 May 2014 and as a result, have entered into a Memorandum of Understanding giving effect to the terms of their agreement concerning the matters in dispute;

AND WHEREAS the Arbitrator, having regard to the matters in dispute and the agreement reached between the parties in relation to these issues intends to make an order in the terms of the agreement reached between the parties;

NOW THEREFORE the Arbitrator, pursuant to the powers conferred on it under s 44 of the Industrial Relations Act, 1979, and by consent, hereby orders:

- (1) THAT the applicant pay the specified salaried employees set out in Schedule A of the Memorandum of Understanding as if they were entitled to have penalties for overtime and for public holidays calculated on their aggregated rate, provided that:
 - (a) the employee retains their aggregation agreement for their listed position (with relief and non-relief equivalent positions regarded as the same position); or
 - (b) if the employee is listed in Schedule A as a Train Controller and they are promoted to one of the aggregated Suburban Operations Coordinator (SOC) positions; or
 - (c) if the employee is listed in Schedule A as a Transit Supervisor and they are promoted to one of the aggregated Transit Shift Commander positions.
- (2) THAT the parties to this order otherwise comply with the Memorandum of Understanding dated 27 June 2014 as set out in Annexure 1 this order.

- (3) THAT the parties may, at any time by mutual agreement, seek the cancellation of this order.
- (4) THAT there be liberty to apply.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

ANNEXURE 1

Memorandum of Understanding: Settlement of Disputes as to Interpretation of *Public Transport Authority Salaried Officers Agreement 2011*

Parties:

This Memorandum of Understanding (MOU) is between:

- the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (ASU);
- the Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees (Professionals Australia or PA); and
- the Public Transport Authority of Western Australia (PTA).

The parties agree to abide by the contents of this MOU.

Scope:

The MOU applies to salaried officers employed under Part 3 of the *Public Transport Authority Act 2003*.

To the extent that the industrial instrument applicable to those employees is capable of alternate interpretations, the interpretation consistent with this MOU shall apply.

Purpose:

The purpose of this MOU is to record a "Without Prejudice" compromise in settlement of various matters in dispute between the parties regarding the interpretation of the *Public Transport Authority Salaried Officers Agreement 2011* (the 2011 Agreement).

The terms of settlement contained in this MOU are a reflection of the unique history and circumstances of these interpretation issues. This MOU is not to be taken as a precedent and will not be used by the parties in any attempt to flow on the conditions of this MOU to any other public sector employees.

Defined terms:

Ordinary Rate of Pay: means the base salary plus the loading in lieu of annual leave loading as specified in the Salary Schedules contained in the relevant Agreement.

New Aggregation Agreement (NAA): means any aggregated arrangement entered into between the PTA and an employee as defined in Clause 4.7 of the 2011 Agreement on or after 16 April 2014.

Existing Aggregation Agreement (EAA) means any aggregated arrangement entered into between the PTA and an employee as defined in Clause 4.7 of the 2011 Agreement before 16 April 2014.

Transition Date means the first Sunday of the first pay period commencing after the signing by all parties (i.e. the PTA, ASU and PA) of this MOU.

Application:

The parties agree that:

1. The Ordinary Rate of Pay is an all-purpose rate, so that overtime, weekend and public holiday penalties are calculated on that rate;
2. Penalties for overtime and for public holidays for salaried employees entering into NAAs with the employer shall be calculated on the Ordinary Rate of Pay, and not on the aggregated rate, so that salaried employees with NAAs will receive:
 - a. the ordinary rate plus a loading calculated on the ordinary rate of pay for overtime; and
 - b. the aggregated rate plus a loading calculated on the ordinary rate of pay for ordinary time worked on public holidays;
3. As a transitional arrangement, the PTA will continue to pay the specified salaried employees in the positions contained in Schedule A, as if they were entitled to have penalties for overtime and for public holidays calculated on their aggregated rate. The PTA will maintain this transitional arrangement for the listed employees while:
 - a. each listed employee retains their aggregation agreement for their listed position (with relief and non-relief equivalent positions regarded as the same position); or
 - b. if the employee is listed in Schedule A as a Train Controller and they later relieve, act in, or are promoted to one of the aggregated Suburban Operations Coordinator (SOC) positions; or
 - c. if the employee is listed as a Transit Supervisor in Schedule A and they later relieve, act in, or are promoted to one of the aggregated Transit Shift Commander positions.
4. The parties will support the issuing of a consent order by the Public Sector Arbitrator in application PSAC11 of 2014:
 - a. Specifically setting out provisions inconsistent with paragraph (3); and
 - b. Referring to and giving binding effect to this MOU.
5. Long service leave will be payable at the ordinary rate of pay, so that aggregated employees will not receive the aggregated rate of pay and employees with commuted allowances will not receive that allowance while on long service leave;

6. The PTA will implement a transitional arrangement for salaried employees listed in Schedule B who have an EAA with the PTA for their substantive position so that the PTA will:
 - a. Establish each affected employee's accrued and pro rata long service leave balance as at the day before the Transition Date;
 - b. Calculate the difference in value of that balance if paid out on that day at the ordinary rate of pay compared with the aggregated rate of pay then applicable to that employee; and
 - c. Offer to pay that sum to each employee as soon as possible after the Transition Date, subject to that employee accepting the waiver set out at paragraph 9 (c) below.
7. The provisions dealing with overtime worked on Saturdays will be interpreted as if the language which applied to salaried employees immediately prior to the making of the *Public Transport Authority Salaried Officers of Western Australia Award 2003* still applied, so that overtime worked on Saturdays is paid at double time;
8. A "qualifying shift" for the purposes of establishing an entitlement to 5 weeks' annual leave under the annual leave clause of the 2011 Agreement:
 - a. will not include telephone calls during a period for which the employee is in receipt of an on call or availability allowance; and
 - b. Will include work during a period for which the employee is in receipt of an on call or availability allowance giving rise to an entitlement to payment under clauses 25.10 – 25.12 (e.g. a minimum shift payment);
9. There be a waiver, by all parties, of:
 - a. any rights to claim or recover back pay in relation to the interpretation issues resolved by paragraphs (1) to (5) above;
 - b. any rights to accrue additional annual leave prior to 1 July 2012 in relation to the interpretation issue resolved by paragraph (8) above,
 - c. any future claim relating to the rate of payment for the Long Service Leave balances the subject of payments under paragraph (6); and acknowledgement that those payments may be adjusted against any such claim.
10. The parties agree that this MOU represents full and final settlement of the disputed interpretation matters the subject of this MOU. There shall be no further claims in relation to these matters.
11. A Single Aggregation Methodology will apply to Aggregated Employees based on the Attached Schedule C.

Termination of the Memorandum of Understanding:

Subject to an application to the Western Australian Industrial Relations Commission the parties may, at any time by mutual agreement, terminate this MOU.

Mr Wayne Wood

Branch Secretary

Western Australian Municipal, Administrative, Clerical and Services Union of Employees (ASU)

Ms Karene Walton

Director

The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees (Professionals Australia)

Mr Mark Burgess

Managing Director

Public Transport Authority of Western Australia

SCHEDULE A – Transitional Arrangement for Calculation of Penalties

Cost Centre	Employee name	Emp'ee No	Position covered by aggregation agreement
N&I	HABANA, IGMEDIO	05455	Electrical Control Officer
N&I	HURRELBRINK, PETER	72380	Electrical Control Officer
N&I	MOIR, GREGORY	73276	Electrical Control Officer
N&I	THOMPSON, COLIN	05521	Electrical Control Officer
N&I	WOOD, PAUL	97564	Electrical Control Officer
N&I	WRIGHT, KENT	85458	Electrical Control Officer (Relief)*
N&I	CAGORSKI, TERRY	86677	Facilities Control Officer
N&I	CLOHESSY, GARTH	85627	Facilities Control Officer
N&I	GREER, JASON	97568	Facilities Control Officer
N&I	LANDWEHR, AARON	86567	Facilities Control Officer
N&I	SKOV, LARS	87037	Facilities Control Officer
N&I	TILLEY, DAVID	85625	Facilities Control Officer
Transwa	ALLEN, DARRY	18354	Operations Officer
Transwa	DI SALVIO, MIRKA	84935	Operations Officer
Transwa	POREBSKI, RICHARD	96685	Operations Officer
TTO Cust. Service	MAPLES DEN, ANDREW	84860	Customer Information Officer
TTO Cust. Service	MCGRISKIN, LORRAINE	77058	Customer Information Officer
TTO Cust. Service	REIRI, JULIE	86021	Customer Information Officer
TTO Cust. Service	DOCHERTY, WILLIAM	97572	Station Coordinator

Cost Centre	Employee name	Emp'ee No	Position covered by aggregation agreement
TTO Cust. Service	HAMMON, DAVID	86746	Station Coordinator
TTO Cust. Service	PINE, FRANK	77007	Station Coordinator
TTO Cust. Service	POSAVEC, ELISABETH	77070	Station Coordinator
TTO Cust. Service	SINGH, AVTAR	86601	Station Coordinator
TTO Depots	GOODGER, ANTHONY	10232	Depot Master
TTO Depots	MARTINOVICH, THERESE	85678	Depot Master
TTO Depots	MARTION, MICHAEL	95472	Depot Master
TTO Depots	MCGOWAN, ALEC	85640	Depot Master
TTO Depots	MEADOWS, GARTH	85681	Depot Master
TTO Depots	MEHARRY, JAMES	82983	Depot Master
TTO Depots	POWELL, ROBERT	86664	Depot Master
TTO Depots	ROBERTS, STEPHEN	19724	Depot Master
TTO Depots	ROLFE, STEPHEN	87702	Depot Master
TTO Depots	ROWE, MURRAY	85858	Depot Master
TTO Security	FORD, REBECCA	10228	Ticketing Control Officer
TTO Security	STUART, MARGARET	89502	Ticketing Control Officer
TTO Security	BICK, CHALLIS	86517	Transit Line Supervisor
TTO Security	CARROLL, JEREMY	86630	Transit Line Supervisor
TTO Security	CRANE, LEE	86636	Transit Line Supervisor
TTO Security	DAVID, MICHAEL	86538	Transit Line Supervisor
TTO Security	DORUK, JUSTIN	86637	Transit Line Supervisor
TTO Security	FRANCIS, TODD	87063	Transit Line Supervisor
TTO Security	FULLER, ALAN	84913	Transit Line Supervisor
TTO Security	HARKEN, TIFFANY	86685	Transit Line Supervisor
TTO Security	KIRKE, KENNETH	86689	Transit Line Supervisor
TTO Security	ROGERS, GEOFFREY	86935	Transit Line Supervisor
TTO Security	STEELE, MICHAEL	86758	Transit Line Supervisor
TTO Security	SVIRAC, STEPHEN	86815	Transit Line Supervisor
TTO Security	YOUNG, PHILIP	87041	Transit Line Supervisor
TTO Security	DICKSON, RAYMOND	86920	Transit Line Supervisor
TTO Security	FISHER, LEE	86882	Transit Line Supervisor
TTO Security	KIRKBRIDE, NEIL	87035	Transit Line Supervisor
TTO Security	SIOULAS, THOMAS	86917	Transit Line Supervisor
TTO Security	BRIGGS, ROBERT	86501	Transit Shift Commander
TTO Security	COMPTON, GEORGE	86506	Transit Shift Commander
TTO Security	HARGRAVE, COLIN	86503	Transit Shift Commander
TTO Security	PETCH, KEVIN	84873	Transit Shift Commander
TTO Security	SPRIGG, PAUL	86504	Transit Shift Commander
TTO Train Control	BURROWS, DOUGLAS	82728	Suburban Operations Coordinator
TTO Train Control	CRISP, PAUL	86213	Suburban Operations Coordinator
TTO Train Control	BRAITHWAITE, GEOFFREY	84910	Train Controller
TTO Train Control	FITZGERALD, JULIE	85721	Train Controller
TTO Train Control	FLOCKTON, WENDY	85899	Train Controller
TTO Train Control	FOSTER, ANTHONY	97225	Train Controller
TTO Train Control	FRANCIS, DEXTER	93644	Train Controller
TTO Train Control	HARVEY, DAMIEN	85893	Train Controller
TTO Train Control	HOPE, STEVEN	95710	Train Controller
TTO Train Control	MCIVER, PAUL	82808	Train Controller
TTO Train Control	PAYNE, GRAHAM	18764	Train Controller
TTO Train Control	SAVINO, ANTONIO	19946	Train Controller
TTO Train Control	SUTTON, KENNETH	68249	Train Controller
TTO Train Control	URRY, STEPHEN	19609	Train Controller
TTO Train Control	VAN DE VELDE, DAVID	95721	Train Controller
TTO Train Control	WILLETT, CRAIG	97469	Train Controller
TTO Train Control	BARLOW, MICHAEL	85839	Train Controller Relief*
TTO Train Control	FELTON, STEVEN	85861	Train Controller Relief*
TTO Train Control	FLEISCHMANN, PETER	18152	Train Controller Relief*
TTO Train Control	PARTRIDGE, ANDREW	77031	Train Controller Relief*

*It is agreed that listed employees currently holding permanent relief positions who are transferred into the non-relief version of the position will be regarded as retaining their EAA. Similarly, listed employees transferring to the equivalent position at the same level in a different location (e.g. Transit Supervisor Midland to Transit Supervisor Armadale) will be regarded as retaining their EAA.

SCHEDULE B – Transitional Arrangement for Long Service Leave

Cost Centre	Employee name	Emp'ee No	Position covered by aggregation agreement
N&I	HABANA, IGMEDIO	05455	Electrical Control Officer
N&I	HURRELBRINK, PETER	72380	Electrical Control Officer
N&I	MOIR, GREGORY	73276	Electrical Control Officer
N&I	THOMPSON, COLIN	05521	Electrical Control Officer
N&I	WOOD, PAUL	97564	Electrical Control Officer
N&I	WRIGHT, KENT	85458	Electrical Control Officer (Relief)
N&I	CAGORSKI, TERRY	86677	Facilities Control Officer
N&I	CLOHESSY, GARTH	85627	Facilities Control Officer
N&I	GREER, JASON	97568	Facilities Control Officer
N&I	LANDWEHR, AARON	86567	Facilities Control Officer
N&I	TILLEY, DAVID	85625	Facilities Control Officer
Transwa	ALLEN, DARRY	18354	Operations Officer
Transwa	DI SALVIO, MIRKA	84935	Operations Officer
Transwa	POREBSKI, RICHARD	96685	Operations Officer
TTO Cust. Service	MAPLESDEN, ANDREW	84860	Customer Information Officer
TTO Cust. Service	MCGRISKIN, LORRAINE	77058	Customer Information Officer
TTO Cust. Service	REIRI, JULIE	86021	Customer Information Officer
TTO Cust. Service	DOCHERTY, WILLIAM	97572	Station Coordinator
TTO Cust. Service	HAMMON, DAVID	86746	Station Coordinator
TTO Cust. Service	PINE, FRANK	77007	Station Coordinator
TTO Cust. Service	POSAVEC, ELISABETH	77070	Station Coordinator
TTO Cust. Service	SINGH, AVTAR	86601	Station Coordinator
TTO Depots	GOODGER, ANTHONY	10232	Depot Master
TTO Depots	MARTINOVICH, THERESE	85678	Depot Master
TTO Depots	MARTION, MICHAEL	95472	Depot Master
TTO Depots	MCGOWAN, ALEC	85640	Depot Master
TTO Depots	MEADOWS, GARTH	85681	Depot Master
TTO Depots	MEHARRY, JAMES	82983	Depot Master
TTO Depots	POWELL, ROBERT	86664	Depot Master
TTO Depots	ROBERTS, STEPHEN	19724	Depot Master
TTO Depots	ROLFE, STEPHEN	87702	Depot Master
TTO Depots	ROWE, MURRAY	85858	Depot Master
TTO Security	FORD, REBECCA	10228	Ticketing Control Officer
TTO Security	STUART, MARGARET	89502	Ticketing Control Officer
TTO Security	BICK, CHALLIS	86517	Transit Line Supervisor
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TTO Security	DAVID, MICHAEL	86538	Transit Line Supervisor
TTO Security	DORUK, JUSTIN	86637	Transit Line Supervisor
TTO Security	FRANCIS, TODD	87063	Transit Line Supervisor
TTO Security	FULLER, ALAN	84913	Transit Line Supervisor
TTO Security	HARKEN, TIFFANY	86685	Transit Line Supervisor
TTO Security	KIRKE, KENNETH	86689	Transit Line Supervisor
TTO Security	ROGERS, GEOFFREY	86935	Transit Line Supervisor
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TTO Security	YOUNG, PHILIP	87041	Transit Line Supervisor
TTO Security	BRIGGS, ROBERT	86501	Transit Shift Commander
TTO Security	COMPTON, GEORGE	86506	Transit Shift Commander
TTO Security	HARGRAVE, COLIN	86503	Transit Shift Commander
TTO Security	PETCH, KEVIN	84873	Transit Shift Commander
TTO Security	SPRIGG, PAUL	86504	Transit Shift Commander
TTO Security	CRAVEN, CHRISTY	86535	Above Establishment
TTO Train Control	BURROWS, DOUGLAS	82728	Suburban Operations Coordinator
TTO Train Control	CRISP, PAUL	86213	Suburban Operations Coordinator
TTO Train Control	BRAITHWAITE, GEOFFREY	84910	Train Controller
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TTO Train Control	HOPE, STEVEN	95710	Train Controller
TTO Train Control	MCIVER, PAUL	82808	Train Controller

Cost Centre	Employee name	Emp'ee No	Position covered by aggregation agreement
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TTO Train Control	BARLOW, MICHAEL	85839	Train Controller Relief
TTO Train Control	FELTON, STEVEN	85861	Train Controller Relief
TTO Train Control	FLEISCHMANN, PETER	18152	Train Controller Relief
TTO Train Control	PARTRIDGE, ANDREW	77031	Train Controller Relief

SCHEDULE C – AGGREGATION METHODOLOGY

- Where shift allowances and other penalties and allowances for a Seven Day Week Employee and/or a Shift Work Employee are aggregated, the allowances and penalties payable under the Aggregated Employee's rotational roster are totalled and averaged across the full roster, and discounted for annual leave.
- Establishing an Aggregated Rate of Pay allows an Aggregated Employee to receive the same Salary for each pay period regardless of the penalties and allowances that would otherwise actually be earned by an individual Employee when working any particular line of the roster, and to continue to be paid that same rate while on annual leave.
- The Aggregated Rate of Pay paid to an Employee under the following methodology is intended by the parties to be a reasonable approximation (within 5% variation) of the sum the Employee would otherwise be paid averaged over the roster usually worked by the Employee.
- The parties may agree by exception that an Aggregated Rate of Pay be calculated by reference to a group of rosters within a workgroup, rather than a single roster, and that rostered overtime be included within the aggregate, where the parties are satisfied that this reflects the wishes of most Aggregated Employees within that workgroup.

METHODOLOGY

1. Aggregated Loading Calculation

- Start with the relevant annual Ordinary Rate of Pay for the Aggregated Employee as shown in Schedule A – Salary Schedules – 37.5 hour week –1.9% Leave Loading or Schedule B – Salary Schedules – 40 hour week –1.9% Leave Loading as applicable.
- Calculate the fortnightly Ordinary Rate of Pay by dividing the annual Ordinary Rate of Pay by 313 then multiplying by twelve.
- Calculate the hourly Ordinary Rate of Pay by dividing the fortnightly Ordinary Rate of Pay by 75 or 80 as applicable.
- Using the usual shift work roster (or where the parties agree, a group of usual shift work rosters) worked by the Aggregated Employee establish for the Aggregated Employee:
 - the overall number of hours for early Morning, Afternoon or Night shifts;
 - the number of Late Shifts;
 - the number of rostered hours on a Saturday shift up to the maximum number of daily ordinary hours applicable to the Aggregated Employee;
 - the number of rostered hours on a Sunday shift up to the maximum number of daily ordinary hours applicable to the Aggregated Employee;
- Calculate the Shift Work Aggregate Component by calculating the following items and then summing all the values to give the Overall Shift Work Aggregate Component for that shift work roster:
 - the Early Morning, Afternoon & Night Shift hours multiplied by the applicable shift penalty hourly rates;
 - the number of Late Shifts multiplied by the applicable shift penalty rate per shift;
- Calculate the Weekend Work Aggregate Component by calculating the following items and then summing all the values to give the Overall Weekend Work Aggregate Component for that shift work roster:
 - the number of shift hours on a Saturday up to the maximum number of daily ordinary hours multiplied by half the applicable hourly Ordinary Rate of Pay;
 - the number of shift hours on a Sunday up to the maximum number of daily ordinary hours multiplied by the applicable hourly Ordinary Rate of Pay;

2. Average Weekly Aggregate Component Calculation

- Determine the Average Weekly Shift Work Aggregate Component by dividing the Overall Shift Work Aggregate Component by the number of weeks covered by the Working Lines in the shift work roster.
- Determine the Average Weekly Weekend Work Aggregate Component by dividing the Overall Weekend Work Aggregate Component by the number of weeks covered by the Working Lines in the shift work roster.

3. Discounting the Averaged Aggregate Component for Annual Leave

- a. The Average Weekly Shift Work Aggregate Component is then 'discounted' to allow the Aggregated Wage Rate to be paid during periods of annual leave, by multiplying by 45/52 (based on an annual entitlement to 5 weeks' annual leave and taking into account that Shift Work allowances do not apply on public holidays).
- b. The Average Weekly Weekend Work Aggregate Component is also 'discounted' to allow the Aggregated Wage Rate to be paid during periods of annual leave, by multiplying by 47/52 (based on an entitlement to 5 weeks' annual leave).
- c. The discounted Average Weekly Shift Work Aggregate Component and the discounted Average Weekly Weekend Work Aggregate Component are added together to give the weekly Aggregated Loading.

4. Calculation of Aggregated Rate

The weekly Aggregated Rate of Pay for the Aggregated Employee is established by adding the weekly Aggregated Loading to the weekly Ordinary Rate of Pay.

CONFERENCES—Matters referred—

2014 WAIRC 00993

DISPUTE RE ROSTER CHANGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00993
CORAM	:	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	TUESDAY, 1 JULY 2014, MONDAY, 21 JULY 2014, TUESDAY, 22 JULY 2014
DELIVERED	:	WEDNESDAY, 10 SEPTEMBER 2014
FILE NO.	:	CR 2 OF 2014
BETWEEN	:	THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH Applicant AND THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS KING EDWARD MEMORIAL HOSPITAL Respondent

CatchWords	:	Matter Referred for Hearing and Determination pursuant to s 44 – Meal break and roster arrangements – Whether nurses are on call during meal breaks – Changes to rosters – Roster review
Legislation	:	<i>Industrial Relations Act 1979</i> s 44
Result	:	Declaration and Order issued
Representation:		
Applicant	:	Ms R Savage
Respondent	:	Mr M Aulfrey of counsel

Reasons for Decision

- 1 This matter is referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979* (the Act). It involves the meal break and roster arrangements for nurses employed on night and weekend shifts in theatre at King Edward Memorial Hospital (KEMH).
- 2 The agreed facts, confirmed by the evidence, are that:
 1. The current shift arrangements for theatre nursing staff are a 10 hour night shift and weekend shifts of eight hours from 7.00 am to 3.00 pm and 1.30 pm to 9.30 pm.
 2. A paid meal break of 30 minutes is included in the shift.
 3. These arrangements have been in place for many years, and no evidence is available as to how they came to be this way.
- 3 When Ms Vicki Gaye Mitchell was employed as Clinical Nurse Manager at KEMH in July 2012, she noticed that these shifts did not allow for a meal break. She investigated and made comparisons with other Australian gynaecological and obstetrics tertiary hospitals. She formed the view that the nurses concerned were not required to be on call and they ought to be able to take an uninterrupted meal break in the great bulk of cases. She also believed that the arrangement did not comply with clause 29 – Meal and Refreshment Breaks of the *Registered Nurses, Midwives and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010* (the Agreement).
- 4 By letter dated 8 November 2013, the respondent advised the nurses of a change to the rosters, that the shifts be extended by 30 minutes to allow the required meal break.
- 5 The applicant says, firstly, that the nurses are on call in accordance with the terms of clause 29 – Meal and Refreshment Breaks. Secondly, the applicant says that before making any changes to the roster, the respondent is obliged to undertake a

roster review in accordance with clause 26 – Flexibility in Hours and Rostering of the Agreement. It seeks an order that the current roster arrangements continue without change.

- 6 The respondent says that the nurses are not required to be on call during meal breaks, that proper coordination of staff, taking account of workload and emergency contingencies, would mean a proper meal break could be taken on a regular basis. The paid meal break seems to have been a long standing practice with no evidence of any direction being given for staff to be on call. The respondent does not object to a roster review, but says that the issue of whether the nurses are on call is an impediment to that review.
- 7 The issues then are whether the nurses are on call during their meal break such as to warrant a paid meal break. Secondly, is the respondent obliged to undertake a roster review in accordance with clause 26, rather than simply notify the nurses of the change?

The Evidence

- 8 The applicant called evidence from Ms Jennifer Helen Cogin and Ms Mary Conway-Bell, registered nurses with many years' nursing experience. Ms Cogin gave evidence that since 1994, when she commenced working as coordinator on nightshift, a paid meal break has been provided to nurses on that shift. Ms Conway-Bell worked for almost seven years on continuous night duty, and returned to day/afternoon shift in September 2013. For the entire 13 years that she worked in the Theatre department, shifts have been of 10 hours' duration on night duty and eight hours on weekend day shifts, and these shifts have always included a paid meal break. She says that this is because the nursing staff are required to remain on call during their break. She also says that nursing staff in the Theatre department are expected to take their meal breaks within the department in case of an emergency. Ms Cogin says that all theatre nurses working weekend and night duty are on call during their meal break.
- 9 The evidence is that there are four nurses and an anaesthetic technician on each weekend and night duty shift. Patients may arrive in theatre within minutes for emergency surgery. To cater for these cases, Ms Cogin says, the staff are continuously on call for the entire shift.
- 10 Two nurses are required to be available for emergency surgery. Two nurses must undertake 'the count' prior to surgery being finished, to ensure that all equipment is accounted for.
- 11 Evidence was also given that the Australian College of Operating Room Nurses (ACORN) standards require two nurses to be available to care for patients in the recovery room. As patients proceed through the various stages of recovery, less immediate care is required and it may get to a point where a nurse in recovery can be released to undertake work in the theatre, and as theatre is completed nurses may be released from there.
- 12 Ms Eileen Elizabeth Hadrys, an Industrial Officer with the Australian Nursing Federation, gave evidence of her understanding of the current arrangements in place in theatre at KEMH and of the provisions of the Agreement, including in particular clause 26 – Flexibility in Hours and Rostering and clause 28 – On Call and Recall. She also expressed her views as to nurses being held on call during their meal break in accordance with clause 29(1) – Meal and Refreshment Breaks.
- 13 The essence of the objections from the applicant and its witnesses is that due to the nature of the emergencies and the circumstances in this theatre, it is necessary for nurses to be on call during their meal break.
- 14 The respondent called evidence from Ms Vicki Gaye Mitchell, Clinical Nurse Manager at KEMH. Ms Mitchell has had experience in clinical, education and management in the public and private sectors over many years. She says that when she commenced employment in that position in July 2012, she noticed that the nightshift and weekend shifts did not allow for a meal break and she investigated the matter. She contacted various people including Health Corporate Network payroll and others. She benchmarked the situation with the Australian gynaecology and obstetric tertiary hospitals, including the Women's Hospital in Melbourne, the Women and Children's Hospital in Adelaide and the Royal Brisbane and Women's Hospital. She said that all other staff rostered onto the night and weekend shifts, within the Agreement, are rostered a non-paid meal break. She says all emergencies are attended to and staff access a meal break utilising efficient coordination and time management. As a consequence of this investigation, Ms Mitchell, with the respondent's Workforce Services Manager and others, met the nursing staff on 5 November 2013 and advised that the current rostering pattern on the night and weekend shifts did not comply with the Agreement. She outlined the information she had, including the benchmarking with interstate obstetric tertiary hospitals and that she had been instructed to forward a letter to the staff advising of a proposed roster change to reflect the non-paid meal break.
- 15 The evidence demonstrates that the staff attempted, unsuccessfully, to raise a grievance within the dispute settlement procedure. However, this was ineffectual due to the document not being signed or dated. They subsequently all signed a document which was forwarded to the employer and acted to activate that process.
- 16 As a result of discussions between the parties, the staff undertook an audit of the arrangements in theatre and in recovery to examine the frequency with which meal breaks would have been interrupted. Ms Mitchell examined the audit materials provided to her. The materials were incomplete, however, she found that staff were going in pairs, not staggering their meal breaks, and that in a significant proportion of cases they could have had an uninterrupted meal break. Her analysis of the audit was examined by Ms Sasha Rademakers, Nurse Manager of Sir Charles Gairdner Hospital (SCGH) theatres since 2011. Ms Rademakers concurred with the comments made by Ms Mitchell. Ms Mitchell also gave evidence of practice at Royal Perth Hospital (RPH) and SCGH based on her experiences there.
- 17 The respondent also presented evidence from Ms Sasha Rademakers. Ms Rademakers gave evidence of her experience of rostering and unpaid meal breaks for nursing staff at SCGH and RPH, working in complex emergency surgery situations. Ms Rademakers also gave evidence of having examined the audit results for KEMH theatre nurses and concurred with Ms Mitchell's conclusions.

- 18 Ms Valerie Sinclair Day gave evidence of her experience at SCGH as Nurse Floor Coordinator in the Operating Suite and Acting Nurse Manager. She said that staff take an unpaid meal break, and if the nurse is unable to take a meal break, payment of 'no meal break' overtime is made. In her 36 years of theatre nursing, Ms Day has never come across any instance where a nurse is paid for a meal break.

Consideration and Conclusions

- 19 The audit, said to have been undertaken by a number of staff members, is somewhat problematic. This is because there are a number of pages and records of particular shifts missing. Further, none of those who participated in the audit gave evidence and the applicant was unable to provide any information of any substance about it. Therefore, it is of no probative value.

On Call

Are the nurses on call during their meal breaks?

- 20 Relevant parts of clause 29 – Meal and Refreshment Breaks provide:

(1) Meal breaks will be a minimum of 30 minutes and will not be counted as time worked, provided that where an employee is held on call within the hospital, the period on call will be counted in the ordinary working hours for that day.

...

(6) Where a hospital nurse is required to work during meal time resulting in postponement of the meal break for more than half an hour, the employee will be paid at overtime rates until the employee gets their meal. The provisions of this subclause will not apply to an employee who is held on call within the hospital during the meal break or is in receipt of a commuted meal break allowance.

- 21 I note that subclause (1) provides an exception to the meal breaks being unpaid where the employee is 'held' on call within the hospital. 'Held' is the past tense of 'hold'. 'Hold' means:

1. to have or keep in the hand; keep fast; grasp. **2.** to reserve; retain; set aside. ... **4.** to keep in a specified state, relation, etc.

Delbridge et al (eds), *The Macquarie Dictionary* (3rd ed, 1997) 1019

- 22 Therefore, the employee is retained or kept on call within the hospital. This is as opposed to being held on call in the theatre department, which is what is said to currently occur. Of course, being held on call within the department would comply with the requirement to be held on call within the hospital.

- 23 It is clear that an employee who is subject to the postponement of a meal break in accordance with clause 29 – Meal and Refreshment Breaks is entitled to be paid at overtime rates until they get a meal.

- 24 Clause 28 – On Call and Recall, subclause (10) provides for an employee being on-call:

On Call Availability

...

(10) An employee placed on-call is required to remain at their private residence or any other mutually agreed place as will enable the Employer to readily contact her/him during the hours for which the employee has been placed on-call. This should not prevent the provision by Employers of electronic or other devices by which the employee can be contacted as an alternative to being stationed at an agreed place. The Employer will provide the device at no charge.

- 25 The essential element in this subclause is that the employee is 'placed on call', and is required to remain at a mutually agreed place to enable the employer to readily contact her/him. As a verb, the word 'place' means:

31. to put in a particular place; set. **32.** To put in an appropriate position or order. **33.** to put into a suitable or desirable place for some purpose, as money for investment, an order or contract, etc. **34.** to fix (confidence, esteem, etc.) in a person or thing. **35.** to appoint (a person) to a post or office. **36.** to find a place, situation, etc., for (a person). **37.** to determine or indicate the place of. **38.** to assign a certain position or rank to. **39.** to direct or aim with precision. **40.** to assign a position to (a horse, etc.) among the leading competitors, usually the first three, at the finish of a race, competition, etc. **41.** to put or set in a particular place, position, situation, or relation.

Delbridge et al (eds), *The Macquarie Dictionary* (3rd ed, 1997) 1638

- 26 Therefore, there is a need for some action, presumably by the employer, through the manager or supervisor to put, determine, direct or assign a nurse on call. A particular action is required.

- 27 There was evidence that some nurses are placed on call for particular purposes such as to be available in the absence of rostered staff. There is a roster of those on call for this purpose. However, this is not the situation of being on call in the theatre department, the subject of this matter.

- 28 It is a question of fact as to whether the nurses are 'held' or 'placed' on call and required to be readily contactable. There is a practice, and evidence strongly suggests that there is an assumption, that the nurses are automatically on call for the whole of their shift, yet there is no evidence that they are held or placed on call, i.e. retained, kept or put in or assigned to that state of being on call.

- 29 In any event, it is a matter for the employer to determine whether there is a need to place nurses on call during their meal breaks. It is a matter of the employer assessing its needs and making a decision, then directing staff and supervisors accordingly.

- 30 If these nurses were ever formally placed on call, then the employer is entitled to decide to no longer place them on call. However, in doing so, and in this case, effecting change to a long standing custom and practice, it is up to the employer to demonstrate that there is good reason for the change (*FEDFU v Robe River Iron Associates* (1987) 67 WAIG 763).
- 31 In this case, the respondent has demonstrated that there is good reason to consider a change in that it has examined the rostering arrangements in other like workplaces and found that by better coordination and supervision, it can both substantially relieve the nurses of the need to be available in a significant proportion of cases, and operate more efficiently and effectively. However, in doing so, it seeks to change the roster arrangements.

Changing the Roster

- 32 Clause 25 – Hours of Work and Rostering provides at subclause (1) that ‘Changes to roster arrangements will be determined at the workplace level in accordance with Clause 26 – Flexibility in Hours and Rostering of this Agreement unless otherwise provided by this clause’. There is no relevant provision to the contrary.
- 33 Clause 26 – Flexibility in Hours and Rostering of the Agreement provides for agreement to be reached to vary roster arrangements. It says:
- (2) Employers and employees covered by this Agreement may reach agreement to vary the methods by which hours and rosters may be worked to meet the requirements of the Health Service and the aspirations of the nurses concerned.
 - (3) An agreement referred to above shall be subject to the procedures below:
 - (a) A representative forum shall be established in the area affected to progress discussions on proposals for change. The forum shall commit to writing and present to nurses/management any proposal for change.
 - (b) The process for seeking and recording the agreement to a proposal for change must be advised to all nurses affected prior to seeking such agreement.
 - (c) A record will be kept of the process followed and the outcome. Further, the process for reaching an agreement must be open and transparent and available for inspection by the Federation if so requested by at least one employee who is affected by the proposed change.
 - (d) Any agreement reached will be committed to writing and if the Federation has not been involved in the negotiations, a copy shall be sent to the Secretary of the Federation.
 - (e) A lead time of a minimum of four weeks shall be provided for the implementation of the proposed arrangements.
 - (f) Nothing shall prevent employees affected by the proposed change from seeking advice from or representation by the Federation at any stage in the above process.
 - (g) Where the Agreement represents the consent of the Employer and the majority of employees affected by the proposed change, the Federation shall not unreasonably oppose the terms of that Agreement.
- 34 The clause requires that ‘vary[ing] the methods by which hours and rosters may be worked’ involves a particular procedure, set out in subclause (3). This requires the establishment of a forum to discuss the proposed changes.

Conclusion

- 35 The evidence is of a long standing custom and practice of theatre nurses at KEMH having paid meal breaks on weekend and night shifts. There is no evidence that they are placed on call. Rather, there is a practice in place. Their situation is to be distinguished from those who are actually placed on the on call roster. However, the employer has demonstrated good reasons for seeking to change this long established arrangement, and that it appears to be unique amongst similar hospitals. The evidence also demonstrates that the taking of meal breaks could be more efficiently coordinated.
- 36 In the circumstances, a declaration will issue that the theatre nurses at KEMH, engaged on night and weekend shifts are not held or placed on call, and an order that prior to initiating any change to the roster arrangements relating to those shifts, the respondent implement the roster review provisions of clause 26 – Flexibility in Hours and Rostering.

2014 WAIRC 01086

DISPUTE RE ROSTER CHANGES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

APPLICANT

-v-

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS KING EDWARD MEMORIAL HOSPITAL

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

THURSDAY, 2 OCTOBER 2014

FILE NO.

CR 2 OF 2014

CITATION NO.

2014 WAIRC 01086

Result Declaration and Order issued

Declaration and Order

HAVING heard from Ms R Savage and later Ms F Dimovski on behalf of the applicant and Mr M Aulfrey of counsel on behalf of the respondent, the Commission pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

- A. DECLARES THAT the theatre nurses at King Edward Memorial Hospital engaged on night and weekend shifts are not held or placed on call.
- B. ORDERS THAT:
1. Prior to making any change to the roster arrangements relating to those shifts, the respondent implement the roster review provisions of clause 26 – Flexibility in Hours and Rostering of the *Registered Nurses, Midwives and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010*.
 2. The status quo in respect of rosters and payments remain until the first of either:
 - (a) the parties reach agreement to vary the roster in accordance with the provisions of clause 26 referred to in Order 1 above; or
 - (b) Friday, 30 January 2015.
 3. There be liberty to apply to either party.

[L.S.]

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

2014 WAIRC 01108

DISPUTE RE TERMINATION OF EMPLOYMENT

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

APPLICANT

-v-

THE GOVERNING COUNCIL OF KIMBERLEY TRAINING INSTITUTE

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 3 OCTOBER 2014
FILE NO/S CR 11 OF 2014
CITATION NO. 2014 WAIRC 01108

Result Application dismissed
Representation
Applicant Mr M Amati
Respondent Mr D Anderson of counsel

Order

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

WHEREAS on the 16th day of April 2014, the 1st day of May 2014, the 9th day of May 2014, the 19th day of May 2014, the 30th day of May 2014 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS on the 24th day of June 2014 the Commission referred the matter for hearing and determination; and

WHEREAS a further conference was convened by the Commission on the 29th day of July 2014 for the purpose of conciliating between the parties; and

WHEREAS on the 16th day of September 2014 the applicant filed a Notice of Discontinuance in respect of the matter;

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

THAT the matter be, and is hereby dismissed.

[L.S.]

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation Industrial Union of Workers	The Minister for Health in his incorporated capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 6/2013	4/02/2013	Dispute re workload of Australian Nursing Federation Members	Concluded
Australian Nursing Federation Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Scott A/SC	C 27/2014	17/09/2014	Dispute re transfer	Discontinued
Civil Service Association of Western Australia Incorporated	Commissioner for Corrections, Department of Corrective Services	Scott A/SC	PSAC 10/2014	N/A	Dispute re work performance	Discontinued
Health Services Union of Western Australia (Union of Workers)	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	Scott A/SC	PSAC 21/2014	N/A	Dispute re reconfiguration staff allocation process	Discontinued
Health Services Union of Western Australia (Union of Workers)	Minister for Health The Minister for Health is incorporated as the WA Country Health Service under section 7 of the Hospitals and Health Services Act 1927 (WA) and has delegated all the powers and duties as such to the Chief Executive Officer of the Department of Health, known as the Director General of Health	Scott A/SC	PSAC 2/2014	30/01/2014 17/03/2014 14/04/2014	Dispute re alleged misconduct	Discontinued
Health Services Union of Western Australia (Union of Workers)	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	Scott A/SC	PSAC 18/2014	N/A	Dispute re employment status	Discontinued
Health Services Union of Western Australia (Union of Workers)	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	Scott A/SC	PSAC 12/2014	6/05/2014 9/05/2014	Dispute re service allocations at Fiona Stanley Hospital	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 25/2013	1/08/2013	Dispute re employment issues	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 26/2013	N/A	Dispute re employment issues	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel Health Services Board and the WA Country Health Service	Harrison C	C 1/2011	25/01/2011 7/02/2011 2/05/2012	Dispute re employment conditions of union members	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Disability Services Commission	Scott A/SC	PSAC 23/2013	2/08/2013 31/10/2013	Dispute re suspension from workplace	Discontinued
The Civil Service Association of Western Australia Incorporated	Mr Reese Waldock Commissioner of Main Roads	Scott A/SC	PSAC 8/2012	27/04/2012 22/05/2012 28/08/2012 19/07/2013	Dispute re negotiations for new agreement	Concluded
The Western Australian Prison Officer's Union of Workers	Department of Corrective Services	Kenner C	C 17/2014	27/05/2014	Dispute re alleged non-compliance with Bandyup Women's Prison local agreement	Discontinued
United Voice WA	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927(WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	Harrison C	C 19/2012	28/03/2012 30/03/2012	Dispute regarding transfer of mental health patients to general wards	Concluded
United Voice WA	The Director General Department of Education and Training	Mayman C	C 25/2012	22/05/2012 30/08/2012 12/03/2013 10/03/2014	Dispute re Termination	Consent
United Voice WA	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927(WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	Harrison C	C 52/2011	23/09/2011 31/08/2012	Dispute re the consultation for the change of management processes	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 01111

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 01111
CORAM	:	CHIEF COMMISSIONER A R BEECH
HEARD	:	MONDAY, 8 JULY 2013, WEDNESDAY, 25 SEPTEMBER 2013, THURSDAY, 10 OCTOBER 2013, TUESDAY, 26 NOVEMBER 2013, MONDAY, 9 DECEMBER 2013, WEDNESDAY, 12 FEBRUARY 2014, MONDAY, 14 APRIL 2014, TUESDAY, 3 JUNE 2014
DELIVERED	:	MONDAY, 6 OCTOBER 2014
FILE NO.	:	B 63 OF 2013, B 64 OF 2013, B 65 OF 2013, B 164 OF 2013
BETWEEN	:	ANDJELKO BUDIMLICH AND OTHERS Applicants AND J-CORP PTY LTD Respondent

CatchWords	:	Programming Direction - Request by respondent to extend time for compliance by one week - request opposed
Legislation	:	Industrial Relations Act 1979 s 27(1)(n)
Result	:	<i>Application for extension of time to file documents granted</i>
Representation:		
Applicants	:	Mr P Mullally
Respondent	:	Ms J Howard, of counsel

Reasons for Decision

- I have considered the request of 2 October 2014 from the respondent that Direction 4 of the Further Amended Directions of 19 June 2014 be varied, the email from Mr Mullally opposing the request and the response received this morning from the respondent to Mr Mullally's email.
- Direction 4 is as follows:
 - The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions by 3 October 2014.
- The respondent seeks that the date of 3 October 2014 be varied to 12 October 2014. I grant the request for the following reasons. I note Mr Mullally's comment that the respondent's witness statements and documents will set out for the first time how the respondent calculated the base commission price and identify the deductions which were made from the sale price paid by the respondent's clients. I consider that information is likely to be of central importance. It is not entirely clear to me why it has taken so long in the long interlocutory history of these matters for this particular information to be assembled, or provided, nevertheless, I consider it will be better for this information to be fully presented rather than be incomplete as it will be if the request is not granted.
- I recognise the applicants' concern that given the number of transactions involved, the evidence and documentation from the respondent will be extensive, and granting the request will correspondingly reduce the time available to them to fully consider it before the hearing commences on 11 November 2014. However, I tend towards the view that if the applicants can show that the extension granted has in fact caused them a prejudice, it might be better to consider seeking a slight variation to the hearing dates and proceed with the full information than to refuse the request and proceed on the set dates without the full information.
- An Order amending the Further Amended Directions will issue in due course providing in Direction 4 that the respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions on or before 13 October 2014 (being the first working day after 12 October 2014).

2014 WAIRC 01115

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANDJELKO BUDIMLICH	APPLICANT
	-v- J-CORP PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	TUESDAY, 7 OCTOBER 2014	
FILE NO/S	B 63 OF 2013	
CITATION NO.	2014 WAIRC 01115	

Result	Further Amended Directions further amended
Representation	
Applicant	Mr P Mullally, as agent
Respondent	Ms J Howard, of counsel

Order

HAVING heard, by correspondence, Mr P Mullally as agent for the applicant and Ms J Howard of counsel for the respondent, I the undersigned, having issued reasons for decision, and pursuant to the powers conferred under s 27(1)(n) of the *Industrial Relations Act 1979*, hereby order:

THAT Direction 4 of the Further Amended Directions issued on 19 June 2014 ([2014] WAIRC 00512) be deleted and the following inserted in lieu thereof:

- “4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions on or before 13 October 2014.”

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 01114

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANDJELKO BUDIMLICH	APPLICANT
	-v- J-CORP PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	TUESDAY, 7 OCTOBER 2014	
FILE NO/S	B 63 OF 2013	
CITATION NO.	2014 WAIRC 01114	

Result	Interlocutory application discontinued
Representation	
Applicant	Mr P Mullally, as agent

Order

WHEREAS this is an application filed on 6 October 2014 for an order that the substantive application herein proceed on an undefended basis;

AND WHEREAS the applicant, by email dated 6 October 2014, advised that the applicant will not proceed and will discontinue this application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under s 27(1)(a) of the *Industrial Relations Act 1979*, hereby order:

THAT the application filed on 6 October 2014 for an order that the substantive application herein proceed on an undefended basis is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 01116

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION HUGH SUTHERLAND ROGERS	APPLICANT
	-v- J-CORP PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	TUESDAY, 7 OCTOBER 2014	
FILE NO/S	B 64 OF 2013	
CITATION NO.	2014 WAIRC 01116	

Result	Further Amended Directions further amended
Representation	
Applicant	Mr P Mullally, as agent
Respondent	Ms J Howard, of counsel

Order

HAVING heard, by correspondence, Mr P Mullally as agent for the applicant and Ms J Howard of counsel for the respondent, I the undersigned, having issued reasons for decision, and pursuant to the powers conferred under s 27(1)(n) of the *Industrial Relations Act 1979*, hereby order:

THAT Direction 4 of the Further Amended Directions issued on 19 June 2014 ([2014] WAIRC 00514) be deleted and the following inserted in lieu thereof:

- “4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions on or before 13 October 2014.”

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 01117

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION EXPEDIT (STAN) CARVALHO	APPLICANT
	-v- J-CORP PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	TUESDAY, 7 OCTOBER 2014	
FILE NO/S	B 65 OF 2013	
CITATION NO.	2014 WAIRC 01117	

Result	Further Amended Directions further amended
Representation	
Applicant	Mr P Mullally, as agent
Respondent	Ms J Howard, of counsel

Order

HAVING heard, by correspondence, Mr P Mullally as agent for the applicant and Ms J Howard of counsel for the respondent, I the undersigned, having issued reasons for decision, and pursuant to the powers conferred under s 27(1)(n) of the *Industrial Relations Act 1979*, hereby order:

THAT Direction 4 of the Further Amended Directions issued on 19 June 2014 ([2014] WAIRC 00515) be deleted and the following inserted in lieu thereof:

- “4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions on or before 13 October 2014.”

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 01118

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ADRIAN VAN DER MEULEN	APPLICANT
	-v- J-CORP PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	TUESDAY, 7 OCTOBER 2014	
FILE NO/S	B 164 OF 2013	
CITATION NO.	2014 WAIRC 01118	

Result	Further Amended Directions further amended
Representation	
Applicant	Mr P Mullally, as agent
Respondent	Ms J Howard, of counsel

Order

HAVING heard, by correspondence, Mr P Mullally as agent for the applicant and Ms J Howard of counsel for the respondent, I the undersigned, having issued reasons for decision, and pursuant to the powers conferred under s 27(1)(n) of the *Industrial Relations Act 1979*, hereby order:

THAT Direction 4 of the Further Amended Directions issued on 19 June 2014 ([2014] WAIRC 00516) be deleted and the following inserted in lieu thereof:

“4. The respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions on or before 13 October 2014.”

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 01069

REVIEW OF PROHIBITION NOTICE

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SOUTHERN GOLF PTY LTD TRADING AS SANCTUARY GOLF RESORT	APPLICANT
	-v- LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER DEPT OF COMMERCE	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	FRIDAY, 26 SEPTEMBER 2014	
FILE NO/S	OSHT 2 OF 2014	
CITATION NO.	2014 WAIRC 01069	

Result	Change of applicant's name
Representation	
Applicant	Mr R Miguel and with him Mr E Goulis
Respondent	Mr T Bishop (of counsel) and with him Mr I Foot

Order

WHEREAS this is an application pursuant to the *Occupational Safety and Health Act 1984*;

AND WHEREAS at the hearing held on 23 September 2014 the respondent agreed the applicant had been incorrectly named;

AND WHEREAS the Commission formed the view that it was appropriate to amend the applicant's name;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the name Robert De San Miguel on behalf of The Sanctuary Golf Resort Pty Ltd be deleted and Southern Golf Pty Ltd trading as Sanctuary Golf Resort be inserted in lieu thereof.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 01056

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2014 WAIRC 01056
CORAM	: COMMISSIONER S M MAYMAN
HEARD	: FRIDAY, 29 AUGUST 2014
DELIVERED	: MONDAY, 22 SEPTEMBER 2014
FILE NO.	: U 171 OF 2013
BETWEEN	: PHILLIP DIGNEY
	Applicant
	AND
	THE BLACK COCKATOO PRESERVATION SOCIETY OF AUSTRALIA
	Respondent

CatchWords	:	Industrial law – Termination of employment – Request for adjournment - Relevant principles as to adjournments – Adjournment granted
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	Adjournment granted
Representation:		
Applicant	:	Mr P Digney
Respondent	:	Mr G Dewhurst

Case(s) referred to in reasons:

Myers v. Myers [1969] WAR 19

Reasons for Decision

- 1 Mr Phillip Digney (the applicant) alleges he was unfairly dismissed by The Black Cockatoo Preservation Society of Australia (the respondent). That application seeks orders from the Western Australian Industrial Relations Commission (the Commission) as particularised in the applicant's statement of claim lodged on 17 October 2013.
- 2 The respondent opposes the claim and challenges the jurisdiction of the Commission to hear and determine the matter. The respondent suggests the Commission does not have the jurisdiction to hear the application and requests the application be dismissed. The respondent also seeks costs arising out of a hearing regarding perceived bias with respect to the matter held on 26 August 2014.

Request for Adjournment

- 3 The present proceedings were listed for hearing on 19 September 2014 for one day. On 17 September 2014 the applicant emailed the Commission making an application for an adjournment of these proceedings on the grounds set out in an email to my Associate. On 17 September 2014 the parties were advised that after careful consideration of the applicant's and the respondent's submissions the request for adjournment had been granted. Reasons for Decision were to be issued shortly. These are those Reasons.

- 4 The applicant's email requesting an adjournment in summary reflected:

I have Bells Palsy, a temporary condition where the nerves on one side of the face stop working. I have been on medication for 4 days now however improvement is slow. ...I don't speak very well and I can't eat properly, few other complications.

So please I seek an adjournment of Friday's hearing and I apologise for the late notice, the doctor and I had hoped that I would've been better than I am by now.

(extract from applicant's email 17 September 2014)

- 5 A medical certificate from the Stirk Medical Group confirming the applicant was 'unfit for an industrial relations hearing' for 19 September 2014 was received by the Commission. That certificate was dated 17 September 2014.
- 6 The Commission sought the views of the respondent as to the adjournment. The respondent wrote a lengthy letter outlining several grounds in opposition to the adjournment being granted. In essence the views of the respondent were that a lot of time, finances and energy had been expounded in putting together the respondent's submissions for the hearing on 19 September 2014. In addition, those persons attending as witnesses had been served with summons and moneys had been allocated. Other witnesses had changed appointments to ensure their availability. The respondent also set out the stress placed on members of the respondent's board and negative health effect on all concerned. As a result of the adjournment application the respondent claimed he had limited days available in 2014 and made the following application:

1. The matter to proceed as agreed to by the applicant, his lawyer and the commission.
2. The society on Friday was going to make application for costs, though please accept this correspondence as notification, confirmation and makes an application for costs of witnesses, travel, loss of personal and society earnings, legal advice obtained to defend this action and currently 9 days of preparation for this trial. (This application for costs is not conditional). Or
3. The matter to be dismissed. Or
4. The matter is heard in the absence of the Applicant.

(extract from respondent's email 17 September 2014)

- 7 To grant or refuse an adjournment is a matter for the discretion of the court to whom the application is made, according to the principles set out in *Myers v. Myers* [1969] WAR 19. But where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party.
 - 8 I am of the view, having considered the submissions that have been made in the present circumstances the test espoused in *Myers v Myers* is satisfied in the applicant's favour. I am satisfied there is a medical burden on the applicant if the hearing does proceed on the presently listed date of 19 September 2014. In my opinion there is however some prejudice to the respondent that I have drawn from Mr Dewhurst's submissions particularly in having the matter time-delayed and issues associated with inconvenience however that prejudice, from my point of view is outweighed by the medical condition of the applicant. Accordingly the hearing is adjourned and a declaration will issue.
-

2014 WAIRC 01057

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PHILLIP DIGNEY

APPLICANT

-v-

THE BLACK COCKATOO PRESERVATION SOCIETY OF AUSTRALIA

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE TUESDAY, 23 SEPTEMBER 2014
FILE NO. U 171 OF 2013
CITATION NO. 2014 WAIRC 01057

Result Declaration issued
Representation
Applicant Mr P Digney
Respondent Mr G Dewhurst

Declaration

HAVING HEARD Mr Phillip Digney on his own behalf and Mr Glen Dewhurst on behalf of the respondent, the Western Australian Industrial Relations Commission (the Commission) pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

DECLARES that the matter listed for Friday, 19 September 2014 is hereby adjourned.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority Salaried Officers Industrial Agreement 2014 PSAAG 16/2014	2/10/2014	Public Transport Authority of Western Australia	Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees	Commissioner S J Kenner	Agreement registered
SWALSC Collective Agreement 2014 AG 14/2014	26/09/2014	Western Australian Municipal Administrative, Clerical and Services Union of Employees	South West Aboriginal Land and Sea Council (SWALSC)	Acting Senior Commissioner P E Scott	Agreement registered
WA Health - United Voice - Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2014 AG 15/2014	1/10/2014	The Minister for Health in his incorporated capacity under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel Health Services Board, WA Country Health Service and the Western Australian Alcohol and Drug Authority	United Voice WA	Acting Senior Commissioner P E Scott	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2014 WAIRC 01063

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 DECEMBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPELLANT

-v-

GOLDFIELDS INSTITUTE OF TECHNOLOGY

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON - CHAIRPERSON
MR G SUTHERLAND - BOARD MEMBER
MR J WOOD - BOARD MEMBER**DATE**

WEDNESDAY, 25 SEPTEMBER 2014

FILE NO

PSAB 28 OF 2013

CITATION NO.

2014 WAIRC 01063

Result	Discontinued
Representation	
Appellant	Ms S van der Merwe
Respondent	Mr R L Bathurst (of counsel) and Ms G Husk

Order

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

The Board convened a scheduling conference on 8 May 2014.

Following the conference the appellant advised the Board that the parties were attempting to resolve the matter via mediation.

On 7 August 2014 the appellant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2014 WAIRC 01000

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 27 MAY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESCIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON BEHALF
OF ERICA FREEMAN**APPELLANT**

-v-

COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MS B CONWAY - BOARD MEMBER
MR T CLARK - BOARD MEMBER**DATE**

THURSDAY, 11 SEPTEMBER 2014

FILE NO

PSAB 7 OF 2014

CITATION NO.

2014 WAIRC 01000

Result	Discontinued by leave
Representation	
Appellant	Ms J Moore
Respondent	Ms T Borwick

Order

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

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Matters dealt with—

2014 WAIRC 01084

EMPLOYMENT DISPUTE RESOLUTION ACT 2008 REFERRAL OF AN EMPLOYMENT DISPUTE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 01084
CORAM	:	CHIEF COMMISSIONER A R BEECH
HEARD	:	THURSDAY, 25 SEPTEMBER 2014
DELIVERED	:	WEDNESDAY, 1 OCTOBER 2014
FILE NO.	:	APPL 26 OF 2014
BETWEEN	:	SAFETA KOS Applicant AND GOVERNMENT OF WESTERN AUSTRALIA, DEPARTMENT OF TRANSPORT Respondent

CatchWords	:	Referral of an employment dispute pursuant to a referral agreement – Referral agreement under the Employment Dispute Resolution Act - Whether an industrial agreement registered under the Industrial Relations Act is a referral agreement – Whether referral has been made by a party to a referral agreement
Legislation	:	Employment Dispute Resolution Act 2008 - Part 2, Div 2, s 12(1); Industrial Relations Act 1979 - s 41, s 41(4) & (7), s 48A(1)
Result	:	<i>Referral discontinued</i>
Representation:		
Applicant	:	Mr K Cranny (as agent)
Respondent	:	Ms C Drew and Mr S Barrett

Reasons for Decision

- 1 This is a referral of an employment dispute to the Commission made under Part 2 Division 2 of the *Employment Dispute Resolution Act 2008* (“the EDR Act”). This part of the EDR Act requires two or more parties to have made a referral agreement providing that a particular employment dispute, or employment disputes of a particular class, between them may be resolved by the Commission. A party to the referral agreement then may refer an employment dispute covered by the referral agreement to the Commission for the Commission to perform such functions as are specified in it.
- 2 The applicant is required to attach to the referral a copy of the referral agreement and has attached a copy of the *Public Service and Government Officers General Agreement 2011*. This is an industrial agreement registered under s 41 of the *Industrial Relations Act 1979* (“the IR Act”). The parties to it are a registered organisation and the employers named in schedule 5 of that industrial agreement. The applicant is not a party to it.
- 3 The applicant considers that the industrial agreement attached to the application is a referral agreement for the purposes of Part 2 Division 2 of the EDR Act, pointing to subclause 48.5 of the dispute resolution provisions which are required by s 48A(1) of the IR Act to be contained in any industrial agreement. That subclause provides as follows:

Where the dispute cannot be resolved within five working days of the union representatives' referral of the dispute to the employer or his/her nominee, either party may refer the matter to the WAIRC.
- 4 The applicant submits that this referral gives effect to that subclause.
- 5 However I am far from satisfied that it does so. Part 2 Division 2 of the EDR Act requires the applicant to be a party to the referral agreement under which the referral is made. The applicant in this matter is not a party to the industrial agreement and therefore cannot rely upon it to support her referral.
- 6 The EDR Act provides that a referral agreement has the meaning given in s 12(1) which provides as follows:
 - (1) Two or more parties may enter into an agreement in writing (a referral agreement) that a particular employment dispute, or employment disputes of a particular class, between the parties may be resolved by the IR Commission.
- 7 A referral agreement has particular characteristics which are not found in a registered industrial agreement. Its sole purpose is to provide that a particular employment dispute, or employment disputes of a particular class, between the parties to it may be resolved by the IR Commission. It comes into force by agreement of the parties and not by registration. It does not need to be registered by the Commission. A party cannot withdraw from a referral agreement without the agreement in writing of the other party or parties to the referral agreement.

- 8 In contrast, an industrial agreement is an agreement with respect to any industrial matter or for the prevention or resolution under the IR Act of disputes, disagreements, or questions relating thereto that may be made between an organisation or association of employees and any employer or organisation or association of employers. The IR Act requires it to have certain provisions in it before it can be registered. By s 41(4) of that Act it will extend to and bind more than the parties to it: it will extend to and bind all employees employed in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies. By s 41(7) there can be unilateral withdrawal, by giving the prescribed notice, in contrast to withdrawal from a referral agreement.
- 9 Therefore the industrial agreement attached to the referral is not a referral agreement for the purposes of Part 2 Division 2 of the EDR Act. There is no suggestion there is in existence a referral agreement between the applicant and the respondent.
- 10 Further, the applicant is not a party to the industrial agreement and has no standing to refer a dispute to the Commission under it.
- 11 The referral is invalid. Section 21(c) of the EDR Act provides power to the Commission at any time after a referral has been made under s 13(1) to decide to discontinue the referral, and an order now issues discontinuing it.

2014 WAIRC 01085

**EMPLOYMENT DISPUTE RESOLUTION ACT 2008
REFERRAL OF AN EMPLOYMENT DISPUTE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SAFETA KOS

PARTIES**APPLICANT**

-v-

GOVERNMENT OF WESTERN AUSTRALIA, DEPARTMENT OF TRANSPORT

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH
DATE WEDNESDAY, 1 OCTOBER 2014
FILE NO/S APPL 26 OF 2014
CITATION NO. 2014 WAIRC 01085

Result Referral discontinued
Representation
Applicant Mr K Cranny (as agent)
Respondent Ms C Drew and Mr S Barrett

Order

HAVING HEARD Mr K Cranny on behalf of the applicant, and Ms C Drew and Mr S Barrett on behalf of the respondent;
NOW THEREFORE, I the undersigned, having given reasons for decision and pursuant to the powers conferred on me under s 21 of the *Employment Dispute Resolution Act 2008*, hereby order -

THAT this referral be, and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

RECLASSIFICATION APPEALS—

2014 WAIRC 01092

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MRS LYN ANDERSON

PARTIES**APPLICANT**

-v-

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

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER J L HARRISON
DATE FRIDAY, 3 OCTOBER 2014
FILE NO PSA 77 OF 2013
CITATION NO. 2014 WAIRC 01092

Result	Discontinued
Representation	
Applicant	Ms K Heal (as agent)

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.

On 24 September 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this appeal be, and is hereby discontinued

[L.S.]

(Sgd.) J L HARRISON,
Commissioner,
Public Service Arbitrator.

2014 WAIRC 01089

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MISS MELISSA BUCHANAN	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON	
DATE	FRIDAY, 3 OCTOBER 2014	
FILE NO	PSA 65 OF 2013	
CITATION NO.	2014 WAIRC 01089	

Result	Discontinued
Representation	
Applicant	Ms K Heal (as agent)

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.

On 24 September 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this appeal be, and is hereby discontinued

[L.S.]

(Sgd.) J L HARRISON,
Commissioner,
Public Service Arbitrator.

2014 WAIRC 01090

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MRS TAMARA CARLUCCI	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON	
DATE	FRIDAY, 3 OCTOBER 2014	
FILE NO	PSA 66 OF 2013	
CITATION NO.	2014 WAIRC 01090	

Result Discontinued
Representation
Applicant Ms K Heal (as agent)

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.
 On 24 September 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.
 NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby discontinued

(Sgd.) J L HARRISON,
 Commissioner,
 Public Service Arbitrator.

[L.S.]

2014 WAIRC 01052

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2014 WAIRC 01052
CORAM : PUBLIC SERVICE ARBITRATOR
 ACTING SENIOR COMMISSIONER P E SCOTT
HEARD : TUESDAY, 2 SEPTEMBER 2014,
 TUESDAY, 16 SEPTEMBER 2014
DELIVERED : MONDAY, 22 SEPTEMBER 2014
FILE NO. : PSA 99 OF 2013
BETWEEN : NATALIE CROUCH
 Applicant
 AND
 DEPARTMENT OF HEALTH - HEALTH INDUSTRIAL RELATIONS SERVICE
 Respondent

CatchWords : Reclassification appeal – Change of position title – Increase in work value – Performance of higher level duties for limited duration – Requirement to occupy position and perform duties for a continuous period of 12 months prior to reclassification request – Policies and procedures – Statement of Principles – Principle 7 – Temporary special allowance
Legislation : *Industrial Relations Act 1979* s 80E(2)(a)
Public Sector Management Act 1994
 Approved Procedure 1 – Approved Classification System and Procedures
 Western Australian Department of Health Operational Circular OP 1435/01
Result : Recommendation and Order issued
Representation:
Applicant : Ms P Marcano as agent
Respondent : Ms M Muccilli and with her Mr J Ross

Reasons for Decision

- 1 This is an application pursuant to s 80E(2)(a) of the *Industrial Relations Act 1979*. The applicant seeks the reclassification of the position of Credentialing Coordinator Level 5 to Level 6, and to include reference to South Metropolitan Health Service in the position title. The grounds on which the application is made include that there have been changes to the role and additional duties which constitute a significant increase in work value. The applicant also compares this position with a number of other positions classified at Level 6.
- 2 The respondent raises a number of objections to the claim. The first is that there is a prerequisite to being entitled to claim reclassification, of having occupied the position and performed the higher level duties for at least 12 months before making the claim (the prerequisite).
- 3 The second is that a significant proportion of the claimed higher level duties were performed as part of a project of limited duration, and those duties are now complete.
- 4 Thirdly, the respondent says that there is insufficient increase in work value to justify the claim.
The applicant's work in the position
- 5 The applicant has occupied the position for some years. She requested a reclassification of the position in 2009 citing a number of grounds, and the position was reclassified to Level 5. From March 2011 until 2 December 2011, the applicant acted

in a Level 6 position at Fremantle Hospital, and from 5 December 2011 until 4 March 2012, in a position at Royal Perth Hospital. She returned to the position the subject of this application at that point. An application for reclassification was made on 2 May 2012. This means that the applicant had occupied the position and performed the claimed higher level duties for less than two months following her return from an absence of around 12 months when she made the application.

The prerequisite

- 6 It was not until the hearing on 2 September 2014 that the respondent asserted that the applicant is not entitled to seek reclassification of the position. It says that it is a prerequisite to applying for reclassification of having been in the position and undertaking the higher level work of the position for a continuous period of 12 months at the time of requesting the reclassification.

Policies and Procedures

- 7 The respondent relies on a number of documents to support its claim there is a prerequisite. The first is the Western Australian Department of Health Operational Circular OP 1435/01, dated 19 July 2001. This sets out that from 1 September 2011, all submissions regarding reclassification of positions received by the Department's Human Resources Services must comply with the requirements of the new Department of Health Classification and Establishment Policy and Guidelines (the Policy). Attached to the Operational Circular is a copy of the Policy. The Policy Statement at 2 provides among other things:

Classification and establishment processes must comply with the *Public Sector Management Act 1994*, Approved Procedures, the Authorities and Delegations Schedule, the State Wage Case Principles (July 2000) and the attached guidelines.

- 8 Therefore, the respondent says that even if Approved Procedures do not have legislative effect as subsidiary legislation in respect of the respondent and its employees, they are incorporated by Operational Circular and constitute the respondent's policy.

Approved Procedure 1

- 9 Approved Procedure 1 – Approved Classification System and Procedures is established under the *Public Sector Management Act 1994* and provides for the reclassification of the substantive holder of a reclassified job if:

the officer has been in the position and undertaking the higher level duties that warranted reclassification of the position, for a 'continuous period' of 12 months. A continuous period, as referred to above, may include normal and/or reasonable periods of leave.

Form E4

- 10 The respondent also relies on the Form E4 – Position Reclassification Request (Form E4). The online version contains an instruction box which provides that:

The substantive occupant must have occupied the position and been performing the higher level duties for a minimum of 12 months to receive the benefit of the reclassification.

Reclassification Guide

- 11 The third document relied on by the respondent is the Reclassification Guide for Applicants linked within the Form E4 (the Reclassification Guide). Under the heading of 'Who can make application and under what conditions?' the document provides:

To make application a substantive occupant of a position must have been in that position and undertaking the higher level duties claimed as warranting reclassification for a continuous period of 12 months, as at the date of application (continuous period may include normal and/or reasonable periods of leave).

- 12 The applicant says that it is unfair of the respondent to raise this issue at the end of the process. The respondent did not notify the applicant that the request for reclassification could not proceed because it did not meet the requirements of the Reclassification Request Form.
- 13 The applicant also relies upon having taken a secondment to Royal Perth Hospital and undertaking a position at Fremantle Hospital, both of which were involved with credentialing duties. During that time, she remained and still remains the substantive holder of the position the subject of this application.

Conclusions regarding the prerequisite

- 14 I feel compelled to note that raising this objection at the hearing when this matter has been on foot for more than two years is unfair to the applicant. The Reclassification Appeals – Practice Direction provides that the appeal must be based on material that was before the employer and not on new material not previously considered by the employer. Although it does not expressly provide the converse to that situation, that is, that the employer should not raise new grounds or material for rejecting the request, that would be the fair approach.
- 15 However, if there is an impediment to the reclassification based on policy and procedure which applies to all applicants for reclassification, it is an appropriate issue to take into account, but should have been raised at the beginning of the process, not the end.
- 16 Approved Procedure 1 and the instructions contained in the Form E4 deal with the situation of a substantive position holder being reclassified where the position itself has been reclassified. This involves a two-stage process. The first stage is the determination of whether the position is to be reclassified. The second stage arises only if the position is reclassified. It requires a determination of whether the substantive position holder ought to receive the benefit of the reclassification. This is as opposed to the employer deciding to advertise the higher level position rather than the position holder automatically obtaining the higher level.
- 17 In this context, neither Approved Procedure 1 nor the Form E4 prohibits a request for reclassification of a position being made. Rather, they set out conditions under which the position holder may receive the benefit of a reclassification of the position. Therefore, neither prevents the applicant from seeking the reclassification of the position. The issue would be whether she would be eligible to receive the benefit of a resulting reclassification.

- 18 As to the Reclassification Guide, if it seeks to reflect the requirement of Approved Procedure 1 and the Form E4, it misses the mark. This is because it sets out a requirement of the prerequisite 12 months 'to make application' for reclassification of a position. If it seeks to set out an additional condition for the making of an application for the reclassification of the position, there is no explanation as to the authority behind this condition. It does so where neither the subsidiary legislation adopted into policy, that is, the Operational Circular and the Policy Statement which adopt Approved Procedure 1, nor the Form E4, sets out such a condition.
- 19 I conclude that the prerequisite does not apply to making an application for reclassification of a position. It applies only to consideration of whether the substantive position holder will receive the benefit of the reclassification of the position. It provides no impediment to this application being considered.
- 20 Therefore, the fact that the applicant did not undertake the claimed higher level duties of the position for 12 months continuously prior to applying for the position to be reclassified, does not prevent the claim being determined on its merits.

The Merits – Restructuring of credentialing

What is credentialing?

- 21 Credentialing is defined in the *Credentialing and Scope of Clinical Practice Management Data System, Business Plan 2012-2013* (the Business Plan) at 6 as:

[A] process used to verify the qualifications and experience of medical practitioners to determine their ability to provide safe, high quality health care services within a specific health care setting. Credentialing is part of a wider organisational quality and risk-management system designed primarily to protect patients.

- 22 According to the Business Plan, 'health services and credentialing committees develop, maintain and periodically review a data system which records essential information regarding medical practitioners credentials and scope of clinical practice.'
- 23 In November 2011, the Business Plan was issued. This recommended the replacement of the then current fragmented credentialing system with a coordinated approach involving a single committee rather than two separate committees; the development of terms of reference to cover that committee; the establishment of databases, and the creation of a coordinator position with central oversight and administration of the Credentialing Data System. It recommended that this coordinator position be classified at Level 6. The position would provide a central point of management for the South Metropolitan Health Service; develop training materials and training courses for credentialing officers at various sites; develop standardised processes across various sites and a manual to ensure consistency in those approaches. Consideration was given to the creation of a separate position as opposed to the reclassification of this position. The process for the creation of a new position has been put on hold awaiting the outcome of this appeal.

Terminology in JDF

- 24 I note in passing that the applicant has outlined a range of changes said to have applied to the position as a consequence of the Business Plan. Ms Crouch gave evidence about some of the duties and Dr Geoffrey Williamson gave evidence about the role of the Committee and its authority. Taking account of that evidence, I conclude that the description of duties said to be new in the proposed Job Description Form (JDF) as well as the description of some existing duties in the existing JDF are not accurate. For example, the proposed JDF, at point 1, 3rd dot point, provides 'Coordinates investigations into Medical Practitioners as directed by MACSOP Committee and reviews, reduces, amends or suspends clinical privileges.' This position appears to have no authority to review, reduce, amend or suspend, other than as directed by the Committee. I suggest that if this is to be included in any JDF, the phrase 'as directed by MACSOP Committee' should be at the end of the sentence, not half way through. The position provides an executive officer service to the Committee and makes recommendations to the Committee. However, the Committee, rather than this position, has end of line responsibility for credentialing decisions.

The work value test

- 25 The test to be applied in a claim for reclassification based on increased work value is reflected in the Statement of Principles arising from the State Wage Case (see *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] 88 WAIG 475 [7] – [15]). The Work Value test provides:

7. Work Value Changes

- 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
- 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
- 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage 'leapfrogging' arising out of changes in relative position.
- 7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.
- 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

- 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
- 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.
- 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.
- 7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.
- 7.10 The expression 'the conditions under which the work is performed' relates to the environment in which the work is done.
- 7.11 The Commission should guard against contrived classifications and over-classification of jobs.
- 7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

2014 State Wage Order [2014] 94 WAIG 652
Schedule 2, 7. Work Value Changes

- 26 As the test sets out, there must be a significant net addition to work value (not change of itself) in the nature of the work, skills and responsibility required or the conditions under which the work is performed. The higher level work is to be ongoing to warrant a permanent increase in the level of classification of the position.

Changes to the duties of this position

- 27 The essential changes said to have occurred in this position fall into two categories:
1. Those which were part of the project and which are now complete; for example, reviewing and standardising medical credentialing and scope of practice management policies, procedures and processes; and developing training materials for credentialing (the development work).
 2. Those which were created as part of the project but which are ongoing, for example, providing database education and support and regular updating of the system and manuals.

Project work

- 28 When the applicant returned to the position the subject of this application, in March 2012, she commenced working on a number of the functions set out in the Business Plan at the direction of her manager. She undertook much of this work for the restructured and coordinated programme, together with Mr Hayden Smith, who was in charge of the project to undertake this work, and a project officer.
- 29 Much of the development work was examining, analysing and standardising policies and procedures, and developing training materials. This work was more difficult and complex analytical work and of a higher level of skill, expertise and responsibility than that of the existing position. It established a new benchmark and a new standard for the credentialing work.
- 30 I find that this work, undertaken in establishing the coordinated processes, was part of a project and was for a limited duration and is not ongoing.
- 31 Maintaining the documentation created during the project and providing daily support to credentialing officers is an ongoing requirement. The Classification Review Report recognised that these include some higher level duties. However, those ongoing duties are not sufficient to take the position to the next classification level.
- 32 Also, some of those matters claimed in the May 2012 Request for Reclassification were used as justification for the reclassification claim in 2009, however, are slightly differently expressed. The essence of most of the ongoing responsibilities remain.
- 33 In the circumstances, and in accordance with the Work Value Changes Principle, 7.6, I recommend that a temporary special allowance be paid to the applicant, to compensate for the work she undertook in the project role, for the period of the project. The allowance should be to Level 6.
- 34 I recognise that the applicant performed this work for only a short time before making the application for reclassification, and that the bulk of the higher level work was undertaken after the application was made. This period would normally be excluded were a reclassification to be the result. However, as a matter of equity, in this case, the allowance ought to cover the whole of the period of the project and not be limited to what would apply in other circumstances.
- 35 Otherwise, the application will be dismissed.
-

2014 WAIRC 01053

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 NATALIE CROUCH **APPLICANT**

-v-
 DEPARTMENT OF HEALTH - HEALTH INDUSTRIAL RELATIONS SERVICE **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
 ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 22 SEPTEMBER 2014

FILE NO PSA 99 OF 2013

CITATION NO. 2014 WAIRC 01053

Result Recommendation and Order issued

Order and Recommendation

HAVING heard Ms P Marcano as agent for the applicant and Ms M Muccilli and with her Mr J Ross for the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

RECOMMENDS THAT a temporary special allowance be paid to the applicant for the duration of the project role.
ORDERS THAT this application be, and is hereby otherwise dismissed.

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

[L.S.]

2014 WAIRC 01094

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 MRS JULIE JENAWAY **APPLICANT**

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

CORAM PUBLIC SERVICE ARBITRATOR
 COMMISSIONER J L HARRISON

DATE FRIDAY, 3 OCTOBER 2014

FILE NO PSA 68 OF 2013

CITATION NO. 2014 WAIRC 01094

Result Discontinued
Representation Applicant Ms K Heal (as agent)

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.
On 24 September 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.
NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby discontinued

(Sgd.) J L HARRISON,
Commissioner,
Public Service Arbitrator.

[L.S.]

2014 WAIRC 01107

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MISS JODI KELMAN	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, 3 OCTOBER 2014	
FILE NO	PSA 21 OF 2013	
CITATION NO.	2014 WAIRC 01107	
Result	Application dismissed	

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and
 WHEREAS on the 24th day of September 2014 the applicant filed a Notice of Discontinuance in respect of the appeal;
 NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 01105

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MISS ANGELA MESCHINO	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, 3 OCTOBER 2014	
FILE NO	PSA 22 OF 2013	
CITATION NO.	2014 WAIRC 01105	
Result	Application dismissed	

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and
 WHEREAS on the 24th day of September 2014 the applicant filed a Notice of Discontinuance in respect of the appeal;
 NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 01061

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR IAN ROBERT	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 25 SEPTEMBER 2014	
FILE NO	PSA 15 OF 2012	
CITATION NO.	2014 WAIRC 01061	

Result	Discontinued
Representation Applicant	Ms P Marcano (as agent)

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.

On 16 September 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the appeal.

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

THAT this appeal be, and is hereby discontinued

(Sgd.) J L HARRISON,
Commissioner,
Public Service Arbitrator.

[L.S.]

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
Mike Zidlicky, trading as Tyred Transport	Tyremax Pty Ltd	Kenner C	RFT 8/2014	15/07/2014	Referral of dispute	Discontinued