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## FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 01294

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. RFT 13 OF 2012 GIVEN ON 9 MAY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

### FULL BENCH

<b>CITATION</b>	:	2014 WAIRC 01294
<b>CORAM</b>	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER S M MAYMAN
<b>HEARD</b>	:	TUESDAY, 21 OCTOBER 2014
<b>DELIVERED</b>	:	TUESDAY, 2 DECEMBER 2014
<b>FILE NO.</b>	:	FBA 8 OF 2014
<b>BETWEEN</b>	:	SHACAM TRANSPORT PTY LTD  Appellant AND DAMIEN COLE PTY LTD  Respondent

### ON APPEAL FROM:

<b>Jurisdiction</b>	:	<b>Road Freight Transport Industry Tribunal</b>
<b>Coram</b>	:	<b>Acting Senior Commissioner P E Scott</b>
<b>Citation</b>	:	<b>[2014] WAIRC 00394; (2014) 94 WAIG 627</b>
<b>File No</b>	:	<b>RFT 13 of 2012</b>

<b>CatchWords</b>	:	Industrial Law (WA) - Appeal against decision of single Commissioner sitting as the Road Freight Transport Industry Tribunal - Assessment of damages arising from the wrongful termination of an owner-driver contract - Principles of assessment of damages in the law of contract considered - Error found in deduction of notional sum for loss of profit
<b>Legislation</b>	:	<i>Owner-Drivers (Contracts and Disputes) Act 2007</i> (WA) s 38(1)(a), s 43(1), s 47(1), s 47(4)
<b>Result</b>	:	Appeal upheld, decision varied
<b>Representation:</b>		
<b>Appellant</b>	:	Mr A Dzieciol (of counsel)
<b>Respondent</b>	:	Mr J Uphill, as agent, and with him Mr D Cole

**Case(s) referred to in reasons:**

Shacam Transport Pty Ltd v Damien Cole Pty Ltd [No 1] [2013] WAIRC 00872; (2013) 93 WAIG 1628  
Australian Goldfields NL (In liq) v North Australian Diamonds NL [2009] WASCA 98; (2009) 40 WAR 191  
Commonwealth v Amann Aviation Pty Ltd [1991] HCA 54; (1991) 174 CLR 64

**Case(s) also cited:**

Robinson v Harman [1848] EngR 135; (1848) 1 Exch 850; 154 E.R. 363  
Hadley v Baxendale (1854) 9 Ex 341  
Keldote Pty Ltd v Riteway Transport Pty Ltd [2010] FMCA 394  
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd (2012) WAIRC 00235; (2012) 92 WAIG 709

*Reasons for Decision***FULL BENCH:****The appeal and the order appealed against**

1 This is an appeal under s 43(1) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) (the *Owner-Drivers Act*), against a decision made by the Road Freight Transport Industry Tribunal (the Tribunal) on 9 May 2014 awarding Shacam Transport Pty Ltd (the appellant) a gross sum of \$9,023.04 for a breach of contract.

**Background**

2 Edward Gregory Richardson and Carol Anne Richardson are directors of the appellant. In 2011 the appellant entered into an owner-driver contract with Damien Cole Pty Ltd (the respondent) who undertakes a cartage business. Part of its business is to cart offal and waste products.  
3 After the respondent arranged for the appellant to purchase a 2007 Volvo prime mover in 2010, Mr Richardson commenced sub-contract driving work solely for the respondent carting offal and waste products from abattoirs in the south-west.  
4 In March 2012, a dispute arose between the parties and the respondent terminated the contract without notice.  
5 On 23 October 2013, the Full Bench allowed an appeal against a decision made by the Tribunal dismissing a claim by the appellant seeking damages against the respondent, for pay in lieu of reasonable notice: *Shacam Transport Pty Ltd v Damien Cole Pty Ltd [No 1]* [2013] WAIRC 00872; (2013) 93 WAIG 1628. The Full Bench held that the respondent was not entitled to terminate the owner-driver contract without notice and made an order to suspend the operation of the decision at first instance and remitted the case to the Tribunal for further hearing and determination. The matter then came before the Tribunal for further hearing on 13 February 2014 for the determination of the quantum of damages to be ordered for the failure to provide reasonable notice of termination of the owner-driver contract.

**The hearing on quantum of damages**

6 When the matter was remitted to the Tribunal two issues arose. The first was what period of time constituted reasonable notice to terminate the contract. The second issue was whether there should be a deduction of a profit margin from the quantum of damages awarded.  
7 After hearing from the parties, the Tribunal determined that in the circumstances a period of reasonable notice was six weeks. The appellant does not take issue with this finding.  
8 At the hearing on 13 February 2014, Mr Richardson gave uncontradicted evidence that after the contract with the respondent was terminated he sought work for the appellant's prime mover and himself by looking in newspapers in the employment section. Because he had not been in the business of contracting trucks out for long he contacted a few friends that he knew had businesses about where to go and what he could do. The outcome of his inquiries was that there was not much work around at that time. However, a friend of his who operates a business trading as Kimberley Water Carting out of Kununurra was looking for a part-time driver. Two weeks after the contract with the respondent was terminated, Mr Richardson commenced work for Kimberley Water Carting in Newman on a construction mine site. He worked approximately five weeks at this site. A few weeks later he carried out another week's work for Kimberley Water Carting just out of Fitzroy Crossing. The prime mover owned by the appellant was not engaged in any of this work. Mr Richardson's total earnings in this period was \$19,270 net.  
9 After having regard to the gross amounts that Mr Richardson was paid by Kimberley Water Carting and superannuation paid, the Tribunal assessed Mr Richardson's earnings during the six week notice period as being a gross amount of \$1,720, plus \$5,980 and \$4,025 which came to a total gross amount of \$11,725.  
10 The fact that steps were taken by Mr Richardson to mitigate the loss of the appellant following the termination of the contract was not challenged by the respondent.  
11 The parties agreed that the earnings under the contract were \$7,400 per week and the variable outgoings for the operation of the appellant's prime mover was \$2,608.66 per week (exhibit A). This resulted in loss of income per week of \$4,791.34. Whilst the basis of the calculation of this agreed amount was not revealed to the Tribunal, it is clear that the variable outgoings include items such as fuel which was used by the prime mover to perform the cartage work the appellant had contracted with the respondent to perform.  
12 At the hearing before the Tribunal, Mr Uphill on behalf of the respondent made a submission that a profit margin of \$2,000 per week ought to be offset from the award of damages. The argument was that as Mr Richardson did not use the prime mover when working with Kimberley Water Carting there was no basis for a profit margin to be awarded. The basis on which that submission was put is that a profit margin is similar to variable outgoings which are sums not incurred or earned as a result of

Mr Richardson not working the vehicle. Thus, in the same way as variable outgoings were not incurred it was argued that the profit margin should not be taken account of.

- 13 The amount of \$2,000 per week was calculated by the respondent by having regard to a table of expenses and income set out in exhibit R3. Exhibit R3 was tendered at the initial hearing at first instance during the evidence given by Mr Damien Cole, the owner of the respondent. Mr Cole said when giving evidence that exhibit R3 had been prepared by Ms Jenny Tanner, the financial controller, and is an estimate of variables of the long distance work carried out by the appellant in relation to proposed earnings (ts 64, 16 April 2013). Exhibit R3 provides as follows:

**(LONG DISTANCE)**

28/03/2013 14:56

<b>VARIABLES</b>					
			KILOMETER		1.2
FUEL USAGE	2.2	S	686400	FUEL PRICE	5
	0.5				0.1
RESALE VALUE	0	RATE	\$7,400	REPAIR	9

**EXPENSES**

<b>OWNERSHIP</b>	<b>48 MONTHS</b>	<b>ANNUAL</b>	
CAPITAL COST	\$205,000		
FIT UP	\$0		
STAMP DUTY	\$0		
OTHER COSTS			
TOTAL CAPITAL COSTS	\$205,000		
<b>OVERHEADS</b>			
LICENCE	\$28,836	\$7,209	
INSURANCE TRUCK	\$14,152	\$3,538	
INSURANCE OTHER	\$4,000	\$1,000	
INTEREST	\$65,600	\$16,400	
DEPRECIATION	\$102,500	\$25,625	
TOTAL OVERHEADS	\$215,088	\$53,772	
<b>OPERATING</b>			
FUEL	\$390,000	\$97,500	25%
REPAIRS/TYRES	\$130,416	\$32,604	
TOTAL OPERATING	\$520,416	\$130,104	
TOTAL RUNNING EXPENSE	\$735,504	\$183,876	
<b>INCOME</b>			
CONTRACT PAYMENT	\$1,539,200	\$384,800	\$32,067
LESS EXPENSE	\$735,504	\$183,876	
MARGIN	<u>\$803,696</u>	<u>\$200,924</u>	52%

**Assumptions**

Used VOLVO 520 HP  
 4 years ownership  
 Finance over 48 months - 30% residual  
 Insurance truck and public liability  
 Based on figures provided by Fertal, October 2010

- 14 At the hearing on 13 February 2014, Mr Uphill also tendered into evidence a profit and loss statement prepared by the appellant for the period July 2011 through to June 2012 (exhibit B). Exhibit B shows that in that period the appellant received income from the respondent, including a diesel fuel rebate, of \$298,833 and incurred expenses of \$260,564.20. Part of those expenses was wages and salaries of \$88,900, other salaries of \$2,200 and superannuation of \$8,001. Items which could clearly be said to constitute variable items included fuel of \$89,144.20 and sub-contract drivers of \$8,727.27. There were also amounts claimed for some matters that could not be regarded as variable outgoings such as motor vehicle insurance of \$6,703.03 and motor vehicle registration of \$8,019.37. The operating profit specified in exhibit B was \$38,268.80 with a net profit of \$25,996.97.
- 15 On the basis of exhibit R3 and exhibit B, Mr Uphill made a submission that the annual margin of the profit in exhibit R3 was equally split between wages of \$100,000 and profit of the same amount. That he submitted is consistent with the amount allocated to wages and salaries set out in exhibit B. Thus, wages could be expected to be about \$100,000 a year, or a weekly figure of \$2,000 per week. Alternatively, it was submitted that if the operating profit of \$38,268.80 is taken into account, that that would amount to a notional profit of \$735 per week (AB 28). In written submissions filed on 16 October 2014, however,

it is stated on behalf of the respondent that the operating profit of \$38,268.80 was for nine months of operation from July 2011 until the end of the contract on 27 March 2012. Thus, for a full year, the profit margin would be \$51,024 or \$1,000 per week.

- 16 The Tribunal accepted the submission made on behalf of the respondent and found that in undertaking an employment relationship during the period in which notice should have been given the appellant effectively decided to forego endeavours to make a profit from the use of the prime mover to gain a short term benefit of receiving a wage. Thus, in choosing not to undertake the business during the weeks of employment with Kimberley Water Carting, the appellant could not reasonably expect to have generated this notional profit. Therefore, an amount of \$2,000 per week during four weeks of employment was deducted from the award of damages.
- 17 After making this finding, the Tribunal calculated the gross amount to be paid to the appellant by the respondent in lieu of reasonable notice as:

Average weekly income x 6 weeks		
= \$7,400 x 2	\$14,800.00	
+ \$5,400 x 4	<u>\$21,600.00</u>	\$36,400.00
Less variable outgoings x 6 weeks		
= \$2,608.66 x 6	\$15,651.96	
Less actual earnings for period to 9 May 2012	<u>\$11,725.00</u>	\$27,376.96
<b>TOTAL</b>		<b>\$9,023.04</b>

#### Grounds of appeal

- 18 The grounds of appeal in this matter are as follows:
- (a) In ground 1 of the appeal it is pleaded that the Tribunal erred in law in the assessment of the appellant's damages arising from the wrongful termination of the owner-driver contract by the respondent, in that the Tribunal deducted an amount of \$2,000 per week from the damages awarded to the appellant for the four weeks that the appellant's director, Mr Richardson, was working as an employee, when there is no basis in law for making such a deduction.
- (b) Ground 2 is expressed in the alternative. It pleads that the Tribunal erred in law, and in fact, in finding that, of the average amount of \$7,400 per week that the appellant earned from providing services to the respondent pursuant to the owner-driver contract, there was a profit margin in an amount of \$2,000, when there was no evidence, or insufficient evidence before the Tribunal, from which the Tribunal could have made such a finding.
- 19 The appellant seeks that the further decision of the Tribunal in matter RFT 13 of 2012 be varied, by deleting the calculation of the pay in lieu of notice in [22] of the reasons for decision, and substituting the following in lieu:

Average weekly income x 6 weeks		
= \$7,400 x 6		\$44,400.00
Less variable outgoings x 6 weeks		
= \$2,608.66 x 6	\$15,651.96	
Less actual earnings for period to 9 May 2012	<u>\$11,725.00</u>	<u>\$27,376.96</u>
<b>TOTAL</b>		<b>\$17,023.04</b>

#### Consideration of the grounds of appeal – assessment of damages

- 20 Pursuant to s 47(1) and s 47(4) of the *Owner-Drivers Act* if the Tribunal determines a dispute referred under s 38(1)(a) of the *Owner-Drivers Act*, the Tribunal may order payment of a sum of money by way of damages.
- 21 Following the remittal of the case to the Tribunal by the Full Bench, the task before the Tribunal was to assess the damage that flowed from the breach of the owner-driver contract. The loss that flowed to the appellant from the breach of contract was the loss of income the appellant would have received if provided with reasonable notice to terminate the contract.
- 22 The relevant legal principles governing an assessment of damages were summarised by Buss JA in *Australian Goldfields NL (In liq) v North Australian Diamonds NL* [2009] WASCA 98; (2009) 40 WAR 191. At [276] his Honour observed:
- The general contractual principle governing the measure of damages is that the innocent party suing for breach of contract is to be placed in the same position, so far as money can do it, as if the contract had been performed: see *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] per French CJ, Gummow, Heydon, Crennan and Kiefel JJ; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 per Mason CJ and Dawson J; *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225 at 237 per Gibbs CJ; *Wenham v Ella* (1972) 127 CLR 454 at 471 per Gibbs J. The innocent party is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss): see *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11 - 12 per Mason, Wilson and Dawson JJ. The innocent party should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss suffered by reason of the breach of contract. Ordinarily, this involves a comparison between the position in which the innocent party would have been if the breach of contract had not occurred and what, relevantly, represents the position in which the innocent party is in after the occurrence of the breach: see *Amann Aviation* (at 116) per Deane J.
- 23 Thus, the Tribunal was required to assess the loss or losses flowing from the respondent's breach of contract, which when assessed should aim to place the innocent party (in this matter the appellant) in the position it would have been if six weeks' notice had been given by the respondent to terminate the owner-driver contract.

- 24 When regard is had to the facts of this matter, the loss that flowed from the respondent's breach was the gross profit expected from performance of work pursuant to the terms of the contract for a period of six weeks immediately following the termination of the contract. Thus, the appellant has the right to be placed in the position it would have been if the contract had been performed; that is if six weeks' notice to terminate the contract had been given by the respondent.
- 25 The starting point in an assessment of damages in this matter is that if the appellant had been provided with six weeks' notice of termination the contract would have remained on foot for a period of six weeks. Thus, the appellant's income from the respondent would have been \$7,400 gross a week and it would have paid \$2,608.66 a week in variable outgoings.
- 26 It is not in dispute that taking into account variable outgoings of \$2,608.66 a week the appellant would have earned a gross amount of \$28,748.04 in the period of notice.
- 27 The appellant through its director, Mr Richardson, took steps to mitigate the appellant's loss suffered by reason of the failure by the respondent to provide reasonable notice to terminate the contract. Mr Richardson was unable to secure work as an owner-driver, but he was able to obtain work as an employee. Thus, from the amount of \$28,748.04 it is agreed an amount of \$11,725 should be deducted, which is a gross amount of \$17,023.04.
- 28 In circumstances where there was no dispute that the appellant had mitigated its loss, no deduction should have been made for a notional loss of profit. The appellant had been unable to secure work using the prime mover owned by it, but was able to secure work for its director, Mr Richardson, as an employee. To make a deduction of an amount allocated to profit could not be said to place the appellant in the same position so far as money can do it, as if the contract had been performed. Thus, there is no reason in fact or at law why an amount representing a notional profit should have been deducted from the award of damages.
- 29 For these reasons, we are of the opinion that ground 1 of the appeal has been made out. Whilst in light of this finding it is not necessary to consider ground 2 of the appeal, we would make the following observations:
- (a) We do not agree that there was no evidence before the Tribunal upon which an assessment of a profit margin could be assessed. An assessment of a head of damage need not be calculated in a way that is precise. In *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 Toohey J observed (138):
- [T]he quantification of damages is 'in many cases no more than an approximation lacking in mathematical or economic accuracy or sufficiency' (*Pennant Hills Restaurants* (1981), 145 C.L.R., at p. 636) or even that the assessment of damages 'does sometimes, of necessity, involve what is guess work rather than estimation' (*Jones v Schiffmann* (1971), 124 C.L.R. 303, at p. 308). It is now almost a century since Bowen L.J. said in *Ratcliffe v. Evans* ([1892] 2 Q.B. 524, at pp. 532-533):
- 'As much certainty and particularity must be insisted on ... in ... proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'
- (b) The Tribunal had before it a statement of income paid by the respondent and an estimate of expenses incurred by the appellant. The estimate was prepared by the respondent's financial controller (exhibit R3). It also had before it exhibit B which was a profit and loss statement prepared on behalf of the appellant showing income received and actual expenses incurred by the appellant. As exhibit R3 was an estimate and exhibit B was a statement of actual expenses, less weight should have been given by the Tribunal to the calculations contained in exhibit R3 than exhibit B.
- (c) In any event, exhibit R3 does not support the respondent's argument that an amount of \$2,000 a week should be deducted from the measure of damages. To do so would, when the expenses set out in exhibit R3 are analysed, result in a double counting of some variable outgoings. In particular, the amount allocated to fuel and repairs and tyres was \$130,104 per annum or approximately \$2,502 per week. Also, exhibit R3 does not take account of other expenses which are accounted for in exhibit B. These include:
- (i) variable expenses for the cost of payments to sub-contract drivers, travel and accommodation expenses; and
- (ii) numerous other fixed costs such as bank fees, bookkeeping fees, company costs, credit fees, insurance, loan expenses and stamp duty.
- (d) As exhibit B contains a comprehensive list of expenses incurred by the appellant and is not merely an estimate of some expenses, if an amount representing the profit generated from the engagement of the appellant's prime mover should have been deducted from the quantum of damages, then the Tribunal should have assessed that amount by regard to a gross profit of \$38,268.80 for nine months reflected in exhibit B, which is approximately \$1,000 per week.

### Conclusion

- 30 The appellant seeks to vary [22] of the reasons for decision at first instance. Such a course of action is not open as the decision the subject of the appeal is not the reasons for decision but the order made on 9 May 2014.
- 31 As ground 1 of the appeal is made out, we are of the opinion that an order should be made to uphold the appeal and vary the decision by deleting the sum of \$9,023.04 and substituting the sum of \$17,023.04.
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**2014 WAIRC 01305**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SHACAM TRANSPORT PTY LTD

**APPELLANT**

**-and-**

DAMIEN COLE PTY LTD

**RESPONDENT**

**CORAM** FULL BENCH  
THE HONOURABLE J H SMITH, ACTING PRESIDENT  
COMMISSIONER S J KENNER  
COMMISSIONER S M MAYMAN

**DATE** THURSDAY, 4 DECEMBER 2014

**FILE NO/S** FBA 8 OF 2014

**CITATION NO.** 2014 WAIRC 01305

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**Result** Appeal upheld, decision varied

**Appearances**

**Appellant** Mr A Dzieciol (of counsel)

**Respondent** Mr J Uphill, as agent, and with him Mr D Cole

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*Order*

This appeal having come on for hearing before the Full Bench on 21 October 2014, and having heard Mr A Dzieciol (of counsel) on behalf of the appellant, and Mr J Uphill, as agent, and with him Mr D Cole on behalf of the respondent, and reasons for decision having been delivered on 2 December 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. The appeal is upheld.
2. The decision made by the Commission on 9 May 2014 ([2014] WAIRC 00394; (2014) 94 WAIG 627) be varied by deleting that sum of \$9,023.04 and substituting the sum of \$17,023.04.

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

[L.S.]

**2014 WAIRC 01246**

APPEAL AGAINST DECISIONS OF THE COMMISSION IN MATTER NO. U 99 OF 2013 GIVEN ON 11 MARCH 2014 AND  
20 MARCH 2014

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION****FULL BENCH**

**CITATION** : 2014 WAIRC 01246

**CORAM** : THE HONOURABLE J H SMITH, ACTING PRESIDENT  
CHIEF COMMISSIONER A R BEECH  
ACTING SENIOR COMMISSIONER P E SCOTT

**HEARD** : FRIDAY, 19 SEPTEMBER 2014

**DELIVERED** : THURSDAY, 6 NOVEMBER 2014

**FILE NO.** : FBA 7 OF 2014

**BETWEEN** : MR CESARE VIOLANTI AND MRS SOMSRI VIOLANTI TRADING AS KWINANA  
PIZZA

Appellant

AND

LIAM CHRISTOPHER PORTER

Respondent

**ON APPEAL FROM:**

**Jurisdiction** : **Western Australian Industrial Relations Commission**  
**Coram** : **Commissioner S M Mayman**  
**Citation** : **[2014] WAIRC 00198; (2014) 94 WAIG 253 and [2014] WAIRC 00214; (2014) 94 WAIG 364**  
**File No.** : **U 99 of 2013**

**CatchWords** : Industrial Law (WA)- Appeal against decisions of the Commission - Claim referred to Commission - Harsh, oppressive or unfair dismissal - Commissioner erred in the assessment of the evidence - What constitutes objectionable leading questions considered - Retrial necessary - Decisions suspended and matter remitted for further hearing and determination

**Legislation** : *Industrial Relations Act 1979* (WA) s 26(1)(b), s 29(1)(b), s 29(1)(b)(i), s 49(2)  
*Evidence Act 1906* (WA) s 106F  
*Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c)

**Result** : Appeal upheld, order made

**Representation:**

**Appellant** : Mr R L Hooker (of counsel)  
**Respondent** : Mrs S M Porter, as agent  
**Solicitors:**  
**Appellant** : Mountains Lawyers

**Case(s) referred to in reasons:**

Barbaro v Minister for Immigration and Ethnic Affairs (1980) 3 ALD 1; [1980] AATA 76  
 Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224  
 Brown v Churchill [2006] WASCA 17  
 Browne v Dunn (1894) 6 R 97 (HL)  
 Devries v Australian National Railways Commission [1993] HCA 78; (1993) 177 CLR 472  
 Fraser v Burswood Resort (Management) Ltd [2014] WASCA 130  
 Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch (1984) 64 WAIG 852  
 Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298  
 Kingstyle Investments Pty Ltd v Lawson [2013] WAIRC 00355; (2013) 93 WAIG 493  
 Maves v Grand Trunk Pacific Railway Co (1913) 14 DLR 70  
 Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677  
 Pochi v Minister for Immigration and Ethnic Affairs (1979) 36 FLR 482  
 R v Wilson (1913) 9 Cr App R 124  
 Secretary to the Department of Human Services v Sanding [2011] VSC 42  
 Singh v Dhaliwal Pty Ltd [2013] WAIRC 00133; (2013) 93 WAIG 197  
 Skinner v Broadbent [2006] WASCA 2  
 The Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203  
 Waterways Authority v Fitzgibbon [2005] HCA 57; (2005) 79 ALJR 1816

**Case(s) also cited:**

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336  
 Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32; (2010) 241 CLR 390  
 Re Minister of Immigration and Multicultural Affairs; Ex parte Applicant S154/2002 (2003) 77 ALJR 1909  
 Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93  
 R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228  
 Wecker v Secretary, Department of Education, Science and Training (2008) 168 FCR 272

*Reasons for Decision***SMITH AP:****Introduction**

- 1 This appeal is instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the Act) against decisions made by the Commission in U 99 of 2013 on 11 March 2014 ([2014] WAIRC 00198; (2014) 94 WAIG 253) and on 20 March 2014 ([2014] WAIRC 00214; (2014) 94 WAIG 364). Application U 99 of 2013 was lodged in the Commission on 28 June 2013 and was heard by the Commission on 25 November 2013 and 6 December 2013.
- 2 Application U 99 of 2013 was an industrial matter referred to the Commission by Liam Christopher Porter under s 29(1)(b)(i) of the Act. Mr Porter claimed he was harshly, oppressively or unfairly dismissed by Mr Cesare Violanti and Mrs Somsri Violanti trading as Kwinana Pizza. Mr Porter's employment was terminated on 1 June 2013.
- 3 On 11 March 2014, the Commission delivered an order declaring that the dismissal of Mr Porter was unfair and that reinstatement or re-employment was impracticable. On 20 March 2014, the Commission made an order that Mr and Mrs Violanti pay Mr Porter the sum of \$5,400 gross to Mr Porter within seven working days of the date of the order, being 10 weeks' remuneration less the sum of \$600, for one week's notice received in the period since dismissal (the decisions).

**The Commissioner's reasons for decision**

- 4 Although the reasons for decision given by the Commissioner are short, to properly deal with the central issues raised in the grounds of appeal it is necessary to set out the findings made in the reasons given by the Commissioner in a fulsome manner. Three witnesses gave evidence on behalf of the applicant, Mr Porter, his mother, Mrs Sharon Porter, and his grandmother, Mrs Jean Anne Nelson.
- 5 In her reasons for decision the Commissioner set out the evidence of Mr Porter which related to the unfair dismissal claim as follows:
  - (a) Mr Porter commenced working at the pizza shop in 2008 when he saw an advertisement in the window and he first worked for Mr Violanti when Mr Violanti purchased the business in October 2009.
  - (b) Mr Porter had never taken any holidays in the time he had been employed by Mr Violanti.
  - (c) Mr Porter denied he had been given any warnings by Mr Violanti during his employment. Furthermore, he denied he had ever stolen anything from Mr and Mrs Violanti.
  - (d) Mr Violanti informed Mr Porter he was dismissed on 28 May 2013. However, he did not leave his employment until 1 June 2013. During that period Mr Porter served customers and at no stage was he told not to desist from serving customers. Also, he was not questioned by police regarding missing money.
  - (e) In cross-examination, Mr Porter denied he was given any warnings by Mr Violanti, suggesting that the reason for his dismissal was that Mr Violanti understood he (Mr Porter) no longer wanted to take over the business. Mr Porter denied he was treated as a family member by Mr and Mrs Violanti although he accepted they would speak on a daily basis as they were working long hours.
- 6 The Commissioner's summary of the evidence given by Mrs Porter was that:
  - (a) in late 2010 Mr Violanti wished to sell the pizza business and Mr Porter was interested in purchasing the business for \$280,000. Mrs Porter expressed her concern to Mr Porter about the price and she sent an email to Eagle Boys Pizza who made contact with her;
  - (b) at the time of Mr Porter's dismissal Mrs Porter accompanied Mr Porter to Mr and Mrs Violanti's business. On that occasion Mr Violanti became quite aggressive with Mr Porter. When Mrs Porter asked for Mr Porter's separation certificate Mr Violanti refused to provide the certificate and threatened to report Mrs Porter to Centrelink;
  - (c) when Mr Porter refused to purchase the business Mr Violanti suggested that Mr Porter rent the business for \$2,500 a week; and
  - (d) when Mr Violanti discovered that Mr Porter was not going to take up the option of rental Mr Porter was ultimately dismissed.
- 7 The Commissioner set out the evidence given by Mrs Nelson as follows:
  - (a) Mr Porter expressed a desire to purchase Mr Violanti's business for \$280,000;
  - (b) at the time she expressed her concern to Mr Porter and raised the issue with her daughter; and
  - (c) Eagle Boys Pizza provided an email to Mrs Porter advising that they had not heard of Mr Violanti's business and they were certainly not interested in purchasing the business.
- 8 The Commissioner set out the evidence given by the witnesses who gave evidence on behalf of the employer and who are employed by Mr and Mrs Violanti as follows:
  - (a) The first witness was Miss B, a 14-year-old child. In accordance with s 106F of the *Evidence Act 1906* (WA), Ms Sue Hutchinson was appointed a suitable and competent communicator, whose function it was to explain to the child questions put to the child and, where necessary, to explain to the court the evidence given by the child. The evidence of Miss B was as follows:
    - (i) Miss B worked part-time for Mr and Mrs Violanti answering phones and taking orders. She had worked at the same time as Mr Porter, some six or seven months earlier.
    - (ii) Miss B could not recall anything Mr Porter may have been given a warning for. She went on to say (ts 44, AB 106):
 

--- who was the delivery man? --- Yeah. They were just talking about parties and stuff like that and then - and then the phone rang so I just went and then did my work and then I went in the cool

room, I think it was to get my drink bottle, I'm not sure, and they were handing over what looked like drugs and then I just went straight back out and went - did my work again and then the delivery driver at the time was - he told me to go to his car and I got a CD off of him and then he took the drugs out of his pocket and, like, put it in his wallet, so at that time I seen it. I'm not quite sure what it was but ---

Okay. So when you - when you saw it a bit closer, the - when he took it out of his pocket and you thought it was drugs, why did you - why did you think it was drugs? --- Well, they were talking about it at the start and it - it just looked like it. It was brown-green - like, brown and green, so it - yeah,, so it ---

So what sort of drugs did it look like? Did - can you ---? --- Probably weed.

**MAYMAN C:** Careful of leading

**MOUNTAIN, MS:** Why - are you able to say why you - you - why you thought that?

What ---? --- It was that way it looked. It was ---

The way it looked? --- Yeah.

And do you - how do you know about the way drugs looked? Are you --- ? --- Well, we learn about it at school and everything, yeah.

You learn about it at school, so you know - you - you learn about drugs at school, is that what you're saying? --- (no audible answer)

Okay. So from your view of what you saw, you think that it was drugs. So just going back. If you could just tell me, the parcel that you saw that - that you recognised as marijuana, was that the same parcel that was given ---

**MAYMAN C:** She didn't say that. Be careful about leading, Ms Mountain.

(iii) In cross-examination Miss B admitted she was not sure what the drugs looked like. She agreed that something was in the delivery driver's pocket that she may not have been able to see although the driver did take something out and when she saw him looking at her he said, 'don't worry, I'm not a bad person' (ts 46, AB 108). Miss B agreed that the exchange did not prove that Elias, the driver, had received the drugs from Mr Porter.

(b) Master P is another child under the age of 18 years. Ms Hutchinson was also appointed as a court communicator to assist Master P in the giving of his evidence. Master P gave the following evidence:

(i) He had been employed by the employer for some two years as a part-time employee. He was in year 9 at school and that while he was working for Mr and Mrs Violanti Mr Porter was also working at night when the employer was not working.

(ii) Master P came across Mr Porter at the till counting \$50 notes and putting some in his pocket. He saw Mr Porter sort slips on the docket station and throw a couple away.

(iii) He also saw Mr Porter on one occasion go into the cool room and drink a beer.

(c) Mr Glenn William Leahy works as a driver delivering pizzas. He commenced working in that position in early January 2012. During that time he came to know Mr Porter. Mr Leahy's evidence was (ts 60, AB 122):

Are you aware of any behaviour that would have given cause for the owners of the shop to give Mr Porter a warning? --- The smell of alcohol, yes.

Okay. So you smelt alcohol on his --- ? --- Yes, I did.

--- breath. What sort of time was that, I mean, was it before, after work, during work, if you can ---? --- During work hours.

During work hours? --- Yeah.

Did that have any effect on --- ? --- No, I didn't think it really took effect on him but I thought that having the smell of alcohol on him - because he was also serving up the front as well.

9 The Commissioner recorded in her reasons for decision that Mr Matthew Lee Beard gave evidence for the employer. She did not, however, set out his evidence but simply said that he works as a pizza maker and is currently employed as a trainee. Otherwise the Commissioner made no other reference to the substance of the evidence given by Mr Beard.

10 The Commissioner set out the evidence given by Mrs Violanti. The Commissioner recorded in her reasons the following exchange between Mrs Violanti and counsel for the employer as follows (ts 73, AB 135):

Do you have any information to give the court today about any warnings that were given to Mr Porter during the time that he was employed with you in the Kwinana Pizza Shop, his behaviour? Can you tell me anything about his behaviour that may have incurred a warning from the owner? --- In the morning?

Warning. When Mr Porter was dismissed, what were the reasons - the reasons for Mr Porter finishing at the shop?

**MAYMAN C:** Mr Violanti, you can't ---? --- The ---

**MOUNTAIN, MS:** Liam? --- Finish?

Yes. He finished working at the shop. What reason why? --- Yes. He steal money.

How do you know that? --- I saw him

You saw him? --- Yes.

...

Okay. And, Mrs Violanti, were you in any way intimidated? Were you - did anyone tell you you had to come in today to give evidence? --- Yes.

Who told you that? --- Had to come here?

Yes? --- My husband.

Your husband said you had to come in? --- Yes.

Yes. Because you're one of the owners? --- Yeah.

Did he tell you what you had to say? Did he say to you, 'You must say this'? --- Yes.

11 The Commissioner summarised the evidence of Mr Violanti as follows:

- (a) Mr Violanti had been a business owner for 35 years in the pizza industry. He bought this particular business at the end of 2010 and at the time Mr Porter was working with the previous owner.
- (b) He offered a traineeship to Mr Porter. In order to do so special permission was required because Mr Porter was a student at the time and wanted to leave school.
- (c) The wage records for Mr Porter were stolen and an investigation that was still ongoing with the police. However, all money paid to employees was recorded in a business cashbook which was tendered into evidence.
- (d) Around January 2013, Mr Violanti considered his relationship with Mr Porter started to go downhill. Mr Violanti was arguing with his wife, the till was not balancing and there appeared to be a number of dollars missing and there were only three persons in the shop; Mr Porter, Mrs Violanti and himself. That night he gave Mr Porter notice as he knew his wife would not steal from him therefore he drew the conclusion that it had to be Mr Porter.
- (e) The initial issues Mr Violanti had with Mr Porter in 2013 were drinking. On the third occasion the drinking occurred Mr Violanti spoke to Mr Porter and the drinking ceased. Mr Violanti also spoke of an allegation raised with him by an employee's father relating to drugs. He spoke with Elias about the matter and it did not happen again.
- (f) The third occasion related to the disappearance of money. When Mr Violanti confronted Mr Porter he denied having taken any money from the till and demonstrated to Mr Violanti that his wallet was empty. It was then that Mr Porter was given a week's notice.
- (g) During Mr Porter's employment he offered Mr Porter the lease on the shop when he had finished his traineeship. It would not have been an outright sale.

12 After recording the evidence in this manner, the Commissioner then observed that in matters such as these it is the responsibility of the employer to apply procedural fairness in investigating such matters. She then stated that in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 and *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 observations were made where it was said that the Commission must make an objective assessment of the circumstances of the conduct which is said to be the basis of a dismissal and that assessment is then used to determine whether the employer has acted reasonably in making its decision to dismiss.

13 The Commissioner then made the following findings:

- (a) In all contested matters the Commission is required to determine the facts. Some facts in these proceedings are not in dispute, but where the facts are disputed the Commission is required to assess the credibility of witnesses, weigh their evidence and give reasons as to why one version is preferred over another. At all times the burden of proof that applies is on the balance of probabilities.
- (b) Having listened carefully to the evidence given by Mr Porter and closely observed him, it was her view that the evidence given was given honestly and to the best of his recollection.
- (c) Having assessed the evidence of Mrs Porter and Mrs Nelson, it was her view that their evidence was given honestly and to the best of their recollection.
- (d) In assessing the credibility of all witnesses the Commission is duty bound to make comment regarding the extent to which counsel for the employer led evidence from the employer's witnesses during examination-in-chief which ultimately made the task difficult in assessing the honesty of the employer's witnesses. The Commissioner referred to s 26(1)(b) of the Act which provides that the Commission in the exercise of its jurisdiction shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just. The Commissioner then found that she placed little weight on the evidence given in particular by Miss B because of the number of leading questions put to Miss B relating to the alleged exchange of drugs between Mr Porter and the delivery driver. Yet, the Commissioner went on to find that she did not believe Miss B to be a dishonest person, it was simply the way in which the questions were put to the witness by counsel for the employer.
- (e) The Commissioner found the evidence given by Mr Beard was unreliable because of the number of leading questions that were put during examination-in-chief in relation to Mr Porter having allegedly stolen money from the till. The Commissioner also found she did not consider Mr Beard to be a dishonest person.
- (f) The Commissioner also found Master P's evidence in relation to pocketing \$50 notes to be unreliable because of the number of leading questions that were put during examination-in-chief and she also found that she did not consider Master P to be a dishonest person and found that in fact he presented as being quite forthright.
- (g) The Commissioner found that Mrs Violanti may have been instructed by her husband as to what to say in the witness box although the Commissioner accepted that there was a language difficulty.
- (h) The Commissioner made no findings about the evidence given by Mr Leahy.
- (i) The Commissioner then found that she accepted in part the evidence given by Mr Violanti with the exception of the elements relating to the allegation of drug handling and stealing by Mr Porter.

- 14 After making those findings, the Commissioner made the following findings:
- on balance the Commission considers the incident relating to the alleged handling of drugs did not occur, or if it did the applicant was not involved;
  - on balance, the applicant may have consumed alcohol on the premises early in 2013 however the Commission does not accept the evidence of Mr Violanti that he warned the applicant regarding the incident therefore the matter went unchecked;
  - the Commission finds that the day the applicant was advised he was to be terminated was Wednesday 22 May 2013 [sic] some seven days before his termination took effect (29 June 2013 [sic]). In this case I have accepted the submissions of the respondent in that one week's notice was provided and the evidence of the applicant in that during the period of notice he continued to work for the respondent, including serving customers; and
  - the Commission considers that the real reason for terminating the applicant was that the relationship between the respondent and the applicant deteriorated from the point at which the applicant refused to purchase or lease the business from the respondent.
- 15 The Commissioner then went on to observe that she considered it strange and incongruous that an employer terminated an employee for stealing and proceeded to allow Mr Porter during his period of notice to continue to serve customers. She then said that accordingly, on balance, she rejected the suggestion that Mr Porter was stealing from the employer, taking into account the employer's flexibility in using Mr Porter to serve customers during his period of notice in addition to considering Mr Porter's exemplary behaviour, his length of service and his willingness to work many additional hours.

#### Grounds of appeal

- 16 In ground 1 it is pleaded that the Commissioner erred in procedural fairness in finding witnesses were led by counsel. In the particulars to ground 1 of the appeal it is stated that the Commissioner erred in finding counsel for Mr and Mrs Violanti led the following witnesses in examination-in-chief:
- (a) Master P;
  - (b) Miss B; and
  - (c) Mr Beard
- 17 The particulars also allege that the Commissioner erred in giving no weight to the evidence of each of those witnesses solely on the basis of the manner in which the questions were put to them by counsel, despite finding the witnesses presented as forthright and honest.
- 18 In ground 2 it is pleaded that the Commissioner did not properly account for the evidence put at the hearing. The particulars provided in respect of ground 2 of the grounds of appeal take issue with findings made in respect of the evidence given by only Mrs Violanti and are in the nature of a submission. The particulars in paragraphs 1, 2 and 3 raise an argument that the Commissioner did not properly assess the evidence given in chief by Mrs Violanti. Particular 4 raises the same issue in respect of evidence Mrs Violanti gave when cross-examined. Particular 5 also raises the same issue in respect of Mrs Violanti's evidence when re-examined. In Particular 6 an argument is raised that if Mrs Violanti's evidence had been properly considered, the evidence of Mrs Violanti ought to have been sufficient evidence on its own to dismiss the application.
- 19 In ground 3 it is pleaded that the decision was against the evidence and the weight of the evidence. The particulars state as follows:
- (a) The Commissioner erred in giving no weight to the evidence given by Mrs Violanti that she saw Mr Porter stealing money from the till on the basis that she may have been instructed as to what to say in the witness box by her husband.
  - (b) The Commissioner erred in not taking into consideration all of the evidence given on behalf of Mr and Mrs Violanti in relation to the issue of stealing money.
  - (c) The Commissioner erred in rejecting entirely the evidence of Master P as unreliable.
  - (d) The Commissioner erred in rejecting the entirety of Mr Beard's evidence.
  - (e) The Commissioner erred in rejecting the evidence of Miss B.
  - (f) The Commissioner accepted the evidence of Mr Violanti with the exception of the elements relating to the allegation of drug handling and stealing by Mr Porter. However, the Commissioner contradicted that finding by finding that Mr Porter may have consumed alcohol on the premises early in 2013, but then did not accept the evidence of Mr Violanti that he warned Mr Porter regarding the incident. It is also stated that this finding was against the evidence given by Mr Violanti.
  - (g) The Commissioner concluded that the real reason for terminating Mr Porter was that the relationship between him and Mr and Mrs Violanti deteriorated from the point at which Mr Porter refused to purchase or lease the business from Mr and Mrs Violanti is against the weight of the evidence.
  - (h) The Commissioner's finding that Mr Porter was not dismissed for stealing was against the weight of evidence and was based solely on the Commissioner's own opinion or thoughts and not supported by evidence and the evidence of Mr Porter's past employment behaviour prior to January 2013 and length of service.
  - (i) Mr and Mrs Violanti were not given an opportunity to comment or respond to the Commissioner's thoughts in regard to why Mr Porter was kept on for a week after he had been found stealing. The question was put to Mr Violanti in cross-examination by Mrs Porter (Mr Porter's mother) and Mr Violanti explained that the police had advised him to give Mr Porter one week's notice. Yet, that part of Mr Violanti's evidence was not excluded as being accepted by the Commissioner.

- (j) The Commissioner erred in giving weight to the evidence of Mrs Porter which evidence was based wholly on hearsay or her own opinion and was not given by Mr Porter in his own testimony when he had the opportunity to do so and was given after Mrs Porter had the benefit of hearing Mr Porter's testimony.
  - (k) The Commissioner erred in her understanding or her summary of Mrs Porter's evidence in relation to the proposed purchase of Mr and Mrs Violanti's business when the evidence of Mrs Porter on this point was based on belief and supposition only.
  - (l) The Commissioner erred in giving weight to the evidence of Mrs Nelson (Mr Porter's grandmother) which evidence was hearsay and was not given by Mr Porter when he had the opportunity to do so in his own testimony.
  - (m) The Commissioner erred in not giving any weight to the evidence of Mr Violanti in response to the issue raised by Mr Porter with regard to selling the business to Mr Porter despite the Commissioner not excluding her acceptance of that evidence of Mr Violanti.
  - (n) The Commissioner erred in her understanding or her summary of Mr Violanti's evidence regarding the drugs on the shop premises.
  - (o) The Commissioner erred in her understanding of the evidence of Mr Violanti where Mr Violanti stated that his wife had raised the issue with him about Mr Porter taking money from the till and Mr Violanti not wanting to believe that to be the case because he had treated Mr Porter as a surrogate son.
  - (p) The Commissioner erred in taking into consideration in her reasons for decision matters that were raised at the hearing solely in relation to Mr Porter's unpaid entitlements.
- 20 These particulars are a summary of the particulars set out in ground 3, paragraphs 1 to 17, of the grounds of appeal. The particulars set out in ground 3, paragraphs 18 and 19, raise a complaint that the Commissioner did not inform the parties until the evidence had closed that the Commissioner did not have jurisdiction to rule on Mr Porter's claim for contractual benefits. As this was not a matter raised in the written and oral submissions by the parties, these reasons do not deal with this issue. Further, this issue does not appear to relate to the central argument raised in ground 3 of the grounds of appeal that seek to challenge evidentiary findings made by the Commissioner.
- 21 In ground 4 of the appeal it is pleaded that the Commissioner erred in the application of law in that she failed to apply the appropriate case law for circumstances where an employee is dismissed for misconduct, in particular it is pleaded that the Commissioner ought to have applied the test in *Bi-Lo Pty Ltd*.

**Matters stated in the application and notice of answer and counter-proposal**

- 22 In Mr Porter's notice of application he states that his employer accused him of stealing when he had not done so and that his 'boss' had refused to show him any evidence that he was stealing.
- 23 In the notice of answer and counter-proposal it is stated that:
- (a) the decision was made to terminate Mr Porter's employment based on a number of warnings regarding unacceptable behaviour over the previous months prior to the termination of employment beginning in or about January 2013;
  - (b) at least two of the warnings ought to have resulted in instant dismissal without notice, but they were prepared to give Mr Porter opportunities to rectify his behaviour because they had trained him up with a view of him taking over the shop within the next 12 months so that they (Mr and Mrs Violanti) could retire;
  - (c) a first warning was given in January 2013 after Mrs Violanti informed Mr Violanti that Mr Porter had been consuming alcohol on the premises during working hours; and
  - (d) a second warning was given sometime after the middle of May 2013 after Mr Violanti was informed by a customer of the shop, and the father of an employee, Miss B, that Miss B had told him that she had seen Mr Porter pass a bag of marijuana to the delivery driver in the cool room of the shop.
- 24 Although it stated in the notice of answer and counter-proposal that a third warning was given for cash in the till not reconciling, it is apparent from the matters stated in the notice of answer and counter-proposal and the evidence given in the proceedings before the Commission that there was not a third warning, but this incident was the incident that Mr and Mrs Violanti say resulted in the termination of employment of Mr Porter. The notice of answer and counter-proposal is in a narrative form and appears to be written on behalf of Mr Violanti who relevantly states as follows:

Over the period of about 8 weeks in April and May 2013 the cash in the till did not reconcile with the till reports, yet the total of the carbon order dockets did reconcile with the cash on hand.

On the night of 22 May 2013 I returned from my usual delivery shift for the night and commenced reconciling the takings for the night. There was a deficit of about \$230 to \$240 in cash on hand compared to what the till had recorded. As this was quite a substantial amount to be missing I reconciled the carbon copy of the order dockets, this time putting them into numerical order also which I did not do on previous occasions. Not all the dockets were present i.e. when put into numerical order there would be a number missing every so often which should not be the case.

Liam is solely responsible for operating the till. I advised Liam of his failure to reconcile the till, the missing cash and the missing dockets.

I did not accuse Liam of stealing. However, Liam's failure to reconcile the till and failure to account for the missing dockets together with his previous serious offences gave me no choice but to dismiss him.

The Applicant worked out the week's notice which meant he was required to be in the possession of a key to perform his duties as required. On the completion of the Applicants shift on Friday 31 May 2013 I took possession of the key and paid the Applicant his wages in cash.

### The central issues raised in the grounds of appeal

- 25 The appellant says there are four issues raised in the grounds of appeal which constitute appealable errors committed by the Commissioner. These are:
- (a) An erroneous construction and application of s 26(1)(b) of the Act in a manner that was critical to the Commissioner's approach to fact finding and caused it to miscarry.
  - (b) An erroneous characterisation of significant portions of evidence-in-chief led on behalf of Mr and Mrs Violanti as having been the subject of 'leading questions' with the consequence that the evidence given by the witnesses concerned was necessarily unreliable and/or of no probative force or weight. Further, even if any of the questions asked in examination-in-chief were leading, which is denied, the Commissioner is not bound by the rules of evidence. Therefore, ipso facto, even if the questions put to the employees could be said to be leading it does not follow that their evidence could be regarded as having no probative value.
  - (c) A failure to make sufficient or proper findings on the facts deposed to by significant portions of evidence led on behalf of Mr Porter and accordingly, a failure to properly:
    - (i) accord Mr and Mrs Violanti procedural fairness; and
    - (ii) discharge the Commissioner's jurisdictional task under the Act.

The Commissioner's assessment of the reasons for the basis of the dismissal of Mr Porter was a theory that was based on no more than speculation and guesswork and ought to not itself have been given any probative value. In particular, the finding that Mr Porter was dismissed because Mr Violanti was unable to get him to engage in a transaction to take over the running of the lease of the shop with a view to buying it had somehow a causative connection with dismissal was not sourced in any direct evidence and revolved around a speculative guess and nothing more.
  - (d) A failure to apply the correct approach to fact finding in unfair dismissal applications where an employer at first instance asserts misconduct on the part of an employee.

### Conclusions

#### (a) Leading questions – Legal principles

- 26 A leading question is a question that suggests the answer or contains the information that the questioner seeks to adduce as evidence or assumes information the existence of which the witness has not given evidence before the question is asked: Glissan J L QC, *Advocacy in Practice* (5<sup>th</sup> ed, 2011) (4.6). Importantly, the answers to leading questions in examination-in-chief or re-examination are not inadmissible in evidence: *R v Wilson* (1913) 9 Cr App R 124. However, little weight may be given to an answer to a question that is leading because of collusion or because of the impropriety of suggesting the existence of facts which are not in evidence: Heydon J D, *Cross on Evidence* (6<sup>th</sup> ed, 2000) [17150]. Thus, the prohibition on leading questions is directed to the conduct of a fair hearing.
- 27 It is non-objectionable to ask questions which are leading in form for the purpose of directing the attention of the witness to a particular topic, but such a question must not suggest the answer required. Such questions enable the witness to be taken to the real matters in dispute. The general rule is that in examining one's own witness, no leading questions must be asked, but that on material points one must not lead his or her own witness but that on points that are merely introductory and no part of the substance of the inquiry one should lead: *Maves v Grand Trunk Pacific Railway Co* (1913) 14 DLR 70, 74 - 75. A question is objectionable as leading when it suggests the answer, not when it merely directs the attention of the witness to the subject matter respecting which he or she is being questioned. Further, 'leading' is a relative not an absolute term. There is no such thing as 'leading' in the abstract, for a question in an identical form in one matter might constitute leading but in another subject matter, the question might be unobjectionable because it is not in dispute, or it is not an issue in dispute: *Maves* (74).
- 28 Whilst a witness must not be shown the answer that is expected by a question, he or she ought to be given the clearest possible indication of the point on which his or her evidence is required: Munkman J H, *The Technique of Advocacy* (1986) (42). Thus, the questions must point the witness in such a way to the subject matter in question that allows the witness to give their answer in their own words.
- 29 The main exceptions to the prohibition on leading during examination-in-chief and re-examination are conveniently summarised by Glissan at 4.8:
- There are numerous exceptions to the prohibition on leading during examination-in-chief (and re-examination). The main exceptions are:
- (1) A witness may be (and should be) led on the formal and introductory parts of his or her evidence. This is commonsense, saves time and allows easy establishment of background detail.
  - (2) Leading is permitted to establish undisputed or non-contentious matters. This ordinarily requires the consent of your opponent, or an understanding of the precise extent of the agreement. Even so, there may be sound tactical reasons for not using leading questions to adduce non-contentious matters.
  - (3) Matters already given in evidence by the witness may be led. This exception is very important and useful for techniques of presentation where problems occur, such as building from 'fortresses', piggy-backing and bringing the witness back to the issue.
  - (4) Leading questions may be asked to direct a witness' mind to a particular point or issue, such as the identification of a person or thing in court (*R v Watson* (1817) 2 Stark 116; 171 ER 591) or details of a letter or members of a partnership. (For the dangers in identification cases, see *Davies and Cody v R* (1937) 57 CLR 170; *R v Domican* (1992) 173 CLR 555.)
  - (5) A question may be asked which is leading in form for the purpose of directing the attention of the witness to a particular topic, but such a question must not suggest the answer required.

- (6) Counsel is always entitled to lead a witness to a denial or to evidence in contradiction of another witness. The evidence to be denied may be put clearly and fully: *Edmonds v Walter* (1819) 3 Stark 7.
- (7) Leading questions may be employed where it is desired to direct the witness' mind to particular points which are vague in the testimony of that witness when given in response to non-leading questions: *R v Hodgson* (1924) 18 Cr App R 7; *R v Duell* [1984] Qd R 451 (CCA).
- (8) Leading questions have been allowed 'to expedite trial without injustice' - sometimes to an extraordinary extent. In the bizarre case of *Ex parte Bottomley* [1909] 2 KB 14, a magistrate in a part-heard case became ill. Each witness was recalled before a new bench, and his or her previous evidence read over in the form of a long leading question. This was approved on the above principle by Phillimore J, who said (at 22):

... it will be for him to consider whether he thinks it desirable that some particular witness should be called and examined in some particular manner; whether the reading of the cross-examination of any particular witness should be postponed till after his examination is taken viva voce; or whether the whole or any part of the evidence of any particular witness should be taken orally de novo.

This confirms a very broad judicial discretion as to leading; see *Cross on Evidence*, Australian ed, para 17145:

... Probably witnesses who are frightened, ignorant, very young, mentally feeble, or not fluent in English may more readily be led than others. Wigmore stated a wider exception:

'Where the witness is unable without extraneous aid to revive his memory on the desired point - ie, where he understands what he is desired to speak about, but cannot recollect what he knows - here his recollection.. being exhausted, may be aided by a question suggesting the answer. The trial judge's discretion must be relied upon to prevent imposition'. (Wigmore V3 para 777)

There seems to be no leading case suggesting that the law goes so far, though Best agreed; the technique is often employed in practice, and this illustrates the width of the judge's general discretion to control the form of questions.

- (9) A further exception more commonly met in practice is what has become known as the rule in *Thynne's* case (above) which arises from the decision of Sir Owen Dixon in *R v Neal* [1947] ALR (CN) 616. The thrust of the rule is that a judge may give limited leave to counsel to cross-examine a witness without declaring that witness hostile.

30 To ascertain whether a question is objectionable as leading depends upon what the matters are in dispute. For example, a leading question might be, 'You were at work on 20 June 2013 in the afternoon when Mr Smith came into the shop.' If, however, it is not in dispute that the witness was at work in the afternoon on that date when Mr Smith came into the shop no objection could properly be made to such a leading question. If, however, it is in dispute whether the person was at work or whether Mr Smith came into the shop on that afternoon, the following questions would be regarded as non-leading, 'Where were you on 20 June 2013 in the afternoon?' If the witness says they were at work, the next question should be, 'Did someone come into the shop that afternoon?' Questions such as, 'Tell us what happened on 20 June 2013 in the afternoon' are to be avoided as such questions allow a witness to stray into irrelevant matters or forget important details: Glissan (4.7).

(b) **Did the questions asked of Miss B, Master P and Mr Beard infringe the prohibition on asking leading questions in examination-in-chief or in re-examination?**

31 In order to answer this question it is necessary to review the entirety of the evidence given by each of these witnesses when they were asked questions by counsel for the respondent.

32 Miss B's evidence was that she observed Mr Porter and another employee, Elias, pass between them a parcel that appeared to contain drugs. The examination-in-chief proceeded as follows:

**MAYMAN C:** Now, what I've done, [ ], is I've brought a friend of the court in and her name is Sue, but she's to help you. So that if you get into difficulty, if you feel a bit lost in here, then rather than me having to help you, that's - that's Sue's job. All right? And that's what she's here for?---Okay.

All right. Thank you.

Thank you.

**MOUNTAIN, MS:** Thanks, [ ]. Would you prefer to stand or sit while you - -?---I can stand.

You can stand. Thanks. [ ], you're a student at Waikiki?---No, Warnbro High.

I beg your pardon?---I'm a student at Warnbro High.

At Warnbro. I beg your pardon. And do you also work?---Yeah.

Can you tell me about your job?---Yeah. I work at Kwinana Pizza as a counter - like, I do the phones and like, take people's orders.

And that's part-time?---Yeah.

Obviously if you're a student you're not working there fulltime. And you have another interest aside from school and working at the shop with - associated with the police?---Yeah.

Can you just give us a little bit of information about that?---It's like police cadets, so you just - what do I say about it?

No, that's fine. So you're a police cadet?---Yeah.

As well as a student and a part-timer at the shop. B, are you aware at any time that you have - or first of all, when did you start at the Kwinana Pizza shop?---I'm not quite sure, but it was about six or seven months ago.

Okay. And you were there at the same time that Mr Porter was there working?---Yes.

So you got to know Mr Porter?---Yeah.

Yes. And can you tell me anything that you observed during that time that you believe Mr Porter may have been given a warning for?---No, I can't. The only -- was the playing around in the cool room, that was the only bit, with the - - -

Yes, you'll need to give that information?---Yeah. Yeah, that was - - -

The - the court doesn't know about that?---Okay.

So that's - that's what you need - you just need to tell your story about what you observed?---Okay. Sorry. Well, him and the delivery guy at the time were - - -

So Mr Porter and?---I think his name was Elias.

Elias - - -?---And he was - - -

- - - who was the deliveryman?---Yeah. They were just talking about parties and stuff like that and then - and then the phone rang so I just went and then did my work and then I went in the cool room, I think it was to get my drink bottle, I'm not sure, and they were handing over what looked like drugs and then I just went straight back out and went - did my work again and then the delivery driver at the time was - he told me to go to his car and I got a CD off of him and then he took the drugs out of his pocket and, like, put it in his wallet, so at that time I seen it. I'm not quite sure what it was but - - -

Okay. So when you - when you saw it a bit closer, the - when he took it out of his pocket and you thought it was drugs, why did you - why did you think it was drugs?---Well, they were talking about it at the start and it - it just looked like it. It was growny-breen [sic] - like, brown and green, so it - yeah, so it - - -

So what sort of drugs did it look like? Did - can you - - -?---Probably weed.

**MAYMAN C:** Careful of leading.

**MOUNTAIN, MS:** Why - are you able to say why you - you - why you thought that? What - - -?---It was the way it looked. It was - - -

The way it looked?---Yeah.

And do you - how do you know about the way drugs looked? Are you - - -?---Well, we learn about it at school and everything, yeah.

You learn about it at school, so you know - you - you learnt about drugs at school, is that what you're saying?---(No audible answer).

Okay. So from your view of what you saw, you think that it was drugs. So just going back. If you could just tell me, the parcel that you saw that - that you recognised as marijuana, was that the same parcel that was given - - -

**MAYMAN C:** She didn't say that. Be careful about leading, Ms Mountain.

**MOUNTAIN, MS:** The - let me see how I can put this. Going back to the cool room - - -?---Yeah.

- - - can you link the parcel that you saw Elias - - -?---Yeah.

- - - with the cool room incident?---Yeah. Well, I didn't get, like, a good glimpse of it but I'd still seen enough when they passed it over and then he put it straight in his pocket and then when he walked out, he took it out of his pocket again so - - -

Okay. So were you a bit concerned about that and what did you - what did you do about what you saw that night?---Well, I - I was, like, a little bit concerned but I just didn't say anything on that side and then my - then I told my dad and then my dad was the one that told Ces so - - -

Okay. So you told your dad, and what did your dad say when you told him?---He - he was just a bit shocked and said, 'You know, that shouldn't happen at work', so I didn't know that he was going to go tell Ces but he did anyway.

Okay. And how do you know that he told Ces?---Well, the next day we were talking about it cos Dad had told him before, like, when I - before I was there and then Dad had just asked me what happened and everything.

So Ces asked you about it the next day?---Yeah.

Okay. And you told him the same story that you've - - -?---Yeah.

- - - you've just relayed and that you told your dad, and what did Ces say to you when you told him what you had seen?---He would look further into it cos he wasn't impressed.

He wasn't impressed. Okay. All right, [ ]. That's - that's all the questions I wanted to ask you. Thank you?---Thank you.

[ ] References to the name of Miss B have been deleted in these reasons.

- 33 Miss B was not asked any questions in re-examination by counsel for the respondent.
- 34 It is clear from the transcript of Ms B's evidence-in-chief that the questions asked of Miss B and the answers given by her that the prohibition against asking leading questions was not breached in any manner that can properly be regarded as material.
- 35 Whilst some of the questions asked by counsel commenced with a statement that repeated evidence that had already been given by the witness before a question was put to the witness, such statements do not render the questions put to the witness as leading. It was proper to lead Miss B about the fact that she was a student. When counsel reached the point at which she wished Miss B to give evidence about the alleged exchange of drugs at work between Mr Porter and Elias, the delivery driver, counsel asked the question, 'And can you tell me anything that you observed during that time (when she worked with Mr Porter) that you believe Mr Porter may have been given a warning for?' This question was not leading as it did not disclose information to the witness about what she had observed and the question did not require any information to be provided about whether Mr Porter did or did not receive a warning. When the Commissioner first warned counsel of leading Miss B, no leading questions had been asked. When the Commissioner warned counsel a second time, the Commissioner put to counsel that the witness did not say that she recognised the drugs as marijuana. However, the witness had said she thought what was handed over was brown and green and was probably 'weed'. Whilst the witness did not use the word marijuana, it is

commonly and well known the word 'weed' is a slang term (informal language) for the prohibited plant cannabis. So too is the word marijuana.

- 36 Master P gave evidence that he observed Mr Porter remove money from the till and put the money in his pocket. He also gave evidence that he saw Mr Porter throw away till receipts. When Master P was questioned by counsel, he too was not led in his evidence in respect of any contentious matters. Master P's evidence-in-chief was as follows:

**MAYMAN C:** Now, just before Ms Mountain starts asking you some questions, you've got a woman sitting next to you and her name's Sue, and she's been appointed by me to give you some assistance. If at any stage you are somewhat confused by the questioning then she'll be here to give you some assistance with those questions. All right?---Yeah.

Thank you?---Thanks.

Ms Mountain?

**MOUNTAIN, MS:** [ ], thanks. Could you tell me, are you employed with Kwinana Pizza Shop?---Yes.

And how long roughly have you been employed there?---Two years.

Two years. Are you fulltime or part-time?---Part-time.

And you're otherwise engaged at - - -?---School.

School. So what year are you in at school?---Year 9.

Year 9. Okay. Thanks, [ ]. Was Mr Porter, or you probably know him as Liam - is it okay if I just refer to you as Liam?

**PORTER, MR:** No, go for it.

**MOUNTAIN, MS:** So did you get to know Liam when you were working there?---Yes.

Yes. And would you be able to tell us if there were any incidences that occurred that you observed in the shop that you believe would have resulted in a - in Liam receiving a warning about his behaviour in the shop?---Yeah. He, like, took money out of the till and - - -

How do you know that?---I watched him. Like, I - when we were cleaning up at night and Ces wasn't around, that we were packing up and I've come across him at the till counting notes, \$50 notes and then he put some in his pocket.

Okay. So you saw \$50 notes going into his - - -?---Yeah.

- - - pocket. Was there anything else that you observed that you can tell us about?

**MAYMAN C:** Ms Mountain, can I just wind you back a bit. He didn't say he saw them going into his pocket. You've just said that.

**MOUNTAIN, MS:** I beg your pardon.

Did you - - -

**MAYMAN C:** Did you put words into his mouth?

**THE WITNESS:** No. I just said I - I just said he put them in his pocket.

**MAYMAN C:** Did you?---Yeah.

I beg your pardon. I'm sorry?---It's all right.

**MOUNTAIN, MS:** Sorry, [ ]. Was there anything else that you observed - - -?---Yes.

- - - while you were working there?---I saw him at the slips on the little docket station we got. He took, like, a couple out and sorted them out and then threw a couple away.

Okay?---A - a couple of notes.

Okay. So - and you thought that was a bit odd, did you - - -?---Yeah.

- - - that - that he would be going through the - the dockets?---Yes.

Okay. Did you say anything to him or did he say anything to you?---I asked him and he - I was like, 'why are you doing that', and he's like, 'oh, they're just false - false dockets', and I was like, 'All right'.

Okay?---Just (indistinct 12.56.15) that.

Okay. Did you mention this behaviour to anybody?---Not really. I said to Em that he was stealing but, yeah, just - yeah, he was stealing, not really taking the dockets. Just he took some money.

Okay. So you didn't mention about the dockets. Did you - Em is - perhaps if I can just explain to Commissioner. Em is what the staff call Mrs Somsri, I believe, the - one of the owners of the business?---Yes.

Yeah. Okay. Sorry, Mrs Somsri Violanti. So you - you know her as Em?---Em, yeah.

Okay. Is there anything else you can tell us, [ ], about the time that you were working at the shop? Was there anything else that may have resulted in - or what you think may have resulted in a warning?---He - when I - different occasions, like, many occasions when I went into the cool room and got my drink and had a drink, he's had a couple, like, cases of beer there and he's occasionally cracked one open.

Okay?---And drank it in there.

Can you tell us whether - the timing of that? Was it during or after - - -?---During work.

- - - work hours?---Yes.

It was during work hours, was it? Okay. Is there anything else you want to say, [ ]?---No.

No. Okay. Thank you very much.

**PORTER, MS:** Okay.

**THE WITNESS:** Yeah, that he also - - -

**MAYMAN C:** Sit down for a moment.

**THE WITNESS:** Sorry.

**MAYMAN C:** No, no, that's all right.

**THE WITNESS:** Also went to the bag as well.

**MOUNTAIN, MS:** Okay. Can you explain that a bit more, a bit - - -?---He - Ces keeps some extra money over in the corner that - so if he needs it through the night. I've - saw him there going - going through the bag as - as well.

Okay. And did you say anything or do anything at that time?---I said - what did I say? Sorry. Just - -

No. That's okay. I mean if you don't - if you don't remember saying anything or doing anything, that's - that's fine. You can - okay. All right. Thanks. Thanks very much, [ ].

- 37 Master P's evidence in re-examination was as follows:

[ ], thanks so much for that. Just one thing that I think there may have been a little bit of confusion on. When these incidents about the dockets and the cash were happening, when was that?---Somewhere between the - maybe like April, May. I don't know.

No, sorry, I - I beg your pardon. I - I actually mean what time of the day or night?---Oh, night Rough - - -

And I don't mean the exact time but in the procedures of - - -?---Roughly between six and probably 8.30 cos that's - at 9 o'clock. I work till - six to nine - - -

Yeah?--- - - with - - -

Okay?---Still with Liam so - - -

Yeah?--- - - - between then.

So at that time of the evening, what are the actual - what's going on in the shop? Where's - where's Mr Violanti at that time, for instance?---At that time, he was on delivery.

So Mr Violanti's out on deliveries and if it's that time of night, is it getting close to - - -?---Pack up.

- - - closing time?---Yes.

And so what are the other staff doing?---They were cleaning up.

Okay. And - - -?---As we all do.

- - - were there any customers in the store?---No.

Okay. Thank you very much, [ ].

[ ] References to the name of Master P have been deleted in these reasons.

- 38 The only question that was put to Master P that was a leading question was after the witness said he saw Mr Porter throw a couple of dockets away, counsel said, 'and you thought that was a bit odd, did you?' The witness replied, 'Yeah.' Whilst this question was plainly a leading question, this question in the context of the entire evidence given by the witness was not a question of the nature that could be said to render the entire examination of the witness to be unfair and thus properly ground a decision by the Commissioner to exclude the whole of his evidence. Nor could it be found on this basis that Master P's evidence was unreliable. It was simply a question from which the witness could be directed to the issue whether anything occurred after he witnessed the action of Mr Porter. The only relevance as to whether the witness thought the disposal of the dockets was odd was to the next question which was asked which was, 'Did you say anything to him or did he say anything to you?' This last question was plainly not a leading question.
- 39 Mr Beard was a friend of Mr Porter and the boyfriend of Mr Porter's sister. Mr Beard was also an employee of Mr and Mrs Violanti. Mr Beard gave evidence that Mr Porter told him that he had stolen money from work. Mr Beard's evidence in examination-in-chief proceeded as follows:

Matthew, what is your occupation?---Pizza maker.

Okay. And where do you work?---Sorry - Kwinana Pizza.

Kwinana Pizza. And how long have you worked there?---About five or six months.

Five or six months. Okay. And are you doing a traineeship - - -?---Yep.

- - - at the moment?

**MAYMAN C:** Pardon? Are you?---Yeah. Yep.

Yes.

**MOUNTAIN, MS:** During your traineeship, Matthew, what hours are you actually required to work at - at the pizza shop, what does Ces ask you to work at the pizza shop each week?---3 to 5.

3 to 5?---On Tuesday, Thursday, Friday, Saturday. And Monday and Wednesday at 5.

Monday/Wednesday 5 to?---9.

5 to 9?---Yep.

I believe you actually work different hours to that - - -?---Yep.

- - - is that at your own request?---Yep.

Okay. Can you say what hours you work because you have requested different hours?---Yep. 12.30.

To when?---Till about 3.30 - 4.

And what days are they?---Tuesday, Thursday, Friday, Saturday.

And what about on Wednesday?---No. I don't do the doughs.

You don't work Wednesday at all?---I do but I don't do the doughs on Wednesdays, so I come in at 5.

You go in at 5 on Wednesday. Why don't you do the doughs on Wednesday?---Just my hours, that's how they were when I started.

Sorry, who does the doughs on Wednesday then if you don't - the shop is open on Wednesdays - - -?---Yeah.

- - - is the shop open on Wednesday?---Yeah. Yep.

Who does the doughs on Wednesday when you don't do them?---Ces sometimes does or I do them the next day.

Okay. Thanks. And during the hours that you work that you've requested to start at 12.30 - - -?---Yep.

- - - do you have a break during the day?---Yep. As soon as I finish the - -

Making the dough - - -?---Making the dough and cleaning up the place.

Okay. So on a normal day - - -?---Yep.

- - - except for the Wednesday when you don't make the dough - - -?---Yep.

- - - what do you actually work at the pizza shop?---12.30 till 9.

Yeah. Sorry, can you tell me about your break?---Oh yeah. I have a break until about 4.15.

Okay. And what time do you normally take your break?---Depends on when I finish - - -

Yep?---It varies. Like, it depends on how fast I do the dough.

Okay?---So, on average, about an hour.

Okay. So you have a break in the middle of the day - - -?---Yep. About 3 - 3.30.

At about 3 - 3.30. Despite the fact that you commenced work - actually, did you work at any - at all - at any time with Mr Porter?---Yep. For a week.

For one week, when he was - - -?---It was one week but I only worked with him for two days.

Okay. So you worked with him for two days?---Yeah. One half day and one full day.

Okay. Matt, can you tell me how you got your job at Kwinana Pizza shop, did you know Mr Violanti prior to getting your job?---In a way. I used to talk to him when we picked up Liam from work and - - -

Okay?---I talked to him now and again.

Okay?---From the car.

And did Mr Violanti assist you in any way prior to getting your job at the pizza shop?---Yes, he did. He tried taking me to a friend of his in - I don't remember where it was but he tried asking his friend if he could give me a job because I was currently unemployed because I lost my job through the company going bankrupt. So - - -

Okay. So he was trying to find you a job somewhere else, and you weren't successful with that job?---It didn't need me because of the hours - because there was too many hours - the job - like, night-time when it finishes and there was no way for me to get home, so they said it wouldn't be best.

Okay. Fine. Are you aware of any reasons that Mr Porter would have been given a warning for serious behaviour or any reasons that his - his employment would have been terminated with Kwinana Pizza Shop?---Probably drinking at work.

Drinking at work?---Probably stealing.

When - well, probably stealing?---Yeah.

What do you mean by 'Probably stealing'?---Well, I've been told that he was stealing.

Okay. Who told you that?---Liam did.

Lim [sic] himself told you that. What did Liam say to you?---That he'd stolen from work from money that was owed to him.

Okay. So Lim [sic] said he stole money from work?---Yep.

But then added to you that it was of money owed to him?---Yep.

Okay. Did he say how he stole it?---He just said he took it from his till. He would take the slips and he would drive away and keep the money.

Okay. Do you know what he means by that? Working there - when he says take the slips, what - what does that mean?---When he works out the front.

Okay?---When he's doing the cashier part.

And the slips, can you explain what the slips are?---The - the slips are dockets that you get when you place an order you write down what they want and then you keep the yellow stuff and that's what the receipts are.

Okay. All right. So the dockets are showing what people have ordered and paid - - -?---Yep.

- - - for a pizza. And Liam said that he would take the - take the slips - - -?---Yep.

- - - and throw them away. And he took money from the till?---The till, yep.

Okay, thank you. Matthew, can you tell me were you intimidated or in any way threatened to give evidence here today?---No, I wasn't.

By anybody at all?---No.

What would you say the relationship is at work between you and Mr and Mrs Violanti? Is it friendly? Do you - do you think that Mr Violanti is a reasonable - - -?---Yeah.

- - - employer?---He's definitely reasonable, yep.

He's reasonable, yes. Do - do you find him intimidating?---No, not really.

And he has never threatened you - - -?---No.

- - - with loss of job or anything else?---No.

Okay. Thank you very much?---Thank you.

- 40 Mr Beard's evidence in re-examination was as follows:

Just in relation to the signing of your daily records?---Yep.

May I hand up this book to Matthew please, to just refresh him regarding how the bookkeeping is kept at the Kwinana Pizza Shop?

**MAYMAN C:** He's just given evidence he doesn't sign for them.

**MOUNTAIN, MS:** Yes, I believe he's mistaken. I think - - -

**MAYMAN C:** Well, he just gave evidence he didn't sign for them. What do you mean he's mistaken?

**MOUNTAIN, MS:** No, what he's mistaken - what the - he doesn't get pay - separate - separate payslips is I think what he was confused about.

**MAYMAN C:** I just wrote down, are you signing for your wages? No.

**MOUNTAIN, MS:** I think - well, can I examine him about that, please?

**MAYMAN C:** All right, okay.

**MOUNTAIN, MS:** The question was do you sign for your wages?---Yep.

There is a difference between signing for your wages and receiving payslips or signing for payslips?---Yep.

If you have a look at that book - - -?---Yep.

- - - can you tell me whether you signed for your wages?---Yeah.

Okay. Did you understand the question that was asked of you about do you sign for your wages? Did you understand that to mean signing a wage book or did you understand it as meaning as receiving payslips?---I understood it as payslips.

**MAYMAN C:** You're leading.

**MOUNTAIN, MS:** Payslips, okay?---Yeah. I thought this was completely different.

Okay. So having looked at that now - - -?---Yeah.

- - - you understand that the question was actually do you sign for your wages.

**MAYMAN C:** Are you leading, Ms Mountain?

**MOUNTAIN, MS:** It's a - - -

**MAYMAN C:** Are you leading?

**MOUNTAIN, MS:** It's a re-examination, Commissioner.

**MAYMAN C:** All right.

**MOUNTAIN, MS:** Thank you. That's all, thanks.

**MAYMAN C:** I don't even know what he's looking at. I don't know what he's looking at.

**MOUNTAIN, MS:** Sorry, would you pass the book to the Commissioner, please?

Thank you.

**MAYMAN C:** All right. Your evidence is concluded, Mr Beard. You may step down?---Thank you.

- 41 Although it could be said that the witness was led in re-examination about whether he 'signed for his wages', this is a matter that the Commissioner could have had regard to when assessing the credibility of the witness, but the leading questions in respect of this issue could not be found to have rendered the entire evidence of the witness to be unreliable. In any event, the Commissioner only disregarded the evidence given by Mr Beard on grounds he was led during examination-in-chief. She did not refer to the evidence given by Mr Beard in re-examination. However, it is plain from the transcript of the evidence given by Mr Beard that Mr Beard was not led in his evidence-in-chief in respect of any matter that was contentious. All that counsel did was when asking questions of the witness about the confessional statements made by Mr Porter, was that she repeated the evidence of the witness before asking another question. For example, after the witness said, 'Well, I've been told that he was stealing', counsel asked, 'Okay. Who told you that?' The witness replied, 'Liam did.' Counsel then repeated that evidence by saying, 'Lim [sic] himself told you that', and then counsel asked, 'What did Liam say to you?' This method of questioning is not leading.
- 42 For these reasons, except insofar as ground 1 pleads a breach of procedural fairness, clearly the Commissioner erred in law in finding that witnesses Miss B, Mr Beard and Master P were led and in giving no weight to their evidence solely on the basis of the manner in which the questions were put to them by counsel. For these reasons, I am of the opinion that ground 1 of the appeal has been made out.

(c) **The Commission should not act upon evidence that is not logically probative**

- 43 Whilst the Commissioner correctly observed that the Commission in the exercise of its jurisdiction is pursuant to s 26(1)(b) of the Act not bound by the rules of evidence, but may inform itself on any matter in such a way as it thinks just, this provision is to be construed as the Commission should, when finding facts, act on material that is rationally probative. In *Kingstyle Investments Pty Ltd v Lawson* [2013] WAIRC 00355; (2013) 93 WAIG 493 [56] -[58]. I, with whom Beech CC and Mayman C agreed, applied the observations and authorities considered by Brennan J in *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33; (1979) 36 FLR 482, when his Honour considered the effect of s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth), which in substance contained the same statutory command as s 26(1)(b) of

the Act. In *Pochi*, Brennan J directly raised the question of how are facts to be proved and how is the sufficiency of proof to be determined when there are no rules of evidence. His Honour then went on to find (491 - 493):

Section 33(1)(c) of the *Administrative Appeals Tribunal Act* provides that: 'the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.' Although the Tribunal is governed by statute in the approach which it must take in assessing the evidence, and the Minister is not, I do not know that the statute confines the Tribunal to an approach which is more restricted than the approach which the Minister might properly take in assessing the same evidence.

The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force', as Hughes C.J. said in *Consolidated Edison Co. v. National Labour Relations Board* ((1938) 305 U.S. 197, at p. 229). To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J. pointed out, though in a dissenting judgment, in *The King v. War Pensions Entitlement Appeal Tribunal; Ex parte Bott*: 'Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, "bound by any rules of evidence". Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice" ((1933) 50 C.L.R. 228, at p. 256). That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence. Diplock L.J. in *R. v. Deputy Industrial Injuries Commissioner; Ex parte Moore* ([1965] 1 Q.B. 456) said: 'These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue' ([1965] 1 Q.B., at p. 488). Lord Denning M.R. in *T. A. Miller Ltd. v. Minister of Housing and Local Government* said much the same: 'Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law' ([1968] 1 W.L.R. 992, at p. 995), and he repeated that observation in *Kavanagh v. Chief Constable of Devon and Cornwall* ([1974] 1 Q.B. 624, at p. 633). In the United States where considerable judicial attention has been given to fact finding by administrative tribunals (see Schwartz, *Administrative Law*, Boston, 1976, pars. 115 et seq.), substantially the same principle has been expressed. It was thought, at one time, that the *Consolidated Edison* judgment ((1938) 305 U.S. 197) required that some legal proof had to be adduced, and that hearsay evidence alone could not support an adverse finding (see Schwartz, par. 118). But in *Richardson v. Perales* ((1971) 402 U.S. 389) the *Consolidated Edison* case was construed in this way: 'The contrast the Chief Justice was drawing ... was not with material that would be deemed formally inadmissible in judicial proceedings but with material "without a basis in evidence having rational probative force". This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case' ((1971) 402 U.S., at p. 407).

The majority judgments in *Bott's* case show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not. Starke J. said: 'The Appeal Tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent medical opinion, for instance, upon oath, and whether cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence, and is authorized to act according to substantial justice and the merits of the case' ((1933) 50 C.L.R., at pp. 249-250).

44 In *Secretary to the Department of Human Services v Sanding* [2011] VSC 42, Bell J recently pointed out [133]:

The material which may properly support a decision of a court or tribunal can legitimately come from a variety of sources, might occupy different points along a spectrum of probative force and reliability and, depending on the issues and circumstances, might require different treatment. Hearsay evidence is admissible if it is fairly reliable, although the weight to be given to it will need to be considered (*TA Miller v Minister of Housing and Local Government* [1968] 1 WLR 992, 995. This approach was applied by Barnett J in *Re Frances and Benny* [2005] NSWSC 1207, [7] in a case concerning the statutory powers of the Children's Court of New South Wales). Evidence which is not the best evidence may be admitted, but if it is challenged and the issue is important it is the best evidence which may be required (*Re Barbaro and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1, 5 per Davies J.). The court or tribunal may act on written submissions containing assertions of fact, and statements made from the bar table by the parties or their legal representatives, but if the asserted facts are in serious dispute and concern important issues, it may be necessary to insist on much more (*Wajnberg v Raynor and Metropolitan Board of Works* [1971] VicRp 82; [1971] VR 665, 678-679; *R v Commonwealth Conciliation and Arbitration Commission; ex parte Melbourne and Metropolitan Tramways Board* [1965] HCA 50; (1965) 113 CLR 228, 244).

45 In *Barbaro v Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 1, 5; [1980] AATA 76 Davies J relevantly observed:

In informing itself on any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that that material is not the best evidence of the matter which it tends to prove.

But the Tribunal does not lightly receive into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a right to appear and be represented carries with it an implication that, so far as is possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided that the testing of the evidence seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits.

- 46 From these observations, the following points can be distilled as applicable to the finding of facts in this Commission in applications made under s 29(1)(b) of the Act:
- (a) in accepting material to justify orders, that material must have rational probative force;
  - (b) facts can be found without demanding adherence to the rules of evidence, but a Commissioner must base his or her decision upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or the likelihood or unlikelihood of the occurrence of some event, past or future;
  - (c) whilst the Commission is not bound by the rules of evidence, that does not mean all the rules of evidence should be ignored. Examples of rules of evidence that should not be ignored are the rules in *Browne v Dunn* (1894) 6 R 97 (HL) and *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 which are rules designed to ensure a fair trial: see the discussion in *Singh v Dhaliwal Pty Ltd* [2013] WAIRC 00133; (2013) 93 WAIG 197;
  - (d) although tribunals can act upon hearsay, it should be given little weight if it is not sourced or no supporting evidence is adduced: *Pochi*; and
  - (e) the Commission should not receive into evidence, or rely upon challenged evidentiary material, where the matter is important, of which there is or should be better evidence.
- 47 The information on which a court or tribunal may act must form a proper basis for the decision. The information can only do that if it is logically probative, reliable and relevant and the parties have been given an adequate opportunity to comment on it.
- 48 As the learned author Forbes J R S in *Justice of Tribunals* (4<sup>th</sup> ed, 2014) points out in respect of relevance (207):

The principle of relevance binds everyone who determines rights according to public or private law. If a tribunal disregards relevant information, or acts on irrelevant information, its decision is apt to be set aside (See paragraphs [6.29] ff, above; *Merivale Hotel Investments Pty Ltd v Brisbane Exposition Authority* [1988] 2 Qd R 562; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40; *Citibank Ltd v FCT* (1988) 88 ATC 4714. But this rule is not infringed merely because a court may take a different view on a question of weight: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, above at 41; *Holmes v DCT* (1988) 88 ATC 4328 at 4339-4341; *Wajnberg v Raynor* [1971] VR 665 at 678. Where a power is expressed in very general terms it is usually left to the decision-maker to decide what is relevant and what is not: *Tomkins v Civil Aviation Safety Authority* (2006) 91 ALD 645; [2006] FCA 1253). A rule allowing a tribunal to 'take such evidence and hear such argument as it thinks proper' does not justify arbitrary neglect of relevant evidence or capricious reliance on irrelevant material (*Brettingham-Moore Municipality of St Leonards* (1969) 121 CLR 509 at 524; *Rose v Boxing NSW Inc* [2007] NSWSC 20 at [72]).

- (d) **Was the 'reason' for termination of the employment of Mr Porter by the Commissioner founded on rationally logically probative evidence?**
- 49 After:
- (a) accepting the evidence of Mr Porter, Mrs Porter and Mrs Nelson;
  - (b) disregarding the entire evidence given by:
    - (i) Mrs Violanti; and
    - (ii) with the exception of Mr Leahy, the employees of Mr and Mrs Violanti;
  - (c) having made no assessment of or findings about the evidence given by Mr Leahy;
  - (d) accepting the evidence of Mr Violanti except 'the elements' relating to the allegations of drug handling and stealing;

the Commissioner found the real reason Mr Violanti terminated the employment of Mr Porter was that the relationship between Mr and Mrs Violanti deteriorated from the point at which Mr Porter refused to purchase or lease the pizza business.

- 50 Leaving aside the fact that the Commissioner made a substantial and erroneous error in judgment in rejecting the evidence of the employees of Mr Violanti and finding their evidence unreliable (on grounds they were led in their evidence-in-chief and failing to make any assessment of the evidence of Mr Leahy or any assessment of the evidence given by Mr Violanti and Mrs Violanti), when the evidence about a proposal or proposals for Mr Porter to purchase or lease the pizza business is assessed, it is patently clear that there was insufficient relevant and rationally probative evidence upon which such a finding could properly be made.
- 51 In this matter a statement is made in the notice of answer and counter-proposal that Mr Porter had been given two warnings over a period of months from January 2013 but that Mr and Mrs Violanti were prepared to give Mr Porter opportunities to rectify his behaviour because they had trained him with a view to him taking over the shop within the next 12 months (AB 26).
- 52 When Mr Porter gave his evidence-in-chief he made only a vague mention of any proposal put to him by either Mr or Mrs Violanti to purchase the business other than to recount a conversation he had with his grandmother, Mrs Nelson, about this issue. His evidence was (ts 12, AB 74):

Could you - can you remember a conversation you had with your nanna in late 2010 about your future plans?---They were to do with me buying the Kwinana Pizza Parlour.

And what were they, please?---I would buy the business for 280,000 off of Ces.

And did Mr Violanti have any other plans after that?---He was going to retire.

And when that did not happen, was anything else said?---He said Eagle Boys wanted to buy the business, apparently.

- 53 Mr Porter did not say when this conversation occurred. In cross-examination, he was asked, 'So what do you think the reason for your dismissal was then?' and he replied, 'Well, I didn't want to take over the business so he wanted to find someone else' (AB 75). Thus, Mr Porter simply proffered a speculative opinion of the reason for the termination of his employment without any supporting or relevant direct or indirect evidence of facts, in particular evidence of any discussion with Mr Violanti about this issue, upon which reliability of his opinion could be assessed.
- 54 Mrs Porter gave hearsay evidence about a conversation Mr Porter had with her mother, Mrs Nelson, a conversation Mr Porter had with Mr Violanti in 2011 and in early 2013 about purchasing or leasing the business, and a conversation she had with Mr Porter about the price Mr Violanti wanted for the business in late 2010. When giving evidence Mrs Porter stated when questioned by the Commissioner (ts 27, AB 89):
- When Liam would not accept that offer, Mr Violanti came up with another one this year that Liam would rent the business for him - from him for two and a half thousand dollars a week. He would be responsible for the rent of the shop and all outgoings and he would have to employ Mrs Violanti and I believe that when he found out Liam was not going to do this, it could be the reason he was dismissed.
- Why do you believe that?---Because up until Liam's last few months where suddenly he's supposed to have done so many things, he had an exemplary record at work. There'd never been any complaints about him from either bosses and Mr Violanti has been heard on many occasions trying to offload the pizza shop to many people and - - -
- What do you say this document proves in your view?---It proves that I sent the email to Eagle Boys back in 2011. So it goes to show that the story is true and that I haven't just fabricated it now like - - -
- All right. Thank you. So this was 2011 ?---Yes.
- 55 Whilst this hearsay was sourced, in that the makers of the statements were identified, the evidence should have been given no weight, as Mr Porter gave no direct evidence about any discussion he had with Mr Violanti about leasing the pizza business. In addition, this evidence was nothing more than an opinion based upon hearsay and an assertion unsupported by any logically probative material that Mr Porter had informed Mr Violanti sometime in early 2013 that he did not wish to purchase or lease the business.
- 56 Mrs Porter also gave evidence about an email she sent to the state manager of Eagle Boys Pizza on 31 January 2011 about whether Eagle Boys Pizza were seeking to purchase the pizza business from Mr Violanti. A copy of Mrs Porter's email and a reply was tendered into evidence: exhibit Porter 4, AB 90. The emailed reply on 4 February 2011 from a Mr Southgate stated he had not heard of Kwinana Pizza, nor did he have any interest in purchasing the store. As this email correspondence occurred in early 2011 and the employment of Mr Porter was terminated in late May 2013, this evidence should have not been given any weight. The sending of the email and the receipt of a reply occurred at a time that was too remote to the termination of employment of Mr Porter and in the absence of any probative direct or indirect evidence about any negotiations that Mr Porter had with Mr Violanti about the sale or lease of the pizza business during 2013, this evidence had no apparent rational connection to the termination of Mr Porter's employment.
- 57 Mrs Nelson also gave evidence about a conversation that she had with Mr Porter at the end of 2010 about a proposal to purchase the pizza business. She told Mr Porter that the price Mr Violanti wanted was 'way too much'. This evidence was also too remote in time to the termination of Mr Porter's employment and raised no primary facts upon which a rational causal connection to the termination of Mr Porter's employment could be made.
- 58 The only other evidence about the sale or lease of the pizza business was given by Mr Violanti when he gave his evidence-in-chief. Mr Violanti said that:
- (a) he was going to retire in October 2013 and that Mr Porter was offered the lease of the pizza business after he finished his traineeship;
  - (b) Mr Porter would have had to pay a bond on the plant and pay rent (AB 149);
  - (c) he denied that he had made an offer to sell the business to Mr Porter;
  - (d) the business had been sold (AB 150); and
  - (e) he did not speak to Mr Southgate about the purchase of the business but had spoken to the person who had owned the Eagle Boys Pizza store in Kwinana (AB 150).
- 59 Mr Violanti did not in his evidence address the issue as to when he offered to lease the business to Mr Porter or when he had the discussion with the owner of the Eagle Boys Pizza store. Importantly, he was not cross-examined about this and it appears that the Commissioner accepted his evidence in respect of this issue. Also of importance is the fact that at no time was it put to Mr Violanti that the reason why he terminated the employment of Mr Porter was because Mr Porter had refused to purchase or lease the business. Nor was there any direct, or indirect, probative evidence that Mr Porter had at any time in 2013 or at any other time informed Mr Violanti that he did not want to purchase or lease the pizza business.
- 60 In these circumstances, the finding made by the Commissioner that the real reason for the termination of employment of Mr Porter was because the relationship between the parties had deteriorated from the point Mr Porter had refused to purchase or lease the business was not founded upon any relevant, reliable, direct, or indirect evidence and was in the circumstances mere speculation.
- (e) **Other errors in the assessment of the evidence**
- 61 In *Devries v Australian National Railways Commission* [1993] HCA 78; (1993) 177 CLR 472, Brennan, Gaudron and McHugh JJ observed that the High Court has pointed out more than once that (479):

[A] finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against — even strongly against — that finding of fact (See *Brunskill* (1985), 59 A.L.J.R. 842; 62 A.L.R. 53; *Jones v Hyde* (1989), 63 A.L.J.R. 349; 85 A.L.R. 23; *Abalos v Australian Postal Commission* (1990), 171 C.L.R. 167). If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' (*S.S. Hontestroom v S.S. Sagaporack* [1927] A.C. 37, at p 47) or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable' (*Brunskill* (1985), 59 A.L.J.R., at p. 844; 62 A.L.R., at p. 57).

- 62 In *Fraser v Burswood Resort (Management) Ltd* [2014] WASCA 130, Martin CJ (with whom McLure P and Newnes JA agreed) recently stated the general principles which govern appeals against findings of fact in civil cases as follows [130] - [131]:

In order to succeed in an appeal against a finding of fact made at first instance, it is necessary for the appellant to establish that an error was made by the trial judge (*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 [27] (Gleeson CJ, Gummow & Kirby JJ); *Williams v The Minister Aboriginal Land Rights Act 1983 and the State of New South Wales* [2000] NSWCA 255 [60] (Heydon JA, Spigelman CJ & Sheller JA agreeing)). In its assessment of whether an error was made by the trial judge, an appellate court will take into account the 'natural limitations' that apply to any appellate review proceeding wholly or substantially on the written record of the proceedings at first instance (*Fox v Percy* [23] (Gleeson CJ, Gummow & Kirby JJ)). Those limitations include the disadvantage which an appellate court has when compared to the trial judge as a result of not having seen the witnesses, and of not having experienced 'the feeling' of a case, which cannot always be readily extracted from a reading of the transcript (*Fox v Percy* [23] (Gleeson CJ, Gummow & Kirby JJ)).

Error will be established if the appellate court concludes that the trial judge failed to draw inferences that should have been drawn from the facts established by the evidence (*Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* [1992] FCA 184 [24]; [1992] FCA 184; (1992) 35 FCR 359). An inference will be drawn from the facts established by the evidence if it is more probable, in the sense that such an inference might reasonably be considered to have a greater degree of likelihood than any other available inference (*Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470, 480 - 481 (Williams, Webb and Taylor JJ)). However, an inference will not be drawn, and error will not be established, if the circumstances established by the evidence do no more than 'give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture' (*Holloway v McFeeters*, referring to *Richard Evans & Co Ltd v Astley* [1911] AC 674, 687 (Robson LJ)). An appellant challenging a finding of fact bears the burden not merely of showing that the facts for which he or she contends might be available or even correct, but of showing that the conclusions of the trial judge ought to be reversed (*Williams* [60]; *Jones v Bradley* [2003] NSWCA 81 [113] - [116] (Santow JA, Meagher & Beazley JJA agreeing); *Adler v Australian Securities and Investments Commission* [2003] NSWCA 131 [17] (Giles JA, Mason P & Beazley JA agreeing); *Dobler v Halverson* [2007] NSWCA 335; (2007) 70 NSWLR 151 [52] (Giles JA, Ipp & Basten JJA agreeing)).

- 63 The findings of credibility in respect of the evidence of Mrs Porter and Mrs Nelson are not material to the issues raised in this appeal as their evidence was not relevant to the alleged misconduct that is said to have occurred in 2013 whilst Mr Porter was employed by Mr and Mrs Violanti.
- 64 Yet, in this matter the Commissioner was required to assess all of the evidence given by each of the other witnesses and determine which competing version or versions of the facts should be accepted as reliable.
- 65 The task of assessing competing versions of facts was explained by Steytler P in *Skinner v Broadbent* [2006] WASCA 2 as follows [37]:

[W]hen deciding between competing versions of the facts, it is necessary for a trial judge to explain why one version has been preferred over another. In doing so, the trial judge should refer to relevant evidence and, when one set of evidence is accepted over a conflicting set of significant evidence, set out his or her findings as to how he or she has come to accept the one over the other: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280; *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 at 443; *Waterways Authority* at 1830. It is a judge's duty to consider all of the evidence in a case and, where important or critical evidence is not referred to, an appellate court may infer that it has been overlooked or that the trial judge failed to give consideration to it: *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435 at 442 and *Beale*, at 443. As Samuels JA pointed out in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728, for a judge to ignore evidence critical to an issue of fact found against a party may promote a sense of grievance and create a litigant who is both disappointed and disturbed, because it tends to deny both the fact and the appearance of justice having been done.

- 66 The Commissioner did not assess the reliability or truthfulness of the competing versions of facts against the accounts of any other witness. The Commissioner found that Mr Porter, Mrs Porter and Mrs Nelson gave their evidence honestly and to the best of their recollection. She also found that she did not believe Miss B, Mr Beard or Master P to be dishonest persons. She also found that Master P presented as being quite forthright. Not only were no reasons given for these findings of credibility, these findings are glaringly inconsistent and erroneous.
- 67 The witness accounts given by Miss B, Mr Beard and Master P directly contradicted Mr Porter's denial of the allegations of dealing in drugs, drinking alcohol on the premises and misappropriation of funds from the till (ts 13, AB 75). Miss B's testimony taken at its highest was that whilst working with Mr Porter she observed him exchange a bag of what appeared to be drugs with another person. I say taken at its highest because when Miss B was cross-examined she conceded that whilst the material in the package looked like marijuana and that the fact that the delivery driver took the package out of his pocket did not prove he received the package from Mr Porter (ts 46, AB 108). Mr Beard's evidence was that Mr Porter told him he had stolen money from work, which was money owed to him and Master P's evidence was that on many occasions he observed Mr Porter drinking beer whilst at work and that he had (at least on one occasion) observed Mr Porter take \$50 notes out of the

till, put some in his pocket and throw some of the dockets away. Miss B's evidence was not challenged in cross-examination on grounds that her account of events was not truthful. In cross-examination Master P's evidence was, however, challenged on grounds of credibility. Master P said when cross-examined that it took Mr Porter between a minute or 30 seconds to remove the money from the till and dockets that corresponded to the amount taken from the till (ts 51, AB 113). It was put to Master P that to do so would take longer than 30 seconds (ts 52 - 55, AB 114 - 117). When cross-examined, Mr Beard's honesty was directly challenged. Firstly, he was asked if he knew it was a serious offence to lie under oath (ts 67, AB 129). Secondly, it was put to him that he was perjuring himself against his girlfriend's brother (Mr Porter) (ts 69, AB 131). Thirdly, it was put to him that Mr Violanti had told him that it was in his best interests to give evidence (ts 69, AB 131). In these circumstances, the Commissioner's finding that Mr Porter, Mr Beard and Master P each gave their evidence honestly failed to recognise that the evidence of Mr Beard and Master P clearly was contrary to the evidence of Mr Porter and the case put on his behalf. Also, no assessment of the reliability of the account given by Miss B, was made. For example, it may have been open to give little weight to the evidence of Miss B on grounds that her interpretation of what she observed Mr Porter hand to the delivery driver may not be reliable as Miss B left the room after Mr Porter handed the delivery driver a package and on her return she then saw the delivery driver take a package out of his pocket which appeared to contain marijuana. Nor was any assessment made of the reliability, consistency or inconsistency of the evidence of Mr Porter, Miss B, Mr Beard and Master P against the evidence given by Mr Violanti or Mrs Violanti.

- 68 The Commissioner rejected the evidence given by Mrs Violanti on grounds that, although Mrs Violanti has a language difficulty, she may have been instructed by her husband as to what to say in the witness box. However, the Commissioner did not state her reasons for making this assessment of the reliability of Mrs Violanti's evidence. It is clear from reading the transcript that Mrs Violanti had some difficulty understanding some questions put to her in examination-in-chief and in cross-examination. This is revealed in the following exchange between counsel and Mrs Violanti:

Okay. And, Mrs Violanti, were you in any way intimidated? Were you - did anyone tell you you had to come in today to give evidence?---Yes.

Who told you that?---Had to come here?

Yes?---My husband.

Your husband said you had to come in?---Yes.

Yes. Because you're one of the owners?---Yeah.

Did he tell you what you had to say? Did he say to you, 'You must say this'?---Yes.

Okay. What I'm trying to say to you, did Mr Violanti - - -?---Sorry.

- - - put words in your mouth and tell you what evidence you had to give or did he say, 'You just tell the truth'?

It's a bit difficult, Commissioner?---Thank you very much.

**MAYMAN C:** I think she's being very honest?---Yeah. I have to say what I saw and what I see - what I saw.

**MOUNTAIN, MS:** He said to you you had to say what - - -?---Yeah.

- - - you saw?---Yeah.

Okay. Thank you very much, Mrs Violanti?---Finish?

**MAYMAN C:** No, no, no.

**MOUNTAIN, MS:** No.

**MAYMAN C:** No, you've got to have more questions?---Yes.

Ms Porter?

- 69 In her reasons for decision the Commissioner included that part of the transcript up to and including the point where Mrs Violanti responded, 'Yes', to the question, 'Did he tell you what you had to say? Did he say to you, "You must say this"?' However, the Commissioner did not include the following questions and answers which put this evidence in a completely different light - that is, that he told her to say what she saw (ts 73, AB 135)
- 70 Whilst the Commissioner referred in part to part of this exchange in her reasons for decision, she made no proper assessment of the evidence given by Mrs Violanti in this exchange. It may, however, have been open to make a finding that Mrs Violanti may have been instructed by her husband as to what to say when giving evidence. Yet, the Commissioner did not reveal her reasons for making that finding. Nor did she assess any other matters raised in the evidence of Mrs Violanti, including the evidence she gave in cross-examination and re-examination, or whether her evidence was consistent with, or was inconsistent with, the evidence given by any other witness. For example, Master P said in his evidence that he told Mrs Violanti that he thought Mr Porter was stealing money (ts 50, AB 112). Mrs Violanti did not, however, say when giving evidence that Master P told her Mr Porter was stealing money. This is an issue that should have been considered when considering the credibility and reliability of the evidence given by Mrs Violanti and Master P.
- 71 The Commissioner also erred in not making any assessment at all about the reliability and credibility of the evidence given by Mr Leahy.
- 72 The Commissioner made no proper assessment of the evidence given by Mr Violanti. She did not state in her reasons for decision why she accepted in part the evidence of Mr Violanti but rejected the 'elements relating to the allegation of drug handling and stealing' by Mr Porter. This finding is not only vague but the reason why such a finding was made is not revealed. This finding is also inconsistent with the subsequent finding made by the Commissioner that she did not accept the evidence given by Mr Violanti that he warned Mr Porter about consuming alcohol on the premises in early 2013.
- 73 The only assessment the Commissioner made about the case put on behalf of Mr and Mrs Violanti that Mr Porter was dismissed because he had stolen money from the till was not made out because:

- (a) the employer allowed Mr Porter to serve customers whilst working out a period of one week's notice;

- (b) Mr Porter's 'exemplary behaviour' prior to the beginning of 2013;
  - (c) Mr Porter's length of service; and
  - (d) Mr Porter's willingness to work many additional hours.
- 74 Whilst the Commissioner's assessment about allowing an employee to serve customers and consequently operate the till after the employee had been given notice to terminate his contract of employment on grounds of stealing and the other matters referred to by the Commissioner in making this finding may have been relevant matters to consider when assessing the credibility and reliability of the evidence given by the witnesses who gave evidence on behalf of Mr and Mrs Violanti, these were only some of the matters that should have been considered and weighed when making a finding about whether the allegation of stealing was made out. In particular, regard should have been made to the direct and relevant evidence given about this issue by Master P, Mr Beard, Mr Leahy, Mr Violanti and Mrs Violanti if each or if any of their evidence had been weighed and assessed as reliable.
- 75 For example, some matters that may have been material to an assessment of credibility and the reliability of evidence were:
- (a) Mrs Violanti said in her evidence that she saw Mr Porter remove money from the till, whereas Mr Violanti said his accountant was concerned about the sales and purchase figures and told him to watch the till and balance the dockets numerically. He also said that his wife raised the issue with him a few times but he told her, 'No, no, no' (ts 86 - 87, AB 148 - 149). Mr Violanti did not say, however, that Mrs Violanti told him that she saw Mr Porter take money from the till. Nor did Mr Violanti say he dismissed Mr Porter for actual stealing but said he did so because he suspected Mr Porter of stealing.
  - (b) Mr Violanti did not produce any dockets in support of his evidence that some dockets were missing (ts 98, AB 160). Yet, this evidence could have been assessed in light of the evidence given by Master P that at the end of each night Mr Violanti counted the dockets and threw them in the bin (ts 55, AB 117).
  - (c) The evidence of Mr Beard that Mr Porter told him that he had stolen from work.
- 76 For these reasons, I am satisfied that the particulars set out in paragraphs 1, 2, 3, 4 and 5 of ground 2 of the appeal have been made out. I am also of the opinion that in ground 3 the following particulars set out in paragraph 20 of these reasons are made out: (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o).
- 77 I am not satisfied that ground 3(a) has been made out on grounds that if the Commissioner had made a proper assessment of the evidence of Mrs Violanti and the reasons why she found that Mrs Violanti had been instructed as to what to say in the witness box by her husband as this finding may have been open. I am also of the opinion that ground 3(p) is not made out as no argument was put to the Full Bench in support of ground 3(p).
- 78 It is also argued on behalf of Mr and Mrs Violanti in ground 4 of the appeal that the Commissioner failed in applying the appropriate case law for circumstances where an employee is dismissed for misconduct.
- 79 In *The Minister for Health v Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 principles that are to be applied by the Commission when considering whether an allegation of misconduct is relied upon by an employer as grounds for dismissal were considered. After considering the application of the test enunciated by the Industrial Commission of South Australia in *Bi-Lo Pty Ltd*, I and Beech CC observed [63] - [67]:

In any event, leaving aside the application of *Bi-Lo*, it is well established that where misconduct is alleged or relied upon there is a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate mitigating circumstances: *Garbett v Midland Brick* [2003] WASCA 36 [72]; (2003) 83 WAIG 893, 901.

In *Garbett* Hasluck J observed that Franklyn J in *Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch* (1992) 46 IR 98 had drawn upon the reasoning in *Robe River Iron Associates v Australian Workers' Union, WA Branch* (1987) 67 WAIG 320 when assessing whether a dismissal was unfair. Hasluck J relevantly observed that Franklyn J [31]:

[H]eld that a decision on the question of whether a dismissal was unfair is a discretionary decision because a value judgment is required to be made as to whether the conduct which gave rise to the dismissal, viewed in all of its circumstances, justified the dismissal. However, a finding of misconduct or of redundancy, which gives rise to a legal right to dismiss an employee, is not the subject of a discretionary judgment. A finding as to misconduct or redundancy is a conclusion of fact. The exercise of discretion arises only at the next step, that is to say, in determining whether the consequence of the misconduct or redundancy is fairly that of dismissal.

What emerges from these cases is that findings of fact must be made by the Commission as to what was the conduct which gave rise to the dismissal, what are the circumstances of that conduct and in making an assessment, regard should be had to the evidentiary onus on the employer.

The evidentiary onus has been described as an evidentiary burden: *Winkless v Bell* (1986) 66 WAIG 847, 848; *Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3)* (1990) 35 IR 70, 84; *Franklins Ltd v Webb* (1996) 72 IR 257, 260. The employer does not have to establish that the employee was actually guilty of the misconduct alleged, rather it must show that following a proper inquiry there were 'reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal': *Bi-Lo* and see too *Western Mining Corporation Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1084); *The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v The Building Management Authority* (1993) 73 WAIG 1876, 1877 per Fielding C. In *Shire of Esperance v Mouritz* (1991) 71 WAIG 891 Kennedy J stated (895):

[I]t appears that the Full Bench misunderstood the nature of an evidential burden when it referred to the evidential burden being upon the employer to establish that summary dismissal for misconduct was justified. An evidential

burden does not require the person upon whom it lies to establish anything. It imposes only an obligation to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.

If the employer establishes its position in this regard the onus then moves to the employee to show that dismissal for that reason was harsh, oppressive or unfair. The Commission should concentrate on the overall effect of the dismissal in its context rather than treating the issue as concluded by the establishment of any breach by the employer of the terms of the contract of employment however inconsequential: *Garbett* [66].

- 80 In this matter the employer sought through evidence of Miss B, Mr Beard, Master P and Mrs Violanti to adduce evidence that the employee was guilty of misconduct, as their evidence at its highest, if accepted, was direct evidence of misconduct. In such a case the employer is obligated to show there is sufficient evidence to establish the facts said to constitute the misconduct.
- 81 Leaving aside the erroneous exclusion of the evidence given by Miss B, Mr Beard, Master P, Mrs Violanti and the failure to consider the evidence of Mr Leahy, the Commissioner made no findings of fact about whether Mr Porter had committed an act or acts of misconduct by stealing because she excluded all of the employer's evidence about this issue. However, it is implicit in her finding that he was not dismissed on grounds of stealing, that she found that it had not been proven that he had stolen money from the till. The Commissioner excluded the evidence given by Mr Violanti in respect of this issue by simply finding that she did not accept his evidence of 'elements relating to the allegation of stealing'. Thus, by excluding all of the employer's evidence about stealing, the Commissioner found the employer implicitly failed to establish facts that constitute the alleged misconduct. Whilst the Commissioner erroneously excluded this evidence, it does not follow that she misapplied the law in respect of the evidentiary burden that fell upon the employer. For this reason, I am not satisfied that ground 4 of the grounds of appeal is made out.
- (f) **Is the Full Bench in a position to weigh the conflicting evidence and draw its own inferences and conclusions about whether Mr Porter was harshly, oppressively or unfairly dismissed?**
- 82 In this matter, leaving aside the erroneous exclusion of witness evidence on grounds that they were each led in their evidence in examination-in-chief, the findings of fact made by the Commissioner are based solely on the credibility of the witnesses.
- 83 In *Brown v Churchill* [2006] WASCA 17, Pullin JA with whom Steytler P agreed observed that [40]:
- An appellate court is obliged to conduct a real review of the trial; and the court is not excused from the task of weighing conflicting evidence and drawing their own inferences and conclusions. In doing so the court must bear in mind however, that it has neither seen nor heard the witnesses, and must make due allowance in this respect: *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [21] - [25]. Although this is an appeal by way of re-hearing, that does not mean that the Court of Appeal is in exactly the same position as the trial Judge. Although the deciding of issues of fact by assessing credibility of witnesses should be minimised, it remains inescapable that in some cases issues will be decided by reference to credibility: *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* [1999] HCA 3; (1999) 73 ALJR 306 at [91]. If in a case credibility is a critical factor, and if evidence wrongly excluded may bear upon the critical witness' credibility, then, according to Windeyer J in *Nominal Defendant v Hook* [1962] HCA 50; (1962) 113 CLR 641 at 661, a retrial 'may generally be had'.
- 84 These principles apply to appeals that are heard by way of a re-hearing. Yet, an appeal to the Full Bench is not in the nature of a re-hearing but is an appeal in the strict sense: *Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch* (1984) 64 WAIG 852. However, this distinction in the role of the Full Bench is not in my opinion material. In *The Minister for Health v Drake-Brockman*, I and Beech CC observed [73]:
- Where the Full Bench conducts an appeal, it is to do so by reviewing the evidence and matters raised before the Commission at first instance for itself to ascertain whether an error has occurred. Appeals before a Full Bench are not conducted as a rehearing but are an appeal in the strict sense: *Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch* (1984) 64 WAIG 852. Pursuant to s 49(4)(a) of the Act an appeal is required to be heard and determined on the evidence and matters raised in the proceedings before the Commission. However, s 49(4)(a) does not prohibit a Full Bench from admitting fresh evidence under special or exceptional circumstances: *Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Ltd* (1990) 70 WAIG 3040. An appeal by way of rehearing is an appeal where an appellate body can receive evidence and its powers are not restricted to making a decision that should have been made at first instance. However, an appellate body in an appeal by way of rehearing can only intervene if there was error on behalf of the primary decision maker: *Coal and Allied Operations Pty Ltd v Full Bench of the Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 [12] - [13]. Therefore the task of considering whether an appealable error has been demonstrated in assessing the credit of a witness or witnesses, where no further evidence is sought to be adduced, whether the appeal is by way of rehearing or in the strict sense, is arguably the same.
- 85 The conclusion reached by the Commissioner that dismissal of Mr Porter was unfair was founded upon unproven facts which in the absence of any proper assessment of all the evidence given by the witnesses was not only highly speculative but glaringly improbable.
- 86 Whilst error has been demonstrated in the reasoning of the Commissioner, is the Full Bench in a position to make its own assessment of the credibility of the witnesses and find facts relevant to the question whether Mr Porter was unfairly dismissed?
- 87 Mr Hooker on behalf of Mr and Mrs Violanti reluctantly put a submission on behalf of his clients that this is not a case where the Full Bench, lacking the opportunity to see and hear the witnesses give their evidence which was rationally probative of the issues in dispute, could legitimately make the necessary findings of fact. It is with regret that this submission must be accepted, as the proper assessment of the credibility of the witnesses in this matter is a critical issue to the determination of the issue whether Mr Porter committed the acts of alleged misconduct. Mr Hooker also made a submission that this matter cannot be remitted to the Commissioner to make fresh findings of credibility and draw relevant and rationally probative inferences

from the evidence. Thus, an order is sought that the decision made at first instance be suspended and the matter be remitted for the matter to be re-heard.

- 88 Unfortunately the critical issues in this matter turned substantially upon a proper assessment of the credibility of the witnesses. A fundamental failure in reasoning that led to findings excluding the evidence of witnesses and making findings that witnesses who gave inconsistent factual accounts were each honest witnesses and a fundamental failure to make any, or any proper assessment of the reliability of the evidence given by each witness renders an order to remit this matter to the Commissioner to make fresh findings of credibility and reliability impossible. In these circumstances, there must therefore be an order made by the Full Bench which will lead to a retrial. Ordering a new trial is in all cases a deplorable result: *Waterways Authority v Fitzgibbon* [2005] HCA 57; (2005) 79 ALJR 1816 [36]. Both parties in this matter will be exposed not only to the cost associated with the first hearing and this appeal, but the cost and inconvenience of a second hearing unless the application is settled. If a second hearing proceeds, the parties and their witnesses will also be exposed to strain and anxiety.
- 89 To enable this matter to be re-heard in its entirety an order should issue to suspend the decisions and remit the matter for further hearing and determination.

**BEECH CC:**

- 90 I have read in advance the Reasons for Decision of Her Honour the Acting President. I agree with her reasons and the order to issue and have nothing to add.

**SCOTT ASC:**

- 91 I have read in advance the Reasons for Decision of Her Honour the Acting President. I agree with her reasons and the order to issue and have nothing to add.

**2014 WAIRC 01251**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MR CESARE VIOLANTI AND MRS SOMSRI VIOLANTI TRADING AS KWINANA PIZZA

**APPELLANT**

**-and-**

LIAM CHRISTOPHER PORTER

**RESPONDENT**

**CORAM**

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER A R BEECH

ACTING SENIOR COMMISSIONER P E SCOTT

**DATE**

MONDAY, 10 NOVEMBER 2014

**FILE NO**

FBA 7 OF 2014

**CITATION NO**

2014 WAIRC 01251

**Result**

Order made

**Appearances**

**Appellant**

Mr R L Hooker (of counsel)

**Respondent**

Mrs S M Porter, as agent

*Order*

This appeal having come on for hearing before the Full Bench on 19 September 2014, and having heard Mr R L Hooker (of counsel) on behalf of the appellant and Mrs S M Porter, as agent, on behalf of the respondent, and reasons for decision having been delivered on 6 November 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. The appeal is allowed.
2. The decisions made by the Commission on 11 March 2014 ([2014] WAIRC 00198; (2014) 94 WAIG 253) and on 20 March 2014 ([2014] WAIRC 00214; (2014) 94 WAIG 364) are suspended.
3. The matter is remitted to the Commission for further hearing and determination.

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

[L.S.]

**PRESIDENT—Matters dealt with—****2014 WAIRC 01260**

A STAY OF OPERATION OF THE ORDER IN MATTER NO. B 166 OF 2013 WHICH IS THE SUBJECT OF FBA 12 OF 2014

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION****PRESIDENT**

**CITATION** : 2014 WAIRC 01260  
**CORAM** : THE HONOURABLE J H SMITH, ACTING PRESIDENT  
**HEARD** : FRIDAY, 7 NOVEMBER 2014  
**DELIVERED** : FRIDAY, 14 NOVEMBER 2014  
**FILE NO.** : PRES 2 OF 2014  
**BETWEEN** : ALFRESCO CONCEPTS PTY LTD  
 Applicant  
 AND  
 TROY PATRICK FRANSE  
 Respondent

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CatchWords : Industrial Law (WA) - Application to stay operation of an order - Ability to pay and repay judgment debt considered - Cost of obtaining advice about rate of taxation to be deducted from award considered - Special circumstances justifying stay not made out

Legislation : *Industrial Relations Act 1979* (WA) s 49(11)

Result : Application dismissed

**Representation:**

Applicant : Mr D Howlett (of counsel)

Respondent : Mr P Mullally, as agent

Solicitors:

Applicant : Westmont Legal

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**Case(s) referred to in reasons:**

John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers [2005] WAIRC 02983; (2005) 85 WAIG 3918

Seacode Nominees Pty Ltd v Penfold [2005] WAIRC 03015; (2005) 85 WAIG 3926

DVG Morley City Hyundai v Fabbri [2002] WAIRC 06321; (2002) 82 WAIG 2440

Osborne v Drive Park Pty Ltd [2005] SASC 252

Miller v Wheatbelt Individual &amp; Family Support Association Inc [2014] WAIRC 00028; (2014) 94 WAIG 179

**Case(s) also cited:**

Eastland Technology Australia Pty Ltd v Whisson [2003] WASCA 307

Palermo v Rosenthal [2010] WAIRC 00790; (2010) 90 WAIG 1527

Griffiths v Freeman [2014] WAIRC 00052; (2014) 94 WAIG 74

*Reasons for Decision***Introduction**

- 1 This is an application made under s 49(11) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant seeks an order that the operation of the decision of the Commission in matter No B 166 of 2013 ([2014] WAIRC 01035; (2014) 94 WAIG 1594) be wholly stayed pending the hearing and determination of the appeal in FBA 12 of 2014.
- 2 The decision in B 166 of 2013 was made by the Commission on 22 September 2014 and contains a declaration and order. The declaration is that Alfresco Concepts Pty Ltd denied Troy Patrick Franse benefits under his contract of employment and the order requires Alfresco Concepts Pty Ltd to pay Mr Franse \$34,536 (less applicable taxation) within 21 days of the order.
- 3 In support of the application for the stay the director of Alfresco Concepts Pty Ltd, Henry Kowalewski, made a statutory declaration on 10 October 2014 setting out the grounds of the stay. The application for the stay is opposed by Mr Franse. On 28 October 2014, Mr Franse swore an affidavit in which he sets out the grounds on which he opposes the application. In response to Mr Franse's affidavit, Mr Kowalewski swore an affidavit on 31 October 2014. Both Mr Franse and Mr Kowalewski appeared in these proceedings and both were cross-examined in respect of the matters raised in their affidavits.

- 4 The grounds of the application for the stay by Alfresco Concepts Pty Ltd are that:
- (a) it has very good prospects of a successful appeal;
  - (b) the appeal will be futile if a stay is not granted because the money awarded by the Commission will not be able to be repaid by Mr Franse;
  - (c) if Alfresco Concepts Pty Ltd is successful on appeal it will not be able to be restored substantially, or at all, to its former position if the decision against it is executed;
  - (d) the payment of the substantial amount of money, the subject of the order, to Mr Franse will create financial hardship for Alfresco Concepts Pty Ltd.
- 5 The grounds upon which Mr Franse opposes the application are:
- (a) Alfresco Concepts Pty Ltd is unable to discharge the onus it carries to cause the Commission to exercise the discretion in its favour;
  - (b) Alfresco Concepts Pty Ltd cannot demonstrate any special or unusual circumstances in this case to justify a stay;
  - (c) Alfresco Concepts Pty Ltd cannot demonstrate that Mr Franse is impoverished and unable to repay the money paid over pursuant to the order; and
  - (d) there is nothing outstanding in the grounds of appeal to raise the prospects of success above the arguable level, particularly as the great majority of the grounds of appeal relate to the facts.

#### **Principles – Should an order be made staying the decision?**

- 6 The principles that apply in deciding whether or not to order a stay of a decision are well established. The relevant principles were summarised by Ritter AP in *John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers* [2005] WAIRC 02983; (2005) 85 WAIG 3918 [34] - [38] as follows:

*In Federal Commissioner of Taxation v Myer Emporium Limited (No 1)* [1986] 160 CLR 220, Dawson J at 222 said that the discretion to 'order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.... Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory.... Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed'.

These observations were cited with approval by Pullin J in *Commonwealth Bank v Bouwman* [2003] WASC 205 and by Anderson J, with whom Pidgeon J agreed, in *Hammersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at pages 89-90. In the latter case, Anderson J said:-

*'... unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the High Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal would be futile.'*

The reasons of Anderson J were cited with approval by Sharkey P in *G & M Partacini t/as Bayswater Powder Coaters v SDAE* (2005) 85 WAIG 51. In that decision, Sharkey P emphasised that the jurisdiction to grant a stay should also be exercised having regard to the requirements of s26 of the Act and the 'need to prevent there being any more uncertainty than is necessary, in industrial matters'.

In *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, the court (Murray and Parker JJ) at 311 distilled generally applicable principles in relation to applications for stays of orders. These principles were set out as follows:-

- 'The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.*
- It is for the applicant for a stay to move the court to a favourable exercise of its discretion.*
- It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.*
- The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.*
- If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.*

*• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.'*

Accordingly, in my opinion, the primary focus is upon the consequences of a stay being granted or not granted. Where, for example, the absence of a stay would render the appeal nugatory or futile, special circumstances warranting the grant of a stay may exist. It will also be necessary to consider matters such as the arguability of the appeal and the balance of convenience. The parties, in their submissions, emphasised that the Commission should consider whether there is a serious question to be tried and where the balance of convenience would lie. In considering the latter consideration, the circumstances of the respondent or any other affected party, such as Mr Kavanagh, can be important.

- 7 Thus, prima facie the successful party is entitled to the benefit of a judgment, but a stay may be granted where the applicant demonstrates special circumstances that justify a departure from the ordinary rule that a successful litigant is entitled to the fruits of the judgment. Therefore, something special or unusual is required before a stay will be granted.
- 8 In *Seacode Nominees Pty Ltd v Penfold* [2005] WAIRC 03015; (2005) 85 WAIG 3926, 3928 Ritter AP referred to the decision of Sharkey P in *DVG Morley City Hyundi v Fabbri* [2002] WAIRC 06321; (2002) 82 WAIG 2440, 2441 in which it was observed that an appeal will be nugatory if the appellant can show that without a stay of execution he or she will be ruined. However, Ritter AP pointed out in *Seacode Nominees Pty Ltd* (3928) that Duggan J put the matter in *Osborne v Drive Park Pty Ltd* [2005] SASC 252 this way:

*'Inability to pay the judgment debt may be relevant to a stay of execution in some cases. However it would not ordinarily be a sufficient reason of itself to attract an exercise of jurisdiction', to grant a stay.*

#### The evidence

- 9 At the hearing of the application for a stay the affidavit sworn by Mr Kowalewski on 31 October 2014 was tendered into evidence: exhibit 1. Mr Kowalewski also gave oral evidence and was cross-examined. In his affidavit he stated that he has grounds to believe that the appeal will be futile if a stay is not granted because if money awarded by the Commission is paid prior to the appeal, and the appeal is successful, the money will not be able to be repaid by Mr Franse. He also said that:
- (a) he is concerned that if Alfresco Concepts Pty Ltd is successful on appeal that it will not be restored substantially, or at all, to its former position if the judgment against it is executed; and
  - (b) the payment of the substantial amount of money to Mr Franse, as ordered by the Commission, will create financial hardship for his company. When cross-examined about why he said that, he said that he had spoken to the bookkeeper about making a payment of \$34,536 and was informed that it would be difficult to do so. He then said that they were at the beginning of a very, very busy season and they purchased a lot of stock.
- 10 Mr Kowalewski also stated in his affidavit that he is concerned about the capacity of Mr Franse to return the money in the event that the appeal is upheld and that he has reasonable grounds to believe that Mr Franse is not currently working. He recited in his affidavit events relating to Mr Franse's efforts to set up an outdoor kitchen company after Mr Franse ceased employment with Alfresco Concepts Pty Ltd and a letter sent by solicitors for Alfresco Concepts Pty Ltd informing Mr Franse to desist from 'trying to poach staff as per the restraint clause in the employment contract'.
- 11 Mr Franse swore an affidavit in opposition to the application by Alfresco Concepts Pty Ltd for a stay: exhibit A. In his affidavit Mr Franse stated that he commenced working full-time about nine weeks after his dismissal from Alfresco Concepts Pty Ltd, and in September 2014 he changed jobs but continued to work on a full-time basis. In his affidavit he also stated he earns \$60,000 per annum. When Mr Franse gave evidence PAYG payment summaries for the period 17 April 2013 to 30 June 2014 were tendered into evidence that show that Mr Franse received gross payments of \$59,346 by Flexi Home Offices and Wardrobes Pty Ltd: exhibit D. Also tendered into evidence were two payslips from The Williams & SH which record that between 1 October 2014 and 28 October 2014 Mr Franse was entitled to an annual salary of \$55,000 per annum, together with an amount of superannuation: exhibit C. When Mr Franse gave evidence he said that the \$60,000 per annum referred to in his affidavit includes the amount payable as superannuation under his current contract of employment.
- 12 Mr Kowalewski also stated in his affidavit that:
- (a) in the event Mr Franse is working as he says he is then \$60,000 per annum is not a large amount of money;
  - (b) once Mr Franse pays an estimated mortgage of \$2,200 per month, \$12,000 per annum in tax and living expenses he will not be able to repay the money; and
  - (c) Mr Franse's wife is not a party to the claim.
- 13 When asked in evidence in-chief to explain how he calculated these figures, Mr Kowalewski said that the calculation of the mortgage payment was based upon what his daughter pays on a mortgage of a similar amount. Mr Kowalewski also stated in his affidavit that:
- (a) he does not want Mr Franse to have to re-mortgage his home in the event the appeal is successful; and
  - (b) whilst Mr Franse was employed by Alfresco Concepts Pty Ltd Mr Franse had told him he had cash flow problems. In these circumstances, Mr Kowalewski formed the opinion that Mr Franse does not have access to funds to repay the money if ordered to be repaid and he does not believe that the position of Mr Franse has improved since he ceased employment with Alfresco Concepts Pty Ltd.
- 14 Mr Franse stated in his affidavit that he owns his own home as joint tenants with his wife, that the property is situated at 150A Grand Promenade, Bedford, and is subject to a mortgage to Bankwest of \$332,000. He also said in his affidavit that his home is valued at about \$650,000. In oral evidence Mr Franse said he and his wife currently pay 'interest only' on the mortgage secured on their property. A Bankwest home loan statement was tendered into evidence which supports Mr Franse's

evidence of the amount owing on the mortgage and records that the loan account is held in joint names and that an amount of approximately \$1,400 was debited to the loan account as interest each month from the period between 7 June 2014 and 5 September 2014: exhibit B.

- 15 In Mr Franse's affidavit he stated that he denied having any financial problems arising from his previous business which he operated before joining Alfresco Concepts Pty Ltd as its manager. When giving oral evidence he stated that he has closed the business as market conditions are tough but that all debts have been paid and there remains money in the business accounts of the business. When cross-examined, Mr Franse said that he jointly owned that business with a David Bennett. Mr Franse was extensively cross-examined by counsel about the statements that he made in his affidavit about his financial circumstances and also about whether the private business which he operated prior to his employment with Alfresco Concepts Pty Ltd had left him with substantial debt. Yet, Mr Franse maintained his position that he does not have any debt from that business and that he does have adequate means to repay the sum of \$34,536 if in the event the appeal is successful. When he was re-examined, he said that in the businesses' everyday trading account they have an amount of \$8,000 and in a US trading account they have an amount of about \$46,000 and that the company has no debts.
- 16 In his affidavit Mr Franse also stated that his wife works full-time and earns \$90,000 per annum and that other than normal household expenses and the mortgage they do not have any other debts.

### Consideration

- 17 Having reviewed the grounds of appeal, the reasons for decision and the exhibits tendered into evidence at the hearing at first instance, I am satisfied that the grounds of appeal raise arguable matters, which taken at their highest, have reasonable prospects of success.
- 18 When Mr Kowalewski gave evidence he was asked whether he had knowledge of, or had sought advice, as to the amount of taxation that should be deducted from the judgment debt of \$34,536 and paid to the Australian Taxation Office. In answer to this question, Mr Kowalewski said that he did not know what amount of taxation should be deducted and he would have to seek advice from an accountant and possibly seek legal advice about the matter. Relying on this evidence, counsel on behalf of Alfresco Concepts Pty Ltd made a submission that as the company is required to obtain advice about the applicable rate of taxation to do so would be time consuming, involve a cost to the company and the appropriate rate will be difficult to ascertain prior to the resolution of some of the issues raised in the appeal. A submission was also made that:
  - (a) it may be relevant for an advisor providing advice about the taxation implications of the order to consider the nature of the award. Yet, it is not clear from the reasons for decision whether the award of a sum of money was for a motor vehicle allowance or should attract a payment of fringe benefits tax, and whether the remaining part of the sum awarded for the 'bonus' should stand or whether it should be assessed as an 'incentive'. The latter is not an issue that can be resolved until the appeal is heard and determined; and
  - (b) it is not clear whether the entire or part of the judgment debt should be assessed as an award of damages.
- 19 In these circumstances, there is the risk that the advice received and acted upon could be erroneous and lead to the company being exposed to a penalty imposed by the Australian Taxation Office.
- 20 The difficulty with this submission is that it speculates that it will be difficult to ascertain the appropriate rate of taxation that must be withheld from the award and paid to the Australian Taxation Office on behalf of Mr Franse. However, no evidence or logically probative material has been put before me upon which I can properly infer that the ascertainment of the rate of taxation is complicated or the rate or amount to be deducted could be dependent upon findings made in the appeal as to whether some or all of the judgment debt should be properly characterised as an allowance, bonus or incentive payment, or as a payment in the nature of an award of damages. Nor has any relevant provisions of any taxation Act of the Commonwealth Parliament been referred to.
- 21 The second issue raised on behalf of Alfresco Concepts Pty Ltd, which also goes to the deduction of taxation from the award, is that if the decision is not stayed and the appeal is successful, the payment to the Australian Taxation Office may not be able to be reversed. Counsel for Alfresco Concepts Pty Ltd submitted that if the money is paid and the appeal is subsequently successful, Mr Franse may not be obliged to return all of the amount of \$34,536 but only the net amount he received after taxation was deducted from the award. This submission, in my opinion, has no merit in light of the concession made on behalf of Mr Franse that if the appeal is successful and the decision of the Commission is quashed, Mr Franse will be required to pay to Alfresco Concepts Pty Ltd part of or the whole of the sum of \$34,536 and at the conclusion of the 2014/2015 financial year he should be able to recover from the Australian Taxation Office any amount of taxation paid by Alfresco Concepts Pty Ltd on the judgment debt that is assessed as an overpayment, after the whole of his assessable income is assessed for this financial year: see the discussion in *Miller v Wheatbelt Individual & Family Support Association Inc* [2014] WAIRC 00028; (2014) 94 WAIG 179 [98] - [99].
- 22 I do, however, accept that Alfresco Concepts Pty Ltd will incur a cost of seeking advice from at least an accountant in respect of the rate of taxation that is to be withheld from the judgment debt and paid to the Australian Taxation Office on behalf of Mr Franse. Yet, I am not persuaded that the fact that the company will be required to ascertain the rate of taxation that is to be withheld from the award and paid to the Australian Taxation Office is a matter that is of such a special or unusual circumstance that its weight favours the granting of a stay of the decision.
- 23 Nor am I satisfied that if the appeal is successful Alfresco Concepts Pty Ltd will not be able to be restored substantially, or at all, to its former position if the decision against it is executed. In particular, I am not satisfied that Mr Kowalewski's contentions that Mr Franse does not have the capacity to repay part of or the entire sum awarded by the Commission has been demonstrated. In particular, exhibits B, C and D provide reliable documentary evidence that Mr Franse has sufficient means to repay the judgment debt in the event the appeal is successful.

- 24 Nor am I satisfied that Alfresco Concepts Pty Ltd does not have the ability to pay the judgment debt. The evidence of Mr Kowalewski was that payment of the sum will be 'difficult', not that it is unable to pay the sum ordered.
- 25 For these reasons, I am of the opinion that Alfresco Concepts Pty Ltd has not established that a stay should be granted. Accordingly, the application will be dismissed.

2014 WAIRC 01259

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
ALFRESCO CONCEPTS PTY LTD

**APPLICANT**

-and-

TROY PATRICK FRANSE

**RESPONDENT**

**CORAM** THE HONOURABLE J H SMITH, ACTING PRESIDENT

**DATE** FRIDAY, 14 NOVEMBER 2014

**FILE NO/S** PRES 2 OF 2014

**CITATION NO.** 2014 WAIRC 01259

**Result** Application dismissed

**Appearances**

**Applicant** Mr D Howlett (of counsel)

**Respondent** Mr P Mullally, as agent

*Order*

This matter having come on for hearing before me on 7 November 2014, and having heard Mr D Howlett (of counsel) on behalf of the applicant and Mr P Mullally, as agent, on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,  
Acting President.

**AWARDS/AGREEMENTS AND ORDERS—Variation of—**

2014 WAIRC 01289

**CLEANERS AND CARETAKERS (GOVERNMENT) AWARD 1975**  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** UNITED VOICE WA

**APPLICANT**

-v-

THE HON MINISTER FOR EDUCATION AND TRAINING, COMMISSIONER MAIN ROADS  
WESTERN AUSTRALIA, DIRECTOR GENERAL DEPARTMENT OF HOUSING AND WORKS

**RESPONDENT**

**CORAM** COMMISSIONER S M MAYMAN

**DATE** FRIDAY, 28 NOVEMBER 2014

**FILE NO/S** APPL 34 OF 2014

**CITATION NO.** 2014 WAIRC 01289

**Result** Award varied

**Representation**

**Applicant** Mr S Dane

**Respondent** Mr R Davenport (as agent)

*Order*

HAVING heard Mr S Dane for United Voice WA, as applicant and Mr R Davenport as agent for The Hon Minister for Education and Training, Commissioner Main Roads Western Australia and Director General Department of Housing and Works; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Cleaners and Caretakers (Government) Award 1975* be varied in accordance with the following schedule and that such variations shall have effect on or after 28 November 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

## SCHEDULE

**1. Clause 5 – Special Rates and Provisions: Remove subclause 5.1 of this clause and insert the following in lieu thereof:**

5.1. - SPECIAL RATES AND PROVISIONS

- 5.1.1 (a) All employees called upon to clean closets connected with septic tanks or sewerage shall receive an allowance of \$0.83 cents per closet per week.
- (b) For the purposes of 5.1 - Special Rates and Provisions, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.
- 5.1.2 Employees called upon outside the ordinary working hours to wash towels shall be paid \$5.20 per dozen for ordinary towels, and \$3.80 per dozen for dusters, hand towels and tea towels.
- 5.1.3 All materials and appliances required in connection with the performance of the employee's duties shall be supplied by the employer.
- 5.1.4 (a) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level unless provided with an assistant.
- (b) (i) When window cleaning is done from a ladder and any portion of a window to be cleaned is more than seven metres from the nearest horizontal plane, the employee shall be paid an allowance of 15 cents per window.
- (ii) The allowance prescribed in 5.1.4(b)(i) shall not be paid where adequate safety equipment such as fall-arrest and restraint systems is supplied. Where such equipment is supplied, it must be used by the employee.
- 5.1.5 Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours, shall be paid an allowance of \$4.85 per day.
- 5.1.6 An employee who is required to open and close classrooms, halls and other school facilities for any activities authorised by the Principal, shall be paid an allowance according to the following scale:
- |   | Per Day |
|---|---------|
|   | \$      |
| (a) Evenings - Monday to Friday   |         |
| Up to 40 rooms per week   | \$8.25  |
| 41 rooms to 100 per week  | \$12.45 |
| Over 100 rooms per week   | \$16.40 |
| (b) Saturday and Sunday   | \$15.65 |
| (c) An additional allowance of \$4.85 shall be paid to a caretaker on each occasion they are required to open or close a school facility after 11.00 pm, Monday to Friday, or for any opening or closing required on a Saturday or Sunday after the initial opening and closing. Provided that on a Saturday or Sunday the additional allowance shall not be paid if the duty is performed less than one hour after the initial or any subsequent opening or closing. |         |
- 5.1.7 (a) Where practicable, suitable dressing accommodation shall be provided by the employer. Cleaning materials, tools and appliances shall not be kept in such rooms.
- (b) All employees shall be provided with the facilities for boiling water.
- (c) Employees shall be permitted to eat their meals in a convenient and clean place protected from the weather and employees shall remove all litter and foodstuffs after use.
- (d) In the event of a dispute concerning the provisions of 5.1, the matter shall be resolved in accordance with the dispute resolution procedure of this award.
- 5.1.8 (a) Any wood chopping duties carried out by the employee shall be by agreement between the employer and the employee.
- (b) Any employee performing wood chopping duties shall be paid an allowance of \$18.50 per tonne to a maximum of:

- (i) 100% of the weight of bushwood supplied or 50% of the weight of mill-ends supplied for enclosed fireplaces such as Wonderheats.
  - (ii) 50% of the weight of bushwood supplied or 20% of the weight of mill-ends supplied for open fireplaces.
- 5.1.9 (a) An estate attendant (Homeswest) who, in their privately owned vehicle, commutes from estate to estate and is required to carry sundry cleaning and/or gardening implements and/or supplies shall be paid \$9.30 per week for all purposes of this award.
- (b) The amount and type of equipment to be carried as prescribed in 5.1.9(a) will be agreed between the union and employer.
- 5.1.10 The rates expressed in 5.1 shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner - level 1, year 1.

**2. Clause 5.4 – First Aid: Remove subclause 5.4 of this clause and insert the following in lieu thereof:**

5.4. - FIRST AID

- 5.4.1 The employer shall provide at each worksite, an adequate first aid kit for the use of the employees in case of accident, and this first aid kit shall be kept renewed and in proper condition.
- 5.4.2 (a) The employer shall, wherever practicable, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all sites or depots where employees are employed. Such employees shall, in addition to first aid duties, be responsible, under the general supervision of the foreperson, for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.
- (b) Employees so appointed shall be paid the following rates in addition to their prescribed wage:
- |                      |                           |
|----------------------|---------------------------|
| 10 employees or less | In excess of 10 employees |
| \$1.70 per day       | \$2.85 per day            |
- (c) The rates expressed in 5.4.2(b) shall be adjusted by a percentage derived from the ASNA amount divided by the key minimum classification rate of a cleaner – level 1, year 1.

**3. Clause 3.2 – Overtime: Remove subclause 3.2.3(a) of this clause and insert the following in lieu thereof:**

- 3.2.3 (a) Any employee who, without being notified the previous day, is required to continue working for more than one hour after the usual ceasing time shall be provided with a meal by the employer or be paid \$12.65 in lieu of the meal.

**2014 WAIRC 01288**

**CULTURAL CENTRE AWARD 1987**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

UNITED VOICE WA

**APPLICANT**

**-v-**

THE LIBRARY BOARD OF WESTERN AUSTRALIA , THE TRUSTEES OF THE WESTERN AUSTRALIAN MUSEUM, THE BOARD OF THE ART GALLERY

**RESPONDENT**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** FRIDAY, 28 NOVEMBER 2014  
**FILE NO/S** APPL 33 OF 2014  
**CITATION NO.** 2014 WAIRC 01288

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**Result** Award varied  
**Representation**  
**Applicant** Mr S Dane  
**Respondent** Mr R Davenport (as agent)

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*Order*

HAVING heard Mr S Dane for United Voice WA, as applicant and Mr R Davenport as agent for The Library Board of Western Australia, The Trustees of the Western Australian Museum and the Board of the Art Gallery; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Cultural Centre Award 1987* be varied in accordance with the following schedule and that such variations shall have effect on or after 28 November 2014

[L.S.]

(Sgd.) S M MAYMAN,  
Commissioner.

SCHEDULE

**1. Clause 15 -Special Rates and Provisions: Remove clause 15 and insert the following in lieu thereof:**

15. - SPECIAL RATES AND PROVISIONS

- (1) The employer shall, where practicable, make suitable provisions for employees to change their clothing on the employer's premises.
- (2) Uniforms and/or clean overalls shall be supplied by the employer free of charge, where the employer requires such to be worn. Such items shall always remain the property of the employer.
- (3)
  - (a) All employees called upon to clean closets connected to septic tanks or sewers shall be paid an allowance of 82 cents per closet per week.
  - (b) For the purpose of this subclause one metre of urinal or three urinal stalls shall count as one closet.
- (4) An employee shall not be required to work from the top of a ladder more than 3.5 metres long which rests on the ground or floor level, unless he/she has an assistant.
- (5) An allowance of \$3.00 per day or part thereof shall be paid to an employee required to use an airlift in the course of their duties.
- (6) An allowance of \$11.70 per day shall be paid in addition to the ordinary rate to an attendant required to operate audio visual equipment.
- (7)
  - (a) Except as provided for in paragraph (b) of this subclause an allowance of \$6.40 per day shall be paid to an employee required to carry keys and be responsible for securing the premises at the close of business.
  - (b) Where it is agreed between the employer and the Union in writing then an alternative arrangement may exist in respect of this subclause.
- (8)
  - (a) An employee who is required to work away from his/her usual place of work shall be paid for any fares in excess of those normally incurred in travelling from his/her home to his/her usual place of work and return, except where an allowance is paid in accordance with Clause 17. - Fares and Travelling Allowances of the Miscellaneous Government Conditions and Allowances Award No. A4 of 1992.
  - (b) Travelling time in excess of that normally incurred in travelling from his/her home to his/her usual place of work and return shall be paid at the rate of ordinary time.
  - (c) An employee who commences or completes a shift at or between the hours of 11.00 pm and 5.00 am, shall in addition to the ordinary rate of pay for that shift be paid an allowance of \$14.40 per shift.

**2. Clause 16 - Wages: Remove sub clause 16(2) of this clause and insert the following in lieu thereof:**

- (2) Leading Hands: In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid:
 

	\$
(a) if placed in charge of not less than one and more than five other employees	\$28.60
(b) if placed in charge of more than six and not more than ten other employees	\$43.80
(c) if placed in charge of more than 11 other employees	\$56.20

**3. Clause 8 - Overtime: Remove sub clause 8(9)(a) of this clause and insert the following in lieu thereof:**

- (9)
  - (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid \$12.65 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each meal by the employer or be paid \$7.40 for each meal so required.

2014 WAIRC 01333

**ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

NATIONAL ELECTRICAL &amp; COMMUNICATIONS ASSOCIATION OF WA (INC) AND OTHERS

**RESPONDENTS****CORAM** COMMISSIONER S M MAYMAN**DATE** TUESDAY, 9 DECEMBER 2014**FILE NO/S** APPL 38 OF 2014**CITATION NO.** 2014 WAIRC 01333**Result** Award varied**Representation****Applicant** Ms N O'Brien**Respondent** No appearance*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and by way of consent by letter dated 3 December 2014 there was no appearance for National Electrical & Communications Association of WA (Inc) and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Electrical Contracting Industry Award R 22 of 1978* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

**SCHEDULE****1. Clause 6. - Safety Footwear: Delete subclause (1) and insert in lieu thereof the following:**

(1) On "construction work" a payment of 15 cents for each hour worked shall be paid to all employees to compensate them for the requirement to wear approved safety footwear which the employees are to ensure are maintained in sound condition.

**2. Clause 12. - Overtime: Delete paragraph (e) of subclause (2) and insert in lieu thereof the following:**

- (e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid \$13.35 for such meal and for a second or subsequent meal if so required.
- (ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.
- (iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, \$13.35.

**3. Clause 18. - Special Rates and Provisions:****A. Delete subclauses (1), (2), (3), (4) and (5) and insert in lieu thereof the following:**

- (1) Height Money: An employee shall be paid an allowance of \$2.70 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.
- (2) Dirt Money: An employee shall be paid an allowance of 55 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- (3) Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 93 cents per hour.
- (4) Confined Space: An employee shall be paid an allowance of 66 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

- (5) Diesel Engine Ships: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 93 cents per hour whilst so engaged.
- B. Delete subclause (7) and insert in lieu thereof the following:**
- (7) Hot Work: An employee shall be paid an allowance of 55 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.
- C. Delete subclauses (9), (10), (11) and (12) and insert in lieu thereof the following:**
- (9) Percussion Tools: An employee shall be paid an allowance of 35 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.
- (10) Chemical, Artificial Manure and Cement Works: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of \$13.80 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.
- (11) Abattoirs: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of \$18.60 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.
- (12) Phosphate Ships: An employee shall be paid an allowance of 83 cents for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.
- D. Delete subclause (19) and insert in lieu thereof the following:**
- (19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid \$11.00 per week in addition to their ordinary rate.
- E. Delete subclause (21) and insert in lieu thereof the following:**
- (21) Nominee: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of \$68.70 per week.

**4. Clause 19. - Car Allowance: Delete this Clause and insert in lieu thereof the following:**

**19. - CAR ALLOWANCE**

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of 80.2 cents per kilometre travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

**5. Clause 20. - Allowance for Travelling and Employment in Construction Work: Delete paragraph (a) of subclause (2) and insert in lieu thereof the following:**

- (a) On jobs measured by radius from the General Post Office, Perth situated within the area of:

	Per Day
	\$
(i) Up to and including 50 kilometre radius	17.30
OR	
(ii) Over 50 kilometres up to and including 60 kilometre radius	21.90
OR	
(iii) Over 60 kilometres up to and including 75 kilometre radius	33.65
OR	
(iv) Over 75 kilometres up to and including 90 kilometre radius	47.65
OR	
(v) Over 90 kilometres up to and including 105 kilometre radius	61.85

**6. Clause 21. - Distant Work:**

**A. Delete subclause (6) and insert in lieu thereof the following:**

- (6) An employee to whom the provisions of subclause (I) of this Clause apply shall be paid an allowance of \$33.80 for any weekend that they returns to their home from the job but only if-
- The employee advises the employer or their agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;
  - The employee is not required to work during that weekend;
  - The employee returns to the job on the first working day following the weekend; and
  - The employer does not provide or offer to provide suitable transport.

**B. Delete subclause (9) and insert in lieu thereof the following:**

- (9) Where an employee, supplied with the board and lodging by their employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$14.95 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**7. Clause 27. - Grievance Procedure and Special Allowance:**

**A. Delete paragraph (a) of subclause (2) of this Clause and insert in lieu thereof the following:**

- (2) (a) The Disputes Committee shall consist of a representative of the Electrical Contractors Association of W.A. or, if the employer concerned so elects, a person nominated by that employer and a representative of the Electrical Trades Union W A, neither of whom shall be directly involved in the grievance, dispute or claim. Such representatives shall convene a meeting of the disputing parties in an endeavour by the process of consultation and conciliation to resolve the dispute without recourse to direct action.

**B. Delete subclause (3) of this Clause and insert in lieu thereof the following:**

- (3) (a) Subject to paragraph (e) of this subclause, a special allowance of \$34.00 per week shall be paid as a flat amount each week except where direct action takes place.
- (b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as non-adherence to the disputes procedure Clause or affect the payment of this allowance.
- (c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and \$34.00 shall be paid.
- (d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.
- (e) An apprentice shall be paid a percentage of \$34.00 being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

**8. Clause 30. - Special Provisions - Western Power: Delete subclause (2), (3), (4) (5) and (6) and insert in lieu thereof the following:**

- (2) In addition to the wage otherwise payable to an employee pursuant to the provisions of this award an employee (other than an apprentice) shall be paid:
- (a) \$2.16 per hour for each hour worked if employed at Muja;
- (b) \$1.28 per hour for each hour worked if employed at Kwinana;
- (3) (a) An employee to whom Clause 20. - Allowance for Travelling and Employment in Construction Work applies and who is engaged on construction work at Muja shall be paid:
- (i) An allowance of \$17.30 per day if the employee resides within a radius of 50 kilometres from the Muja Power Station;
- (ii) An allowance of \$46.75 per day if the employee resides outside that radius; in lieu of the allowance prescribed in the said Clause.
- (b) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.
- (4) In addition to the allowance payable pursuant to subclause (6) of Clause 21. - Distant Work of this award an employee to whom that Clause applies shall be paid \$29.50 on each occasion upon which the employee returns home at the weekend but only if –
- (a) The employee has completed three months' continuous service with the employer;
- (b) The employee is not required for work during the weekend;
- (c) The employee returns to the job on the first working day following the weekend;
- (d) The employer does not provide or offer to provide suitable transport;
- and such payment shall be deemed to compensate for a periodical return home at the employer's expense.
- (5) An employee to whom Clause 21. - Distant Work of this award applied and who proceeds to construction work at Muja from their home where located within a radius of 50 kilometres from the General Post Office, Perth -
- (a) Shall be paid an amount of \$79.40 and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said Clause; and
- (b) In lieu of the provisions of subclause (4) of the said Clause, shall be paid \$79.40 and for three hours at ordinary rates when their services terminate if the employee has completed three months continuous service;
- (6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this Award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of \$454.80 per week to meet the expenses reasonably incurred by the employee for board and lodging.
- (b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.
- (ii) The accommodation shall be of a reasonable standard.
- (iii) The employee shall continue to maintain their original residence.
- (iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.
- (v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this Award shall not apply.

**9. Clause 36: - Superannuation: Delete subparagraph (i) of paragraph (b) of subclause (2) and insert in lieu thereof the following:**

(i) For Apprentices not engaged on construction work, a weekly contribution calculated as 9.50% of the rate of pay prescribed in the First Schedule - Wages of this Award as follows:

Four Year Term		Three and a Half Year Term		Three Year Term	
1st Year	\$30.11	Six Months	\$30.11	1st Year	\$39.38
2nd Year	\$39.38	Next Year	\$39.38	2nd Year	\$51.73
3rd Year	\$51.73	Next Year	\$51.73	3rd Year	\$60.99
4th Year	\$60.99	Final Year	\$60.99		

**10. Clause 37. – Structural Efficiency: Delete paragraph (e) of subclause (1) of this Clause and insert in lieu thereof the following:**

(e) The parties shall establish an Industry Committee comprising an equal number of nominees of employer organisations which represent employers in the Electrical Contracting Industry and nominees of the Electrical Trades Union WA. The Committee shall be jointly chaired by a nominee of either of the Electrical Contractors' Association and of the Electrical Trades Union WA.

- (i) The industry committee will be responsible for the undertaking of industry, workplace and individual employee skills analysis and classification grading in consultation with the relevant authorities.
- (ii) The industry committee will review any application by an employee for relief from the provisions of the Award insofar as meeting the criteria of the definition for any classification.
- (iii) The industry committee in consultation with the relevant authorities shall be responsible for the accreditation of the content of all training prescribed by this Award which is not provided by TAFE or higher institutions.
- (iv) The industry committee shall conduct a continuous review of the content of all training prescribed by this Award including that which is provided by TAFE or higher institutions.
- (v) The industry committee shall also give consideration to measures relating to the implementation of the new classification structure and any facilitative provisions contained in this Award.
- (vi) Individual employers and employees bound by the Award have the right of direct access to the industry committee on matters of a specific nature for which one week's notice has been given.

**11. First Schedule - Wages:**

**A. Delete subclause (3) of this Clause and insert in lieu thereof the following:**

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

- (a) If placed in charge of not less than three and not more than ten other employees \$28.60
- (b) If placed in charge of more than ten and not more than twenty other employees \$44.00
- (c) If placed in charge of more than twenty other employees \$56.70

**B. Delete subclauses (5) and (6) of this Clause and insert in lieu thereof the following:**

(5) Tool Allowance:

- (a) In accordance with the provisions of subclause (20) of Clause 18. – Special Rates and Provisions of this award the tool allowance to be paid is:
  - (i) \$16.50 per week to such tradesperson, or
  - (ii) In the case of an apprentice a percentage of \$16.50 being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(6) Construction Allowance:

- (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid:
  - (i) \$51.10 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.
  - (ii) \$45.90 per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.
  - (iii) \$27.20 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

**C. Delete subclauses (9) and (10) of this Clause and insert in lieu thereof the following:**

(9) Licence Allowance:

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid \$24.30 per week.

(10) Commissioning Allowances:

An "Electrician Commissioning" as defined shall be paid at the rate of \$37.10 per week in addition to rates prescribed in this schedule.

**12. Third Schedule – Named Parties to the Award: Delete this Schedule and insert in lieu thereof the following:**

**THIRD SCHEDULE – NAMED PARTIES TO THE AWARD**

Electrical Trades Union WA  
24 / 257 Balcatta Road  
Balcatta WA 6062  
Telephone: (08) 94403522  
Facsimile: (08) 9440 3544  
Email: [info@etuwa.com.au](mailto:info@etuwa.com.au)  
Webmail: [www.etuwa.com.au](http://www.etuwa.com.au)

**2014 WAIRC 01334**

**ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

**-v-**

CHUBB ELECTRONIC SECURITY AND OTHERS

**RESPONDENTS**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** TUESDAY, 9 DECEMBER 2014  
**FILE NO/S** APPL 39 OF 2014  
**CITATION NO.** 2014 WAIRC 01334

**Result** Award varied  
**Representation**  
**Applicant** Ms N O'Brien  
**Respondent** No appearance

*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and by way of consent by letter dated 3 December 2014 there was no appearance for Chubb Electronic Security and others; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Electrical Trades (Security Alarms Industry) Award, 1980* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

[L.S.]

(Sgd.) S M MAYMAN,  
Commissioner.

## SCHEDULE

**1. Clause 11. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:**

- (f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$12.75 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid \$8.75 for each meal so required.

**2. Clause 15. - Special Rates and Provisions:****A. Delete subclauses (1) to (4) inclusive and insert in lieu thereof the following:**

- (1) Height Money: An employee shall be paid an allowance of \$2.90 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.
- (2) Dirt Money: An employee shall be paid an allowance of 59 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- (3) Confined Space: An employee shall be paid an allowance of 74 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.
- (4) Hot Work: An employee shall be paid an allowance of 59 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees celsius.

**B. Delete subclause (6) and insert in lieu thereof the following:**

- (6) Percussion Tools:

An employee shall be paid an allowance of 37 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

**C. Delete subclauses (13) and (14) and insert in lieu thereof the following:**

- (13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid \$12.00 per week in addition to their ordinary rate.
- (14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of \$24.30 per week.

**3. Clause 16. – Car Allowance: Delete subclause (3) and insert in lieu thereof the following:**

- (3) A year for the purpose of this Clause shall commence on the 1 July and end on the 30 June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE****ON EMPLOYER'S BUSINESS****MOTOR CAR**

Area and Details	Engine Displacement (In Cubic Centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
	Rate per Kilometres (cents)		
Metropolitan Area	83.8	74.9	65.1
South West Land Division	85.8	76.7	66.7
North of 23.5° South Latitude	94.7	84.6	73.6
Rest of the State	88.2	79.5	68.9
Motor Cycle (In All Areas)	28.7 Cents per Kilometre		

**4. Clause 18. – Distant Work: Delete subclauses (4) and (5) and insert in lieu thereof the following:**

- (4) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of \$35.10 for any weekend that they return to their home from the job but only if -
- (a) The employee advises the employer or the employer's agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;
- (b) The employee is not required for work during that weekend;
- (c) The employee returns to the job on the first working day following the weekend; and
- (d) The employer does not provide or offer to provide suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$15.65 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**5. Clause 28. - Wages: Delete subclauses (3) - (5) and insert in lieu thereof the following:**

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of \$16.70 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson shall replace or pay for any tools supplied by the employer if lost through their negligence.

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) \$54.30 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) \$49.10 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) \$28.40 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) Leading Hand: In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	\$30.80
(b)	If placed in charge of not less than ten and not more than twenty other employees	\$47.00
(c)	If placed in charge of more than twenty other employees	\$60.60

**2014 WAIRC 01335**

**ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

**-v-**

ACTION ELECTRONICS PTY LTD AND OTHERS

**RESPONDENTS**

**CORAM** COMMISSIONER S M MAYMAN

**DATE** TUESDAY, 9 DECEMBER 2014

**FILE NO/S** APPL 40 OF 2014

**CITATION NO.** 2014 WAIRC 01335

**Result** Award varied

**Representation**

**Applicant** Ms N O'Brien

**Respondent** No appearance

*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and there was no appearance on behalf of Action Electronics Pty Ltd and others, as respondents; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Electronics Industry Award No. A 22 of 1985* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

[L.S.]

(Sgd.) S M MAYMAN,  
Commissioner.

## SCHEDULE

1. **Clause 9. – Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following:**
  - (f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$12.00 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid \$8.05 for each meal so required.
2. **Clause 13. - Car Allowance: Delete subclause (3) of this Clause and insert in lieu thereof:**
- (3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE****ON EMPLOYER'S BUSINESS****MOTOR CAR**

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
	Over 2600cc	1600cc -2600cc	1600cc & Under
Metropolitan Area	82.6	73.7	64.0
South West Land Division	84.3	75.4	65.8
North of 23.5° South Latitude	92.6	83.3	72.6
Rest of the State	86.9	78.0	67.7
MOTOR CYCLE (IN ALL AREAS)	28.1 cents per kilometre		

3. **Clause 15. - Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu thereof:**
  - (4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of \$34.90 for any weekend that the employee returns home from the job, but only if -
    - (a) The employee advises the employer or the employer's agent of the employee's intention no later than Tuesday immediately preceding the weekend in which the employee so returns;
    - (b) The employee is not required for work during that weekend;
    - (c) The employee returns to the job on the first working day following the weekend; and
    - (d) The employer does not provide, or offer to provide, suitable transport.
  - (5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$15.20 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.
4. **Clause 20. - Special Provisions: Delete subclauses (1) - (4), (6) - (8) and (14) and insert in lieu thereof the following:**
  - (1) **Dirt Money:** An employee shall be paid an allowance of 59 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
  - (2) **Confined Space:** An employee shall be paid an allowance of 73 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.
  - (3) **Hot Work:** An employee shall be paid an allowance of 59 cents per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.
  - (4) **Height Money:** An employee shall be paid an allowance of \$2.75 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.
  - (6) **Diesel Engine Ships:** The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 99 cents per hour whilst so engaged.

- (7) Percussion Tools: An employee shall be paid an allowance of 37 cents per hour when working pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.
- (8) Chemical, Artificial Manure and Cement Works: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of \$14.90 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.
- (14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid \$11.60 per week in addition to their ordinary rate.

**5. Clause 33. - Wages: Delete subclauses (2) and (5) and insert in lieu thereof the following:**

**(2) Leading Hands:**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

- |     |  |         |
|-----|--|---------|
| (a) | If placed in charge of not less than three and not more than ten other employees | \$30.50 |
| (b) | If placed in charge of more than ten but not more than twenty other employees    | \$46.00 |
| (c) | If placed in charge of more than twenty other employees                          | \$59.90 |

**(5) Tool Allowance**

- (a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -
- (i) \$16.70 per week to such technician, serviceperson, installer; or
  - (ii) In the case of an apprentice a percentage of \$16.70 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (c) An employer shall provide for the use of technicians, service people, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

**PART II - CONSTRUCTION**

**6. Clause 5. - Special Rates and Provisions: Delete subclause (2) and insert in lieu thereof the following:**

- (2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.
- (b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of \$346.50.
- (c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

**7. Clause 6. - Allowance for Travelling and Employment in Construction Work: Delete paragraphs (a), (b) and (c) of subclause (1) of this Clause and insert in lieu thereof:**

- (a) On places within a radius of 50 kilometres from the General Post Office, Perth - \$16.65 per day.
- (b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 85 cents per kilometre.
- (c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 85 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

**8. Clause 7. - Distant Work: Delete subclauses (6) and (7) respectively and insert in lieu thereof:**

- (6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of \$34.00 for any weekend that the employee returns home from the job, but only if -
- (a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;
  - (b) The employee is not required for work during that weekend;
  - (c) The employee returns to the job on the first working day following the weekend; and
  - (d) The employer does not provide, or offer to provide, suitable transport.
- (7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$14.95 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**9. Clause 10. - Wages: Delete subclauses (5), (6) and (7) of this clause and insert in lieu thereof the following:**

**(5) Construction Allowances:**

- (a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -
- (i) \$53.60 per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.
  - (ii) \$48.50 per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.
  - (iii) \$28.30 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.
- (b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

**(6) Leading Hand:**

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

- |     |  |         |
|-----|--|---------|
| (a) | If placed in charge of not less than three and not more than ten other employees | \$30.50 |
| (b) | If placed in charge of more than ten but not more than twenty other employees    | \$46.00 |
| (c) | If placed in charge of more than twenty other employees                          | \$59.90 |

- (7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -
- (i) \$16.70 per week to such Technician, Serviceperson or Installer, or
  - (ii) In the case of an apprentice a percentage of \$16.70 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,
- for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.
-

2014 WAIRC 01327

**ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

THE MINISTER FOR WORKS AND OTHERS

**RESPONDENTS****CORAM** COMMISSIONER S M MAYMAN**DATE** TUESDAY, 9 DECEMBER 2014**FILE NO/S** APPL 41 OF 2014**CITATION NO.** 2014 WAIRC 01327

<b>Result</b>	Award varied
<b>Representation</b>	
<b>Applicant</b>	Ms N O'Brien
<b>Respondent</b>	Ms L MacBride and with her Mr J Chapman (as agent)

*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and Ms MacBride (as agent) on behalf of the Minister for Works and others, as respondents; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

## SCHEDULE

1. **Clause 14. - Overtime: Delete paragraphs (e) of subclause (3) of this clause and inset in lieu thereof the following:**
  - (e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid \$12.50 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, they shall be supplied with each such meal by the employer or be paid \$8.80 for each meal so required.
2. **Clause 14. - Overtime: Delete paragraphs (h) of subclause (3) of this clause and inset in lieu thereof the following:**
  - (h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid \$5.80 for breakfast.
3. **Clause 17. - Special Rates and Provisions: Delete subclauses (1) - (5) and insert in lieu thereof the following:**
  - (1) Height Money: An employee shall be paid an allowance of \$2.70 for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.
  - (2) Dirt Money: Dirt Money of 56 cents per hour shall be paid as follows:-
    - (a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.
    - (b) Bitumen Sprayers - Large Units:
      - (i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine from the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.
      - (ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 63 cents per hour shall be paid.

- (c) Bitumen Sprayers - Small Units:
    - (i) To employees for work done on main tank, its fittings, pump and spray arms.
    - (ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.
  - (d) To employees on all other dirty tar sprays and kettles.
  - (e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.
  - (f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.
  - (g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.
- (3) Confined Space:  
72 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.
- (4) Any employee actually working a pneumatic tool of the percussion type shall be paid 36 cents per hour extra whilst so engaged.
- (5) Hot Work: An employee shall be paid an allowance of 56 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.
- 4. Clause 17. - Special Rates and Provisions: Delete subclauses (8) - (16) and insert in lieu thereof the following:**
- (8) Any employee working in water over their boots or, if gumboots are supplied, over the gumboots, shall be paid an allowance of \$1.70 per day.
- (9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 56 cents.
- (10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of \$3.45 for such examination and \$1.23 per hour extra thereafter for fixing, renewing or repairing such work.
- (11) Ship Repair Work: Any employee engaged in repair work on board ships shall be paid an additional \$6.15 per day for each day on which so employed.
- (12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of \$2.37 per hour.
- (13) An employee shall, whilst using explosive powered tools, be paid an allowance of 21 cents per hour, with a minimum payment of \$1.50 per day.
- (14) Abattoirs -  
An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of \$19.30 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to \$18.00 with respect to any employee who is supplied with overalls by the employer.
- (15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 60 cents per hour, with a minimum payment for four hours.
- (16) Morgues -  
An employee required to work in a morgue shall be paid 60 cents per hour or part thereof, in addition to the rates prescribed in this clause.
- 5. Clause 17. - Special Rates and Provisions: Delete subclause (19) and insert in lieu thereof the following:**
- (19) An employee required to repair or maintain incinerates shall be paid \$3.65 per unit.
- 6. Clause 17. - Special Rates and Provisions: Delete subclauses (21) - (24) and insert in lieu thereof the following:**
- (21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 42 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.
- (b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.
- (c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

- (d) For the purpose of this subclause foundry work shall mean:
- (i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and
  - (ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:
    - (aa) Non-ferrous die casting (including gravity and pressure):
    - (bb) Casting of billets and/or ingots in metal mould;
    - (cc) Continuous casting of metal into billets;
    - (dd) Melting of metal for use in printing;
    - (ee) Refining of metal.

- (22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of \$23.50 per week.
- (23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 76 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.
- (24) Towing Allowance: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of \$5.35 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

**7. Clause 17. - Special Rates and Provisions: Delete subclauses (26) - (29) and insert in lieu thereof the following:**

- (26) First Aid Allowance: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid \$11.60 per week in addition to their ordinary rate.
- (27) Polychlorinated Biphenyls  
Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of \$2.37 per hour whilst so engaged.
- (28) Nominee Allowance:  
A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of \$20.50 per week.
- (29) Hospital Environment Allowance:  
Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:
- (a) (i) \$16.50 per week for work performed in a hospital environment; and
  - (ii) \$5.50 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -
    - Princess Margaret Hospital
    - King Edward Memorial Hospital
    - Sir Charles Gairdner Hospital
    - Royal Perth Hospital
    - Fremantle Hospital
  - (b) \$12.00 per week for work performed in a hospital environment at -
    - Kalgoorlie Hospital
    - Osborne Park Hospital
    - Albany Hospital
    - Bunbury Hospital
    - Geraldton Hospital
    - Mt. Henry Hospital
    - Northam Hospital
    - Swan Districts Hospital
    - Perth Dental Hospital

- (c) \$7.90 per week for work performed in a hospital environment at -
- |                     |                       |
|---------------------|-----------------------|
| Bentley Hospital    | Derby Hospital        |
| Narrogin Hospital   | Port Hedland Hospital |
| Rockingham Hospital | Sunset Hospital       |
| Armadale Hospital   | Broome Hospital       |
| Busselton Hospital  | Carnarvon Hospital    |
| Collie Hospital     | Esperance Hospital    |
| Katanning Hospital  | Merredin Hospital     |
| Murray Hospital     | Warren Hospital       |
| Wyndham Hospital    |                       |

**8. Clause 19. – Fares and Travelling Allowances: Delete paragraphs (a), (b) and (c) of subclause (1) and insert in lieu thereof the following:**

- (a) On places within a radius of fifty kilometres from the General Post Office, Perth - \$17.65 per day;
- (b) For each additional kilometre to a radius of sixty kilometres from the General Post Office, Perth – 93 cents per kilometre;
- (c) Subject to the provisions of paragraph (d) work performed at places beyond a sixty kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employee with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause in which case an additional allowance of 93 cents per kilometre shall be paid for each kilometre in excess of the sixty kilometre radius.

**9. Clause 20. – Distant Work – Construction: Delete subclauses (6) and (7) of this Clause and insert in lieu thereof the following:**

- (6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of \$36.35 and for any weekend that he/she return to his home from the job but only if -
- (a) The employer or his/her agent is advised of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;
- (b) He/she is not required for work during that weekend;
- (c) The employee returns to the job on the first working day following the weekend; and
- (d) The employer does not provide or offer to provide suitable transport.
- (7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, they shall be provided with suitable transport to and from that job or be paid an allowance of \$15.90 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**10. Clause 21. – District Allowances: Delete subclause (6) of this Clause and insert in lieu thereof the following:**

- (6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	COLUMN II STANDARD RATE  \$ Per Week	COLUMN III EXCEPTIONS TO STANDARD RATE  Town Or Place	COLUMN IV RATE  \$ Per Week
6	89.90	Nil	Nil
5	73.50	Fitroy Crossing Halls Creek Turner River Camp Nullagine Liveringa (Camballin) Marble Bar Wittenoom Karratha	99.00    92.40   87.00
4	37.30	Port Hedland Warburton Mission Carnarvon	80.50 99.70 34.80

COLUMN I DISTRICT	COLUMN II STANDARD RATE \$ Per Week	COLUMN III EXCEPTIONS TO STANDARD RATE Town Or Place	COLUMN IV RATE \$ Per Week
3	23.40	Meekatharra Mount Magnet Wiluna Laverton Leonora Cue	37.30
2	16.70	Kalgoorlie Boulder Ravensthorpe Norseman Salmon Gums Marvel Loch Esperance	5.60 22.10
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

**11. First Schedule - Wages: Delete subclauses (5) and insert in lieu thereof the following:**

- (5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all-purpose industry allowance of \$18.60.
- (b) This allowance shall be paid in two instalments, as follows:
- (i) \$9.30 of the allowance shall be paid after the first 12 months of Government service; and
- (ii) the remaining \$9.30 - totalling \$18.60 - shall be paid on completion of 24 months of Government service.
- (c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows:
- (i) The increase shall apply to the 'plus 24 months of service' rate;
- (ii) The increase is to be rounded to the nearest ten cents;
- (iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and
- (iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

**12. First Schedule - Wages: Delete subclause (8) and insert in lieu thereof the following:**

- (8) (a) Leading Hands
- A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:
- |   |       |
|---|-------|
|   | \$    |
| If placed in charge of not less than three and not more than 10 other employees | 29.90 |
| If placed in charge of more than 10 and not more than 20 other employees        | 45.50 |
| If placed in charge of more than 20 other employees                             | 58.40 |
- (b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than 10 other employees.
- (c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.
- (d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	\$
Manjimup, Collie	72.90
Harvey, Dwellingup, Mundaring, Yanchep	36.20
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	18.40
Jarrahdale	18.40

**13. First Schedule - Wages: Delete subclauses (10) – (12) inclusive and insert in lieu thereof the following:**

**(10) Construction Allowance**

- (a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -
- (i) \$52.10 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;
  - (ii) \$47.00 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A “multi-storeyed building” is a building which, when completed will consist of at least five storeys.
  - (iii) \$27.70 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.
- (b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.
- (c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

**(11) Tool Allowance**

- (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -
- (i) \$16.50 per week to such tradesperson; or
  - (ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in this Schedule,
- for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.
- (c) An employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through the negligence of such employee.

**(12) Drilling Allowance**

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional \$2.73 per hour whilst so engaged.

**14. Fifth Schedule – Building Management Authority Wages and Conditions: Delete paragraphs (c), (d) and (e) of subclause (5) of this Schedule and insert in lieu thereof the following:**

- (c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all-purpose payment of \$31.20 per week.
- (d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.
- (e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all-purpose allowance of \$42.00 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule – Wages of this Award.

**15. Fifth Schedule – Building Management Authority Wages and Conditions: Delete subclause (7) of this clause and insert in lieu thereof the following:**

**(7) Computing Quantities:**

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid \$4.40 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

**16. Sixth Schedule – Named Parties to the Award: Delete this Schedule and insert in lieu thereof the following:**

**SIXTH SCHEDULE - NAMED PARTIES TO THE AWARD**

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch  
Electrical Trades Union WA

2014 WAIRC 01287

**GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** UNITED VOICE WA**APPLICANT**

-v-

THE HON. MINISTER FOR EDUCATION, THE HON. PREMIER OF WESTERN AUSTRALIA ,  
THE HON. MINISTER FOR AGRICULTURE**RESPONDENT****CORAM** COMMISSIONER S M MAYMAN**DATE** FRIDAY, 28 NOVEMBER 2014**FILE NO/S** APPL 32 OF 2014**CITATION NO.** 2014 WAIRC 01287**Result** Award varied**Representation****Applicant** Mr S Dane**Respondent** Mr R Davenport (as agent)*Order*

HAVING heard Mr S Dane for United Voice WA, as applicant and Mr R Davenport as agent for The Hon. Minister for Education, The Hon. Premier of Western Australia, The Hon. Minister for Agriculture; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Gardeners (Government) 1986 Award No. 16 of 1983* be varied in accordance with the following schedule and that such variations shall have effect on or after 28 November 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

## SCHEDULE

**1. Clause 16 - First Aid- Kits and Attendants: Remove sub clause 16.2 of this clause and insert the following in lieu thereof:**

The employer shall, wherever practicable and where there are two or more employees, appoint an employee holding current first aid qualifications from St John Ambulance or similar body to carry out first aid duty at all works or depots where employees are employed. Such employees so appointed in addition to first aid duties, shall be responsible under the general supervision of the supervisor or foreperson for maintaining the contents of the first aid kit, conveying it to the place of work and keeping it in a readily accessible place for immediate use.

Employees so appointed shall be paid the following rates in addition to their prescribed rate per day:

Qualified Attendant	\$ Per Day
10 employees or less	1.70
In excess of 10 employees	2.70

**2. Clause 25 - Wages: Remove sub clause 25(3) of this clause and insert the following in lieu thereof:**

(3) A Senior Gardener/Ground Attendant who is required to maintain turf wickets, bowling greens or tennis courts shall be paid in addition to the rates prescribed an amount of \$7.80 per week. Occasional off-season attention shall not qualify an employee for payment under this subclause.

**3. Clause 25 - Wages: Remove sub clause 25(5) of this clause and insert the following in lieu thereof:**

(5) Leading Hands

Leading Hands and Senior Gardener/Ground Attendants if placed in charge of:

- (a) five and not more than ten other employees shall be paid \$27.40 per week extra;
- (b) more than ten but not more than 20 other employees shall be paid \$40.20 per week extra;
- (c) more than 20 other employees shall be paid \$53.30 per week extra.

**4. Clause 25 - Wages: Remove sub clause 25(10) of this clause and insert the following in lieu thereof:**

(10) Toilet Cleaning Allowance (Zoological Gardens)

- (a) Employees of the Zoological Gardens Board covered by this award who are required to clean public toilets shall be paid 85 cents per closet, per week.
- (b) For the purposes of this subclause one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

- (c) All such employees shall be supplied with rubber gloves on request.
5. **Clause 12 - Overtime: Remove sub clause 12(2) of this clause and insert the following in lieu thereof:**
- (2) When an employee without being notified on the previous day or earlier is required to continue working after his usual knock off time for more than two hours, the employee shall be provided with a meal or be paid \$12.65 in lieu thereof.

2014 WAIRC 01336

**GATE, FENCE AND FRAMES MANUFACTURING AWARD**  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
ELECTRICAL TRADES UNION WA

PARTIES

APPLICANT

-v-

CAI FENCES AND OTHERS

RESPONDENTS

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** TUESDAY, 9 DECEMBER 2014  
**FILE NO/S** APPL 42 OF 2014  
**CITATION NO.** 2014 WAIRC 01336

**Result** Award varied  
**Representation**  
**Applicant** Ms N O'Brien  
**Respondent** No appearance

*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and there was no appearance on behalf of CAI Fences and others, as respondents; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Gate, Fence and Frames Manufacturing Award* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

SCHEDULE

1. **Clause 7. - Overtime: Delete paragraph (f) of subclause (3) and insert in lieu thereof the following:**
  - (f) Subject to the provisions of paragraph (h) of this subclause, an employee required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid \$11.70 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid \$8.10 for each meal so required.
2. **Clause 14. - Special Rates and Provisions: Delete subclauses (1), (2) and (4) of this clause and insert in lieu thereof the following:**
  - (1) **Dirt Money:** An employee shall be paid an allowance of 58 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
  - (2) **Confined Space:** An employee shall be paid an allowance of 72 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.
  - (4) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association appointed by the employer to perform first aid duties, shall be paid \$11.80 per week in addition to the ordinary rate.
3. **Clause 19. - Fares & Travelling Time: Delete paragraphs (a) of subclause (2) and insert in lieu thereof the following:**
  - (a) On places within a radius of 50 kilometres from the General Post Office, Perth - \$17.45 per day.
4. **Clause 20. - Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:**
  - (6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of \$33.20 for any week-end the employee returns to the employee's home from the job, but only if -

- (a) The employee advises the employer or the employer's agent of the employee's intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;
  - (b) The employee is not required for work during that week-end;
  - (c) The employee returns to the job on the first working day following the week-end; and
  - (d) The employer does not provide, or offer to provide, suitable transport
- (7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$14.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

**5. First Schedule - Wages: Delete subclauses (2) and (6) of this clause and insert in lieu thereof the following:**

- (2) Leading Hand: In addition to the appropriate rate prescribed in subclause (1) of this clause, a leading hand shall be paid:
- |   | \$    |
|---|-------|
| (a) If placed in charge of not less than three and not more than 10 other employees | 31.00 |
| (b) If placed in charge of more than 10 and not more than 20 other employees        | 47.70 |
| (c) If placed in charge of more than 20 other employees                             | 61.50 |
- (6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -
- (i) \$17.30 per week to such tradesperson, or
  - (ii) In the case of an apprentice a percentage of \$17.30 being the percentage which appears against the year of apprenticeship in subclause (a) of subclause (3) of this Schedule.
- For the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.
  - (c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
  - (d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through their negligence.

**2014 WAIRC 01337**

**LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

KONE ELEVATORS PTY LIMITED AND OTHERS

**RESPONDENTS**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** TUESDAY, 9 DECEMBER 2014  
**FILE NO/S** APPL 43 OF 2014  
**CITATION NO.** 2014 WAIRC 01337

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**Result** Award varied  
**Representation**  
**Applicant** Ms N O'Brien  
**Respondent** No appearance

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*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and there was no appearance on behalf of Kone Elevators Pty Limited and others, as respondents; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Lift Industry (Electrical and Metal Trades) Award 1973* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

## SCHEDULE

1. **Clause 12. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following:**
  - (f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$12.75 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with each such meal by the employer or be paid \$8.75 for each meal so required.
2. **Clause 16. - Special Rates and Provisions: Delete subclauses (5) and (6) and insert in lieu thereof the following:**
  - (5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of \$23.90 per week.
  - (6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid \$11.90 per week in addition to his/her ordinary rate.
3. **Clause 17. - Car Allowance: Delete subclause (3) and insert in lieu thereof the following:**
  - (3) A year for the purpose of this Clause shall commence on the 1st day of July and end on the 30th day of June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE  
ON EMPLOYER'S BUSINESS  
MOTOR CAR**

AREA AND DETAILS	ENGINE DISPLACEMENT (In Cubic Centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Metropolitan Area	83.7	74.8	65.0
South West Land Division	85.5	76.5	66.5
North of 23.5' South Latitude	93.8	84.3	73.4
Rest of the State	88.2	79.1	69.0
Motor Cycle (In All Areas)	28.8 cents per kilometre		

4. **Clause 18. - Fares & Travelling Allowance: Delete subclause (2) and insert in lieu thereof the following:**
  - (2) An employee to whom subclause (1) of this Clause does not apply and who is engaged on construction work or regular repair service and/or maintenance work shall be paid an allowance in accordance with the provisions of this subclause to compensate for excess fares and travelling time from the employee's home to his/her place of work and return:
    - (a) On places within a radius of 50 kilometres from the General Post Office, Perth - \$17.30 per day.
    - (b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 95 cents per kilometre.
    - (c) Subject to the provision of paragraph (d), work performed at places beyond a 60 kilometres radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this Clause, in which case an additional allowance of 95 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres radius.
    - (d) In respect to work carried out from an employer's depot situated more than 60 kilometres from the G.P.O., Perth, the main Post Office in the town in which such depot is situated shall be the centre for the purpose of calculating the allowance to be paid.
    - (e) Where transport to and from the job is provided by the employer from and to his/her depot or such other place more convenient to the employee as is mutually agreed upon between the employer and employee, half the above rates shall be paid; provided that the conveyance used for such transport is provided with suitable seating and weatherproof covering.

- 5. Clause 19. – Distant Work: Delete subclauses (6) and (7) and insert in lieu thereof the following:**
- (6) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of \$35.10 for any week-end they return home from the job, but only if -
- The employee advises the employer or the employer's agent of such intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;
  - The employee is not required for work during that week-end;
  - The employee returns to the job on the first working day following the week-end; and
  - The employer does not provide, or offer to provide, suitable transport.
- (7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$15.70 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.
- 6. Clause 28. - Lift Industry Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following:**
- (1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of \$112.50 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.
- 7. First Schedule - Wages: Delete subclauses (3) and (6) and insert in lieu thereof the following:**
- (3) Leading Hands:
- In addition to the appropriate total wage prescribed in this Clause, a leading hand shall be paid -
- If placed in charge of not less than three  
and not more than ten other employees \$ 30.30
  - If placed in charge of more than ten  
and not more than twenty other employees 46.10
  - If placed in charge of more than twenty  
other employees 59.50
- (6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of their work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-
- \$16.70 per week to such tradesperson; or
  - In the case of an apprentice a percentage of \$16.70 being the percentage which appears against their years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.
- (b) Any tool allowance paid pursuant of paragraph (a) of this Clause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.
- (c) An employer shall provide for the use of tradesperson or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A tradesperson or apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

2014 WAIRC 01338

**METAL TRADES (GENERAL) AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

ANODISERS WA AND OTHERS

**RESPONDENTS****CORAM**

COMMISSIONER S M MAYMAN

**DATE**

TUESDAY, 9 DECEMBER 2014

**FILE NO/S**

APPL 44 OF 2014

**CITATION NO.**

2014 WAIRC 01338

<b>Result</b>	Award varied
<b>Representation</b>	
<b>Applicant</b>	Ms O'Brien
<b>Respondent</b>	No appearance

*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and there was no appearance on behalf of Anodisers WA and others, as respondents; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Metal Trades (General) Award* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

SCHEDULE

**1. Clause 3.2 – Overtime: Delete 3.2.3(6) and insert in lieu thereof the following:**

- (6) Subject to the provisions of 3.2.3(7) of this subclause, an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid \$12.80 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with each such meal by the employer or be paid \$8.70 for each meal so required.

**2. Clause 4.8 – Wages and Supplementary Payments:**

**A. Delete 4.8.2(1) and insert in lieu thereof the following:**

- (1) Leading Hand:  
In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week -
- |   | \$    |
|---|-------|
| (a) If placed in charge of not less than three and not more than 10 other employees | 30.60 |
| (b) If placed in charge of more than 10 and not more than 20 other employees        | 46.70 |
| (c) If placed in charge of more than 20 other employees                             | 60.40 |

**B. Delete 4.8.6(1) and insert in lieu thereof the following:**

- (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of -
- (a) \$16.70 per week to such tradesperson, or
- (b) In the case of an apprentice a percentage of \$16.70 being the percentage which appears against the year of apprenticeship in 4.8.3,
- for the purposes of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

**C. Delete 4.8.7 and insert in lieu thereof the following:**

- 4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of \$27.00 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities but an employee so employed for no more than three days in a week shall be paid on a pro rata basis.

This subclause shall not apply to employees employed by Cockburn Cement Limited.

**3. Clause 5.2 – Special Rates and Facilities: Delete this clause and insert in lieu thereof the following:**

- 5.2.1 Height Money: An employee shall be paid an allowance of \$2.75 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespeople nor to riggers and splicers on ships and buildings.
- 5.2.2 Dirt Money: An employee shall be paid an allowance of 60 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.
- 5.2.3 Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this Award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding \$1.01 per hour.

- 5.2.4 **Confined Space:** An employee shall be paid an allowance of 72 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.
- 5.2.5 **Diesel Engine Ships:** The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of \$1.01 per hour whilst so engaged.
- 5.2.6 **Boiler Work:** An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which the employee may be entitled under 5.2.2 and 5.2.4.
- 5.2.7 **Hot Work:** An employee shall be paid an allowance of 60 cents per hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1° and 54.4° Celsius.
- 5.2.8 (1) Where in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may –
- (a) Fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;
  - (b) Fix the period (including a minimum period) during which any allowance so fixed is to be paid; and
  - (c) Prescribed such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Board sees fit.
- (2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.
- (3) An allowance fixed pursuant to 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.
- 5.2.9 **Tarring Pipes:** The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of 98 cents per day whilst so engaged.
- 5.2.10 **Percussion Tools:** An employee shall be paid an allowance of 35 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.
- 5.2.11 **Chemical, Artificial Manure and Cement Works:** An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of \$14.90 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.
- 5.2.12 **Abattoirs and Tallow Rendering Works:** An employee, employed in and about an abattoir or in a rendering section of tallow works, shall be paid an allowance calculated at the rate of \$19.40 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this Clause.
- 5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in 5.2.1 - Height Money.
- 5.2.14 **Phosphate Ships:** An employee shall be paid an allowance of 85 cents for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.
- 5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than they would be entitled to receive pursuant to the award which would apply if such employee was employed in the gold mine concerned.
- 5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.
- 5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.
- 5.2.18 **Special Rates Not Cumulative:** Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely – the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.
- 5.2.19 **Protective Equipment:**
- (1) An employer shall have available a sufficient supply of protective equipment (as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.
  - (2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.
  - (3) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if the employee does both employees shall be deemed guilty of wilful misconduct.

- (4) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.
- (5) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.
- 5.2.20 (1) Subject to the provisions of this Clause, an employee whilst employed on foundry work shall be paid a disability allowance of 42 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.
- (2) The foundry allowance herein prescribed shall also apply to apprentices and un-apprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.
- (3) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this Clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.
- (4) For the purpose of this subclause 'foundry work' shall mean -
- (a) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and
- (b) Where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -
- (i) Non-ferous die casting (including gravity and pressure);
- (ii) Casting of billets and/or ingots in metal moulds;
- (iii) Continuous casting of metal into billets;
- (iv) Melting of metal for use in printing;
- (v) Refining of metal.
- 5.2.21 An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid \$11.70 per week in addition to the employee's ordinary rate.
- 5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant Regulation in force on the 28th day of February, 1978 under the *Electricity Act 1945*, shall be paid an allowance of \$24.20 per week.
- 4. Clause 5.3 – Car Allowance: Delete 5.3.3 and insert in lieu thereof the following:**
- 5.3.3 A year for the purpose of this Clause shall commence on the 1st day of July and end on the 30th day of June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S  
OWN VEHICLE ON EMPLOYER'S BUSINESS**

**MOTOR CAR**

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
	RATE PER KILOMETRE (CENTS)		
	Over 2600cc	Over 1600cc & Under -2600cc	1600cc & Under
Metropolitan Area	83.3	74.7	64.9
South West Land Division	85.2	76.5	66.6
North of 23.5° South Latitude	93.8	84.4	73.3
Rest of the State	88.1	78.9	68.7
Motor Cycle (in all areas)	28.7¢ per kilometre		

- 5. Clause 5.5 – Distant Work: Delete 5.5.4 and 5.5.5 and insert in lieu thereof the following:**
- 5.5.4 An employee, to whom the provisions of 5.5.1 apply, shall be paid an allowance of \$35.30 for any weekend that the employee returns home from the job, but only if -
- (1) The employee advises the employer or the employer's agent of such intention not later than Tuesday immediately preceding the weekend in which the employee so returns;

- (2) The employee is not required for work during that weekend;
- (3) The employee returns to the job on the first working day following the weekend; and
- (4) The employer does not provide, or offer to provide, suitable transport.

5.5.5 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$15.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds twenty (20) minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

## PART 2 – CONSTRUCTION WORK

### 6. Clause 13. – Wages: Delete 13.4, 13.5 and 13.6 and insert in lieu thereof the following:

#### 13.4 Construction Allowances

- (1) In addition to the appropriate rates of pay prescribed in this clause, an employee shall be paid -
  - (a) \$54.00 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.
  - (b) \$48.60 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.
  - (c) \$28.50 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.
- (2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

#### 13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a Leading Hand shall be paid –

	\$
(1) If placed in charge of not less than three (3) and not more than ten (10) other employees	30.60
(2) If placed in charge of more than ten (10) and not more than twenty (20) other employees	46.70
(3) If placed in charge of more than twenty (20) other employees	60.40

13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

- (a) \$16.70 per week to such tradesperson; or
- (b) In the case of an apprentice a percentage of \$16.70 being the percentage which appears against their year of apprenticeship in 4.8.3 of Clause 4.8 - Wages and Supplementary Payments of PART 1 - GENERAL (subject to Clause 12.2 - Apprentices of PART 2) of this Award, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson or apprentice.
- (2) Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.
- (3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (4) A tradesperson or an apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

### 7. Clause 15.1 – Special Allowances and Provisions: Delete 15.1.2(2) and insert in lieu thereof the following:

- (2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of \$911.60.

### 8. Clause 15.1 – Special Allowances and Provisions: Delete 15.1.4 and insert in lieu thereof the following:

15.1.4 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of \$24.20 per week (rate from 11/4/90). **Clause 15.2 – Allowance for Travelling and Employment in Construction Work: Delete 15.2.1(1), 15.2.1(2) and 15.2.1(3) and insert in lieu thereof the following:**

- (1) On places within a radius of 50 kilometres from the General Post Office, Perth - \$17.25 per day.
- (2) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 92 cents per kilometre.

- (3) Subject to the provisions of 15.2.1(4), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 92 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

**10. Clause 15.3 – Distant Work: Delete 15.3.6 and 15.3.7 and insert in lieu thereof the following:**

15.3.6 An employee, to whom the provisions of 15.3.1 apply, shall be paid an allowance of \$35.30 for any weekend that the employee returns home from the job, but only if -

- (1) The employee advises their employer or the employer's agent of their intention not later than the Tuesday immediately preceding the weekend in which they so return;
- (2) The employee is not required for work during that weekend;
- (3) The employee returns to the job on the first working day following the weekend; and
- (4) The employer does not provide, or offer to provide, suitable transport.

15.3.7 Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from the job or be paid an allowance of \$15.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**11. Clause 15.4 – Special Provision – Western Power: Delete 15.4.2 and insert in lieu thereof the following:**

15.4.2 In addition to the wage otherwise payable to an employee pursuant to the provisions of PART 2 - CONSTRUCTION WORK of this Award, an employee (other than an apprentice) shall be paid –

- (1) \$2.41 per hour for each hour worked if employed at Muja;
- (2) \$1.41 per hour for each hour worked if employed at Kwinana;
- (3) A safety footwear allowance of twelve (12) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee. Failure to wear approved safety footwear or to maintain it in sound condition as determined by the employer shall render the employee liable to dismissal.

**12. Clause 15.4 - Special Provision – Western Power: Delete 15.4.3, 15.4.4 and 15.4.5 and insert in lieu thereof the following:**

15.4.3 (1) An employee, to whom Clause 15.2 - Allowance for Travelling and Employment in Construction Work of this PART applies and who is engaged on construction work at Muja, shall be paid -

- (a) An allowance of \$17.25 per day if the employee resides within a radius of 50 kilometres from the Muja power station;
  - (b) An allowance of \$45.60 per day if the employee resides outside that radius.
- in lieu of the allowance prescribed in the said clause.

(2) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

15.4.4 In addition to the allowance payable pursuant to 15.3.6 of Clause 15.3 – Distant Work of this PART, an employee to whom that clause applies shall be paid \$34.00 on each occasion upon which the employee returns home at the weekend, but only if -

- (1) The employee has completed three months' continuous service with the employer;
- (2) The employee is not required for work during the weekend;
- (3) The employee returns to the job on the first working day following the weekend;
- (4) The employer does not provide, or offer to provide, suitable transport;

and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

15.4.5 An employee to whom Clause 15.3 - Distant Work of this PART applies and who proceeds to construction work at Muja from home where located within a radius of 50 kilometres from the General Post Office, Perth -

- (a) Shall be paid an amount of \$79.90 and for three hours at ordinary rates in lieu of expenses and payment prescribed in 15.3.3 of the said clause; and
- (b) In lieu of the provisions of 15.3.4 of the said clause, shall be paid \$79.90 and for three (3) hours at ordinary rates when the employee's services terminate, if the employee has completed three (3) months' continuous service;

and the provisions of 15.3.3 and 15.3.4 of Clause 15.3 - Distant Work of this PART shall not apply to such employee.

2014 WAIRC 01342

**RADIO AND TELEVISION EMPLOYEES' AWARD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

ELECTRICAL TRADES UNION WA

**APPLICANT**

-v-

HILLS INDUSTRIES LTD AND OTHERS

**RESPONDENTS**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** TUESDAY, 9 DECEMBER 2014  
**FILE NO/S** APPL 45 OF 2014  
**CITATION NO.** 2014 WAIRC 01342

**Result** Award varied  
**Representation**  
**Applicant** Ms N O'Brien  
**Respondent** No appearance

*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and there was no appearance on behalf of Hills Industries Ltd and others, as respondents; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Radio and Television Employees' Award* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

## SCHEDULE

1. **Clause 9. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:**
  - (f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid \$12.75 or a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid \$8.65 for each meal so required.
2. **Clause 13. – Car Allowances: Delete subclause (3) of this Clause and insert in lieu thereof the following:**
  - (3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

**RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE****ON EMPLOYER'S BUSINESS****MOTOR CAR**

Area and Details	Engine Displacement (in Cubic Centimetres)		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Metropolitan Area	83.6	74.7	65.0
South West Land Division	85.5	76.5	66.5
North of 23.5° South Latitude	93.9	84.2	73.5
Rest of the State	88.2	79.1	69.0
Motor Cycle (In All Areas)	28.6 cents per kilometre		

3. **Clause 14. – Distant Work: Delete subclause (4) of this Clause and insert in lieu thereof the following:**
  - (4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of \$15.65 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

**4. Clause 29. - Wages: Delete subclauses (2) and (5) of this Clause and insert in lieu thereof:****(2) Leading Hands:**

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

- |     |    |  |       |
|-----|----|--|-------|
|     | \$ |  |       |
| (a) |    | If placed in charge of not less than three and not more than ten other employees | 30.50 |
| (b) |    | If placed in charge of more than ten and not more than twenty other employees    | 46.30 |
| (c) |    | If placed in charge of more than twenty other employees                          | 59.90 |
- (5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-
- (i) \$16.60 per week to such Serviceperson, Installer or Assembler; or
- (ii) In the case of an apprentice a percentage of \$16.60 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause,
- for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.
- (b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.
- (c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.
- (d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through their negligence.

**2014 WAIRC 01286**

**RANGERS (NATIONAL PARKS) CONSOLIDATED AWARD 2000**  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
UNITED VOICE WA

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

THE CHIEF EXECUTIVE OFFICER (EXECUTIVE DIRECTOR) OF THE DEPARTMENT OF  
CONSERVATION AND LAND MANAGEMENT

**RESPONDENT**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** FRIDAY, 28 NOVEMBER 2014  
**FILE NO/S** APPL 31 OF 2014  
**CITATION NO.** 2014 WAIRC 01286

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<b>Result</b>	Award varied
<b>Representation</b>	
<b>Applicant</b>	Mr S Dane
<b>Respondent</b>	Mr R Davenport (as agent)

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*Order*

HAVING heard Mr S Dane for United Voice WA, as applicant and Mr R Davenport as agent for The Chief Executive Officer (Executive Director) of the Department of Conservation and Land Management; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Rangers (National Parks) Consolidated Award 2000* be varied in accordance with the following schedule and that such variations shall have effect on or after 28 November 2014.

[L.S.]

(Sgd.) S M MAYMAN,  
Commissioner.

## SCHEDULE

**1. Clause 9. – Overtime: Delete subclause 9(7) of this clause and insert the following in lieu thereof:**

- (7) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid \$12.60 for a meal, and if owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each such meal by the employer or be paid \$7.40 each meal so required.
- (b) The provisions of paragraph (a) of this subclause do not apply-
- (i) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that he/she will be required; or
- (ii) to any employee who lives in the locality in which the place of work is situated who can reasonably return home for meals; or
- (iii) where the overtime worked is outside the customary meal time.
- (c) If an employee provides him/herself with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, the employee shall be paid for each meal provided and not required, the appropriate amount prescribed in paragraph (a) of this subclause.
- (d) An employee required to work continuously from midnight to 6.30am and ordered back to work at 8.00am the same day shall be paid \$6.50 breakfast.
- (e) The provisions of this subclause do not operate so as to require payment of more than double time rates, or double time and one half on a holiday prescribed under this Award for any work.

**2. Clause 14 - Conditions and Allowances: Remove Clause 14 and insert the following in lieu thereof:**14. - CONDITIONS AND ALLOWANCES

- (1) The provisions of the Miscellaneous Government Conditions and Allowances Award No. A 4 of 1992 shall apply mutatis mutandis to all employees covered by this Award.
- (2) Subject to the provisions of this Award, the provisions of the Public Service Award 1992 PSA NO. 4 of 1989 at:
- (a) Clause 30, - Camping Allowance and Schedule C - Camping Allowance; and
- (b) Clause 33, - Diving Allowance, Clause 34, - Flying Allowance and Schedule K - Diving, Flying and Seagoing Allowance.
- as amended from time to time, shall apply mutatis mutandis to employees covered by this Award.
- (3) Mobile Rangers shall, in addition to their normal rate of pay, be paid an allowance of \$131.20 per week to offset the costs associated with living in and maintaining a caravan.
- This allowance is to be moved year to year to reflect the change in CPI for Perth.
- (4) The following conditions shall apply to Rangers Assistants on vermin, plant or noxious weed control who are required to use a toxic substance.
- (a) The employee shall be informed by the employer of the health hazards involved and instructed in the correct and necessary safeguards which must be observed in the use of such materials.
- (b) The employee using such materials shall be provided with, and shall use, all safeguards as are required by the appropriate government authority or, in the absence of such requirement, such safeguards as are defined by a competent authority or person chosen by the union and the employer.
- (c) The employee using toxic substances or materials of a like nature shall be paid 64 cents per hour extra. Employees working in close proximity to employees so engaged shall be paid 57 cents per hour extra.
- (d) For the purposes of this subclause toxic substances shall include epoxy based materials and all materials which include or require the addition of a catalyst hardener and reactive additives or two pack catalyst system shall be deemed to be materials of a like nature.
- (5) (a) An employer who requires a Rangers Assistant to use a pesticide shall:
- (i) Inform the employee of any known health hazards involved; and
- (ii) Ascertain from the Department of Health and Medical Services whether and, if so, what protective clothing or equipment should be worn during its use.
- (b) Pending advice from that department the employer may require the pesticide to be used if the employer informs the employee of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.
- (c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraphs (a) and (b) of this subclause and, where necessary, instruct the employee in its use.
- (d) An employee required to wear protective clothing or equipment for the purpose of this subclause shall be paid 72 cents per hour or part thereof while doing so unless the Union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while

- wearing it or, in the event of disagreement, the Western Australian Industrial Relations Commission so determines.
- (e) An allowance is not payable under this clause if the Department of Health and Medical Services advises the employer in writing that protective clothing or equipment is not necessary.
- (6) Where agreement is reached between the employer and the employee, payment of wages may be made in cash and a signature of the employee shall be obtained for such cash payment.

2014 WAIRC 01343

## WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

## PARTIES

ELECTRICAL TRADES UNION WA

APPLICANT

-v-

THE MINISTER FOR HEALTH AND OTHERS

RESPONDENTS

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** TUESDAY, 9 DECEMBER 2014  
**FILE NO/S** APPL 46 OF 2014  
**CITATION NO.** 2014 WAIRC 01343

**Result** Award varied  
**Representation**  
**Applicant** Ms N O'Brien  
**Respondent** Mr B Kirwan

*Order*

HAVING heard Ms O'Brien for Electrical Trades Union WA, as applicant and Mr Kirwan on behalf of the Minister for Health and there was no appearance on behalf of the others, as respondents; the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *WA Government Health Services Engineering and Building Services Award 2004* be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after the 9th day of December 2014.

(Sgd.) S M MAYMAN,  
 Commissioner.

[L.S.]

## SCHEDULE

1. **Clause 4. – Application & Parties Bound: Delete paragraph (e) of subclause (1) and insert in lieu thereof the following:**
  - (e) Electrical Trades Union WA.
2. **Clause 19. – Leading Hand Allowance: Delete subclause (1) of this Clause and insert in lieu thereof the following:**
  - (1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid –
    - (a) Not less than 3 and not more than 10 other employees - \$44.80 per week;
    - (b) More than 10 and not more than 20 other employees - \$60.10 per week;
    - (c) More than 20 other employees - \$75.10 per week.
3. **Clause 23. – Special Rates and Provisions:**
  - A. **Delete subclause (1) of this Clause and insert in lieu thereof the following:**
    - (1) Disability Allowances
      - (a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. – Title, as at the date of registration of this Award.
      - (b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of \$2.26 for each hour or part thereof whilst so engaged.

- (c) Asbestos:
- (i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.
  - (ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, i.e. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of \$0.75 per hour for each hour or part thereof whilst so engaged.
- (d) Furnace Work  
Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid \$1.64 per hour or part thereof whilst so engaged.
- (e) Construction Allowance
- (i) In addition to the appropriate rate of pay prescribed in Appendix A. – Salaries of this Award, an employee shall be paid –
    - (aa) \$49.50 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;
    - (bb) \$44.70 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A “multi-storey building” is a building which, when completed, shall consist of at least five stories.
    - (cc) \$26.30 per week if engaged otherwise on Construction Work.
  - (ii) The rates specified in paragraph (1)(e)(i) shall be discounted by \$20.40 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.
- (f) Asbestos Eradication
- (i) This subclause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.
  - (ii) For the purposes of this clause “asbestos eradication” means work on or about buildings, involving the removal of any other method of neutralisation of any materials which consist of, or contain asbestos.
  - (iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.
- Without limited the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.
- (iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of \$1.63 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23. – Special Rates and Provisions.
  - (v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (i.e. 1716 “Specification of Respiratory Protective Devices”) shall be worn by all personnel during work involving eradication of asbestos.
- (g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

**B. Delete paragraphs (b), (d), (e) and (f) of subclause (3) of this Clause and insert in lieu thereof the following:**

- (b) Permit Work  
Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid \$19.30 for that week in addition to the rates otherwise prescribed.
- (d) Scaffolding Certificate Allowance  
A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid \$0.61 per hour or part thereof, in addition to the rates otherwise prescribed in this Award.
- (e) Nominee Allowance  
A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of \$19.30 per week.
- (f) Setter Out  
A setter out (other than a leading hand) in a joiner’s shop shall be paid \$5.85 per day in addition to the rates otherwise prescribed.

**4. Clause 25. – Overtime: Delete paragraph (a) of subclause (7) of this Clause and insert in lieu thereof the following:**

- (a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of \$13.75 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to an employee notified on the previous day of the previous day of the requirement to work such overtime.

**6. Appendix A. – Salaries: Delete subclause (1) of this Appendix and insert in lieu thereof the following:**

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

	Level	Percentage Relativity to C10 Trades- person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple- mentary Payment	State Wage Order Adjust ment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	345.70	762.90	12.40	102.60	12.00	46,423
	Building Tradesperson Level 05	105	383.50	54.60	346.40	784.50	13.04	103.00	12.00	47,604
	Building Tradesperson Level 06	110	401.70	57.20	347.10	806.00	13.68	103.30	12.00	48,774
	Building Tradesperson Level 07	115	420.00	59.80	345.80	825.60	14.22	103.50	12.00	49,835
	Building Tradesperson Level 08	120	438.20	62.40	346.50	847.10	14.86	85.90	12.00	50,072
	Building Tradesperson Level 09	125	456.50	65.00	347.20	868.70	15.50	86.40	12.00	51,258
Painter	Building Tradesperson Level 04	100	365.20	52.00	345.70	762.90	12.40	79.60	12.00	45,223
	Building Tradesperson Level 05	105	383.50	54.60	346.40	784.50	13.04	79.90	12.00	46,399
	Building Tradesperson Level 06	110	401.70	57.20	347.10	806.00	13.68	80.10	12.00	47,564
	Building Tradesperson Level 07	115	420.00	59.80	345.80	825.60	14.22	80.40	12.00	48,630
	Building Tradesperson Level 08	120	438.20	62.40	344.40	845.00	14.86	62.80	12.00	48,757
	Building Tradesperson Level 09	125	456.50	65.00	347.20	868.70	15.50	63.30	12.00	50,053

	Level	Percentage Relativity to C10 Trades- person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple- mentary Payment	State Wage Order Adjust ment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
Plasterer	Building Tradesperson Level 04	100	365.20	52.00	345.70	762.90	12.40	97.20	12.00	46,141
	Building Tradesperson Level 05	105	383.50	54.60	346.40	784.50	13.04	97.50	12.00	47,317
	Building Tradesperson Level 06	110	401.70	57.20	347.10	806.00	13.68	97.90	12.00	48,492
	Building Tradesperson Level 07	115	420.00	59.80	345.80	825.60	14.22	98.20	12.00	49,559
	Building Tradesperson Level 08	120	438.20	62.40	346.50	847.10	14.86	80.50	12.00	49,790
	Building Tradesperson Level 09	125	456.50	65.00	347.20	868.70	15.50	80.80	12.00	50,966
Plumber	Building Tradesperson Level 04	100	365.20	52.00	345.70	762.90	12.40	125.00	12.00	47,591
	Building Tradesperson Level 05	105	383.50	54.60	346.40	784.50	13.04	125.20	12.00	48,762
	Building Tradesperson Level 06	110	401.70	57.20	347.10	806.00	13.68	125.50	12.00	49,932
	Building Tradesperson Level 07	115	420.00	59.80	345.80	825.60	14.22	125.80	12.00	50,999
	Building Tradesperson Level 08	120	438.20	62.40	346.50	847.10	14.86	108.20	12.00	51,235
	Building Tradesperson Level 09	125	456.50	65.00	347.20	868.70	15.50	108.50	12.00	52,411
Other Building employees not elsewhere classified	Building Employee Entrant Level	78	284.86	40.56	340.54	665.96	9.68	70.80	14.00	39,669
	Building Employee Level 1	82	299.46	42.64	341.10	683.20	10.20	71.00	14.00	40,606
	Building Employee Level 2	87	319.18	45.45	341.88	706.51	10.87	71.20	14.00	41,867
	Building Employee Level 3	92	337.44	48.05	342.58	728.07	11.51	71.50	14.00	43,041
Mechanical Fitter,	Building Employee Level 4	100	365.20	52.00	345.70	762.90	12.40	71.90	14.00	44,925
	Engineering Employee Level 14	78	284.86	40.56	340.54	665.96	14.68	69.60	14.00	39,867

	Level	Percentage Relativity to C10 Trades- person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple- mentary Payment	State Wage Order Adjust ment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Salary
Motor Mechanic,	Engineering Employee Level 13	82	299.46	42.64	341.10	683.20	15.40	69.80	14.00	40,815
Refrigeration	Engineering Employee Level 12	87.4	319.18	45.45	341.88	706.51	16.47	70.00	14.00	42,097
Fitter & other	Engineering Employee Level 11	92.4	337.44	48.05	342.58	728.07	17.41	70.30	14.00	43,286
engineering	Engineering Tradesperson Level 10	100	365.20	52.00	345.70	762.90	18.80	86.90	12.00	45,937
trades	Engineering Tradesperson Level 09	105	383.50	54.60	346.40	784.50	19.70	87.20	12.00	47,127
employees not	Engineering Tradesperson Level 08	110	401.70	57.20	347.10	806.00	20.70	87.40	12.00	48,311
elsewhere	Engineering Tradesperson Level 07	115	420.00	59.80	345.80	825.60	21.60	87.70	12.00	49,396
classified	Engineering Tradesperson Level 06	125	456.50	65.00	349.30	870.80	23.50	70.40	12.00	50,951
	Engineering Tradesperson Level 05	130	474.80	67.60	347.90	890.30	24.40	70.70	10.00	51,926
Electrical Fitter/ Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	345.70	762.90	18.80	109.90	12.00	47,137
Mechanic	Engineering Tradesperson Level 09	105	383.50	54.60	346.40	784.50	19.70	110.20	12.00	48,327
	Engineering Tradesperson Level 08	110	401.70	57.20	347.10	806.00	20.70	110.60	12.00	49,521
	Engineering Tradesperson Level 07	115	420.00	59.80	345.80	825.60	21.60	110.80	12.00	50,601
	Engineering Tradesperson Level 06	125	456.50	65.00	347.20	868.70	23.50	93.30	12.00	52,036
	Engineering Tradesperson Level 05	130	474.80	67.60	347.90	890.30	24.40	93.70	10.00	53,126

## NOTICES—Award/Agreement matters—

2014 WAIRC 01354

### WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 22 of 2014

#### APPLICATION FOR A NEW AGREEMENT TITLED

#### “DEPARTMENT OF CULTURE AND THE ARTS VENUES MANAGEMENT AGREEMENT 2014”

NOTICE is given that an application has been made to the Commission by *The Director General of the Department of Culture and the Arts* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

#### 3. Definitions

“**Employee**” means a person employed by the Employer who is a member or is eligible for membership of the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees).

“**Employer**” means the Department of Culture and the Arts. The Term ‘Department of Culture and the Arts’ and the ‘Department’ shall be used interchangeably and shall have the same meaning.

...

“**Union**” means the Media and Entertainment Arts Alliance of Western Australia (Union of Employees).

#### 5. Parties to the agreement

5.1 The Department of Culture and the Arts Venues Management Agreement is binding upon:

- (a) The Employer;
- (b) The Union; and
- (c) All Employees who are members, or who are eligible to be members, of the Union.

#### 10. LOCATION OF EMPLOYMENT

10.1 This agreement recognises that:

- (a) The Department operates a multi venue organisation and as such requires the flexibility to mobilise Employees for the purposes of staffing events and covering staff shortages due to leave or unplanned situations as necessary.
- (b) Headquarters will be the venue the Employee is rostered to work at, in the Central Business District and/or Subiaco, and on a daily basis.
- (c) Venues under this Agreement include His Majesty’s Theatre, Perth Concert Hall, State Theatre Centre of Western Australia, Subiaco Arts Centre and Albany Entertainment Centre. Should there be any variation to the venues listed; the Union will be advised in writing.
- (d) Albany shall be located at the Entertainment Centre, or other places in Albany as determined.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,  
Registrar.

[L.S.]

12 December 2014

## CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE—Matters dealt with—

2014 WAIRC 01262

### REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 8 AUGUST 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

BEN THOMPSON

**APPLICANT**

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

**RESPONDENT**

**CORAM**

ACTING SENIOR COMMISSIONER P E SCOTT

**DATE**

TUESDAY, 18 NOVEMBER 2014

**FILE NO/S**

APPL 21 OF 2014

**CITATION NO.**

2014 WAIRC 01262

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<b>Result</b>	Consent Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr T Kucera of counsel
<b>Respondent</b>	Mr S Kemp of counsel and with him Ms S Walker of counsel

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*Consent Order*

WHEREAS this is an application brought pursuant to Section 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985*; and

WHEREAS the parties have provided a minute of consent order, signed by each counsel, and the Commission has formed the opinion that such a consent order is appropriate to issue;

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

1. THAT the application by the Applicant, Mr Ben Thompson, be adjourned *sine die* by agreement between the parties;
2. THAT the matter be relisted for a directions hearing by application to the Commission by either party.

[L.S.]

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

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## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

**2014 WAIRC 01270**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	STEVEN CHAN	<b>APPLICANT</b>
	-v-	
	DISABILITY SERVICES COMMISSION	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	THURSDAY, 20 NOVEMBER 2014	
<b>FILE NO/S</b>	B 147 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01270	

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<b>Result</b>	Application dismissed
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*Order*

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

WHEREAS on Thursday the 4<sup>th</sup> day of August 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the parties reached agreement in principle; and

WHEREAS on Thursday the 20<sup>th</sup> day of November 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

[L.S.]

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

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**2014 WAIRC 01269**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION STEVEN CHAN	<b>APPLICANT</b>
	-v-	
	DISABILITY SERVICES COMMISSION	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	THURSDAY, 20 NOVEMBER 2014	
<b>FILE NO/S</b>	U 146 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01269	
<b>Result</b>	Application dismissed	

*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and  
 WHEREAS on Thursday the 4<sup>th</sup> day of August 2014 the Commission convened a conference for the purpose of conciliating between the parties; and  
 WHEREAS the parties reached agreement in principle; and  
 WHEREAS on Thursday the 20<sup>th</sup> day of November 2014 the applicant filed a Notice of Discontinuance in respect of the application;  
 NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:  
 THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,  
Acting Senior Commissioner.**2014 WAIRC 01309**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TERRI COLLINS	<b>APPLICANT</b>
	-v-	
	THE LOWER GREAT SOUTHERN FAMILY SUPPORT ASSOCIATION	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	THURSDAY, 4 DECEMBER 2014	
<b>FILE NO/S</b>	U 124 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01309	
<b>Result</b>	Application dismissed	
<b>Representation</b>		
<b>Applicant</b>	Mr R Lewis of counsel	
<b>Respondent</b>	Ms R Airey of counsel	

*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979* which was filed out of time; and  
 WHEREAS the application was set down for a Directions hearing on the 3<sup>rd</sup> day of October 2014 at which the Commission issued Directions for the preparation for a hearing of the application to extend time in December 2014; and  
 WHEREAS on the 28<sup>th</sup> day of October 2014 the parties advised that they were in discussions with a view to resolving the matter and sought the suspension of the Directions issued on the 3<sup>rd</sup> day of October 2014; and

WHEREAS on the 2<sup>nd</sup> day of December 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 01175**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

SHANNON EDWARD FRANKS

**APPLICANT**

-v-

OUTTA LIMMITS

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER

**DATE** TUESDAY, 21 OCTOBER 2014

**FILE NO.** U 140 OF 2014

**CITATION NO.** 2014 WAIRC 01175

**Result** Directions made

**Representation**

**Applicant** Mr B Dawkins of counsel

**Respondent** Mr D Singh of counsel

*Directions*

HAVING heard Mr B Dawkins of counsel on behalf of the applicant and Mr D Singh of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby directs –

- (1) THAT each party shall give informal discovery by serving its list of documents by 7 November 2014.
- (2) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely by no later than 13 November 2014.
- (3) THAT the applicant and respondent file an agreed statement of facts (if any) by no later than 17 November 2014.
- (4) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 24 November 2014.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2014 WAIRC 01292**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2014 WAIRC 01292  
**CORAM** : COMMISSIONER S J KENNER  
**HEARD** : TUESDAY, 21 OCTOBER 2014, THURSDAY, 27 NOVEMBER 2014  
**DELIVERED** : THURSDAY, 27 NOVEMBER 2014  
**FILE NO.** : U 140 OF 2014  
**BETWEEN** : SHANNON EDWARD FRANKS  
Applicant  
AND  
JAMES KEMP TRADING AS OUTTA LIMMITS  
Respondent

Catchwords : Industrial law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Summary dismissal – Allegations denied – No opportunity to respond – Compensation – Principles applied – Dismissal unfair – Compensation awarded – Declaration and orders made

Legislation : *Industrial Relations Act 1979* (WA) ss 23A(6), 29(1)(b)(i)

Result : Application upheld

**Representation:**

Counsel:

Applicant : Mr B L Dawkins of counsel

Respondent : No appearance

Solicitors:

Applicant : Baldivis Law and Mediation

**Case(s) referred to in reasons:**

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

*Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8

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

*Reasons for Decision*

*Ex Tempore*

- 1 The applicant Mr Franks worked for the respondent at a retail business trading by the name of Outta Limmits as its Manager. The business is a retail shop based at Port Kennedy in the State of Western Australia. The evidence is that the applicant was responsible for staff, stock and generally overseeing sales in the retail business. Mr Franks, the applicant, worked from 12 May 2014 to 16 June 2014 on which date he was summarily dismissed by the respondent. The respondent, as the Commission understands it sold, amongst other things, what were described in evidence as “smokable potpourri products”.
- 2 The applicant testified that for five months prior to commencing work with the respondent at Outta Limmits, he worked for another business undertaken by the respondent in partnership with another person in a shop called “The Shaman Shack” in a similar capacity to the position that he occupied at the Outta Limmits business. According to the applicant, at The Shaman Shack business, he was paid the sum of \$1,050 per week net. On the applicant’s evidence, he was paid at the same rate in his employment at the Outta Limmits business and on the same basis. In support of the payments made to him at The Shaman Shack business is exhibit A1, which comprises two pay advices issued to the applicant supporting his net weekly payment of \$1,050.15 per week.
- 3 The applicant says that whilst he was employed at the Outta Limmits business he did not receive pay advices; rather he received his pay in cash, the details of which were set out on what he described as an envelope which he has not kept since that time, despite a request being made for pay slips to be provided to staff. The applicant testified that he worked satisfactorily for the respondent and did so by long hours, on the basis of 12 hours per day over seven days per week.
- 4 The applicant testified that on 16 June 2014 both Mr Kemp and another person, a Mr Corbett, spoke to him at the end of the working day after other staff had left the premises. The applicant testified that Mr Kemp accused him of stealing stock and being abusive to other staff, amongst other matters. The applicant says that nothing was put to him to sustain the allegations and he was given no opportunity to respond to them either. The applicant strongly denies the allegations made by the respondent. Another employee, who the Commission understands is also the partner of the applicant, Ms Meakins, testified that there was no substance to the allegations. In her view, as all stock was subject to a stocktaking process and there has been no suggestion of complaint from suppliers or indeed from the police against the applicant or any other person, since the applicant’s dismissal, to support the allegations made.
- 5 At the end of the conversation on 16 June, the applicant was informed that he was instantly dismissed. The applicant testified that since that time he has been out of work for most of the time, despite endeavours to find alternative employment which he has only recently done so, in another hopefully more reputable retail establishment. The applicant claims some three months’ compensation for his loss. The applicant’s evidence also was that since his dismissal, he has been on Centrelink benefits and also had to borrow money from family members to make ends meet.
- 6 In the absence of evidence from the respondent the Commission is obliged to accept the evidence of the applicant, unless I find it to be inherently incredible, which I do not. I accept the applicant’s evidence as to his employment by the respondent and the circumstances in which it was brought to an end on 16 June 2014.
- 7 The law in this area is well settled. The employer has a lawful right to terminate an employee’s employment as long as it is done in a way that is not an abuse of the contractual right to terminate. The authority for that proposition is very well known, and is cited in the applicant’s outline of submissions and is *The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385. Further in cases of summary dismissal for misconduct, which this is, there is an evidentiary onus on the employer to establish the basis for the decision to dismiss and to show that at least there was some reasonable investigation undertaken in relation to the alleged

misconduct prior to the decision to implement a dismissal in those circumstances. The authority for that proposition, again cited in the applicant's outline of submissions, is the South Australian decision of *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224. In short, in those cases, the law is that there is an onus on the respondent to establish there were proper grounds for summary dismissal despite the overall persuasive burden still remaining on the applicant to demonstrate their summary dismissal was harsh, oppressive or unfair.

- 8 In this case the Commission is not satisfied to this effect. In my view, the dismissal was effected in a manner which was plainly unfair on the evidence. Therefore I am satisfied that on 16 June 2014 the applicant was unfairly dismissed by the respondent. Understandably, in the present circumstances, the applicant does not seek reinstatement, but rather, compensation. As to this, the Commission may award compensation under s 23A(6) of the Act for loss or injury caused by the dismissal. The basis for establishing and working out compensation for loss or injury is well settled. I merely refer to the decision of the Full Bench of this Commission in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8.
- 9 On the evidence the Commission is satisfied that the applicant has suffered loss as a result of his unfair dismissal. Since 16 June the applicant has not been substantially employed save for earning some \$300 from other work in about September on the evidence. The applicant claims three months compensation for his loss from 16 June and the Commission is satisfied that at least that loss has been suffered in toto, directly arising from his unfair dismissal by the respondent. Therefore on that basis and on the basis of the evidence of the pay slips before me, which establish that a gross weekly wage of \$1,346.15 was paid to the applicant during the course of his relatively short employment, the Commission will order compensation for loss in the sum of \$16,153 gross.
- 10 Accordingly, the Commission will make a declaration and orders.

2014 WAIRC 01293

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	SHANNON EDWARD FRANKS	<b>APPLICANT</b>
	-v-	
	JAMES KEMP TRADING AS OUTTA LIMMITS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	THURSDAY, 27 NOVEMBER 2014	
<b>FILE NO/S</b>	U 140 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01293	

<b>Result</b>	Application upheld. Declaration and orders issued
<b>Representation</b>	
<b>Applicant</b>	Mr B L Dawkins of counsel
<b>Respondent</b>	No appearance

*Declaration and Orders*

HAVING heard Mr B L Dawkins of counsel on behalf of the applicant and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby —

- (1) ORDERS that the name of the respondent be amended by deleting the name "Outta Limmits" and inserting in lieu thereof the name "James Kemp trading as Outta Limmits."
- (2) DECLARES that the applicant was unfairly dismissed by the respondent on 16 June 2014.
- (3) ORDERS that the respondent pay to the applicant the sum of \$16,153 gross as compensation for loss within 21 days.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2014 WAIRC 01281**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
CHRISTOPHER LEA HUGHES **APPLICANT**

-v-  
LEON AND CAROLINE WHITE OF A MAN AT HAND **RESPONDENT**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** WEDNESDAY, 26 NOVEMBER 2014  
**FILE NO/S** B 167 OF 2014  
**CITATION NO.** 2014 WAIRC 01281

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**Result** Application dismissed  
**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*;  
AND WHEREAS this matter was listed for hearing on 18 November 2014 for the applicant to show cause why the application should not be dismissed;  
AND WHEREAS the applicant failed 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.) S M MAYMAN,  
Commissioner.**2014 WAIRC 01264**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MR MARK KICKETT **APPLICANT**

-v-  
BEANANGING KWUURT INSTITUTE **RESPONDENT**

**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT  
**DATE** TUESDAY, 18 NOVEMBER 2014  
**FILE NO/S** B 197 OF 2014  
**CITATION NO.** 2014 WAIRC 01264

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**Result** Application dismissed

*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979* filed on Friday the 19<sup>th</sup> day of September 2014; and  
WHEREAS on Thursday the 23<sup>rd</sup> day of October 2014 the applicant informed the Commission that the parties had reached a settlement in this matter; and  
WHEREAS on Friday the 7<sup>th</sup> day of November 2014 the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in relation to this matter;

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 01263**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	MR MARK KICKETT	<b>APPLICANT</b>
	-v-	
	BEANANGING KWUURT INSTITUTE	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	TUESDAY, 18 NOVEMBER 2014	
<b>FILE NO/S</b>	U 197 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01263	
<b>Result</b>	Application dismissed	

*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979* filed on Friday the 19<sup>th</sup> day of September 2014; and

WHEREAS on Thursday the 23<sup>rd</sup> day of October 2014 the applicant informed the Commission that the parties had reached a settlement in this matter; and

WHEREAS on Friday the 7<sup>th</sup> day of November 2014 the applicant filed a *Form 14 – Notice of withdrawal or discontinuance* in relation to this matter;

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 01344**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
<b>CITATION</b>	: 2014 WAIRC 01344
<b>CORAM</b>	: COMMISSIONER S M MAYMAN
<b>HEARD</b>	: MONDAY, 17 MARCH 2014, MONDAY, 4 AUGUST 2014, TUESDAY, 5 AUGUST 2014
<b>DELIVERED</b>	: WEDNESDAY, 10 DECEMBER 2014
<b>FILE NO.</b>	: U 178 OF 2013
<b>BETWEEN</b>	: GEORGE KURILOWSKI Applicant AND SHARYN O'NEILL, DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION Respondent

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CatchWords	:	Industrial Law - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Failure to comply with a lawful directive - Principles considered - Applicant not harshly, oppressively or unfairly dismissed - Application dismissed - <i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(i)
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(i)
Result	:	Application dismissed
<b>Representation:</b>		
Applicant	:	Mr M Rennie (of counsel)
Respondent	:	Mr D Matthews (of counsel)

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**Case(s) referred to in reasons:**

Jones v Dunkel (1959) 101 CLR 298

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

**Case(s) also cited:**

Blackadder v Ramsey Butchering Services Pty Ltd (2002) 118 FCR 395 [68]:

Thompson v IGT (Australia) Pty Ltd (2008) 173 IR 395

*Reasons for Decision*

- 1 Mr George Kurilowski (the applicant) was employed by the Department of Education (the respondent) at Denmark Primary School (the school) as cleaner in charge. His employment commenced in 1 August 2005 and was terminated by the respondent on 15 October 2013. By correspondence dated 27 September 2013 the respondent advised the applicant that his employment had been terminated. In the circumstances, the applicant submits his dismissal to be unfair, harsh and oppressive.
- 2 It is suggested by the respondent the dismissal of the applicant's employment was not unfair, harsh and oppressive. The respondent denies the allegations made by the applicant and submits that both Mr Rennie counsel for the applicant and the applicant seemed to avoid all efforts by the respondent to address its concerns with respect to the applicant's health. The respondent formed the view that in the circumstances dismissal of the applicant was appropriate and accordingly the respondent seeks an order that the application be dismissed in its entirety.
- 3 At the commencement of the hearing a detailed statement of agreed facts (SAFS) was submitted:
  1. On 4 May 2005 the applicant commenced as a casual cleaner at the Denmark Primary School ('the school').
  2. On 1 August 2005 the applicant was made permanent in his employment.
  3. On 23 October 2005 the applicant was made cleaner in charge at the school (contract of employment attached).
  4. At the beginning of the 2006 school year Stephen Fielding became principal of the school.
  5. At the beginning of the 2007 school year Brian Lee became principal of the school.
  6. At the beginning of the 2009 school year Leigh Sheldon became principal of the school.
  7. By letter dated 5 March 2012 Ms Sheldon wrote to Dr John Pearce, Specialist Physician in Occupational and Rehabilitation Medicine about the applicant (copy attached).
  8. By letter dated 6 March 2012 Ms Sheldon directed the applicant to attend an appointment with Dr Pearce on 21 March 2012 and to not return to the school until Dr Pearce indicated that the applicant was fit for duty. The letter also informed the applicant that the respondent would 'maintain the applicant's normal salary whilst the necessary information is gathered'. (copy attached)
  9. On 21 March 2012 the applicant attended an appointment with Dr Pearce.
  10. On 27 March 2012 Dr Pearce prepared a medical report on the applicant (copy attached).
  11. By letter dated 8 November 2012 John O'Brien, Manager, Labour Relations, Department of Education wrote to the applicant directing the applicant to attend an appointment with Dr Pearce on 22 November 2012 (copy attached).
  12. By letter dated 19 November 2012 solicitors acting for the applicant wrote to Mr O'Brien in response to Mr O'Brien's letter (copy attached).
  13. By letter dated 21 December 2012 Mr O'Brien wrote to the applicant [applicant's solicitor] directing [the applicant] to attend an appointment with Dr Pearce on 27 February 2013 (copy attached).
  14. By letter dated 22 February 2013 solicitors acting for the applicant wrote to Mr O'Brien in response to Mr O'Brien's letter (copy attached).
  15. By undated letter Mr O'Brien wrote to the applicant directing him to attend an appointment with Dr Pearce on 10 April 2013 (copy attached).

16. By undated letter Mr Keith Dodd, Director, Labour Relations, Department of Education, wrote to solicitors acting for the applicant (copy attached).
  17. By letter dated 28 March 2013 solicitors acting for the applicant wrote to Mr O'Brien in response to the letters referred to the two preceding paragraphs (copy attached).
  18. By letter dated 4 April 2013 Mr Dodd wrote to solicitors acting for the applicant setting out that the applicant was to attend an appointment with Dr Pearce on 23 April 2013 (copy attached).
  19. By letter dated 12 April 2013 solicitors acting for the applicant wrote to Mr Dodd in response to Mr Dodd's letter (copy attached).
  20. By letter dated 29 April 2013 Mr O'Brien wrote to the applicant in relation to him not having attended any re-appointment with Dr Pearce and in relation to the potential implications for the applicant's future employment with the respondent (copy attached).
  21. By letter dated 10 May 2013 solicitors acting for the applicant wrote to Mr O'Brien in response to Mr O'Brien's letter (copy attached).
  22. By letter dated 22 July 2013 Mr Cliff Gillam, Executive Director, Department of Education, wrote to the applicant directing him to attend an appointment with Dr Pearce on 15 August 2013 (copy attached).
  23. By letter dated 9 September 2013 Mr Gilliam wrote to the applicant in relation to his future employment with the respondent (copy attached).
  24. By letter dated 13 September 2013 solicitors acting for the applicant wrote to Mr Gillam in response to Mr Gillam's letter (copy attached).
  25. By letter dated 27 September 2013 Mr Gillam wrote to the applicant informing him that his employment contract was terminated effective from the date of that letter (copy attached).
  26. On 17 October 2013 solicitors acting for the applicant wrote to Mr Gillam in response to Mr Gillam's letter (copy attached).
  27. Between 6 March 2012 and 16 August 2012 the applicant (sic) was paid salary by way of a combination of annual leave and personal leave in the amount of \$21,318.91 gross.
  28. On 16 August 2012 the respondent ceased paying the applicant as he had exhausted his annual and personal leave entitlements.
  29. The applicant was not paid salary from 16 August 2012 to the date of the termination of his employment, 27 September 2013.
  30. The applicant's gross weekly wage was \$778.13 (or \$40,462.76 per annum).
- 4 The Commission thanks the parties for their efforts in drawing together the statement of agreed facts. I have not included in my reasons for decision the various copies attached to the SAFS. The Commission has however relied upon those documents in reaching its decision.
- 5 An application was lodged in the Western Australian Industrial Relations Commission (the Commission) on 29 October 2013. The applicant seeks six months compensation.
- 6 When the application was initially lodged an contractual entitlements application was lodged with the s 29(1)(b)(i) matter. During the course of the hearing the applicant advised he was withdrawing the contractual entitlements application and accordingly an order was issued (2014) WAIRC 00916; (2014) 94 WAIG 1443 on 8 August 2014 discontinuing the matter.
- 7 The applicant was employed pursuant to the *Cleaners and Caretakers (Government) Award 1975* and the *Government Services (Miscellaneous) General Agreement 2004*.

#### **Applicant's Opening Submissions**

- 8 This particular matter commenced in 2008 when a teacher at the school Ms Kate Woodward back in 2006 claimed to have allergies associated with perfume and cleaning products. From early 2006 onwards those allergies led to several changes in the cleaning process at the school and the associated cleaning products that were used. It is said that some members of the school staff including the school council and the P & C became vocal supporters of Ms Woodward. The applicant submits that some information was spread by the P & C about one of the particular cleaning products that was used at the school. Subsequently a workers compensation claim was submitted by Ms Woodward associated it was said to an allergy which alleged an inability to work. The claim of workers compensation alleged harassment was also made by the applicant. That teacher left the school on workers compensation on or about April 2008 and did not return. In fact Ms Woodward ceased employment with the respondent in 2009. It is said that a number of persons seem to blame the applicant for the fact that the teacher left the school and to some extent the applicant and his wife seemed to receive some negative treatment as a result.
- 9 In April 2008 Ms Woodward made a complaint of criminal assault against the applicant although no charges were laid and in that same month the applicant made a complaint about Ms Woodward. It does appear from documents on the respondent's file that no substantive action on either complaint was taken until October 2008 when there was an internal review undertaken by a consultant to the respondent. There is some division amongst the school in that there was an element of disharmony and disruption. It is suggested by the applicant that the principal at the time Mr Lee failed to stem criticism of the applicant and it seemed to lead to a poor relationship between the applicant and Mr Lee. The Commission is invited to infer from the evidence that from 2010 Ms Sheldon who became the principal at the beginning of that year began a campaign to get the applicant to leave the school.

- 10 On 9 March 2012 the applicant was stood down by Ms Sheldon over an alleged incident on 28 March 2012 where some rubbish bags the applicant was carrying hit a child or children. The principal referred the applicant to Dr Pearce, the respondent's occupation physician. Applicant's counsel accepted that in some circumstances referral by an employer to a medical practitioner to be a lawful directive but it was said in this matter that it was not. The essence of the challenge by the applicant is that it relates to the process or the basis for and the process by which the applicant was referred and the subsequent referrals by the respondent.
- 11 The respondent appears to make no allegation about the applicant's ability to carry out his duties. When he was referred to Dr Pearce the applicant had been working for the respondent for almost seven years. At no stage had there been a finding of misconduct against the applicant although at that point there was an investigation process by the Standards and Integrity Directorate (SID) of the respondent in relation to an incident with another child. In this matter a letter dated 6 March 2012 was given to the applicant on or about 9 March 2012. In the letter to Dr Pearce Ms Sheldon makes very general allegations against the applicant relating to seemingly aggressive and intimidating behaviour.
- 12 These comments were inflammatory particularly as they were made in the context of some level of disharmony relating to the applicant. In the applicant's view those allegations were calculated to make him resign. It also appears that by way of another document, a letter to Dr Pearce of 5 March 2012, that the principal went behind the applicant's back and made further largely generalised allegations against him. These allegations were serious and to some extent amounted to bullying and in his opening counsel for the applicant advised he would be referring the Commission to s 10.3 of the Code of Practice for Violence, Aggression and Bullying at work as published by the Commission for Occupational Health and Safety and particularly the provisions dealing with natural justice and procedural fairness.
- 13 The applicant went to see Dr Pearce on 21 March 2012 accompanied by his union representative, a representative of the respondent and the applicant's wife Ms Kurilowski. It is not in dispute that Dr Pearce recommended that the applicant be referred for a psychiatric report and that he remained off work until a further review by Dr Pearce. The applicant challenged Dr Pearce's recommendation that the applicant need see a psychiatrist and indeed that he remain off work in the meantime.
- 14 From about late 2012 onwards there was a standoff between the applicant and the respondent. The applicant submitted Ms Sheldon had not properly investigated the allegations against Mr Kurilowski before referring him to Dr Pearce.
- 15 In general, the respondent simply said this is a medical matter and we have concerns for the applicant's health and welfare of the students at school. It is the view of the applicant that at no stage did he refuse to see Dr Pearce again, merely his position was reserved awaiting the receipt of particulars of the allegations allegedly made by Ms Sheldon.
- 16 In the circumstances the applicant asserts that the right of dismissal was exercised so harshly and oppressively against the applicant as to amount to an abuse of the right and was therefore unfair within the meaning of the *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (1985) 65 WAIG 385.

#### Applicant's Evidence

- 17 Mr George Kurilowski gave evidence (exhibit Kurilowski 35). The applicant gave evidence that on 1 August 2005 his employment was made permanent and 24 October in the same year he was appointed to cleaner in charge subject to a three month probationary period. In that position the applicant's duties incorporated cleaning, supervising cleaning staff and ordering in cleaning products and liaising with the school principal.
- 18 At the beginning of the 2006 school year one of the teachers a Ms Woodward wrote of difficulties she had experienced with allergies and specifically a cleaning product. As a result of which the principal Mr Fielding informed the cleaners to change a cleaning product to Sanazone in the administration area, staff toilets and Ms Woodward's room. Several changes were made to the cleaning programme and also to the products used to accommodate Ms Woodward's requirements. The witness gave evidence that in April 2008 the school principal informed the witness and Ms Woodward to desist from any interaction and that cleaning matters should be referred to the principal. Some two weeks later two police officers arrived at the school and asked the applicant to accompany them to the local police station. It was during an interview the police suggested they were investigating an allegation by Ms Woodward that on 24 April 2008 the applicant had assaulted Ms Woodward by spraying her with a spray bottle. The applicant in his written statement stated:

That allegation was completely false. I gave the police my version of events and they did not lay any charges. However, it was most embarrassing, particularly receiving a visit from the police at the school and leaving with them.

From about late April 2008 onwards, several members of the school staff with whom I had previously had a good relationship appeared to be avoiding talking or interacting with me and some occasionally glared at me whenever they saw me.

(exhibit Kurilowski 35 [35] – [36])
- 19 It was suggested by the applicant giving evidence that from 2008 onwards some staff members started alienating the applicant and his wife who also worked at the school in an administrative capacity. Later in 2008 the applicant was given an email by Ms Jo Connoley of SID relating to what were described as a chemical sensitivity issues at the school. It was the view of the applicant that his relationship with the principal was deteriorating and the applicant was not receiving support. As a result the applicant wrote a letter of complaint dated 27 November 2008 to a representative in the Albany district office of the respondent. A meeting took place in 2009 and it is the view of the applicant that things appeared not to change yet over the 2009 school year the applicant's relationship with his principal Mr Lee deteriorated further. Mr Lee left the school at the end of 2008 and was replaced by Ms Leigh Sheldon at the beginning of the 2009 school year. In that same year the principal changed the cleaning areas for various cleaners the effect of which was that the number of toilets the applicant had to clean increased from 16 to 31 and a further increase was implemented in 2011 to 39. It is suggested in evidence by the applicant that

two of the cleaners, Mr Tom Herrington and Ms Glenys Benson had no toilets to clean. In the view of the applicant this was done to annoy the applicant.

- 20 The applicant gave evidence there was an interchange between himself and Mr Herrington in 2011 which resulted in a complaint being made to the police and subsequently an investigation was made into the matter by SID. The applicant was not informed that a complaint had been made until late in October 2011 and he was not informed of the SID investigation until November 2011. In December 2011 the applicant received a letter from Mr Geoff Davies of SID outlining the complaint against him. The applicant gave evidence that he responded to that letter and other matters by letter in January 2012 the upshot was he received a letter from the respondent dated 26 April 2012, advising that the applicant had been found guilty of misconduct and accordingly he received a reprimand.
- 21 After the applicant was referred to Dr Pearce instead of providing particulars of the allegations, the respondent simply kept making appointments for the applicant to see Dr Pearce. Ultimately, the basis on which the respondent dismissed the applicant was his failure to see Dr Pearce not a failure to consult a psychiatrist. Yet Dr Pearce is not a psychologist or a psychiatrist given Dr Pearce's suggestion that the applicant see a psychiatrist and then see Dr Pearce again, which suggests that Dr Pearce was not qualified to be in a position to assess the applicant's physiological state therefore the respondent should not have directed the applicant to see Dr Pearce again without the psychiatric report.
- 22 In March 2012 the witness gave evidence that he was required to attend a meeting with the principal Ms Sheldon where she raised two issues, one in relation to a matter relating to Ms Robyn Grey where the applicant was accused of arming the alarm system while Ms Grey was still in the administration area. This was denied by the applicant. The second matter was that three staff members who had made statements alleging that on 28 February 2012 while walking past a line of children the applicant had hit some of the children with rubbish bags which he had placed over his shoulders. This was a surprise to the applicant and he gave evidence he did not recall having made contact with children and if there was any contact made then such contact was accidental. A further meeting was held on 9 March 2012 with Ms Sheldon whereby she handed the applicant a letter dated 6 March 2012 and an associated referral form to Dr Pearce the respondent's occupational physician. At the same time the applicant was stood down with pay. The correspondence and associated referral letter to Dr Pearce addressed a number of issues including:

... allegations of aggressive, belligerent and intimidatory behaviour, including the most recent complaint from three staff members regarding your contact with several students, the Department believes it would now be timely for the Department's Occupational Physician, Dr John Pearce, to examine you and determine what further course of action to take.

The information gathered will assist the Department in being fully informed and better placed to discharge the duty of care owed to other staff working for the Department and to the students in its care. Mindful of our duty of care to our employees you are hereby directed not to return to Denmark Primary School until such time as Dr Pearce indicates your fitness for duty. Additionally, and given the extenuating circumstances, the Department will maintain your normal salary whilst the necessary information is gathered.

Accordingly, you are hereby directed, under the employer's common law duty of care to attend an appointment with Dr Pearce at 9.15am on Wednesday 21 March 2012 at 151 Royal Street East Perth.

...

Yours sincerely

Leigh Sheldon

Principal

6 March 2012

(exhibit Kurilowski 34)

- 23 The applicant gave evidence that he denied the allegations specified by Ms Sheldon in the correspondence. The applicant's evidence was that Ms Sheldon was trying to get rid of him because Ms Sheldon kept changing his shifts to the point where it was difficult to keep up with the changes and difficult to keep up with the workload.
- 24 The applicant saw Dr Pearce on 21 March 2012 and it is the applicant's position that the respondent made a number of further referrals for the witness to see Dr Pearce. The applicant gave evidence that until such time he had received particulars of the allegations against him he reserved his position about seeing Dr Pearce or seeing a psychiatrist. At no stage did the applicant receive the particulars he required from the respondent. The applicant gave evidence that when he went to see Dr Pearce it was inferred there was a personality conflict between the applicant and Ms Sheldon.
- 25 In his statement the applicant asserts the respondent made a number of referrals for him to see Dr Pearce pending advice from his solicitor on receipt of particulars of the allegations that had been made against the applicant. Mr Kurilowski reserved his position about seeing Dr Pearce on a second occasion and indeed about visiting a psychiatrist as recommended by Dr Pearce.
- 26 Ultimately the respondent threatened to dismiss the applicant if he did not see Dr Pearce. That threat was outlined in correspondence of 27 September 2013, and was received by the applicant in the post on 15 October 2013 (correspondence referred to is attached to the SAFS). Prior to receiving that correspondence the applicant received a notice of intent to terminate his employment from Mr Keith Dodd that correspondence was received on 29 April 2013:

Dear Mr Kurilowski

NOTICE OF INTENT TO TERMINATE YOUR EMPLOYMENT

I write with reference to your employment with the Department of Education (the Department) and your failure to attend a number of medical appointments with the Department's Occupational Physician, Dr John Pearce. You have now failed on three (3) occasions to attend such an appointment.

You were initially sent a letter dated 8 November 2012 by Mr John O'Brien, Manager Labour Relations, in which you were given a lawful direction to attend an appointment on 22 November 2012. You were advised in that letter that, in the absence of extenuating circumstances, any failure to attend the scheduled appointment may lead to disciplinary action for disregarding a lawful order, including termination of employment.

Two subsequent attempts to re-appoint you with Dr Pearce, in February 2013 and again earlier this month, resulted in similar non attendance.

Prior to recommending to the Executive Director Workforce regarding a proposal to terminate your employment I am providing you with an opportunity to respond to this matter. Please send your response to Mr Cliff Gillam, Executive Director Workforce, 151 Royal Street, East Perth 6004, by 10 May 2013. Should no appropriate response be received by this date I will proceed with a recommendation to the Executive Director that he terminate your employment.

Should you have any question in regards to your termination, please contact Mr John O'Brien, Manager Labour Relations on 9264 5126.

Yours sincerely

KEITH DODD

DIRECTOR

LABOUR RELATIONS

29 APRIL 2013

(correspondence attached to SAFS)

27 In relation to the applicant's consultation with Dr Pearce at the commencement of the consultation he was asked 'where's Sheldon?' to which the applicant responded 'I don't know' (ts 30). Dr Pearce added 'I thought she'd be here'. The applicant informed the respondent's counsel that Dr Pearce screwed up his report from Dr Prathalingam and threw it in the bin. The applicant was asked whether he informed anyone of this behaviour to which he responded he had not.

28 The applicant was asked what he had done for work since been terminated:

I am waiting for this to clear before I seek employment - - -

So you've made no effort - - -? - - - depending the outcome.

You've made no efforts whatsoever? - - - No, I haven't.

You're 62 going on 63? - - - Yes.

You've missed a day and a half of work in the last 10 years? - - - Yes.

And you haven't tried to get any other paid employment?- - - No, I haven't.

(ts 44)

29 Ms Mathilda Adriana Kurilowski gave evidence on behalf of the applicant. The witness was asked what happened when they went to see Dr Pearce. In response the witness said Dr Pearce questioned them as to why they were not at the previous appointment to which the applicant responded they were not aware of any previous appointment. To the witness Dr Pearce appeared annoyed and he responded he was a busy man. Dr Pearce also asked where Ms Sheldon was given she had made allegations regarding the applicant and she was not there to answer them. In addition he threw Dr Prathalingam's letter in the bin. Dr Pearce discussed with the applicant the option of moving schools. The witness raised the issue of Denmark being a small country town and the option of moving schools was not a viable one. Then everyone with the exception of the applicant, left the room and on their return Dr Pearce stated he could not see anything wrong with the applicant and was not sure why he was there. The witness gave evidence she recalls him being quite gruff at first and annoyed however he became somewhat friendlier throughout the appointment.

30 The witness gave evidence that she worked at the school and had a very good relationship in 2010 with Ms Sheldon but by 2012 Ms Sheldon had made a complaint about her and her own relationship with the principal was extremely strained. It was due to the Mr Herrington incident. The witness was the registrar of the school and in that capacity she was called to a meeting in October 2011 together with the principal. She gave evidence that as the applicant's wife she did not want to be involved in a disciplinary matter and was upset that she was present while the applicant was being questioned about an incident that had occurred the day before. It was the witness's view that she should not have been there at all. The principal asked the witness to prepare a memo to the applicant instructing him to cease contact with Mr Herrington. The witness was instructed to put her own signature on it and in the words of the witness:

Preparing that letter embarrassed and humiliated me.

(exhibit Kurilowski 43)

31 The witness lodged a complaint with SID on 26 February 2012 relating to Ms Sheldon.

- 32 In cross-examination the witness was asked whether, based on her observations of the interaction between Mr Lee and the applicant, they both gave as good as they got. The witness agreed. The witness was asked to list employees who had issues with the applicant. In response she named Ms Anne Richardson-Newton, Mr Chris Day, Mr Joe Keech, Ms Robyn Grey, Ms Linda Gerard, and a parent called Ms Julie Lehane a teacher called Ms Lesley Howells, Ms Pam Wells, Mr Paul Knightley, Ms Sheldon, Ms Jenny Harrison, Ms Helen Lee-Norwood, Ms Margaret Holmes and Mr Herrington.

#### Applicant's Concluding Submissions

- 33 Counsel for the applicant submitted that each party submitted their cases on very different lines. The applicant submits that his history with the school is relevant whereas the respondent submits it not to be. To that extent the applicant relies on [1] – [6] in the written outline of opening submissions and in addition to that he relies on their chronology as handed up as an aid during proceedings.
- 34 The applicant describes the case being waged against him as commencing back in 2006 and it got progressively worse in 2008 and it seems from exhibit Kurilowski 4 that Ms Woodward was referred by the then principal Mr Steve Fielding to Dr Pearce but she did not attend because the matter was best dealt with at a school level. In 2008, Ms Woodward returned to school and the cleaning regime began to change due to requests made by Ms Woodward. In April 2008, the applicant wrote a letter of complaint to the employees' services bureau with a copy to the principal Mr Lee (exhibit Kurilowski 8). It appears that Ms Woodward went on worker's compensation on or about March 2008, the basis of that claim being chemical intolerance and alleged bullying or harassment by the applicant. A report was made by Ms Woodward to the police that the applicant had squirted her with a bottle however nothing came of that. Later a complaint was made to SID regarding the applicant and at about that time some parents of the children in Ms Woodward's class or formerly her class became involved.
- 35 When Mr Lee was principal of the school the respondent referred to a number of notes made by him regarding letters sent to the applicant throughout that period. This leaves two proposals; firstly, that a *Jones v Dunkel* (1959) 101 CLR 298 inference can be drawn because Mr Lee was not here to give evidence. Secondly, the weight that the Commission should place upon Mr Lee's letters should be balanced accordingly. The applicant considers that Ms Sheldon was trying to ensure that the applicant should resign, relying on the evidence to draw the inference. Mrs Kurilowski's evidence was to the effect that Ms Sheldon had said 'why doesn't George just leave?' on about three occasions (ts 145).
- 36 It was the view of the applicant that he did challenge the finding of misconduct by the respondent in relation to the Mr Herrington incident, in particular exhibit Kurilowski 32 the correspondence from the applicant's union, United Voice to SID challenging that particular finding an aspect of Ms Sheldon's correspondence, and quoted in the United Voice letter which relates to the applicant. That extract reads:

Difficult ... aggressive, intimidatory, non-compliant, and I actually believe that that he projects his own way of thinking onto others. I don't believe that he is truthful, I do believe he is highly vexatious when it comes to, if someone makes a complaint about him, he will seek to annoy them in some way – being highly vexatious. On the one hand I could attribute his behaviours to be highly vexatious, on the other extreme I could say that actually malevolent and malicious.

(extract of Ms Sheldon's statement included in exhibit Kurilowski 32)

Counsel for the applicant described these words to be 'scathing'.

- 37 The applicant's representative in relation to Dr Pearce urged the Commission to closely look at the transcript particularly in relation to Dr Pearce and his comments about the applicant being an 'unconvincing historian'. The applicant submitted that Dr Pearce clearly believed the allegations put by Ms Sheldon about the applicant to be true and his rationale for the comment that the applicant was 'unconvincing' was that he denied the allegations. Given they were very broad allegations what a person can do with such matters unless they are more detailed. At least some concession was made by Dr Pearce in relation to his statement in that he referred to the applicant as 'reluctant and vague' rather than 'evasive'.
- 38 Counsel for the applicant submitted that the applicant as a matter of procedural fairness had a right to know what the allegations were against him. All he had were the broad allegations contained in the letter to him of 6 March 2012 and the letter of referral to Dr Pearce. These were broad generalisations. The position of the applicant was that if the respondent could outline and particularise what the allegations were then the applicant wished to respond to each of the allegations and then he would review his position about whether he would attend a psychiatrist and obtain a report and would turn to Dr Pearce. At this stage the Commission was taken to the SAFS and in particular to counsel's correspondence to Mr John O'Brien, manager of labour relations of the respondent dated 28 March 2013 attached to SAFS and an extract of that correspondence which specifies:

The referral form to Dr Pearce contained some serious although very general allegations against Mr Kurilowski. At this stage, he can only respond with the general denial but, as a matter of procedural fairness, he should have the opportunity to respond to particularised allegations.

Please provide me with details of each allegation of:

- aggression and intimidation;
- vexatious, provocative and challenging behaviour;
- refusal to accept responsibility for his own actions;
- belligerent and a uncooperative attitude when called to account; and
- paranoia.

In each case, except for the Herrington matter, please provide details of the date of each alleged incident, at least a summary of each allegation and, where there are documents relating to any allegation, may I please have a copies?

I request this information for 2 reasons. Firstly, except for the Herrington matter, Mr Kurilowski should have the opportunity to respond to such allegations and secondly, without more information, I am not in a position to advise Mr Kurilowski about whether or not he should in fact see a psychiatrist. Further, on the issue of psychiatrist, the prospects of Mr Kurilowski getting an appointment with and a report from a psychiatrist on such short notice (before the appointment with Dr Pearce on 10 April) are fairly remote. Out of courtesy to Dr Pearce, I therefore suggest that that appointment be postponed with Mr Kurilowski reserving his position on whether there is any need to attend.

Finally, Mr Kurilowski has been now stood down for over 12 months. In your letter to him of 6 March 2012, the school principal said that he would be stood down with pay. He was, however, paid up to September 2012 but that was treated as sick pay.

It seems to me that, in the absence of any medical finding that he is unfit to work or any finding of misconduct, he should have been paid while stood down. Please let me know the Department's position on that.

Yours faithfully,

Michael Rennie

- 39 In a response dated 4 April 2013 Mr Keith Dodd of the respondent wrote that this was a fitness for work issue and currently the respondent considers Dr Pearce to have determined the applicant to be unfit for duty and therefore regular pay has been removed and personal leave applies.
- 40 Further requests are made by the applicant's legal counsel for details of Ms Sheldon's allegations against the applicant and for any supporting documents. The applicant suggests that the submission of the respondent is that it is not necessarily a medical matter and that the referral made by Dr Pearce that the applicant see a psychiatrist is to rule out any psychiatric or psychological problems. The applicant says all these allegations have been made against him some of which amount to bullying and intimidation without any specifics being provided. According to procedural fairness the applicant should be entitled to know what the allegations are.
- 41 Counsel for the applicant considered there to be a mitigation issue based on the applicant's evidence and took the matter no further. Reinstatement would, in the view of the applicant, be untenable and the claim was amended to compensation. In the event the applicant is successful it will be necessary to include a component as recognition for injuries suffered. The amount sought is six months remuneration in lieu of reinstatement including further or alternatively compensation for injury.

#### **Respondent's Opening Submissions**

- 42 The applicant was required by the respondent to attend an appointment with Dr Pearce a specialist physician in Occupational and Rehabilitation Medicine. That appointment was on 21 March 2012 and was made following a direction by Ms Sheldon. The direction for the applicant to attend the appointment was given on 6 March 2012.
- 43 Following the consultation with Dr Pearce he wrote 'it is my opinion Mr Kurilowski's reported behavioural concerns could be explained on a psychological basis' and 'I have accordingly written to his general practitioner Dr AW Prathalingam requesting psychiatric referral.' Dr Pearce wrote in the same letter that 'it is my plan to re-appoint Mr Kurilowski to further advise (sic) on case management when I receive a psychiatric report' and 'in the interim period Mr Kurilowski should remain off work and the non-medical issues would be best deferred.'
- 44 The respondent submitted that the applicant at no stage came back to visit Dr Pearce with a psychiatric report or otherwise.
- 45 The respondent submits:
- The applicant was dismissed because of his consistent refusal to follow a lawful and reasonable direction to re-attend upon Dr Pearce with a report from a psychiatrist.

(respondent's opening submissions [5])

- 46 The applicant was required to see Dr Pearce with a psychiatric report in a letter dated 8 November 2012, following the applicant's failure to do so over the preceding seven months. That direction was revoked following the receipt of correspondence from the applicant's solicitor acting on his behalf. The correspondence was dated 19 November 2012. By further correspondence the applicant was directed to attend Dr Pearce and to seek a report from a psychiatrist on 27 February 2013, 10 April 2013, 23 April 2013 and 15 August 2013. The respondent submits that the applicant failed to attend any such appointments.
- 47 The respondent was willing for the applicant to organise his own referral to a psychiatrist through his general practitioner. At no stage did the respondent attempt to exercise control over the applicant. On each occasion the applicant was informed that the respondent would organise flights to and from Albany for the purposes of an appointment. The applicant refused to attend or re-attend Dr Pearce with the report as requested. The applicant required 'particulars' for the reasons why his principal Ms Sheldon had required him to attend Dr Pearce and he also wanted to be given an opportunity to comment upon those particulars and to submit the reasons why he should never have been required to attend Dr Pearce in the first place.
- 48 The respondent submits that it is the applicant's belief that he is entitled to the 'particulars' of the reasons why Ms Sheldon had referred him to Dr Pearce and that once received it is open to the applicant to attempt to persuade the respondent that he should never have been referred in the first place and that would be the end of the matter. The applicant submits he is entitled to refuse to obey the lawful direction of the respondent to require the applicant to re-visit Dr Pearce until he had those particulars and had been given the opportunity to convince the respondent that he should never have been referred to Dr Pearce in the first instance.
- 49 This, in the respondent's submission, remains the applicant's case on his unfair dismissal claim the applicant's continued refusal to attend Dr Pearce was and remains his unfair dismissal claim.

- 50 The respondent submits that Madgwick J in *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395 [68]:  
 an employer should, where there is a genuine indication of the need for it, also be able to require an employee, on reasonable terms, to attend a medical examination to confirm his or her fitness.  
 At [69] Madgwick J held that such a term should be implied into contracts of employment. Madgwick J held at [69]:  
 The question whether it is reasonable for an employer to request an employee to attend a medical examination will always be a question of fact as will the question of what are reasonable terms for the undertaking of the medical examination.
- 51 The directions to attend upon Dr Pearce which were the relevant directions according to the respondent were based entirely upon his medical opinion that it is what the applicant should have done. If the applicant had considered that the referral to Dr Pearce by Ms Sheldon was unreasonable then the onus was on the applicant to raise his objection at that time. The reasonableness or otherwise of Ms Sheldon's direction was overtaken by the applicant attending Dr Pearce and the medical opinion expressed by Dr Pearce that the applicant should obtain a report from a psychiatrist and return to Dr Pearce with that report. The respondent could not have ignored Dr Pearce's advice.
- 52 In so far as Dr Pearce's opinion was disputed Goldberg J in *Thompson v IGT (Australia) Pty Ltd* (2008) 173 IR 395 [38], held that:  
 The difficulty with those observations of the applicant is that he is not a doctor. Whether it is appropriate or necessary for him to have a psychiatric assessment or to have a meeting with a psychiatrist is a matter ultimately for the doctors to determine, but having regard to his history and the matters to which I have referred, I do not consider that it is unreasonable that there be such a request made by the respondent.
- 53 The respondent pointed out to the applicant on a number of occasions that he was being directed to re-attend Dr Pearce and why he was being required to do so. A letter was sent to the applicant dated 22 July 2013 where by the applicant was informed that if he did not attend Dr Pearce on 15 August 2013 such a failure could have implications for his employment relationship. The applicant did not attend. Further, by letter dated 9 September 2013 the applicant was informed of the respondents' preliminary view that his employment may be terminated and was given the opportunity to make comments.
- 54 The respondent suggests that reinstatement or indeed re-employment is impracticable as indeed the applicant himself does not seek reinstatement given the employment relationship has by the applicant's own admission broken down to 'a lack of mutual trust and confidence'. In relation to quantum of compensation the respondent reserves his rights, if it becomes relevant in proceedings, to make submissions having heard the applicant's submissions relating to mitigation.
- 55 Counsel for the respondent summarises the applicant's case to be that Ms Sheldon should not have sent the applicant to Dr Pearce in March 2012. In essence that was the evidence from both the applicant and his wife that the principal of the school and others 'had it in for Mr Kurilowski' (ts 66). A campaign was on foot to force the applicant to resign or failing that the principal was determined that she might be able to get rid of the applicant by way of a referral to Dr Pearce.
- 56 The applicant complied with the direction of the principal. Ms Sheldon set out what had been a number of complaints and allegations relating to the applicant in correspondence to Dr Pearce and provided her own opinion in relation to that referral. Given Ms Sheldon is not a diagnostician she provided in the correspondence a non-medical opinion in relation to the applicant by describing some of the behaviours that had preceded the referral. Once the applicant had agreed to see Dr Pearce the matter was overtaken by the opinion of Dr Pearce that the applicant should then go and see a psychiatrist. The respondent was duty bound to act on what Dr Pearce had said and do nothing more than that and direct the applicant to attend the psychiatrist.
- 57 The applicant was free to determine a psychiatrist of his own choosing and to procure a report from that psychiatrist and bring it back to Dr Pearce. That was all the respondent was requiring of the applicant. This the applicant refused and continued to refuse. The applicant said nothing and did not take up the opportunity to make any submissions to the respondent in relation to his failure to follow the respondent's directions and ultimately the respondent dismissed the applicant.
- 58 The respondent submits that almost all of the applicant's statement (exhibit Kurilowski 35) is irrelevant:  
 It's a potted history, a very potted history of Mr Kurilowski and Mr Kurilowski's work at the school, makes complaints about a few people, tries to put in contacts – context a few matters, gives Mr Kurilowski's side of the story in relation to a few matters.

(ts 68)

### Respondent's Evidence

- 59 Mr Neil Robert Milligan gave evidence for the respondent. Mr Milligan is the regional educator, executive director for the south-west of Western Australia. The witness is currently in his fourth year in that position. The witness represents the director general in the region working throughout the south-west both with independent public schools and non-independent public schools. The witness gave evidence that in his role he is required to review appeals against referrals when a principal refers a staff member to the occupational physician and in that capacity the person who's being referred has some three days in which to ask for that referral to be appealed. The appeal comes to the witness and the witness reviews the files from the school. The witness gave evidence he on occasion reviewed a file relating to the applicant from the school and on such occasions the witness looks for evidence that the referral is based on concerns about the person's medical condition. It is not the role of the witness to get involved in performance issues nor to pass judgement in terms of the medical condition given the witness has no training in that area but where there are behaviours that might seem either irrational or unacceptable it is the practice of the witness to refer the matter to protect the person being referred.
- 60 In relation to the paperwork seen by the witness there seemed to have been a prolonged period of difficulties whereby the applicant had demonstrated irrational behaviours and disharmony that was being created and while the witness did not draw

any conclusions of a medical nature there was ample evidence to suggest that in fairness to the applicant ought be referred to Dr Pearce, the respondent's occupational physician at the time.

- 61 The witness gave evidence that there were a number of members of staff who had a fearful and worrying relationship with the applicant and attempts to address issues had to be undertaken by a number of separate principals. In each case the applicant had not responded and had continued with behaviours that appeared somewhat threatening.
- 62 Dr John Leslie Pearce, consultant and occupational physician gave evidence for the respondent. In the last 35 years the witness has had a wide range of consultancies within the State, Commonwealth government and private sectors. In that capacity whilst not employed by those bodies he is a contractor and has consulted with Western Power for some 25 years, the respondent for 22 years, Medibank Private for 16 years, the Taxation Department 14 years and has worked for 50-100 organisations. In addition the witness has his own private medico legal consultancy and has done some work for both plaintiff and defendant lawyers. The witness has also done consultancy work through Veterans Affairs and in that capacity has carried out fitness for duty, impairment disability assessments on veterans and also has experience with physical and psychological disorders for some five to 10 years plus. The witness also carried out all the impairment disability assessments on psychiatric patients including the cases of the Vietnam veterans. He is not a psychologist or psychiatrist and he is not specialised in that area but has had a vast range of experience in dealing with such areas of work. The witness's statement was identified as exhibit Education 3. The witness went to his referral form relating to the applicant a form referred to as JLP 5. In that form the clinical findings of the applicant were referred to by the witness as:

Mr Kurilowski who challenged the reason and need for referral represented as a [un]cooperative man who is able to maintain good eye contact.

(JLP 5 referral form)

- 63 As a result of the referral of the applicant by Ms Sheldon the witness gave evidence he wrote a letter to the applicant's GP:  
21/3/12. Dr W Prathalingam - - -

...

Dear doctor, your 60 year old cleaner patient, Mr George Kurilowski was referred to me by (indistinct 10.48.15) under a duty of care for a fitness to duty assessment. Mr Kurilowski has been put off work due to reported unacceptable, aggressive, intimidatory behaviour. Would you kindly refer Mr Kurilowski to a psychiatrist to exclude a psychological cause for the above allegations. With thanks.

Yours sincerely, JPS.

(ts 102-103)

- 64 That correspondence was provided to the applicant to give to Dr Prathalingam. The document was tendered to proceedings (exhibit Education 4) and the witness gave evidence as to the role that he plays as a consultant. In that capacity he sees approximately 900,000 people a year. Probably a third to a half of those clients are psychological stress disorders and over the years a special clause has been added to the witness's contract to provide Dr Pearce with the right to send people to the psychiatrist of his choice:

So really I guess my opinion here was largely based on the history provided me by referral, phone calls, discussions with Labour Relations and the principal and I notice that Mr Gillam, the executive director Workforce and Mr Dodd, director of Labour Relations were involved which is quite unusual that they are involved so - - -

...

I guess I could have made a decision on the history provided me without seeing him but it's not my - my practice to always see people, eyeball them and make a decision whether there's anything urgent about it. At the time of consultation I was satisfied there was no evident psychoses. I was happy for Mr Kurilowski to get a psychiatrist of his own choice and provide me in due course. If I'd been concerned I probably would have referred him to the two - two psychiatrist that I use.

Were you planning to provide information other than this letter to psychiatrist that Mr Kurilowski chose to go to? - - - It would - would - would be my practice to see him again once he provided that - the name of the psychiatrist and communicate with that psychiatrist ask specific questions.

After the consultation? - - - Yes

(ts 103-104)

- 65 It was put to the witness that the applicant had given evidence that Dr Pearce could not see anything wrong with him at the time of the referral to which the witness answered 'that's - that's certainly incorrect. That - I would never have said that'. The witness clarified for the Commission that in his role with the respondent he was not a treating doctor for those persons referred. His client was actually the respondent or the director general of education. Every person the witness sees generates a report afterwards.
- 66 Before seeing the applicant and in addition to receiving the respondent's referral form the witness received correspondence from Ms Sheldon. The witness revealed given he had been with the respondent for some 22 years and was on first name terms with a number of principals in the organisation including Ms Sheldon. He discussed the issue relating to the applicant with Ms Sheldon before seeing Mr Kurilowski as the witness recalled the case had been worrying her for some time. The witness recalled he also discussed the matter with labour relations as they also had some issues. The witness was directed to an attachment to Dr Pearce's statement (JLP 5). It was put to the witness:

that - that's a very scathing letter, isn't it?---I - I - I'm not sure I'd use the word, 'Scathing,' but I - I'd say, to me it was a very worrying letter that I had grave concerns both personal and vicarious after reading it.

(ts 107)

- 67 The witness gave evidence that at the time the consultation occurred he recalled the applicant bought his advocate along, his wife and a Ms Wilson from the respondent was in attendance. The witness denied asking the applicant why Ms Sheldon was not there and stated it would not have been appropriate for her to be there. The witness indicated he would not have said that there was anything wrong with the applicant, nor did he recall reading a report from the applicant's Dr Prathalingam which follows that he does not recall throwing a note from the same doctor in the bin. At the conclusion of the consultation the witness denied suggesting there was nothing wrong with the applicant.
- 68 The witness' questions during the consultation process were mostly addressed through his advocate, the union representative. The applicant was largely uncooperative and the witness admitted that he is a slow writer and an untidy writer and that this practice is based mostly on comprehensive reports.
- 69 The witness described the applicant to be a cleaner in charge who had been ordered off work following a physical altercation and because of a number of people who had been intimidated by him. The witness digressed to describe a principal who was terrified of the applicant who subsequently became a patient of Dr Pearce. The witness described his role under the duty of care to determine whether the applicant was fit to do the job safely and appropriately both in respect to his own health and the applicant's vicarious implications to others.
- 70 It was put to Dr Pearce:

But the path of least resistance for you was to suggest that Mr Kurilowski remain off work and see a psychiatrist, wasn't it? That was the path of least resistance as far as you were concerned?---I - I don't think - I don't see it as least resistance, I had a duty of care and responsibility to - to my client.

(ts 120)

- 71 The witness made it clear the principal Ms Sheldon required the duty of care matter to be addressed with the applicant, hence the referral to Dr Pearce. The applicant's case was not complicated. While the witness acknowledged there may be disciplinary matters to deal with those were not his concern. All he had to consider was whether there was a medical matter to case manage. On that issue the witness made clear he had a duty of care to the respondent.

#### **Respondent's concluding submissions**

- 72 In correspondence written by Ms Sheldon she had directed the applicant visit Dr Pearce on 21 March 2012 (exhibit Education 3 attachment). Following the consultation Dr Pearce wrote a medical report and that is attached to his statement (exhibit Education 3, JLP 5) in which he wrote that:
- It is my plan to re-appoint Mr Kurilowski to further advise on case management when I receive a psychiatric report. In the interim period Mr Kurilowski should remain off work and the non-medical issues would best be deferred.
- 73 JLP 5 was the medical report of Dr Pearce attached to exhibit Education 3. That report was clear that there were industrial and possibly disciplinary matters in relation to the applicant that were relevant but the more pressing issues related to medical matters and as such those medical matters needed to be ruled out before referring to any industrial issues. The view of Dr Pearce was that following the consultation in March the applicant should see a psychiatrist of his own choosing (through his GP, Dr Prathalingam) and then report back to Dr Pearce. The fact of the matter is that the applicant never went back to Dr Pearce with the psychiatric report as requested and was eventually dismissed because of the consistent refusal on the applicant's part to follow what were a series of lawful directives issued by the respondent.
- 74 The applicant was eventually dismissed because of his consistent refusal to follow what the respondent says was a reasonable, lawful direction to re-attend Dr Pearce with a report from a psychiatrist. Counsel for the respondent notes that the applicant's counsel accepted that there was a direction to attend with the psychiatrist's report. All the relevant documents, the directions and the refusals that were sent to the applicant and the responses that were sent to the respondent are to be found as attachments to the SAFS. The respondent submits that it is beyond question the only fair construction can be that the applicant refused to attend firstly a psychiatrist and subsequently Dr Pearce with a psychiatrist's report. Each of the letters from the respondent to the applicant issuing the direction to attend a psychiatrist and report back to Dr Pearce with the report advised the applicant that the respondent would organise flights to and from Albany. The respondent submits that matter is relevant to the reasonableness of the respondent's direction.
- 75 The applicant's refusal to visit Dr Pearce and refusal to attend a psychiatrist was that he wanted particulars of the reasons why Ms Sheldon had referred him in the first instance. The applicant wanted the opportunity to comment upon the particulars before he went and saw the psychiatrist. It is to be assumed that he wished to contest the need to visit the psychiatrist or convince the respondent there was no reasonable basis on which to refer or alternatively that Dr Pearce's opinion that he should see a psychiatrist would somehow disappear. The respondent submits that it was necessary to collect this medical information to ensure psychiatrist is able to have a look at the applicant and rule out the need for the applicant's psychiatric or mental health issues.
- 76 Alternatively if a psychiatrist returns a report of a nature that determines decisions have to be made by Dr Pearce about what next steps there are in terms of medical treatment then clearly the disciplinary and performance issues are put to one side while those medical issues are dealt with. The respondent says both the applicant's refusal to go back to see Dr Pearce was misconceived because the direction to visit Dr Pearce was given by Ms Sheldon and his first visit he complied with. Dr Pearce's medical opinion arising out of that first visit could not be undermined in any way. The respondent submits in cross-examination that the applicant should see a psychiatrist; the respondent submits they were bound to act the view as reached by Dr Pearce in March 2012. The respondent could not ignore it, the applicant could not ignore and more importantly the

applicant could not debate the basis about why he was there in the first place. The circumstances in which the respondent may direct an employee to go to see a doctor are not in dispute. The respondent submits that the directive to attend the first consultation was followed by several directions to attend a psychiatrist then re-attend Dr Pearce. These were not followed yet they were all relevant directions and were based simply upon Dr Pearce's opinion that the applicant should attend a psychiatrist and re-attend Dr Pearce. The respondent submits that the indication of what was needed came from the opinion of Dr Pearce. Put from an alternative point of view if Dr Pearce had said that the applicant did not need to see a psychiatrist that all was well then that would have concluded the matter from a medical point of view. His opinion was the applicant needed to see a psychiatrist. If the applicant did not want to see Dr Pearce and did not think he needed to see him then the applicant needed to raise the objection but that was not the issue. The applicant did attend and the applicant's objection was overtaken by the fact that he did consult with Dr Pearce in March 2012 after which Dr Pearce gave his considered medical opinion.

- 77 Once the respondent receives Dr Pearce's advice even if the applicant submits that he should never have been there in the first place and did not like the terms of the consultation. The respondent is duty bound to act on the advice of Dr Pearce the dismissal of the applicant for repeatedly refusing to comply with the direction based on medical opinion was not unreasonable and the respondent submits that the dismissal of the applicant for repeatedly refusing to comply with a lawful direction based on a medical opinion was not unreasonable and therefore the unfair dismissal claim of the applicant must be dismissed. Just prior to the final termination letter being written (the document attached to SAFS) the respondent did write to the applicant and provide the applicant with a final opportunity (correspondence from Mr Gillam) whereby the applicant was advised the respondent was considering terminating the applicant's employment and asking whether the applicant had any final comment to make. Such a step fulfilled what the respondent considered to be the final opportunity for the applicant to convince their employer that the employment relationship should not be brought to an end. That correspondence states:

I write with reference to your employment with the Department of Education and your failure to attend yet another medical appointment with the Department's occupational physician, Dr John Pearce, on Thursday, 15 August 2013. This is the fourth time you've been directed and failed to attend such an appointment.

You were provided with a letter sent on 22 July 2013 under my signature in which you were given a lawful direction to attend the above appointment. You were advised in the letter that the absence of extenuating circumstances any failure to attend the scheduled appointment may lead to disciplinary action for disregarding a lawful order, including termination of your employment.

You failed to attend the appointment or provide reasons for your absence.

Prior to making a decision to terminate your employment I am providing you with an opportunity to respond to this matter.

(letter from Mr Gillam dated 9 September 2013 attached to SAFS)

- 78 It was made clear that the respondent objected to large sections of the applicant's statement (exhibit Kurilowski 35) [7] – [99] and [110]. The respondent did so on the basis of the relevance of the material included in those sections of the applicant's statement. Further the respondent objects to the entirety of Mrs Kurilowski's statement. Those statements were made for the same reason, that being relevance.
- 79 When considering the reasonableness of the referral to Dr Pearce the applicant says that two different principals at the school namely Mr Lee and Ms Sheldon had separate campaigns to try and get the applicant to leave the school and the referral for the applicant to see Dr Pearce was drafted by Ms Sheldon as a means of prosecuting that campaign. In relation to Mr Lee the respondent draws a conclusion Mr Milligan was asked to address the Commission on the issue when giving evidence. The document concerned relates to a letter from the applicant to Mr Lee, in particular an extract from that correspondence:

I believe that your mandate is still, as I stated in my last letter to district office, to get rid of me as I know too much about how the cleaning situation has been mishandled regarding Kate's health.

(exhibit Kurilowski 28)

- 80 The respondent asked the Commission to go back to [7] of the applicant's outline of submissions where it was said:
- The Commission will be invited to infer from the evidence that from about 2010 Ms Sheldon began a campaign to get the applicant to leave his employment of his own accord. When he failed to do so on 9 March 2012, she stood him down over an alleged incident on 28 February 2012, and referred him to the Department's occupational physician, Dr Pearce, purportedly on medical grounds.

(applicant's opening submissions [7])

The respondent continued to deal with the reasonableness of the issues.

- 81 The respondent is referred to [71] of the applicant's statement (exhibit Kurilowski 35) when the applicant received correspondence from Ms Sheldon threatening disciplinary action and relegation because he locked an area early. There was little more said for some time then the number of toilets the applicant was required to clean went from 16 to 31 then up to 39 and after that the applicant complained and the principal reduced the numbers the applicant was required to clean back to 32:

My perception was that the reason for increasing my toilet load was to annoy me.

(ts 133)

The respondent submitted there seemed to be little evidence to that effect.

- 82 At this stage Ms Sheldon had been there since the commencement of 2009. The next matter is the Tom Herrington incident in which the applicant is found guilty and is reprimanded. The respondent says there does not appear to be a behind the scenes campaign with any substance but the one issue that did occur is that there is a referral to Dr Pearce. Ms Sheldon refers the applicant on the basis of determining whether there were medical issues at play. The respondent says this is not controversial and Dr Pearce gave evidence that it is not seemingly complicated. The respondent submits there is no campaign. The Commission was directed to go to attachment NRM 2 where notes are compiled by Mr Lee and subsequently Ms Sheldon,

some of them a number of years ago. Such notes are put no higher than relational issues between staff, and it is in this case relating to the applicant and they are written a long time ago in some cases. A file note dated 14.05.09 made by the then principal:

BL made a file note of an incident between him and GK when BL gave GK a letter confirming that Standards and Integrity (SID) had found that the KW complaint was unsubstantiated. GK was rude and belligerent and want to know why BL was helping him and told him he had an ulterior motive. GK alleged that BL had contacted SID, BL said that wasn't true and GK called BL a 'fucking liar'. BL told him he was way out of line and to re-read the letter on his computer. GK called him a 'fucking liar' again. GK stated he was wrong but refused to apologise.

(NRM 3 BL file note 14.05.09)

83 On another occasion on 13.11.09:

BL wrote to GK regarding extreme concern over the way that GK conducts himself when speaking to, and interacting with, other staff. BL described GK as abusive, threatening and intimidating based on reports from staff and his own experiences with GK.

(BL letter 13.11.09)

84 A further file note on 18.10.11:

Tom Herrington (TH) alleges that he was assaulted by GK in the toilets. The allegation was investigated by SID which found that GK had committed an act of misconduct and imposed an action of a formal reprimand.

(SID file)

85 That was not the case with the cleaner in charge at the school he did and the applicant admits it the respondent raises several concerns about communication between office staff and the applicant and tabled in the proceedings was a document from Ms Lehane a community member whom the applicant states or as part of the conspiracy to get rid of the applicant from the school Ms Lehane is involved in a mothers support group, a weekly supported playgroup, baby massage centre and participates in a family place steering committee and from time to time comes into contact with the applicant. She describes the applicant's behaviour in 2008 as:

His behaviour towards me has been consistently extremely unpleasant and very unhelpful – to the point of sabotaging the services offered at the centre while I have actually been present on the school site. His behaviour towards me has been hostile and irrational and has made me feel very uncomfortable and upset on a number of occasions.

(NRM 2, 13)

86 The respondent so far as Mr Lee is concern is consistently trying to pacify the applicant, to put things in writing and to try and improve communication in a considered manner. For example:

Wednesday, 17th September was the third time you've entered into a conversation with me over a complaint from another staff displaying an extremely angry and aggressive stance using many coarse expletives in a loud voice. Twice this has been because you have disagreed with a direction I have given you. While I understand you may be angry and you may wish to discuss the decision with me you have no right to do so in the manner that you displayed.

(NRM 2, 27)

87 The respondent submits such an approach to be firm and fair. The principal had not taken a disciplinary approach and could easily have done. The principal has not entered any form of campaign against the applicant. The respondent submits that there is no campaign being waged against the applicant. There is a genuinely held view by Ms Sheldon that she legitimately and reasonably considered there may be a medical issue and therefore the applicant ought be referred to Dr Pearce. The Commission is to consider which is more likely. The respondent suggests this is not a bullying case and the applicant has not made an allegation of bullying against the respondent.

88 The determination is whether it is reasonable for Dr Pearce to require the applicant to attend the psychiatrist and return to Dr Pearce with that psychiatrist's report. It is a case about whether it was reasonable for Ms Sheldon to refer the applicant in the first instance to see Dr Pearce or alternatively whether that was part of a campaign waged against the applicant.

89 The documentation in the respondent's submission establish overwhelmingly that there was a reasonable basis for the referral and that there is no evidence whatsoever of the campaign that this was part of bullying against the applicant. The respondent says the Commission need go no further than consideration of Mr Milligan's statement. He was called as a witness to assist the Commission in his capacity as regional executive director and determine whether it was reasonable to refer persons to the occupational physician. It was determined on the basis of the documentation provided that the referral of the applicant to Dr Pearce was well within the parameters of school matters. Mr Milligan was, in the view of the respondent an impressive witness in that he was calm, credible and convincing and on that basis his evidence should be accepted.

90 The applicant's case is not unusual in that he is not the subject of a campaign against him. There are no conspirators in Denmark and there are no personnel currently plotting the downfall of the applicant. The circumstances are in the view of the respondent reasonable to have the employer determine that there may be something medical going on here and it is within the employer's duty of care to refer the applicant to Dr Pearce. It was reasonable for Dr Pearce to request a psychiatric review and to have the applicant return to see Dr Pearce with the review. Thereafter it was entirely reasonable for the respondent to dismiss the applicant for his failure to comply.

91 The applicant has withdrawn his submissions in relation to reinstatement and clearly the employment relationship has it irretrievably been broken down due to a lack of mutual trust and confidence. The respondent submits that there is a duty to mitigate loss or once the applicant had lost his job there would have to be some sort of discount for his complete failure to discharge the duty of mitigation. In the respondent's submission such failure would need to be as high as 50%.

92 The respondent's submissions are and remain that an order should issue dismissing the application.

## Commission's Conclusions

### Credibility of Witnesses

- 93 As to the credibility of witnesses the applicant gave a history of events at the school going back to 2006, some eight years ago. In doing so the Commission did notice that the applicant interpreted events in a manner whereby the Commission can only conclude that the applicant made attempts to disguise the events, particularly with regard to what occurred during the applicant's visit to Dr Pearce in March 2012. It is obvious that the applicant and Ms Kurilowski had a different story in relation to the consultation with Dr Pearce. For example, with respect to the issue of Dr Pearce questioning why Ms Sheldon had even needed to refer the applicant, that aspect was rejected in evidence by Dr Pearce. The Commission is inclined to accept the evidence of Dr Pearce. Furthermore the suggestion by the applicant that Dr Pearce threw Dr Prathalingam's report in the bin was not something recalled by Dr Pearce. Dr Pearce didn't ever recall receiving a note from the applicant's general practitioner. The Commission is again inclined to accept the evidence of Dr Pearce. Further the applicant gave evidence that Dr Pearce asked why Ms Sheldon was not present at the consultation in Perth, an aspect of evidence denied as 'not appropriate' by Dr Pearce. Dr Pearce in the giving of his evidence presented as a straight forward and truthful person.
- 94 The remaining evidence of the applicant is reluctantly accepted, recognising a large amount of the detailed evidence submitted by the applicant is indeed, mostly irrelevant for the purposes of these proceedings simply as having occurred prior to the relevant issues for consideration in these proceedings occurred. The evidence of Ms Kurilowski, with the exception of those aspects already referred to in [93] is, in large part accepted. The evidence of Mr Milligan is accepted as straightforward and helpful.
- 95 The Commission has carefully considered the evidence, the documentation and the submissions of the applicant and the respondent. The SAFS and associated documents represent a significant detail between the applicant and respondent that is accepted between the parties did occur. There were a substantial number of documents presented during the proceedings including the SAFS and (NRM 1, NRM 2 and NRM 3 and their various attachments) in addition to the various exhibits of each party that suggest a regrettable relationship between principals, staff at the school and the applicant, much of which appeared to involve some levels of aggravation between individual principals, teachers and the applicant going back as far as 2006.
- 96 The Commission was invited by the applicant's counsel to draw a *Jones v Dunkel* inference on the failure of the respondent to bring Mr Lee a principal at the school some six years ago to give evidence. The Commission chose not to on the basis that these proceedings are about the failure on the part of the applicant to follow lawful directions, the first of which was issued by Dr Pearce on 19 March 2012. Mr Lee's tenure at the school concluded at the end of 2009 and therefore, in the view of the Commission cannot be considered relevant to these proceedings. The Commission hasn't relied on the letters written by Mr Lee other than in a very general sense where the Commission refers in [98] to the 'regrettable relationship between principals, staff at the school ... and the applicant'. The Commission does not accept that having Mr Lee available for cross-examination would have assisted the proceedings.
- 97 The Commission has considered the evidence given in these proceedings and reviewed the substantial amount of documentation tendered at the hearing together with the extensive amount of agreed documentation in SAFS. On the evidence before me and given my views on witness credibility the Commission finds that the respondent had good reason to form the view that the applicant should be terminated after he had failed to comply with a series of lawful directions given to him commencing with the directive issued by Dr Pearce during the consultation on 21 March 2012. Subsequent directives were issued by way of correspondence on 8 November 2012, 27 February 2013, 10 April 2013, by undated letter Mr Keith Dodd wrote to the solicitors acting for the applicant, on 4 April 2013 Mr Dodd wrote again to the solicitors acting for the applicant, on 29 April 2013 Mr Dodd wrote to the applicant, on 22 April 2013 Mr Gillam wrote to the applicant on 22 July 2013 and finally on 27 September 2013 Mr Gilliam wrote to the applicant informing him he had been terminated effective from the date of the correspondence.
- 98 The correspondence that was sent by the respondent to the applicant or to the applicant's solicitors and the responses from the applicant and the applicant's solicitors is set out in more detail in the following paragraphs. The Commission finds that the respondent informed the applicant on numerous occasions about the necessity to return to see Dr Pearce together with a review from a physiatrist and it did so in a reasonable manner having advised the applicant that it would provide for plane fares to and from Albany to Perth in addition to allowing the applicant through his general practitioner to select a physiatrist of his choice. However, the applicant failed to comply with any of the requests from the respondent between March 2012 and September 2013.
- 99 The applicant sought further details on allegations made by Ms Sheldon about him before determining whether he would comply with the respondent's lawful directive. The Commission is of the view that it was too late for such a position to be adopted by the applicant. The applicant had already consulted with Dr Pearce in March 2012.
- 100 The Commission finds that the applicant has not been the subject of an ongoing campaign against him in the school, as he has been suggested. The Commission finds there are no conspirators in Denmark and there are no personnel currently plotting the downfall of the applicant. Given the number of events at the school that had preceded March 2012 involving the applicant, it seemed reasonable for Ms Sheldon to refer the applicant to Dr Pearce in March 2012 however whether it was reasonable or not is not an issue for consideration in these proceedings.
- 101 What the Commission is required to determine is whether it was reasonable for the respondent to rule out any possible medical issues with the applicant. Such a matter was within the employer's duty of care to refer the applicant to a medical examination to determine whether there were any medical issues in play with the applicant's behaviour.
- 102 The Commission finds, given the applicant's demeanour which caused Ms Sheldon to refer the applicant in the first instance to Dr Pearce that it was eminently reasonable for Dr Pearce to determine whether there were any medical issues at play with the applicant.
- 103 The Commission acknowledges that the applicant complied with the direction at first instance and attended the consultation with Dr Pearce. The Commission finds that following the initial consultation Dr Pearce referred the applicant to a psychiatrist

of the applicant's own choosing through his GP, Dr Prathalingam. It was reasonable for Dr Pearce to request a psychiatric review to be undertaken by some other person as during the giving of evidence Dr Pearce indicated he didn't have the necessary qualifications to assess the applicant. It was necessary to have the applicant return to see Dr Pearce with the psychiatric appraisal. Dr Pearce, in such circumstances normally referred persons to one of two particular psychiatrists of his choice however on this occasion he suggested the applicant's general practitioner retain the discretion to refer the applicant to a psychiatrist of his own choosing, an eminently sensible decision.

104 The applicant was directed not to return to work until such time as Dr Pearce had indicated he was fit for duty, during which time the respondent would maintain the applicant's normal salary. The date of the applicant's first appointment with Dr Pearce was 21 March 2012. On 27 March 2012 Dr Pearce prepared a medical report on the applicant. The Commission does not think it appropriate to quote from that report given the confidential nature of medical reports generally, although I do note the parties have included the report as an attachment to the SAFS. The Commission finds the point at which the consultation with Dr Pearce concluded in March 2012 any cooperation being extended by the applicant ceased in that the lawful direction issued by the respondent to obtain a psychiatric review and return to Dr Pearce was not followed.

105 Correspondence was exchanged:

- the respondent issued a follow-up by way of correspondence on 8 November 2012 when Mr John O'Brien, manager, labour relations wrote to the applicant requiring him to attend an appointment with Dr Pearce together with his psychiatric report on 22 November 2012.
- on 19 November 2012 the applicant's solicitor sought detailed reasons as to why the respondent wished to assess the applicant's fitness for work. In addition the applicant wished to know his rights in relation to the proposed second appointment with Dr Pearce.
- the respondent indicated by way of correspondence dated 21 December 2012 to the applicant that the statutory responsibility is to protect the 'safety and wellbeing of employees and students. Recent events have led the Department to be concerned for Mr Kurilowski's medical status. A further appointment was made with Dr Pearce for 27 February 2013 at 12.15pm. The applicant was reminded he would need a copy of a psychiatrist's report (a copy of that correspondence is attached to SAFS).
- in correspondence from the applicant's solicitor dated 22 February 2013 it was said 'On 8 November 2012, you advised Mr Kurilowski of a further appointment with Dr Pearce and, at my request, you deferred that appointment'. The correspondence went on to say that the applicant denied allegations of aggression and belligerence or having any mental disorder and suggests 'the whole process since March 2012 has been premised on the principal's bald suggestion that Mr Kurilowski is suffering from some unspecified mental disorder. On the contrary, the evidence suggests that Mr Kurilowski has been the victim in this long running saga which calls into question the Department's compliance with its duty of care to him.  
In summary, unless you can provide me with more evidence and reasons why Mr Kurilowski should see Dr Pearce again, then he will not attend' (a copy of that correspondence is attached to SAFS).
- on 28 March 2013 the applicant's solicitor requested of the respondent details of each allegation of:
  - aggression and intimidation;
  - vexatious, provocative and challenging behaviour;
  - refusal to accept responsibility for his own actions;
  - belligerence and uncooperative attitude when called to account; and
  - paranoia.

The applicant's solicitor indicates that he requires information about each of these allegations to enable him to advise the applicant whether or not he should proceed to see a psychiatrist and furthermore on the basis of that whether he should then return to see Dr Pearce.

- on 4 April 2013 Mr Keith Dodd, director labour relations wrote to the applicant's solicitor. The correspondence maintained Ms Sheldon's concerns that the respondent was of the view that their concerns were sufficient to require the assurance of a medical practitioner, in this case a psychiatrist report to confirm whether or not the applicant could in an effective manner carry out the functions for which he had been employed without either exacerbating his own health or indeed compromising the general duty of care owed by the respondent to other employees and students. At this stage a further appointment had been scheduled with Dr Pearce on 23 April 2013 requiring the applicant to attend together with a psychiatric report and a warning was issued that in the circumstances if the applicant did not comply with the directive the respondent considered disciplinary proceedings may be actioned against the applicant in the event he failed to follow a reasonable lawful direction.
- on 12 April 2013 the applicant's solicitor repeated his request for the particulars of the principal's allegations against the applicant and any associated supporting documentation as a matter of procedural fairness to provide the applicant with the opportunity to respond.
- on 29 April 2013 Mr Dodd wrote to applicant advising of his failure to attend a number of medical appointments with Dr Pearce and informing him of the respondent's intention to terminate the applicant's employment and providing the applicant with an opportunity to respond to this matter prior to Mr Dodd recommending to the executive director of workforce Mr Cliff Gillam that he dismiss the applicant.
- in correspondence of 10 May 2013 the applicant's solicitor indicated that the applicant had never ruled out seeing Dr Pearce again but did deny that such a request was not a lawful direction nor indeed was the applicant's period of indefinite and largely unpaid period of suspension. The applicant requested that the school undertake an investigation of the alleged acts of misconduct by the applicant and once again repeated

that the allegations be put to the applicant in detail and in writing and that he be provided with sufficient time to respond. The letter advises if the respondent carries out the task as requested the applicant will review his position.

- correspondence was forwarded by Mr Gillam on 22 July 2013 issuing a directive for the applicant to attend Dr Pearce at 11.15 on Thursday, 15 August 2013 and to bring with him a psychiatrist's report. The applicant was advised that the respondent would organise flights to and from Albany for the appointment and the applicant was informed that he was required to follow all reasonable and lawful directives. 'Where a member of the non-teaching staff is found to have committed a breach of discipline, a penalty can be imposed, ranging from a reprimand to termination of employment'.
- Mr Gilliam on 9 September 2013 writes a further letter to the applicant noting he has missed a fourth appointment with Dr Pearce on 15 August 2013. Mr Gilliam provides the applicant with a further opportunity to respond prior to making a decision to terminate the applicant's employment and asks the applicant to respond by 20 September 2013, if no response is received by that date Mr Gillam advises he will be proceeding to terminate the applicant's employment.
- on 13 September 2013 the applicant's solicitor seeks further requests for particulars of the allegations against Mr Kurilowski within 10 days of the date of the correspondence.
- on 27 September 2013 Mr Gillam, executive director of workforce of the respondent advises:

I note all efforts to have concerns about your health addressed from mid 2012 have been met with vigorous avoidance from both you and your legal representative, Mr Michael Rennie. Through numerous letters it has been explained to you the reason for the appointment with Dr Pearce was for medical concerns borne out by the Department's duty of care and these concerns would provide to you. Given your ongoing refusal to attend a number of appointments made for you, and having considered the matters raised by you, I remain in the opinion that termination of your employment is the most appropriate action in all the circumstances. Accordingly it has been decided to terminate your employment effective from the date of this letter.

I have instructed the Personnel and Payroll Branch to calculate any outstanding leave entitlements that may be owed to you and deposit these monies into your usual nominated bank account. If any monies are owed to the Department, this amount may be deducted from any final payment where the Department is properly authorised to do so.

Please also be advised that as you have failed to follow a lawful directive, as outlined above, you will not be able to seek future employment with the Department, in any form, without showing good cause as to how your circumstances have changed. A medical clearance from Dr Pearce stating you are fully fit for employment will also be required. Your personnel records will be marked accordingly.

...

Yours sincerely

Cliff Gillam

- 106 The Commission finds also that the requirement issued by Dr Pearce upon the applicant to attend a psychiatrist and return to see Dr Pearce is not disputed. The Commission finds that the applicant's claims that his termination was unfair and he was denied procedural fairness lacks substance. The Commission rejects the applicant's claims that he should have had the allegations that Ms Sheldon had made detailed. This matter was not relevant to the referral and the psychiatrist's review as sought by Dr Pearce.
- 107 The Commission finds that Dr Pearce was seeking to rule out medical matters as being relevant to the applicant and it was reasonable for him to do so. The ability for the respondent to complete that task was never able to be fulfilled because of the repeated refusal by the applicant to follow what was a lawful directive.
- 108 The applicant was informed repeatedly, initially by Dr Pearce then in correspondence from Mr O'Brien, Mr Dodd and subsequently Mr Gillam that he was required to seek a psychiatrist's review and subsequently return to Dr Pearce and furthermore if he chose not to then his employment may be in jeopardy. The advice could not have been clearer yet the applicant seemed to continue with views relating to what had occurred in the school in 2006, 2009 and 2010, then seeking clarification on the basis of the allegations made by Ms Sheldon.
- 109 With respect those years had long gone and the recent behaviour of the applicant had indeed surpassed those years. The Commission goes so far as to suggest that a large part of evidence brought forward was not relevant to these proceedings. These proceedings relate to the failure to follow a series of lawful instructions following 21 March 2012, the point at which the applicant left Dr Pearce's consulting rooms. In the Commission's view, given the applicant's repeated refusal to obey a lawful instruction from the respondent to re-attend Dr Pearce together with a review from a physiatrist of the applicant's own choosing and given the applicant had been made aware on a number of occasions of the ramifications of such behaviour, the applicant's actions in relation to failing to undertake such lawful instruction when expressly told to do so is sufficient to warrant termination of the applicant's employment.
- 110 The Commission finds the applicant was dealt with in a procedurally fair manner in relation to the stages of being advised of and issued with a series of lawful instructions. At each stage it was made clear to the applicant what the consequences of his failure to carry out the lawful instructions from the respondent would be. Further, the respondent offered to fly the applicant to and from appointments with Dr Pearce facilitating any costs the applicant may have to sustain. At the final stage, in correspondence from Mr Gillam dated 22 July 2013 the respondent gave the applicant an opportunity to respond prior to effecting the dismissal. Thereafter the Commission finds it was entirely reasonable for the respondent to dismiss the applicant for his failure to comply with the lawful instruction.

111 The Commission finds that the applicant was given 'a fair go all round' in accordance with the *Undercliffe* test. Applying the relevant legal authorities, the Commission finds it was appropriate in the circumstances for the respondent to dismiss the applicant.

112 On this basis an order will issue dismissing the application.

2014 WAIRC 01345

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GEORGE KURILOWSKI	<b>APPLICANT</b>
	-v-	
	SHARYN O'NEILL, DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S M MAYMAN	
<b>DATE</b>	WEDNESDAY, 10 DECEMBER 2014	
<b>FILE NO/S</b>	U 178 OF 2013	
<b>CITATION NO.</b>	2014 WAIRC 01345	

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr M Rennie (of counsel)
<b>Respondent</b>	Mr D Matthews (of counsel)

*Order*

HAVING heard Mr M Rennie (of counsel) on behalf of the applicant and Mr D Matthews (of counsel) on behalf of the respondent, the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be and is hereby dismissed.

[L.S.]

(Sgd.) S M MAYMAN,  
Commissioner.

2014 WAIRC 01297

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION FIONA MARDLING	<b>APPLICANT</b>
	-v-	
	KIMBERLEY ABORIGINAL MEDICAL SERVICES COUNCIL	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S M MAYMAN	
<b>DATE</b>	TUESDAY, 2 DECEMBER 2014	
<b>FILE NO/S</b>	U 93 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01297	

<b>Result</b>	Application discontinued
<b>Representation</b>	
<b>Applicant</b>	Mr Jason Leeder (ANFIUWP)
<b>Respondent</b>	Ms Anna Murphy (of counsel)

*Order*

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

AND WHEREAS on 23 June 2014 and 14 July 2014 the Commission convened a conference for the purpose of conciliation between the parties;

AND WHEREAS on 28 November 2014 a signed Notice of Discontinuance in respect of the application was filed;

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 01282**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION VINCENT MAYERS-LEDUC	<b>APPLICANT</b>
	-v-	
	TURNER CONSTRUCTION GROUP	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S M MAYMAN	
<b>DATE</b>	WEDNESDAY, 26 NOVEMBER 2014	
<b>FILE NO/S</b>	B 149 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01282	

<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	No appearance
<b>Respondent</b>	No appearance

*Order*

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

AND WHEREAS this matter was listed for conference on 21 August 2014;

AND WHEREAS at the conclusion of the conference agreement was able to be reached;

AND WHEREAS this matter was listed for hearing on 18 November 2014 for the applicant to show cause why the application should not be dismissed;

AND WHEREAS the applicant failed 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.) S M MAYMAN,  
Commissioner.

**2014 WAIRC 01312**

<b>WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION</b>	
<b>CITATION</b>	: 2014 WAIRC 01312
<b>CORAM</b>	: COMMISSIONER S M MAYMAN
<b>HEARD</b>	: TUESDAY, 2 SEPTEMBER 2014, MONDAY, 27 OCTOBER 2014, TUESDAY, 28 OCTOBER 2014, WEDNESDAY, 29 OCTOBER 2014
<b>DELIVERED</b>	: FRIDAY, 5 DECEMBER 2014
<b>FILE NO.</b>	: U 114 OF 2014
<b>BETWEEN</b>	: BELINDA PINKER
	Applicant
	AND
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	Respondent

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CatchWords	:	Industrial Law (WA) - Termination of employment - Allegation of harsh, oppressive and unfair dismissal - Application to seek reinstatement - Findings of breach of discipline against a teacher - Penalty of dismissal disproportionate to breaches - Totality principle - Procedural unfairness - Disbarment - Trust and confidence - Principles considered - Applicant not harshly, oppressively or unfairly dismissed - Application dismissed - <i>Industrial Relations Act 1979</i> (WA) s 29(b)(i); <i>Public Sector Management Act 1994</i> (WA) Part 5, s 78, s 78(2), s 80, s 80A, s 80(b), s 80(c), s 82A
Legislation	:	<i>Industrial Relations Act 1979</i> (WA), <i>Public Sector Management Act 1994</i> (WA)
Result	:	Application dismissed
<b>Representation:</b>		
Counsel:		
Applicant	:	Mr D Stojanoski (of counsel)
Respondent	:	Mr D Anderson (of counsel)

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**Case(s) referred to in reasons:**

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

Blyth Chemicals v Bushnell (1933) 49 CLR 66

Bogunovich v Bayside Western Australia Pty Ltd (1988) 78 WAIG 3635

Danijel Pantovic v Public Transport Authority of Western Australia (2011) WAIRC 00876

Guretti v The Director General, Department of Education (2013) WAIRC 07799; (2008) 93 WAIG 1399

Hospital Employee's Industrial Union and Wongan Hills Hospital No. 626 of 1978

Jones v Dunkel (1959) 101 CLR 298

Leahy v Liquor, Hospitality and Miscellaneous Union (2009) WAIRC 00580; (2009) 89 WAIG 1120

Lee v Director General, Department of Education and Training (2004) WAIRC 13757

Logan-Scales, Department of Consumer and Employment Protection v Ticket Xpress Pty Ltd (2005) WAIRC 02788

Milward, Department of Consumer and Employment Protection v Melrose Farm Pty Ltd t/as Milesaway Tours (2007) WAIRC 00505; (2007) 87 WAIG 1098

North West Council v Dunn 127 CLR 247 at 263

Oliver and Oliver t/as Club Sierra v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch (1994) 74 WAIG 2637

Pantovic v Public Transport Authority of Western Australia (2011) WAIRC 00876; (2011) 91 WAIG 2094

Public Employment Industrial Relations Authority v Scorzelli [1993] NSWIRC 48

Salemi v MacKellar (No 2) (1977) 137 CLR 296; 14 ALR 1

Samata v Fraser Chief Executive Officer Shire of Gingin (2011) WAIRC 00116; (2011) 91 WAIG 1975

Shire of Esperance v Mouritz (1991) 71 WAIG 891

The Minister for Health in the Metropolitan Health Services Board v Drake-Brockman (2012) WAIRC 00150; (2012) 92 WAIG 2013

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

United Voice WA v Director General, Department of Education (2014) WAIRC 01137; (2014) 94 WAIG 1742

*Reasons for Decision*

- Ms Belinda Pinker (the applicant) was employed by the Department of Education (the respondent) at Southern River College in June 2005 and her employment was terminated by the respondent on 28 April 2014. The respondent dismissed the applicant asserting that each of the six allegations against the applicant constituted a separate breach of discipline contrary to s 80 of the *Public Sector Management Act 1994* (WA) (PSMA). The respondent considered a range of penalties other than termination and determined that in this matter termination of the applicant's employment was appropriate. The applicant complains that her dismissal was harsh, oppressive or unfair. She seeks reinstatement. This is opposed by the respondent.

**Background**

- On 17 June 2013, information was received by the Standards and Integrity Directorate (SID) of the respondent alleging that whilst a teacher at Comet Bay College (CBC) in 2010 and Southern River College (SRC) in 2011 the applicant directed Mr Glenn Meinema, her ex-partner, to check student assessments and to access the respondent's network and that the applicant provided final semester 1 grades for students from SRC prior to marking their assessments.

- 3 On 2 December 2013, a letter was sent to the applicant by Mr Geoff Davis of the respondent, setting out seven allegations and advising the applicant that the respondent was treating the matter as a disciplinary matter pursuant to s 81 of PSMA (exhibit Education 3). The seventh allegation was subsequently withdrawn by the respondent.
- 4 On 26 May 2014, the applicant filed a Notice of Application in the Western Australian Industrial Relations Commission (the Commission) applying for an order of reinstatement or compensation in respect of harsh, oppressive or unfair dismissal for the reasons set out in the application. On 20 June 2014, the respondent filed a Notice of Answer in the Commission denying that the applicant's dismissal was harsh, oppressive or unfair and seeking an order that the application be dismissed.

#### Applicant's Opening Submissions

- 5 When considering the conduct the respondent complained of, it is conceded by the applicant that the conduct complained in part occurred. The applicant submits that the penalty subsequently prescribed, that being that dismissal is disproportionate when having regard to the conduct complained of by the respondent. It is the task of the Commission to determine whether the legal right of the respondent to terminate has been exercised so harshly or oppressively as to amount to an abuse of that right considering the Industrial Appeal Court decision in *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 (*Undercliffe*) and the decision in *North West County Council v Dunn* (1971) 126 CLR 247, 263.
- 6 The applicant referred to the termination of the employment relationship by the respondent as amounting to a decision to exclude or disbar the applicant. In this case the applicant can no longer continue in her chosen profession as the respondent in Western Australia is the largest employer of teachers. It is therefore more harsh than simply a termination of an employment contract for example in the private sector. The Commission is being asked to have regard to the impact of the dismissal as being greater in its scope. The Commission therefore needs to have regard to the totality principle. When considering the issue of totality the Magistrate in *Milward, Department of Consumer and Employment Protection v Melrose Farm Pty Ltd t/as Milesaway Tours*; (2007) WAIRC 00505; (2007) 87 WAIG 1098 considered:
- In arriving at the appropriate penalties, this Court must, of course, impose penalties which are meaningful and take account of the maximum available pursuant to the legislation. The penalty must be relative to the conduct of the respondent in each instance and must not be out of kilter with the total underpayment. Further it ought not in totality, be crushing and a consideration of the totality principle is entirely appropriate.
- 7 It is the view of the applicant that the respondent should have had regard for the entirety of the applicant's conduct when determining the penalty including the implications for future employment. The applicant was charged with a series of breaches that were not only similar but in some cases the same. The punishment of dismissal was, in the view of the applicant, not comparable to the cumulative conduct complained of. It has had the effect of being disparate to the conduct complained of. Having regard for the decisions in *United Voice WA v Director General, Department of Education* (2014) WAIRC 01137; (2014) 94 WAIG 1742 *Logan-Scales, Department of Consumer and Employment Protection v Ticket Xpress Pty Ltd* (2005) WAIRC 02788; *Oliver and Oliver t/as Club Sierra v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch* (1994) 74 WAIG 2637.
- 8 The conduct complained of did not, in the view of the applicant, repudiate the employment contract having regard for the *Undercliffe* decision. There was no intention to repudiate the respondent's authority in this regard. The Commission must determine whether there was, in respect of the conduct, an intention on the part of the applicant to repudiate the employer's authority and employment contract. The conduct complained of was not conduct with such gravity as to indicate a rejection or repudiation of the employment contract by the applicant.
- 9 In addition the trust and the confidence between the employer and the employee was not broken. Counsel for the applicant submitted that the conduct must be 'destructive of the necessary confidence between the employer and employee' so as to constitute dismissal having regard for the decision in *Leahy v Liquor, Hospitality and Miscellaneous Union* (2009) WAIRC 00580; (2009) 89 WAIG 1120 and in addition *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66.
- 10 In determining whether the applicant was dismissed in circumstances that were harsh, oppressive and unfair the Commission must have regard for and take into account whether the applicant was afforded procedural fairness. It is the applicant's submission that she was not afforded procedural fairness in this regard and accordingly lack of procedural fairness was a factor constituting unfairness in the dismissal. The applicant's counsel referred to the decisions of the *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 (*Bi-Lo*) in determining whether the applicant was dismissed in circumstances that were harsh oppressive and unfair.
- 11 The Commission must take into account whether the applicant was dismissed by a public sector body that being the respondent and whether the respondent had complete regard to the strict procedural fairness requirements that apply. Counsel for the applicant submitted that in the event of the absence of a fair procedure incorporating the principles of natural justice as is contended by the applicant the respondent is not entitled to subject the applicant to the penalty of dismissal. In determining whether the applicant was unfairly dismissed the Full Bench considered the decision in *The Minister for Health v Drake-Brockman* (2012) WAIRC 00150; (2012) 92 WAIG 203 and *Bi-Lo*.
- 12 The next step is for the Commission to make findings in relation to the circumstances of the applicant's conduct having regard for the length and/or quality of the employee's service and any other relevant matters to be taken into consideration in determining whether the dismissal was harsh, oppressive or unfair. Having regard for these factors will enable the Commission to determine overall whether the dismissal was harsh, oppressive or unfair and decide finally whether the penalty of dismissal as determined by the respondent was appropriate in relation to the conduct.

#### Applicant's Evidence

- 13 Ms Everal Mary-Anne Pearse gave evidence for the applicant. Ms Pearse is currently a principal with the respondent, based at SRC and has been in this position for three and a half years. Prior to that, Ms Pearse was the principal consultant for the

regional office, and before that she was the principal and deputy principal at Melville Senior High School. Ms Pearse has been in the teaching profession with the respondent for some 31 years. Ms Pearse gave evidence she was the applicant's principal in 2011, at the time when the applicant did relief mathematics teaching at SRC, and again in 2013, when the applicant was a science teacher at SRC. Ms Pearse gave evidence the applicant demonstrated a vast improvement in her classes and demonstrated:

a real passion for her teaching and curriculum understandings. I would generally view her classes to see some of the great work she was doing. At this time, Ms Pinker was managing her students very well.

(exhibit Pinker 1 [10])

- 14 Ms Pearse gave evidence that she was surprised at the allegations made of the applicant and reviewed the assessments the applicant was using. These were found to be accurate and were supported by her head of department. The witness gave evidence that her trust and confidence in the applicant was not broken:

My level of trust in Ms Pinker today is completely intact and the trust and integrity I place in Ms Pinker is very good.

(exhibit Pinker 1 [13])

- 15 The witness gave evidence that with respect to the issue of dismissal received by the applicant, it was her view as a principal and a member of the teaching profession that such a penalty should not have been imposed by the respondent.

- 16 The witness gave evidence that Mr Peter Meinema, the father of the applicant's ex-partner, came to SRC and made allegations against the applicant during family law proceedings between the applicant and her ex-partner. The witness gave evidence she was unable to deal with the matter and there was no option but to refer the allegations to the respondent:

When the department officially made the alleged breach of discipline allegations against Ms Pinker, I wrote a commendation reference for the [sic] Ms Pinker during the investigation process and wanted to submit this to the investigator appointed by the department so that the investigator could consider this reference.

However, the Regional Director, South Metro (of the Department) directed me not to submit any such references with regards to Ms Pinker. I did not submit the reference. It is my view the Department did not take into consideration all the relevant material available to them prior to making a decision.

Further to this, the Department or [sic] Standards and Integrity never approached me to ask what procedures I had put in place to ensure this kind of thing did not happen again.

(exhibit Pinker 1 [17] - [19])

- 17 The witness gave evidence the applicant gives 120% of her time, living for children and education in particular from low socioeconomic backgrounds. Ms Pearse indicated that the applicant was an important part in developing the robotics programme at SRC and assisting children to learn about science in relation to robotics.

- 18 Mr Michael John Stewart Erith gave a written statement (exhibit Pinker 2) on behalf of the applicant. Mr Erith is currently the deputy principal of SRC and has been with the respondent since 1982, and has been in the position of deputy principal with the respondent since 2003. The witness's statement was largely similar to the evidence of Ms Pearse in that Mr Erith submitted unchallenged evidence that the applicant had strong relationships with students and, importantly:

[P]resented innovating and challenging lessons. She achieved good results. This is a good achievement in light of SRC, and especially Coodanup Community College having very difficult students to teach. Belinda was able to get these students engaged (even with some of the most challenging students).

(exhibit Pinker 2 [8])

- 19 In the statement it was asserted that the applicant made herself available for after school activities. The witness indicated his trust and confidence in the applicant was not broken and remained that way. The witness in his statement spoke of a difficult situation at SRC when the applicant was first appointed in that the classes she was required to deal with were not functioning well in relation to student behaviour. The applicant was able to deal with the behaviour of students and deliver the curriculum required.

- 20 The applicant was later appointed to a merit based position in 2013, an associated science related position. Prior to the applicant's termination, she established a team of 10 students that participated in a robotics challenge involving an Australia-wide competition, the basis of which the applicant put together with a programme associated with Curtin University. The applicant's team comprised of SRC students and they competed against a number of teams from across Australia, together with China, and went on to be placed fifth in Australia and were the top team from Western Australia.

- 21 The witness' statement demonstrated that the applicant in recent years has shown great improvement and commitment to her own professional practice. She was awarded a scholarship to a Masters in Education at the University of Western Australia. There was a gap created by the termination of the applicant and the special skills' set she brought to SRC in that the new employees that have been brought in to replace the applicant are not achieving the levels the applicant had brought to the school:

Belinda actively promoted science and robotics at SRC. Her passion is to develop girls curiosity for science and engineering. A group of 10 girls were wanting to be a unique team at this years FLL Challenge.

Belinda was proposing to take about 60 students to Curtin University this year to compete in the SLS Robotics challenge (about 4 or 5 teams) and as a result of Belinda's removal, not [sic] students will not be going.

(exhibit Pinker 2 [37] - [38])

- 22 The witness statement submitted by Mr Erith indicated he had no doubt with regard to the applicant's ability to carry out her job professionally, and furthermore he would be happy to have her back at SRC as a teacher in the future:

If there was to be an active management programme instituted as a result of this process I would be comfortable to monitor and report to the Department.

If you were able to allow Belinda to show you the detail of her programming and insight to the Minerals program that she developed at SRC, I would lay it to anyone to be able to present a better programme.

(exhibit Pinker 2 [44] - [45])

- 23 Mr Glenn Waters O'Rourke submitted a written statement on behalf of the applicant (exhibit Pinker 3). Mr O'Rourke is currently employed by the respondent, having been employed as a science teacher by the respondent for some 32 years, and has been head of learning in the area of science for the last six years. With respect to the applicant, the witness was her direct line manager from her appointment at SRC in 2013, until her termination in term 1, 2014, and in such a role had the opportunity to view the applicant in her classes. As a colleague attending the same school as the applicant and required as part of the applicant's head of learning area role, the witness gave evidence he is required to go in and out of classes in his supervisory capacity. The witness statement outlined there was nothing untoward with regard to the applicant's classes, and similarly to the previous two witnesses, namely Mr O'Rourke and Ms Pearse, the witness outlined in his written statement the importance of the applicant's role in the robotics course at SRC and, in addition, her teaching abilities and ability to carry out her job professionally. Finally, the witness wrote in his statement that he was not aware of any student being adversely affected by the applicant's conduct in regard to the allegations made.

- 24 In concluding his witness statement, Mr O'Rourke states:

In my professional opinion, having been a teacher for 32 years, in a Head of Learning Position for 6 years and having also been Belinda's direct line manager, what Belinda brought to SRC and the Department of Education far out-weighs the penalty of dismissal Belinda received.

The Department of Education are at a loss without Belinda.

(exhibit Pinker 3 [34] - [35])

- 25 Ms Fiona Margaret Harling gave evidence for the applicant. Ms Harling is a mathematics teacher at SRC, employed by the respondent. The witness has been a mathematics teacher for approximately 20 years, 13 of which have been for the respondent. During 2011, the witness, for nine months, taught alongside the applicant when she was a relief teacher at SRC, and again in 2013, some two years in all. In the witness' mind, there was no requirement that the applicant required any assistance in the classroom.

- 26 When the applicant first came to SRC in 2011, it was clear that the previous teacher had not included some of the assessments in the mathematics class. Because it was a concurrent unit, it was determined that an estimated mark could be allocated for first semester and the witness gave evidence that, together with the applicant and in consultation with the head of department, that in second semester when the students had concluded all of their assessments, the semester 1 mark could be adjusted if necessary. This did not affect the students or their final marks. Ms Harling gave evidence that first semester results are a progressive grade and are generally about informing parents with regards to where the children are at, and it is the final grade, the one at the end of the year, that overrides the semester 1 result. If the students are in consecutive courses, then this cannot be done. But it is where the students are in concurrent courses, such as are arranged at SRC and in this particular maths course that the witness taught together with the applicant that this is carried out as standard practice.

- 27 The witness gave evidence that she became aware that one of the allegations she now knows to be allegation 4 was in relation to the early allocation of mathematics marks to students in concurrent classes. However, she was not contacted by anyone from SID to either participate in an interview or provide any comments with regards to the allegation. The respondent did not appear to understand that the arrangement in concurrent courses was common practice.

- 28 The witness gave evidence similar to the previous witnesses, that her trust and confidence in the applicant remained unbroken. Further, she held the applicant in high esteem, particularly with her teaching ability in the manner she treated children:

[I]t would be a real shame for the Department of Education to lose a very bright and talented teacher. Belinda is effective with the low socio economic students. These students really need Belinda.

(exhibit Pinker 4 [24] - [25])

- 29 The witness gave evidence that the applicant's impact in the class remains even though she has been terminated. In cross examination, the witness clarified that her head of department was Ms Andrade. Counsel for the respondent asked on several occasions whether the witness was aware of or understood what the allegation was against the applicant relating to the marking issue. In response, the witness answered:

?---And I'm feeling kind of badgered at the moment, just to give my heads-up on that one. Okay? I am feeling quite badgered at the moment as a witness and I'm - and I'm sorry that that's where - but I'm - I'm trying to work out why an allegation has been made about a - a final mark that's not final.

(ts 35)

- 30 In response, counsel for the respondent submitted that he was not attacking the credibility of the witness' statement, simply suggesting that there was some confusion as to the wording and secondly, was the proposition put in contrary terms to the evidence that the witness had given as required by the rule in *Jones v. Dunkel* (1959) 101 CLR 298 and it would be improper to continue without the proposition being put so as to avoid an adverse inference being drawn.

- 31 In re-examination, counsel for the applicant clarified that the applicant arrived at SRC close to reporting time as a relief teacher. The witness was asked to define what a marking guide meant in mathematics, and explained that a marking guide is used as the solution for marking purposes. It is used to create consistency across teachers within a department or across the State, and it is used as a marking guide. The witness gave evidence that it is not just how the final answer is applied; it sets the methodology and the demonstration of behaviours through common calculations.
- 32 Mr Sheldon Smith gave evidence for the applicant. Mr Smith is employed in two roles at Curtin University as course coordinator and equity and diversity advisor. The witness has been employed at Curtin University for about four years, prior to that he worked in the high school system in South Africa. The witness gave evidence he has been employed in the education sector for approximately 22 years. The witness currently works with the applicant as part of his equity and diversity role, and is the applicant's direct line manager. The applicant is employed at Curtin in the role of tutor, mentor and general office administrator. The witness gave evidence he has been working with the applicant for approximately five months, however he has been familiar with her work for some three years and knew of her work prior to actually commencing work with her at Curtin. The witness gave evidence that very few qualified teachers such as the applicant wished to work in the public sector, in particular in schools such as SRC. In the main, such teachers wish to work in the private school sector. The witness gave evidence that the applicant was an excellent administrator, at an operational level, and that her dismissal is a loss to the public school system:
- I would like to see her be re-integrated into the public school system as soon as possible, for the sake of the education of students.
- (exhibit Pinker 6)
- 33 In cross-examination, counsel for the respondent questioned the witness on his familiarity as to whether he was aware of the allegations in relation to the specifics of why the applicant was dismissed for professional misconduct.
- 34 The witness gave evidence that he spoke with the applicant about the allegations, both before and during the interview process. The witness gave evidence that he also discussed the matter with other staff at Curtin.
- 35 Ms Belinda Rosemary Pinker was sworn to give evidence. Her witness statement was identified as exhibit Pinker 7. The applicant gave evidence that she had been employed by the respondent from June 2005 to April 2014, in the main as a science teacher but also in the area of mathematics. Prior to 2005 the applicant was a swimming teacher with the respondent from 1995 to 2005, in the main at the Armadale Aquatic Centre, a low socioeconomic area. Before the allegations that were outlined in correspondence dated 2 December 2013, the applicant had not any disciplinary matters raised by the respondent. At the time the letter was received by the applicant, there were relevant matters happening in the witness' life, namely:
1. The applicant was subject to proceedings in family law, in relation to a legal separation between herself and her then-partner of some 12 years, Mr Glenn Meinema;
  2. It was asserted in a written statement that Mr Glenn Meinema had mental health issues which involved mood changes;
  3. It was asserted there was some physical violence involved whereby the witness was required to leave her home; and
  4. The witness' mother was ill during this period.
- (exhibit Education 3)
- 36 The witness gave evidence that during her employment at CBC she was suffering from allergy issues and required time off. As a consequence, the witness sustained a workers' compensation claim. Difficulties were developing in relation to the witness' relationship with her partner and evidence was led that there was an altercation whereby she left her partner and drove to her mother's home continuing to work at CBC for a period. Following an altercation with her principal and line manager, the witness reduced her work to relief work as it was a long drive from Kelmscott to the school. At the time, the witness' partner was in Alma Street, a psychological unit associated with Fremantle Hospital.
- 37 The witness gave evidence she contacted SRC asking for relief work. At the time, the witness was not looking for a fulltime position nor a permanent position, but given science was her preference she gave evidence she was able to also teach relief mathematics. SRC had available a relief mathematics position in 2011, and hired the applicant.
- 38 Following the investigation by SID, the witness gave evidence that everyone she spoke to considered that in relation to what she had done:
- Everybody I spoke to didn't – didn't think that what I had done, didn't assume that I'd get a dismissal. They kept it on the table because it was in the paperwork. They said, you know, it is there but it's highly unlikely you'll get one of those. You could get a 10 day fine, you could get a drop in level. And even people implied that that wouldn't be that severe.
- (ts 53)
- 39 The witness gave evidence there was scope for the respondent to reduce her classification level as an appropriate penalty. The witness gave evidence that it was degrading to find out she had been terminated and to discover that the respondent had not informed the principal at SRC was also difficult to deal with. The applicant gave evidence that the manner in which she had to enter the front office, hand in her name badge, her keys and any school materials that she had at the time, and exit the school site was an extremely unpleasant experience:
- I've never seen kids get down on their hands and knees and beg a teacher to come back. I've seen that now. That doesn't happen, that's not normal.
- (ts 54)

40 The witness gave evidence that she is prepared to take any other penalty the respondent is prepared to execute, other than termination. The witness gave evidence that the dismissal has negatively impacted on her livelihood. In particular, she is unable to take a loan out to ensure her home is liveable given she is currently on a casual contract at Curtin University. In addition, the witness is unable to play hockey this year as the local neighbourhood understand she has been dismissed by the respondent. The local neighbourhood assume that the witness was dismissed by the department for inappropriate interaction with children. The witness expressed her preference to be teaching in a lower socioeconomic area. The witness indicated she was able to get a job in a private school however she had spent the majority of her teaching years working for schools in lower socioeconomic environments.

41 In their response to the assertion by the respondent that the applicant committed a breach of discipline contrary to s 80(b) of PSMA by contravening the respondent's *Code of Conduct* by directing the applicant's then partner, Mr Glenn Meinema to check assessments completed by students on the applicant's behalf, the applicant gave evidence that she grouped the allegations 1, 3 and 6 together. The witness gave evidence that she had grouped the allegations together because they were exactly the same assertions being made by the respondent, and on each occasion she had directed Mr Glenn Meinema, to check assessments on her behalf:

I would ask my then partner to check the working out of my marks as I felt I had made some mistakes.

(ts 60)

42 In respect of allegations 2 and 5, the witness indicated the respondent's allegation that she had committed a breach of discipline contrary to s 80(c) of PSMA by committing an act of misconduct in contravention of respondent's *Telecommunications Use Policy* by providing her personal logon information, including her password, to Mr Glenn Meinema to access the respondent's network was correct. In relation to that particular allegation, the witness indicated that she was having difficulties accessing the data and was having trouble with her computer. Mr Meinema was good at fixing computers and the difficulty she experienced with the computer occurred mainly at weekends.

43 With respect to allegation 4, the witness indicated it was alleged by the respondent that she had committed a breach of discipline contrary to s 80(b) of PSMA by contravening the respondent's *Code of Conduct*, namely by allocating semester 1 grades to students prior to marking their assessments. The witness gave evidence it was her view that allegations 1, 3 and 6 should have been dealt with by the respondent as one allegation. Similarly, allegations 2 and 5 should have been dealt with as one allegation and allegation 4 should have been dealt with as one allegation. It was submitted by the applicant, that she would have been found in total, to have breached three disciplinary matters, rather than six.

44 The applicant went on to submit her remorse for her actions and accepted that she had made mistakes with regards to the allegations:

I am very remorseful for my actions. I feel embarrassed and ashamed by my actions in relation to this matter. I accept I am accountable for my bad choices which also happened during the hardest period of my life. At the time I was going through a legal separation from my 12 year relationship (family law proceedings) with my partner; I was suffering serious physical abuse at the hands of my then partner; and I was also caring for my very ill mother who had cancer.

I have worked very hard since this nightmare period of my life finished, especially at Southern River College in Gosnells where I have the total trust and respect of my direct line managers and my administration team.

(exhibit Pinker 7, [81] - [84])

45 In cross-examination, counsel for the respondent questioned the applicant in relation to the grouping of the allegations, in particular allegations 1, 3 and 6. The applicant was asked to confirm whether she gave her password to Mr Glenn Meinema. She answered in the affirmative. When asked why she gave her password to Mr Glenn Meinema, the witness answered she was having trouble accessing her computer and accessing data. Mr Anderson, on behalf of the respondent, went back to the allegation in the applicant's submissions which portray:

"I asked Mr – my partner, Mr Glenn Meinema to check my working out of marks as I felt I had made some mistakes," is that correct?---Yes.

Now, I put it to you that when you were interviewed by the investigator in regard to these allegations, the investigator put it to you that your partner marked papers for you outright?---Yes, she did.

And your response to the investigator was that he did, is that correct?---Parts.

This is not a game, Ms Pinker?---I'm not playing it as a game.

Perhaps you'd like to elaborate on that for the Commissioner? ---I am more than happy to elaborate. I got him to mark some multiple choice sections. I got him to do – to check calculations, but when it came to adding up final exam booklets and stuff like that, no, I did that personally.

(ts 67)

46 The applicant agreed that on occasion Mr Glenn Meinema would correct the applicant's marking out of assessments in his own right, without checking with the applicant first. Counsel for the respondent asked the applicant which was more serious, giving Mr Glenn Meinema her logon details to allow him to enter marks into the system; or alternatively, giving Mr Glenn Meinema logon details to fix the computer. In response, the applicant answered:

They're both serious.

Which in your – in your opinion is more serious?---Either way, he's got access.

(ts 68)

- 47 The witness gave evidence that she directed her partner to mark her papers outright with respect to multiple choice sections. It was at this stage counsel for the respondent asked the applicant:
- Why do you come to the Commission seeking the Commission to review the penalty given to you in regard to the allegations and not disclose all your own admissions and I put it to you that you only select the less serious admissions in terms of what you disclose. I'm asking you why is that?
- Because I believe the wording of some of the allegations to be disproportionate to what is actually happened.
- No, we're not dealing with the wording of the allegations. I'm asking you with regard to your admissions to those allegations, why you don't give the Commission the full version of your own events, that is to say, the full scope of your admissions. You don't need to answer that now because I'll come back to that but before I do, I put to you that the effect of your submissions in your witness statement and in your evidence, is to mislead the Commission.
- (ts 68, 69)
- 48 An extract from exhibit Education 1 was put to the witness by the respondent, specifically the third last paragraph on the second page. The exhibit is from the applicant's counsel and specifies, on the third paragraph of the second page:
- My client will rely on this letter in adjudication of this matter. We believe that the response contained above makes the tendering of the investigating (sic) report unnecessary.
- (exhibit Education 1)
- 49 Effectively, it was put to the applicant that her lawyers were acting on behalf of her, submitting that the correspondence (exhibit Education 1) was all that the Commission required. The Commission did not need to have regard to any agreed facts. The Commission did not need to consider the investigation report as drawn together by SID on behalf of the respondent. It was suggested by the applicant that the letter (exhibit Education 1) was all that the Commission needed to rely upon.
- 50 The witness indicated that she understood and did not want to change her position having regard for the schedule attached to her application at the time it was lodged. The applicant was given an opportunity to read her application that was submitted to the Commission, before answering the question. Subsequent to determining her position, the applicant was given an opportunity, with the consent of the respondent, to consult with her counsel by way of a brief adjournment. Counsel for the respondent questioned the applicant as to whether the facts in the application were correct and complete to the best of her knowledge and belief. In response, the applicant answered:
- Yes, they are.
- (ts 73)
- 51 It was at this stage that the correspondence submitted at the commencement of proceedings by the respondent was tendered into evidence, namely exhibit Education 1 from the applicant's counsel.
- 52 As a result of the qualifications made by the applicant, it was put by the respondent:
- Yes. Ms Pinker, I – I say to you that the position you're taking in your letter through your lawyers and also in your originating application, affects the credibility of your application fundamentally. I put that to you and I say that that is the case, because your lawyers are asking the Commission to determine the proportionality of the penalty imposed upon you, by simply having regard to the partial admissions made by you as contained in that letter and as contained in the application. I put it to you that you have made admissions that your conduct, as particularised in your responses, can be described as less serious than the admissions that you have agreed to admit in your applications and I put to you that the effect of that – the effect of your submissions, is misleading to the Commission. Now, you see, I started my cross-examination by telling you there are points of the application that troubled me - - -? --- Yes.
- (ts 74)
- 53 The witness gave evidence that the findings made in relation to the allegations by the respondent are reliant upon the evidence gathered by the investigation. The applicant answered in the affirmative. The applicant gave evidence that she had read the investigation report (see attachment to exhibit Education 2).
- 54 The witness agreed that in relation to allegations 2 and 5, in at least one of those matters the applicant gave her password to Mr Glenn Meinema to access the network, and that the details for accessing the network were provided by the witness in order for Mr Glenn Meinema to enter marks. In addition, in relation to allegations 1, 3 and 6, the witness had committed a breach of discipline by contravening the respondent's *Code of Conduct* by directing Mr Glenn Meinema to check students' assessments of students from SRC. In this case, it was put to the witness that Mr Glenn Meinema was used to check the witness' marking student assessments. Furthermore, Ms Andrade did not direct the witness to provide an approximation in grades to the students in semester 1 at SRC, which is contrary to your evidence:
- So turning to the evidence that you don't agree with in regard to the allegations, you are aware that you're alleged to have entered final semester 1 grades prior to marking assessments and you have admitted to that allegation. Is that correct?---Yes.
- ...
- And isn't it true, in fact, that Ms Andrade says she asked you to give students an exam and she asked you to enter those grades as the final semester grades?---She did for year 8 and for year 9, not for the upper school's marks. And those marks were entered for the year 8s and year 9s.
- (ts 75)

- 55 The applicant gave evidence that Ms Andrade did direct the witness to do lower school examinations. The witness was not involved in upper school matters. The applicant gave evidence that she did not agree with some of the investigation report's findings. The witness was asked whether she was content for the Commission to have regard for all of the evidence for the purpose of determining whether the penalty imposed by the respondent was reasonable and fair in the circumstances. In response, the witness confirmed that the Commission could have regard for all of the evidence.
- 56 The witness was shown [8] of her witness statement (exhibit Pinker 7) and a particular section was read out to the witness:  
 My then partner had very serious mental health issues including severe depression and schizoid personality disorder. This personality disorder fluctuated and there were periods when he was not showing any signs of the personality disorder.  
 (exhibit Pinker 7)
- 57 The witness was asked to explain the context of this particular paragraph in her statement. The applicant indicated that whilst it did not make the situation less offensive, it did give some background. The applicant was asked if her partner's medical condition was as the applicant alleged, why she would ask him to mark papers. The witness, in response, indicated that some days were good and others were not so good.
- 58 The applicant gave evidence that from her point of view, the respondent did not take her circumstances into consideration when determining whether she ought to be dismissed. Specifically, when interviewed the applicant indicated she was not asked about the allegations:  
 I got confronted by the allegations. I was asked direct questions. I wasn't given the opportunity to fully explain the reasoning behind it.  
 You see, but before the finding and the penalty was imposed you were given an opportunity to respond?---I did.  
 (ts 79)
- 59 The witness indicated her future work appeared to be put to one side, even though the witness indicated she may have made a mistake.

#### Applicant's Closing Submissions

##### Penalty of dismissal disproportionate

- 60 The applicant submitted the dismissal was harsh, oppressive and unfair when taking into account the conduct complained of by the respondent. The applicant referred to the decision by Scott ASC in *Jakob v Director General, Department of Education* (2012) WAIRC 01063; (2012) 93 WAIG 41 where it was found that the conduct complained of was not sufficient to justify dismissal.
- 61 In *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Department of Education and Training* (2008) WAIRC 01260; (2008) 88 WAIG 1709, the Liquor, Hospitality and Miscellaneous Union brought an unfair dismissal claim on behalf of its member, Mr Deas. Reinstatement of employment was awarded by Harrison C and part of the argument made out by the applicant was that Mr Deas' dismissal was disproportionate.
- 62 The Commission is required to enquire as to whether the applicant had received 'less than a fair deal' and whether the applicant was given a 'fair go all round'. The Commission must examine the severity of the dismissal as per Brinsden J in the *Undercliffe* decision.
- 63 The applicant acknowledged that the respondent had the right to terminate her services. The question to be considered by the Commission is not one as to the respective legal rights of the employer or the employee, but a question as to whether the legal right of the employer has been exercised so harshly or oppressively against the applicant as to amount to an abuse of that right. Such a test was adopted by Brinsden J in *Undercliffe* and was observed by Walsh J in *North West County Council v Dunn*. In *Undercliffe*, the majority judgment adopted a test that the respondent had abused its right to dismiss the applicant by not allowing procedural fairness and failing to take into account consideration of impeccable conduct and service over a long period of years.
- 64 It is submitted in light of the applicant's otherwise flawless record of service with the respondent and having regard to her level 2.9 position, and forthcoming completion of her Master's degree which would have placed her into a level 3a administrator's role, the respondent could have imposed an alternative penalty under the relevant provisions of PSMA. The respondent could have:
- (a) reduced the level of classification of the applicant;
  - (b) reduced the applicant's monetary remuneration;
  - (c) imposed a fine on the applicant; or
  - (d) revoked the applicant's Master's programme that was being fully funded by the respondent.

An alternative penalty would have been more appropriate.

- 65 Mr Eamon Ryan in giving evidence stated he was not the decision maker or the author of the correspondence that ultimately dismissed the applicant from her employment. It therefore follows that Mr Ryan is not the person to give evidence as to the appropriateness of the penalty subsequently imposed by the director general. The decision maker was not called by the respondent, nor did she file a witness statement. The respondent at no stage led evidence or gave a reason as to why this was the case. In such circumstances, the applicant invites the Commission to draw an adverse inference in accordance with the principle in *Jones v Dunkel* (1959) 101 CLR 298. This principle was recently referred to by the Commission in *Guretti v The Director General, Department of Education* (2003) WAIRC 07799; (2003) 93 WAIG 1399. In determining whether the

dismissal was disproportionate to the conduct as complained of so as to amount to an unfair dismissal, the Commission may take into account further following factors.

The totality principle

- 66 The termination of the employment relationship by the respondent represents for the applicant a disbaring order. The applicant is in her view severely prejudiced in not being able to pursue her profession given that the respondent is the largest employer of teachers in the State of Western Australia. The penalty therefore is not just limited to being an industrial penalty, but is also a civil penalty. The Commission has to have regard to the totality principle.
- 67 The applicant committed a number of breaches that were not only similar but were the same. It was said by the applicant that:  
The penalty of dismissal was not proportionate to the aggregate conduct complained of.
- a. The conduct complained of arises from 3 alleged acts, however the respondent have imposed a penalty as if though there were 6 separate alleged acts and therefore set aside the totality of the conduct when imposing the penalty.
  - b. Allegations 1, 3 and 6 are allegations for the same conduct and allegation in the same way that allegations 2 and 5 were also allegations for the same conduct. The Respondent should have viewed this as 2 allegations but instead unfairly and harshly imposed a penalty on the basis of 5 separate distinctive allegations.

When having regard to the totality principle, the dismissal is harsh, oppressive and unfair, and had the effect of being disproportionate to the conduct complained of.

(applicant's closing submissions [16] - [17])

- 68 The totality principle was taken into account by the Commission most recently in *United Voice WA v Director General, Department of Education*. Comments were made in *Logan-Scales, Department of Consumer and Employment Protection v Ticket Xpress Pty Ltd*:  
[T]he court should also have regard to the totality principle. Although each individual breach ought to be looked at separately, the total effect should also be considered in determining the appropriateness of the penalties to be imposed.
- 69 The applicant was disciplined for six breaches. Some were similar and in some cases the same. Ultimately, the penalty of dismissal was not proportionate to the aggregate conduct complained of by the respondent. The respondent at no stage led evidence as to why the same allegations were separated. It is the view of the applicant that without such evidence, the Commission is invited to draw a view that the respondent made an error in separating each of the breaches into separate allegations, an error that in the view of the applicant led to a disproportionate penalty being imposed.

Conduct did not repudiate the employment contract

- 70 One of the issues to determine is whether the conduct complained of repudiated the employment contract. An issue the Commission is required to consider in determining the harshness or otherwise of the dismissal is whether there was a clear intention on the part of the applicant to repudiate the employer's authority. Kennedy J in the *Undercliffe* decision states that this to be a critical factor. The respondent indicates that the conduct first complained of arose in January 2010 however the applicant continued to be employed for a further four years. Therefore, there was no intention on the part of the applicant to repudiate her employer's authority.

Trust and confidence not broken

- 71 The applicant's conduct was not of sufficient severity to break the trust and confidence of the respondent. Evidence was heard from Ms Pearse, Mr Erith, Mr O'Rourke, Mr Healy and Ms Harling that their trust and confidence in the applicant had not been broken and continues to this day. This is in contrast to the respondent in their termination letter (exhibit Education 5) who considered that the applicant's conduct had caused an 'irretrievable breakdown in the employer/employee relationship with regard to trust and integrity issues.'

Denial of procedural fairness

- 72 Further, in determining whether the applicant was dismissed harshly, oppressively or unfairly, the Commission is required to take into account whether the applicant was afforded procedural fairness. The applicant submits that in accordance with the decision as per *Bogunovich v Bayside Western Australia Pty Ltd*, she was not afforded procedural fairness in that the respondent:  
Did not carry out a proper investigation into all matters as was reasonable;  
Did not have reasonable grounds on the information available at the time for considering that Ms Pinker's conduct was in breach of discipline sufficient so as to justify dismissal; *Bilo Pty Ltd v Hooper*.
- 73 The applicant alleges the specifics of the denial of procedural fairness arise due to the:
- a. Respondent not properly adhering to the higher standard of procedural fairness applied to it as a public sector employer.
  - b. Lack of relative fairness in the treatment of witnesses, resulting in prejudice to the applicant.
  - c. Respondent not taking into consideration all relevant material and failing to conduct a proper investigation.
  - d. Investigator being influenced by irrelevant and prejudicial matters.
  - e. Decision maker being improperly informed and taking action (i.e. dismissal) that is harsh and excessive in all of the circumstances.

(applicant's closing submissions [39])

- 74 Ms Pearse gave evidence that she drafted a letter of commendation for the applicant during the investigation process into the conduct complained of and was prohibited from submitting this for consideration by the respondent by the Regional Director South Metro who advised Ms Pearse not to do so. Under cross-examination Ms Cann (the investigator) stated that the respondent would accept any references, material or letters as part of the investigation (ts 107) It is therefore submitted the decision maker did not have all relevant material before her to make a decision, a denial of procedural fairness.
- 75 The applicant raised a number of issues relating to the denial of procedural fairness:
- Mr Glenn Meinema's interview could not have been admissible as he held an actual bias against the applicant due to a relationship breakdown.
  - The respondent interviewed Ms Pearse but only on a preliminary basis.
  - The investigator's report includes a summary of the transcript of the interviews conducted. The inclusion of these points into the investigator's report indicates the respondent relied on these points. The point made by Mr Hayres did not form part of the allegations and should not have been taken into consideration by the respondent.
  - Mr Hayres was not called as a witness by the respondent. The Commission is invited to draw an adverse inference in accordance with the well-established principle in *Jones v Dunkel*. This principle was referred to by the Commission in *Guretti v The Director General, Department of Education*.
- 76 Ms Andrade closely monitored the applicant as Ms Andrade had some concerns regarding the applicant's paperwork as she was 'struggling with marking assessments'. The investigator's report is a summary of the transcript of interviews conducted and to include such points into the investigator's report indicates the respondent relied on the points. Ms Andrade's points made did not form part of the allegations and therefore should not have been taken into consideration.
- 77 It is asserted that the applicant has not had access or been afforded an opportunity to a fair hearing or the right to appoint the decision to terminate her to be made by an unbiased or disinterested decision maker, and the right to have that decision to be made based on logically probative evidence as per the decision in *Salemi v MacKellar (No 2)* (1977) 137 CLR 296; 14 ALR 1 (*Salemi*). Therefore, the applicant has been denied natural justice. Ms Cann, the person investigating the conduct complained of, wrote a briefing note to the decision maker (exhibit Education 7) that raised the extenuating circumstances between the applicant and Mr Glenn Meinema, suggesting those circumstances to be irrelevant. Ms Cann informed the director general to disregard the fact that:
- the Applicant was the subject of domestic violence; that the Applicant was going through a complicated legal separation in the family court for a relationship of 12 years, that Glenn Meinema (her former partner) and his father informed the department about the (sic) Belinda's conduct, that Glenn Meinema was suffering from medical conditions.
- (applicant's closing submissions [45])
- 78 Furthermore, Ms Cann did not consider it necessary to interview Ms Harling with regard to the allocation of grades and how that practice was undertaken, particularly in semester 1. In this regard, the applicant has been denied her right to natural justice as per the decision in *Salemi*.
- 79 Had the respondent applied procedural fairness in the investigation process they may have determined an alternative penalty other than termination as was observed at [99] by his Honour P J Sharkey in the Full Bench decision of *West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers, Perth v Geraldton Meat Exports Pty Ltd* (2001) WAIRC 03573. Sharkey P, at [101] determines:
- if procedural fairness was afforded, it should have altered the outcome and, for that reason alone, the dismissal was unfair, even without the clear substantial unfairness.

The respondent as a public sector body

- 80 The procedural issues raised must be applied as the strict requirements for procedural fairness that apply to the respondent as a public sector employer associated with the relevant disciplinary instruments. If the respondent failed to apply the requirements to which it was subject, then the applicant suggests that amounts to an unfair dismissal: *Public Employment Industrial Relations Authority v Schorzelli* [1993] NSWIRC 48. The disciplinary instruments applicable to the respondent at the time the applicant was dismissed were:
- a. PSMA.
  - b. Commissioners' Instruction number 3 – Discipline – general.
  - c. Public Sector Standard – discipline.
  - d. The respondent's own policy – Staff conduct and discipline.
- 81 In the absence of a fair procedure which failed to apply the principles of natural justice the applicant asserts that the respondent was not entitled to apply the penalty of dismissal.
- 82 The evidence showed the applicant to be a swimming teacher with the respondent from 1995 to 2005 following which she became an academic teacher for a further nine years, from 2005 to 2014, a total of some 19 years. The evidence further shows in relation to the applicant's quality of employment that:
- a. the applicant's service with the respondent was untarnished. At no stage had the applicant been the subject of any disciplinary matters.
  - b. the applicant was a teacher of excellent standing, described by her colleagues as the greatest teacher that some of her colleagues had ever seen.

- c. Importantly, the applicant's role was important and central in establishing the robotics programme at SRC (her place of employment prior to her dismissal). The evidence demonstrated that the applicant's robotics team comprised of SRC students drawn from a lower socioeconomic grouping that became the highest ranking team in Western Australia and the fifth ranking team nationally, in a national competition.
- d. Ms Pearse, the SRC principal, stated that the applicant developed programmes that were not only in use by SRC but also by other schools in Western Australia.

#### Remedy

- 83 There is a responsibility on the respondent to lead evidence that reinstatement is impracticable. Counsel for the applicant refers to the comments of Scott ASC in her concluding statements in *Jakob* [50]. At no stage did the respondent lead any evidence or make any suggestion that reinstatement would be impracticable.
- 84 The applicant's evidence demonstrated that she had mitigated her circumstances and had been working as a casual at Curtin University. In addition, the evidence of Mr Smith, the applicant's line manager at Curtin University, testified to support this circumstance.
- 85 In conclusion, counsel for the applicant requested the applicant be reinstated, pursuant to s 23A of the Act, and requested the Commission exercise its powers under the same section to require the respondent pay to the applicant all remuneration lost without loss of entitlements.

#### **Respondent's Opening Submissions**

- 86 From the allegations made by the respondent against the applicant each allegation constitutes a separate breach of discipline contrary to s 80 of PSMA. Information was received by the SID that whilst the applicant was a teacher at CBC during 2010 and at SRC in 2011 she had asked Mr Glenn Meinema, (her then partner) to:

Mark student assessments and access the Department's network to record the results on her behalf. It was further alleged that in 2011, Ms Pinker provided final semester One and Two grades for students from SRC prior to marking their assessments.

1.3 on 9 July 2013, the matter was reported to the Corruption and Crime Commission (CCC).

(extract from SIDS investigation report attached to exhibit Education 2)

- 87 On 2 December 2013, a letter was sent to the applicant by Mr Geoff Davis of the respondent, setting out the seven allegations and advising the applicant that the respondent was treating the matter as a disciplinary matter pursuant to s 81 of PSMA (exhibit Education 3).
- 88 The seven allegations as put to the applicant included:
1. It is alleged that between January 2010 and December 2010 you committed a breach of discipline contrary to section 80(b) of the *Public Sector Management Act 1994* by contravening the Department of Education's *Code of Conduct*.
  2. It is alleged that between June 2011 and July 2011 you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994* by committing an act of misconduct.
  3. It is alleged that between June 2011 and July 2011 you committed a breach of discipline contrary to section 80(b) of the *Public Sector Management Act 1994* by contravening the Department of Education's *Code of Conduct*.
  4. It is alleged that between May 2011 and July 2011 you committed a breach of discipline contrary to section 80(b) of the *Public Sector Management Act 1994* by contravening the Department of Education's *Code of Conduct*.
  5. It is alleged that in October 2011 you committed a breach of discipline contrary to section 80(c) of the *Public Sector Management Act 1994* by committing an act of misconduct.
  6. It is alleged that in October 2011 you committed a breach of discipline contrary to section 80(b) of the *Public Sector Management Act 1994* by contravening the Department of Education's *Code of Conduct*.
  7. It is alleged that in October 2011 you committed a breach of discipline contrary to section 80(b) of the *Public Sector Management Act 1994* by contravening the Department of Education's *Code of Conduct*.

Each allegation included particulars and subsequently details surrounding the involvement of the applicant at both CBC and SRC in 2010 and 2011.

- 89 The conclusion of the investigator in relation to the investigation found:

In disciplinary and administrative investigations, an allegation must be proven on 'the balance of probabilities.' It must be more probable than not that the allegation occurred.

Having considered all the evidence, there is sufficient evidence to support allegation one, two, three, four, five and six. In relation to allegation seven, there is insufficient evidence to prove on the balance of probabilities that Ms Pinker allocated grades prior to marking all the assessments.

I respectfully submit that it is open for the Director General to find on the balance of probabilities that allegations one, two, three, four, five and six are substantiated.

It is recommended that:

Consideration is given by Director General to finding Ms Pinker has committed six breaches of discipline.

An appropriate consequence/penalty is considered by the Director General with regards to the finding made.

Ms Pinker and Ms Margaret Collins, Regional Executive Director, South Metropolitan Region are advised of the outcome of this matter.

(extract from exhibit Education 4)

90 On 6 March 2014 Ms Cann finalised an investigation report into the allegations and the applicant was provided with a copy of the report. The respondent proposed at that stage to find that the applicant had committed six breaches of discipline and it was proposed that a penalty of termination would be proposed. A copy of correspondence was drafted and sent by the director general dated 17 March 2014 (exhibit Education 4). By letter dated 11 April 2014 the applicant responded through her then solicitors to the proposed penalty letter, that being the applicant's final response. By letter dated 28 April 2014 the respondent confirmed her findings that the applicant had committed six breaches of discipline and that a penalty of termination was justified in the circumstances. The correspondence noted the individual concerns that had been raised by the applicant's solicitor in their correspondence of 11 April 2014 in particular:

- The motivation of Mr Glenn Meinema for reporting the matter.
- Mr Meinema's mental state.
- Your emotional state and personal issues during 2010 and 2011 in respect to the breakdown of your relationship with Mr Meinema.
- The evidence in considering a breach of discipline in respect to each allegation.
- The seriousness of your conduct and that the proposed penalty was harsh and severe.

I have considered your submission and note the points made about this matter. However, I am not persuaded away from my preliminary view that you committed six breaches of discipline and that I should terminate your employment.

(exhibit Education 4)

The correspondence went on to finalise the applicant's employment with the respondent.

- 91 On 26 May 2014 the applicant filed a Form 2 – Notice of Application in the Commission applying for an order of reinstatement or compensation in respect of harsh, oppressive or unfair dismissal for reasons set out in the application. On 20 June 2014 the respondent filed a Notice of Answer denying that the applicant's dismissal was harsh, oppressive or unfair and seeking that the application be dismissed.
- 92 The respondent is not in a position to seek to challenge the veracity of the applicant's claims as to her employment history, qualifications and achievements in any event the respondent does not seek to do so as part of defending the application.
- 93 Each of the allegations against the applicant constitutes a separate breach of discipline contrary to s 80 of PSMA. The respondent submits that the common law rule concerning double jeopardy provides that the applicant cannot be penalised for more than one of these offences however what the respondent does submit is that each separate allegation relates to a course of conduct that is separated by the fact that the conduct was not unbroken and occurred over different dates. The respondent submits to different assessments and in some cases occurred at different schools.
- 94 The respondent will make oral submissions at the hearing as to the claims that have been made by the applicant that she has been denied procedural fairness. However, notwithstanding any flaws it is now the task of the Commission to reach a conclusion on whether the respondent's decision to dismiss the applicant was harsh, oppressive or unfair.
- 95 In making findings with respect to the allegations the respondent relied upon the evidence as collected by the investigator from 10–14 (investigation report, exhibit Education 2, attachment). A summary of the evidence relied on by the respondent is contained within a briefing note dated 12 March 2014 provided to the respondent. A copy of that briefing note was submitted to the director general through Mr Eamon Ryan executive director professional standards and conduct (exhibit Education 6).
- 96 The respondent's finding in respect to the second allegation is based on an acceptance of the applicant's own evidence to the investigator that she provided logon details to her partner in order for him to enter marks. In respect of the third allegation that matter is based on Mr Glenn Meinema's evidence that he was directed to mark assessments rather than the applicant's evidence which suggested she only used Mr Glenn Meinema to check marking to ensure it was correct.
- 97 The respondent's finding in regard to the fourth allegation is based on the applicant's reliance that Ms Andrade directed her to approximate grades for students when no such direction was given.
- 98 The respondent submits that the truthfulness of evidence as set out in the paragraphs above [93]–[94] was accepted by the respondent in making its findings and is consistent with the submissions of the applicant in relation to this application.
- 99 The respondent submits that the Commission needs to satisfy itself as to the truthfulness of the applicant's submission prior to turning to consider whether the penalty imposed by the respondent in respect of the allegations is disproportionate.
- 100 The respondent submits that regardless of what evidence was relied upon in applying the penalty to dismiss the applicant the Commission must satisfy itself as to the truthfulness of the applicant's submissions and mitigating factors put forward by the applicant because those submissions may have effect on the Commission's assessment of the applicant's culpability and ultimately the proportionality of the penalty.
- 101 The respondent submits that the refusal by the applicant to allow the investigation report to be put before the Commission is an attempt by the applicant and her representative to prevent the Commission from setting off on a fact finding expedition as to the truthfulness or otherwise of the applicant's submissions.
- 102 In proceeding the Commission will be required to determine the truthfulness of the applicant's submissions as laid out in the schedule at [29] of the application. It is then appropriate to have regard to the question whether the penalty of dismissal is disproportionate to the allegation.

103 The Commission should note that:

[a]n employee's conduct in the investigation process in attempting to mislead and obfuscate, can of itself, be sufficient to warrant an employer losing confidence in the integrity of the employee (see: *Danijel Pantovic v Public Transport Authority of Western Australia* (2011) WAIRC 00876).

(respondent's opening submissions [36])

104 The factors that the respondent has had regard for prior to the decision to impose the penalty to dismiss are set out in the briefing note, the proposed penalty letter and the penalty letter. In the proposed penalty letter (exhibit Education 4) the respondent informed the applicant that she would have regard to a number of factors including:

- (a) the nature and seriousness of the allegations;
- (b) the impact the applicant's behaviour has had on her reputation, and the reputation of the Department;
- (c) any mitigating and extenuating circumstances provided by the applicant in her submissions;
- (d) the applicant's length of service with the Department;
- (e) the applicant's admissions in respect of the some of the behaviour; and
- (f) industrial advice received from the Labour Relations Directorate in respect to the appropriate action.

105 The respondent responded to the applicant by way of the penalty letter and in so doing addressed issues raised by the applicant:

- (a) the nature and seriousness of the allegations;
- (b) the impact the Applicant's behaviour has had on her reputation, and the reputation of the Department;
- (c) any mitigating and extenuating circumstances provided by the Applicant in her submissions;
- (d) the Applicant's length of service with the Department;
- (e) the Applicants admissions in respect of some of the behaviour; and
- (f) industrial advice received from the Labour Relations Directorate in respect to the appropriate action.

(respondent's opening submissions [39])

106 With respect to the findings made by the respondent it submitted that the findings made by the respondent in this case warranted the penalty of dismissal.

#### **Respondent's Evidence**

107 Ms Amanda Yvonne Cann gave evidence on behalf of the respondent. Ms Cann is employed as a senior investigator with SID. The witness was engaged by Ms Sharyn O'Neill, director general of the respondent to investigate seven allegations of breach of discipline by the applicant. The witness conducted the investigation and prepared a report dated 5 March 2014. This report was attached to her witness statement (exhibit Education 2).

108 Counsel for the applicant indicated they had certain issues with the validity of the report in particular, a number of relevant persons had not been interviewed in drawing together the investigation report, namely personnel from SRC. Counsel for the applicant asked how the investigation report may be tendered through a witness who cannot speak to the document given she is not the author of the document. In response, counsel for the respondent indicated the document to be a record relied upon by the respondent and the witness to be an employee of the respondent with the capacity to identify the documents and have them tendered. The Commission indicated the witness to be an employee of the respondent who had been involved in the investigation and had given evidence to that effect. The witness had also indicated she had been involved in the investigation at the outset of her evidence.

109 In addition, the final penalty letter received by the applicant that addressed the issues or concerns that had been raised by the applicant through her legal representative (exhibit Education 5) was correspondence from Ms O'Neill. It was dated 28 April 2014 and importantly it had taken into account a number of concerns regarding the investigation (refer [89]):

110 In cross-examination, counsel for the applicant took the witness to exhibit Education 7, and specifically to the second last paragraph on the first page of that exhibit, which reads:

The concerns raised in relation to Ms Pinker's relationship with Mr Meinema and his motivation for reporting the matter are irrelevant in considering Ms Pinker's actions. By raising these concerns, it appears Ms Pinker fails to accept full ownership of her actions and places blame on Mr Meinema for her own conduct.

(exhibit Education 7)

111 The witness was taken to cl 5.2 of the investigation report, which was attached to her witness statement (exhibit Education 2):

5.2A An appropriate consequence/penalty is considered by the Director General with regards to the finding made.

(exhibit Education 2)

The witness was asked to compare the statement with a paragraph from exhibit Education 7, correspondence written by the witness to Ms O'Neill dated 16 April 2014 and in particular a paragraph from that correspondence, on the second page, which specified:

In relation to the proposed penalty, I also respectfully submit that the view of terminating Ms Pinker's employment with the Department be maintained.

If you are in agreement with this recommendation, I request that the attached letter to Ms Pinker, outlining the final outcome be signed.

(exhibit Education 7)

- 112 It was put to the witness that the terms contained in the investigative report, together with the briefing note to the director general, were suggestive and ‘tainted with bias, and the Director-General has been unable to effectively provide a proper penalty. And in this case, a disproportionate penalty was given because there was a bias apparent’. In response, the witness indicated that the director general was able to overturn the recommendation at any stage.
- 113 The witness was questioned in relation to Ms Cann’s interview with Ms Pearse, the principal of SRC. In response, the witness indicated her interview with Ms Pearse was preliminary and limited to the applicant’s conduct between 2010 and 2011. The witness described her role was to investigate the matter and provide the subsequent evidence to the director general. The applicant was able to provide character references if she wished to, however that was not the role of the witness to seek such references on behalf of the applicant in her capacity as a teacher. The witness did, however, agree that in the event such references were provided, she would be able to take them on board.
- 114 Ms Cheryl Patricia Andrade gave evidence for the respondent. Ms Andrade is head of mathematics at SRC. Ms Andrade reviewed her witness statement and confirmed it to be an accurate record for the purpose of proceedings (exhibit Education 8). On 5 February 2014, the witness participated in an interview with Ms Cann and Ms Davidson, senior investigators with the respondent. The interview was attached as a witness statement (exhibit Education 8). It was put to the witness that the applicant was alleged to have allocated final semester 1 grades to students at SRC prior to marking assessments:

Ms Pinker’s evidence in regard to that allegation is that she was following a direction from you to enter approximate grades for students?---That’s untrue.

(ts 112)

- 115 The witness gave evidence that classes for which the applicant was provided with examinations were year 8 and year 9. According to Ms Andrade’s evidence, there was no reason to provide approximate grades to students. The applicant was provided with examinations in year 8 and year 9 classes, and the witness indicated that she was unsure of what classes she would be required to provide approximate grades. The witness indicated that the applicant had brought to her attention the fact that the previous teacher had not finished all the necessary assessments. The witness gave evidence that the applicant was required to set an exam, mark the papers and put in a grade, in the same way as other teachers were required to do in that year.
- 116 In cross-examination, the witness indicated the course the applicant was required to pick up on at the end of semester 1 was a concurrent course. In other words, the students had commenced the course and in those circumstances they are called ‘concurrent courses’. The witness gave evidence that the applicant came in on a relief basis to replace the teacher who had left, unwell. The students at the time the applicant took over were behind in their assessments. The teacher is supplied, in this case the applicant, with a marking key so all the teachers mark based on the answers. When the applicant, arrived she was given marking keys to enable her to get the answers. In re-examination, the witness indicated she was not aware of any accusation at the time against the applicant, or indeed anyone else.
- 117 Ms Suzanne Catherine Harrison gave evidence for the respondent. Ms Harrison is employed as the dean of science at CBC. In October 2013, Ms Harrison participated in an interview with Ms Cann and Mr Baker, investigators for the respondent. Her interviews was attached to the witness statement and provided as exhibit Education 9. In cross-examination, the witness vaguely remembered talking to the headmaster about the applicant, however she admitted that she had never really analysed the applicant’s work. The witness indicated that students had raised concerns about not getting any feedback from the applicant even though they had never officially raised any concerns with the witness; they had merely heard it through the grapevine, which cannot be considered an authoritative or informative source.
- 118 Mr Glenn Robert Meinema gave evidence for the respondent. On 1 October 2013, the witness participated in an interview with Ms Cann. The interview was attached and marked exhibit Education 10. The witness indicated in relation to the marking of papers on behalf of the applicant:
- First of all, yes, I did mark papers and the extent is that I – I marked all portions of paperwork that – of assessments, assignments and examinations, whether they be multiple choice, short answer or long answer.
- And for what schools did – or was it – well, perhaps that’s – what school did you mark papers for?---Comet Bay College and Southern River College.
- And did you have any involvement in the entering of marks?---Yes, I did.
- And what was that involvement?---The involvement was to place the marks that had been calculated on the papers onto a spreadsheet and in some circumstances inputting those – the grades onto the Department’s database.
- And over what period of time do you say that you marked papers for Ms Pinker? ---Between the first and last it was about a year?
- And how frequently would you mark the papers? ---Well, it would have occurred every six months, so at the end of first semester and at the end of second semester.
- And can you confirm the year for me?---The first lot was at the end of 2010 and the second and third lots were at the end of semester one 2011.

(ts 128, 129)

- 119 The witness indicated, relating to his memory, in relation to the interview he had had with representatives from SID:  
 Yes?--- at the time I had this interview I didn't remember it, but now I do and I don't see any – any problem with that at all.  
 (ts 135)
- 120 The witness gave evidence he would log on to the respondent's portal when the applicant was not present.
- 121 Mr Eamon Francis Ryan gave evidence for the respondent. Mr Ryan is the executive director, professional standards and conduct division of the respondent and was appointed to the position in 2011. In this capacity, the witness gave evidence he is responsible for SID, audit and risk management, screening unit and legal services. The witness reports directly to Ms O'Neill. The witness oversees the respondent's misconduct identification matters, and in that capacity provides advice and recommendations to the director general. The witness gave evidence that this includes the provision of advice in relation to determination of the appropriate outcome, including the selection of an appropriate penalty following the conclusion of an investigation.
- 122 The witness gave evidence that he was familiar with the investigation that had taken place in relation to the applicant, namely that undertaken by Ms Cann, pursuant to part 5 of PSMA. At the conclusion of the investigation, a recommendation was made that the applicant was found to have committed some six breaches of discipline. The seventh allegation was unable to be sustained. The witness gave evidence that on 13 March 2014, advice was given to Ms O'Neill, in relation to the outcome of the possible range of penalties. That advice was given in the witness' standing as executive director, the purpose being for the director general to make a preliminary finding on outcome and possible penalty, and to make those preliminary findings known to the applicant to give her an opportunity to respond to the findings and to respond also to the proposed penalty. Ms O'Neill, it was said by Mr Ryan in his statement (exhibit Education 11), wrote to the applicant in a letter dated 17 March 2014 (exhibit Education 4). That correspondence outlined the director general's preliminary findings, along with the proposed penalty of termination, and gave the applicant an opportunity to respond before making a final determination in the matter.
- 123 The applicant's lawyers, Friedman, Lurie Singh and D'Angelo, answered on behalf of the applicant on 11 April 2014. An additional briefing note came to the witness, dated 23 April 2014 (exhibit Education 7). This final briefing note was submitted to the director general of the respondent for consideration.
- 124 The witness gave evidence that of specific relevance in this matter was that the penalty to be imposed was that all the evidence was considered and Mr Ryan indicated he had regard for such evidence prior to supporting the recommendation made to the director general. At the time, in March and also in April when the briefing notes were prepared, the witness had access to the file, he read it and the investigation report and took account of the evidence and considered the relevant matters. Of relevance was the seriousness of the allegations, and considering those issues together with the standards and expectations of the respondent, particularly in setting standards for staff it was the witness' view that termination of employment was an appropriate penalty, and in that context that was the penalty put forward in support of the recommendation to the director general.
- 125 In providing the Commission with an explanation as to why the penalty was chosen in this case, the witness spoke from a broad point of view in answering the question and said:  
 Okay. Speaking – speaking broadly from a – a – a – sort of a bigger perspective, the – the conduct that was found in this matter was quite significant. It involved a significant level of dishonesty. It was a significant breach of trust. It was a clear failure to meet the high standards of expectations that I set for employees and that fundamentally eroded the trust that the Director-General and the Department was entitled to have and that was the basis upon which termination was considered as the appropriate penalty.  
 (ts 149)
- 126 The witness gave evidence that the director general does not delegate the responsibility for making the decisions in relation to determination of penalty, nor the determination in relation to ascertaining the breakdown in trust and confidence. She takes that task very seriously. The witness was asked, given that the applicant is well-liked by her peers and is clearly a good teacher, why in such circumstances would the respondent not give a teacher a second chance. In response, the witness answered that it comes down to the nature of the conduct that had been proved and the extent of the dishonesty.

#### **Respondent's Closing Submissions**

- 127 The respondent refers back to the application by the applicant which in essence asserts that her dismissal was harsh oppressive and unfair having regard to the circumstances set out in the schedule to the Form 2 – Application.
- 128 The essence of the application is a claim by the applicant that the penalty of dismissal is disproportionate to the conduct complained of by the respondent. Two central issues arise in relation to that claim.
- a. whether the Commission can be satisfied with the truthfulness of the applicant's submissions outlined in [29] of Form 2 – Application. These submissions were repeated in exhibit Education 1, correspondence from counsel for the applicant, Slater and Gordon to the respondent; and
  - b. whether the penalty is disproportionate to the conduct complained of, that being the allegations.

#### **Applicant's submissions in response to the allegations**

- 129 The respondent submits having regard to [29] of Form 2 of the application and exhibit Education 1 the responses of the applicant can be summarised as follows:
- a. in regard Allegations 1, 3 and 6, the Applicant asked her then partner to check the working out of her marks as she felt she had made some mistakes; and

- b. in regard to Allegations 2 and 5, the Applicant was having trouble with her computer and accessing data, mainly on the weekends, and her then partner was good at fixing computers; and
- c. in regard to Allegation 4, the Applicant was told to give approximate grades by Ms Andrade and the semester 1 grades were not final grades because the unit ran concurrently.

(respondent's closing submissions [7])

The position taken by the applicant in regard to the application

- 130 The Commission is to have regard to the applicant's responses contained in Form 2 of the application and consider her responses as the sole evidence of the circumstances in which the breaches of discipline occurred.
- 131 Refer to exhibits Education 1, 2 in transcript of proceeding [70] – [71].
- 132 The respondent submits that the applicant intended for her responses to be relied upon by the Commission in satisfying itself as to which breaches of discipline had been committed and in what circumstances so as to make the investigation report unnecessary as evidence. At the commencement of proceedings counsel for the applicant directed the Commission to turn its mind to 'the question of law', that being that the penalty of dismissal was disproportionate to the conduct that the applicant complained of. Such a direction suggested that the Commission already had all of the evidence necessary in order for it to be satisfied as to the circumstances in which the alleged breaches had been committed and was therefore immediately able to turn its mind to the question of penalty.

The applicant's additional responses made in cross-examination as to the circumstances in which the breaches of discipline were committed

- 133 During the hearing the applicant was cross-examined as to the circumstances in which the breaches of discipline had been committed. In summary those responses were provided by the respondent as follows:
- (a) the Applicant's then partner would mark "parts" of assessments outright for the Applicant (see: Transcript of the Proceedings, page 67);
  - (b) the Applicant's then partner would correct the Applicant's marking out of papers on occasion without checking with the Applicant first (see: Transcript of Proceedings, page 67);
  - (c) the Applicant gave her then partner access to the Department of Education's Network via her personal password to directly enter in marks, on the Applicant's behalf, including from papers that the Applicant's then partner had graded himself (see: Transcript of Proceedings, page 67); and
  - (d) the Applicant had no reason to doubt the evidence of Ms Andrade, a witness whose evidence contradicts the Applicant's in that she says that she did not at any stage tell the Applicant to enter approximate grades for students.

(respondent's closing submissions, [13])

- 134 In making findings as to the circumstances in which the breaches were committed, the respondent relied upon admissions made by the applicant to the investigator that are consistent with her responses to the allegations given in cross-examination as per exhibit Education 6 and in general [20] – [28] of the respondent's written submissions as filed 24 October 2014. It was put to the applicant during cross-examination that her responses were in general 'not fulsome evidence of the uncontested circumstances in which the breaches of discipline had been committed despite the fact that it purported to be so' ([15]).
- 135 After a period of time and following a short adjournment the applicant conceded that that 'so that this is fair' for the Commission to have all the evidence inclusive of the investigation report (ts 77).

The unfortunate effect of the applicant's position in regard to the application

- 136 The applicant in this application sought to rely on her responses to the allegations unfortunately to the exclusion of all other evidence. This gave rise to a belief that her responses thereby contained a description of the circumstances in which the breaches of discipline had been committed and no further evidence was needed by the Commission. In determining whether the penalty is disproportionate to the 'conduct complained of', that being the allegations the Commission should have regard to the evidence of the more serious circumstances in which the breaches of discipline had been committed. Unfortunately these did not get as frequent an airing in the Commission as should have been appropriate.

Whether the penalty is disproportionate to the conduct complained

- 137 When the range of conduct is considered and the period of time over which the conduct occurred associated with the reputational damage for the applicant and for the respondent generally it is submitted that the penalty is proportionate to the allegations as committed.
- 138 This issue has taken up an important part in this hearing. In exhibit Education 4 the respondent notified the applicant that the director general would have regard to the following factors:
- (a) the nature and seriousness of the allegations;
  - (b) the impact the applicant's behaviour has had on her reputation, and the reputation of the Department;
  - (c) any mitigating and extenuating circumstances provided by the Applicant in her submissions;
  - (d) the Applicant's length of service with the Department;
  - (e) the Applicant's admissions in respect of some of the behaviour; and
  - (f) industrial advice received from the Labour Relations Directorate in respect to the appropriate action.

(respondent's closing submissions [33])

- 139 Having considered the applicant's response to exhibit Education 4 the respondent responded to the applicant by way of exhibit Education 5 and in doing so the respondent noted and addressed the following points raised by the applicant:
- (a) the motivation of the Applicant's then partner for reporting the matter;
  - (b) the Applicant's then partner's mental state is alleged by the Applicant;
  - (c) the Applicant's emotional state and personal issues during 2010 and 2011 in respect to the breakdown of her relationship with her then partner;
  - (d) the evidence considered in determining a breach of discipline in respect to each allegation; and
  - (e) the seriousness of the Applicant's conduct and that the Applicant considered that the penalty was harsh and severe.

(respondent's closing submissions [34])

- 140 The respondent emphasised the evidence given by Mr Ryan in relation to the loss of trust and confidence in the applicant as an employee, in terms of the conduct complained of and the number of submissions and responses made by the applicant or on behalf of the applicant throughout the disciplinary process. The applicant was initially asked to respond to the allegations and did so by way of written submissions to the respondent dated 18 December 2013. In relation to allegations two and five the applicant did not admit she had given her partner logon details to enable him to enter the grades on her behalf and instead indicated it was because she was having computer difficulties. In relation to allegations one, three and six the applicant denied one and three and in relation to allegation six she accepted that as Mr Glenn Meinema had marked some papers that she had left at home and the applicant reflected on her wrongdoing as 'inadvertent'.
- 141 The next response to the allegations was by way of correspondence dated 11 April 2014 and was with reference to allegations two and five. The applicant sought to defend her actions previously admitted to by describing her conduct as 'innocent' and 'not detrimental' and that it did not compromise the 'integrity of the school or Department of Education's computer network' (exhibit Pinker 7, attachment one). The applicant conceded that she directed her partner to mark multiple-choice exam papers describing her conduct as a 'minor breach' and 'highly technical' in nature (exhibit Pinker 7, attachment one) and counsel for the respondent described this as spin and half-truths which became central to the disciplinary process concerning the applicant and evidence of this type of behaviour became readily apparent when one reflected on the position taken by the applicant in relation to the application.
- 142 The Commission, in determining whether the penalty is disproportionate to the conduct complained of may take into account an employee's conduct in the investigation process in the manner in which the applicant has in the view of the respondent misled and obfuscated which can in its own right be sufficient to warrant an employer losing confidence in the integrity of an employee. This approach was reflected in the decision of *Pantovic v Public Transport Authority of Western Australia* (2011) WAIRC 00876; (2011) 91 WAIG 2094.
- 143 The three issues relating to the evidence as led by the applicant that the respondent considers relevant to the question of penalty are:
- (a) why is the Respondent in a better position to judge the breakdown of trust and confidence than the Applicant's former Principal and colleagues;
  - (b) accepting that the Applicant has good qualifications and has recently performed well, why can the Applicant not be given a second chance; and
  - (c) why did the Respondent not have more regard to the Applicant's personal circumstances at the time of the breaches of discipline?

(respondent's closing submissions [47])

- 144 The respondent sets the standard of conduct expected of all staff and the director general does not ever delegate to the decision-making authority in relation to making such findings and imposing penalties particularly in relation to misconduct matters.
- 145 In relation to the second matter the nature and seriousness of the allegations that were required to be proven were such that termination was considered to be the most appropriate penalty. The respondent's view the level of dishonesty and the breakdown of trust was significant as was the differing versions of the applicant's evidence.
- 146 In relation to [143](c), the respondent did consider the submissions put by the applicant at the time the director general made her final determination but she was not persuaded to alter her view and termination was determined to be the most appropriate penalty.

Other issues raised by the applicant

- 147 The respondent submitted that termination of the applicant did not amount to disbaring as the applicant was able to seek employment in a teaching capacity within Western Australia and outside of the Department. Furthermore, there is no requirement for the respondent to employ on the sole basis that a person has a teaching degree. Gaining employment with the respondent as a teacher involves a competitive recruitment process. The respondent is a large employer of teachers in the state of Western Australia which allows them to be selective as to who they employ, especially where there is a belief there is a significant loss of trust.
- 148 The investigation conducted by the respondent relating to the applicant is a confidential matter that is held on file with SID and does not appear on the applicant's 'teacher's file'. If the applicant were to seek employment outside of the respondent it would be she who would determine whether or not to advise potential employers of the specific circumstances of what occurred.

- 149 Concern was raised regarding the loss of the applicant's 'e number' (ts 61). This matter is relevant only to departmental employees as a form of employment number therefore has no relevance to employment outside of the department. The respondent submitted that it is the Teacher's Registration Board who determines whether a person is suitable to be registered as a teacher and has the ultimate decision as to whether a person can be employed as a teacher and in what capacity. That the applicant no longer has an 'e number' as a consequence of the respondent deciding that the applicant is no longer a suitable teacher for employment within the respondent and not related to employment as a teacher generally. Claims were made by the applicant in that her conduct ought not be considered as separate allegations, in particular allegations one, three and six ought to be considered as one matter and allegations two and five ought to be considered as another matter. In response the respondent considers the matters occurred on different dates at different worksites and affected different students and therefore needed to be addressed and investigated individually. The applicant received one penalty for her conduct overall.
- 150 The respondent suggests that the totality principle has been confused as totality refers to overall wrongdoing rather than the totality of the conduct complained of. The respondent submits that penalties were not imposed for each of the breaches but rather one penalty was imposed for the applicant's overall conduct and therefore the question the Commission has to consider is does the totality of the wrongdoing – that is, does the penalty ultimately imposed bare a proper relationship to the overall transgression involved in the allegations, having regard for their entirety and the circumstances of the case? The respondent referred to the decision of the Supreme Court in *Roffey v WA* [2007] WASC 246.
- 151 The respondent considers that the penalty is proportionate to the conduct complained of and for that purpose the respondent relies on its submissions, in particular [31] to [50] of its closing submissions.
- 152 With respect to the applicant's claim that the conduct complained of was not conduct that repudiated the employment contract the applicant was required to comply specifically with the respondent's *Code of Conduct* and *Code of Ethics* and in failing to do so she breached her employment contract.
- 153 The applicant asserts that in light of her being able to continue to be employed for a further four years with the respondent and with great employment distinction beyond the time when breaches of discipline were first committed there was clearly no intention to repudiate the employer's authority or contract. In this regard it is important to note that the respondent was not made aware of the allegations until 17 June 2013. The applicant's continued employment thereafter does not mean the respondent condoned her actions.
- 154 The overall effect of the applicant's submissions concerning procedural fairness is that the respondent's decision to terminate the applicant was procedurally unfair so as to lead ultimately to a disproportionate penalty. When considering it a question of whether more weight should have been attributed to favourable character references from the applicant's former colleagues the Commission should also consider how little weight if any the respondent would have placed on unfavourable opinion evidence from former colleagues.
- 155 In concluding, the applicant's claim is based on equity and yet to date the applicant has failed to accept full responsibility for the circumstances in which the breaches of discipline were found to have been committed.
- 156 The Commission is a review jurisdiction that requires (and relies upon) parties seeking relief to have regard to the long established maxim which was re-iterated by Kelly SC in the majority decision of the Commission *Hospital Employee's Industrial Union and Wongan Hills Hospital* No. 626 of 1978 that 'he who come into equity must come with clean hands' – a saying which is far from incorrect in this matter.
- (respondent's closing submissions, [84])
- 157 Having regard to exhibit Education 4 and exhibit Education 5 it was appropriate for the director general to terminate the applicant's contract of employment. The nature and the seriousness of the allegations as proved was such that a penalty of dismissal was determined by the respondent to be appropriate. In the respondent's view the level of dishonesty was significant and the breakdown of trust was more so.
- 158 The respondent requested that the application be dismissed.

### Commission's Conclusions

#### Credibility of witnesses

- 159 Having heard all of the evidence, a significant amount of which was unchallenged, the Commission is required to determine witness credibility. The applicant appeared at first to give evidence to the best of her ability however she did contradict herself on occasion:

I am aware my conduct could be a contravention of the Department's *Code of Conduct*, but I did not think that my actions contravened the Department's *Code of Conduct*, or would directly affect the students.

(exhibit Education 2, 7 investigative interview)

- 160 What has been unfortunate has been the number of opportunities whereby the applicant has muddied the waters about what actually occurred back in 2010 and 2011. Where the applicant's evidence departs from other witnesses is with the evidence given by Ms Andrade in relation to whether a direction was given by Ms Andrade to the applicant. I prefer the evidence given by Ms Andrade with respect to the allocation of grades in semester 1 at SRC in 2011. Ms Andrade clearly directed the applicant to set exams for the students in semester 1 and did not direct the applicant to approximate her marks in that same semester as was suggested by the applicant and Ms Harling. Further, the Commission accepts the evidence of Mr Glenn Meinema over the applicant with respect to having marked rather than just checking the SRC student assessments in semester 1, 2011. In all other respects Mr Glenn Meinema's evidence was given honestly, with some qualification, as he recalled his memory had been somewhat repressed at the time he was interviewed by Ms Cann (during the investigative process):

Yes? --- At the time I had this interview, no, I didn't remember it, but now I do and I don't see any – any problem with that at all.

(ts 135)

- 161 On the important issues of marking and portal entry Mr Glenn Meinema appeared to remember relevant events with some accuracy. The applicant's remaining evidence, with the exceptions listed in [159] - [160] was given to the best of her recollection. On the issue of continued trust and confidence the applicant relied substantively on the evidence of Ms Pearce, Mr Erith, Mr O'Rourke and Ms Harley, all from SRC. Each witness gave evidence or tabled statements amongst other things going to their continued trust and confidence in the applicant. Ms Cann, Mr Ryan, Ms Pearce and Mr Smith and all other witnesses gave evidence honestly and to the best of their recollection, recognising particularly for those witnesses from CBC the memory of working with the applicant was almost four years ago. Some of the evidence given by Ms Harrison appeared to be somewhat imprecise however I do recognise the witness was being asked to recall events of four years earlier.
- 162 The fact that Mr Peter Meinema (Mr Glenn Meinema's father) made a number of comments during his son's investigative interview and was not called by the respondent to give evidence is a relevant matter. Mr Peter Meinema's comments can relevantly be described as hearsay and his comments therefore attract little or no weight.
- 163 The test for determining whether the applicant was unfairly dismissed or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant. The test was outlined by the Industrial Appeal Court in the *Undercliffe* decision. The responsibility is on the applicant to establish that the termination of the applicant was, in all the circumstances, unfair. Whether the right of the employer to dismiss the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined by the Commission. A dismissal for a valid reason within the meaning of the Act may still be unfair if that dismissal is affected in a manner which is unfair. To terminate an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair *Shire of Esperance v Mouritz* (1991) 71 WAIG 891.

#### The Statutory Scheme

- 164 Section 78 of PSMA is contained in Part 5. The provision outlines the rights of appeal to the Commission for relevant employees. On this was no dispute. The Commission finds that the applicant is a relevant employee for the purpose of these proceedings pursuant to s 78(2) of PSMA.
- 165 The relevant provisions of PSMA in relation to the breaches and subsequent disciplinary action taken by the respondent against the applicant are to be found at:

#### **80. Breaches of discipline, defined**

An employee who —

- (a) disobeys or disregards a lawful order; or
- (b) contravenes —
  - (i) any provision of this Act applicable to that employee; or
  - (ii) any public sector standard or code of ethics;
- or
- (c) commits an act of misconduct; or
- (d) is negligent or careless in the performance of his or her functions; or
- (e) commits an act of victimisation within the meaning of section 15 of the *Public Interest Disclosure Act 2003*,

commits a breach of discipline.

- 166 Of particular relevance to the applicant were s 80(b) and s 80(c) of PSMA in terms of allegations 1, 3, 4, 6 and 7 which related to s 80(b) and allegations 2 and 5 which related to s 80(c). Allegation 7 was unable to be sustained by the respondent and was subsequently withdrawn.
- 167 In relation to those allegations which related to s 80(b) of PSMA, the relevant public sector code was the respondent's *Code of Conduct* specifically:
3. Fraudulent and Corrupt Behaviour
- Employees do not engage in conduct which is dishonest and that causes actual or potential benefit or detriment to any person or entity.
- 168 With respect to allegations 2 and 5, which related to s 80(c) of PSMA, those allegations were considered to be a contravention of the respondent's *Telecommunications Use Policy* which states:

#### 3.2 Telecommunications Security

Staff and contractors must not allow or facilitate unauthorised access to the Department's network through the disclosure or sharing of passwords, personal logon information, user accounts or other information designed for security purposes.

#### **82A. Disciplinary matters, dealing with**

- (1) In dealing with a disciplinary matter under this Division an employing authority —
  - (a) must proceed with as little formality and technicality as this Division, the Commissioner's instructions and the circumstances of the matter permit; and

- (b) is not bound by the rules of evidence; and
  - (c) may, subject to this Division and the Commissioner's instructions, determine the procedure to be followed.
- (2) Even though an employing authority decides to act under section 81(1)(a), the employing authority may, at any stage of the process, decide instead that it is appropriate —
- (a) to take improvement action with respect to the employee; or
  - (b) that no further action be taken.

### Allegations

- 169 Although to some extent there are elements of agreement between the applicant and the respondent on the allegations the Commission considers there are considerable aspects of evidence that differed particularly when considering the applicant's schedule to Form 2 – Application, together with exhibit Pinker 7 and the evidence the applicant gave during the proceedings. When the applicant's evidence is compared with the investigation report (exhibit Education 2), in particular the interviews of Ms Pearse, Ms Andrade and Mr Glenn Meinema then circumstances vary in the way in which the responses were given to the Commission.
- 170 Respondent's counsel submitted at the outset of the hearing correspondence (exhibit Education 1) that had earlier been forwarded to the respondent outlining:
- The applicant's response to each of the allegations;
  - A suggestion that the applicant's response would therefore make the tendering of the respondent's investigation report unnecessary; and
  - If the respondent were to proceed and table the investigation report a suggestion was made that all aspects of the report would need to be verified.
- 171 Therefore, the Commission is required to make findings with respect to each of the allegations as there are differences between the applicant and the respondent. Before doing so the Commission finds that the applicant ultimately accepted a position that 'it is fair' for the Commission to 'have all the evidence' inclusive of the investigation report produced by SID (ts 77). The Commission considers for the applicant to ultimately adopt this position at that stage of the proceedings was indeed proper.

### Allegation 1

- 172 Between January 2010 and December 2010, at CBC, the applicant was alleged to have breached s 80(b) of PSMA by contravening the respondent's *Code of Conduct*, in that she directed Mr Glenn Meinema to assess students' marks. The applicant states (exhibit Pinker 7) she limited her actions in relation to allegation 1 by her direction to Mr Glenn Meinema:
- to check the working out of my marks as I felt I had made some mistakes.
- 173 A summary of an interview between Ms Cann and Ms Pearse during the investigation process includes a declaration by Ms Pearse that:
- Ms Pinker stated Mr Glenn Meinema had marked assessments for her.
- (exhibit Education 2 [2.5])
- 174 The applicant stated during her interview with the investigator:
- I am aware my conduct could be a contravention of the Department's *Code of Conduct*, but I did not think that my actions contravened the Department's *Code of Conduct* or would directly affect the students.
- (exhibit Education 2 [2.8])
- 175 The Commission finds the applicant breached the *Code of Conduct* in that she directed Mr Glenn Meinema to mark the assessments knowing that such a direction was in breach of the respondent's *Code of Conduct*.

### Allegation 2

- 176 Between June 2011 and July 2011, the applicant, it was alleged by the respondent, breached s 80(c) of the PSMA by committing an act of misconduct. The respondent alleged she provided personal logon information, including her password, to Mr Glenn Meinema to access the respondent's network.
- 177 Because Mr Glenn Meinema is not an employee of the respondent, the applicant's actions were considered to be in breach of the respondent's *Telecommunications Use Policy*.
- 178 The applicant, in response to the allegation, asserted she was having difficulty with her computer and accessing data, and Mr Glenn Meinema was good with computers. In addition, the trouble seemed to occur at weekends (exhibit Pinker 7). The applicant declared in her interview during the investigation process she had done the wrong thing with respect to this allegation:
- I was aware of this and know I did the wrong thing here.
- (exhibit Education 2, 7 allegation 2 dot point)
- 179 The Commission finds that the applicant's behaviour between June 2011 and July 2011 breached s 80(c) of PSMA by committing an act of misconduct in that she provided personal respondent logon information, including her password, to Mr Glenn Meinema to access the respondent's network. In particular, because Mr Glenn Meinema is not an employee of the respondent, the applicant breached the *Telecommunications Use Policy*.

Allegation 3

180 It is alleged between June 2011 and July 2011 the applicant contravened s 80(b) of PSMA by contravening the respondent's *Code of Conduct*. During this period the applicant was at SRC and directed Mr Glenn Meinema to check assessments on her behalf. The applicant's defence is as it was for allegation 1 (exhibit Pinker 7 [72]):

I asked my then partner Mr Glenn Meinema to check the working out of my marks as I felt I had made some mistakes.

181 During the applicant's interview in the investigation process the applicant admitted she had asked Mr Glenn Meinema to check the grades (exhibit Education 2, 7). In addition the applicant was shown assessments and was unsure as to whether the mark was her own mark or that of Mr Glenn Meinema's (exhibit Education 2, 12 [3.8]).

182 The Commission finds that on the balance of probabilities the applicant requested Mr Glenn Meinema mark rather than check assessments for students of SRC in the months of June and July 2011. The applicant admitted as much to Ms Pearce. The Commission finds that the applicant's actions as a qualified teacher in requiring Mr Glenn Meinema to mark assessments was dishonest and was in contravention of the respondent's *Code of Conduct*.

Allegation 4

183 It is alleged the applicant between May 2011 and July 2011 committed a breach of discipline contrary to s 80(b) of PSMA by contravening the respondent's *Code of Conduct* at SRC by allocating final semester 1 grades prior to marking student assessments. The applicant asserted in response to the allegation she was informed by Ms Andrade to provide the students with approximate grades which did not impact on students as the units were concurrent over two semesters, therefore semester 1 grades were the preliminary step. Ms Harling and the applicant allocated estimates (exhibit Pinker 7 [76]).

184 Mr Glenn Meinema stated in his interview that the applicant directed him to manipulate marks to match the grades as provided (exhibit Education 2, 12). Further, Ms Pearce stated at 3.12 of exhibit Education 2 that the applicant had admitted to her that grades had been made up.

185 The Commission finds that the applicant's position as to what occurred is not supported by witnesses to proceedings. The Commission finds that at no stage did Ms Andrade instruct the applicant to distribute approximate grades to the students. From the applicant's admissions to Ms Pearce, together with her directions to Mr Glenn Meinema, it would be reasonable in the Commission's mind to conclude that the applicant allocated semester one grades in contravention of the respondent's *Code of Conduct*.

Allegation 5

186 With respect to this allegation there is no dispute between the applicant and the respondent that in this matter the applicant did provide her own logon information and associated password to Mr Glenn Meinema to enable him to access the respondent's network in October 2011 in breach of discipline contrary to s 80(c) of PSMA in breach of the *Telecommunications Use Policy*.

The applicant says in response to that particular allegation that she was having difficulty with her computer at the time, in accessing data and furthermore suggests her partner was very good with computers. The applicant asserts that the problem mainly occurred at weekends (exhibit Pinker 1, [74]) and further she did not admit she had provided her logon details to Mr Glenn Meinema.

187 The Commission finds based on the evidence it is reasonable to determine that the applicant's actions were in contravention of the respondent's *Telecommunications Use Policy* in particular s 3.2. in that she did provide her logon details to Mr Glenn Meinema.

Allegation 6

188 It is alleged in October 2011 the applicant admitted a breach of discipline contrary to s 80(b) of PSMA by contravening the respondent's *Code of Conduct* at SRC. On this occasion the applicant directed Mr Glenn Meinema to mark student's assessments on her behalf. Importantly, Mr Glenn Meinema is not an employee of the respondent. In response the applicant states that she asked Mr Glenn Meinema to check the working out of her marks as she considered there were mistakes (exhibit Pinker 1 [72]).

189 On 15 January 2014, at approximately 10.05 am, the applicant participated in an electronically recorded interview at SRC conducted by Ms Cann. Also present was Ms Davies and Ms Pearce as a support person. A summary of the applicant's interview with respect to allegation 6 follows:

Allegation Six

- I got Mr Glenn Meinema to complete the marking of the multiple choice of some assessments.
- I know it's incredibly wrong and it was me cutting a corner because I was late.
- I can't tell you know if I got him to do anything else with these assessments.
- It would have been one of my lower school classes.

(exhibit Education 2, 10)

190 The Commission finds that with respect to allegation 6 in consideration of the applicant's conduct by allowing a person who is not qualified as a teacher to mark assessments the applicant may have caused a detriment to the students in the event that assessments were marked incorrectly. On the balance of probabilities in the view of the Commission the applicant's actions were in contravention of the *Code of Conduct* in particular s 3 which requires employees of the department to act ethically and avoid engaging in any behaviour which may be considered fraudulent and/or corrupt.

191 With respect to allegation 7 the respondent withdrew the allegation.

Penalty disproportionate to breaches

192 The applicant contended the determination of termination as a penalty in response to the six breaches of PSMA was a disproportionate response. In particular, the applicant submitted:

- (a) senior staff at SRC including the principal, maintained their trust in the applicant as a teacher and would welcome the applicant back to the school at any time;
- (b) she conceded through the investigation process the conduct complained of and expressed remorse and apologies for her actions;
- (c) there had been no previous disciplinary matter against the applicant from when she was first employed in 2005, some nine years earlier;
- (d) when the conduct complained of occurred the applicant was having relationship difficulties with her partner of 12 years, leading to family law proceedings and subsequently, a separation;
- (e) her mother was very ill; and
- (f) her professional role as a science teacher, specifically in the area of robotics for children in lower socioeconomic areas had to date been an important part of the SRC science activities, being noted nationally.

193 Conversely, the respondent submits a number of factors were taken into account when considering the issue of penalty:

- the nature and seriousness of the allegations;
- the impact that your behaviour has had on your reputation, and the reputation of the Department;
- any mitigating or extenuating circumstances provided by you in your submissions;
- your length of service with the Department;
- that you have made some admissions in respect to your behaviour; and
- industrial advice received from Labour Relations Directorate in respect to appropriate action.

Prior to making a final decision and taking the action outlined above, I am providing you with an opportunity to provide a written submission concerning the proposed finding and action. In your submission you may wish to include an explanation of your conduct, or reasons why the proposed finding and/or action should not be taken against you.

(exhibit Education 4)

194 In addition to the aforementioned matter the following was taken into account by the respondent:

- The motivation of Mr Glenn Meinema for reporting the matter.
- Mr Meinema's mental state.
- Your emotional state and personal issues during 2010 and 2011 in respect to the breakdown of your relationship with Mr Meinema.
- The evidence considered in determining a breach of discipline in respect to each allegation.
- The seriousness of your conduct and that the proposed penalty was harsh and severe.

I have considered your submission and note the points made about this matter. However, I am not persuaded away from my preliminary view that you committed six breaches of discipline and that I should terminate your employment.

(exhibit Education 5)

195 Following the investigation undertaken by SID, Ms Cann and Mr Riddle wrote to the director general as follows:

In considering the most appropriate action to take, I respectfully submit that the following factors should be carefully considered:

- The nature and seriousness of the allegations;
- The impact that Ms Pinker's behaviour may have had on her reputation and/or the Department's reputation;
- Any mitigating or extenuating circumstances provided in Ms Pinker's submissions;
- Ms Pinker's length of service with the Department;
- That Ms Pinker made some admissions in respect to her behaviour; and
- Industrial advice received from the Employee Relations Directorate in respect to appropriate action.

On 7 March 2014, Mr John O'Brien, Employee Relations Directorate, recommended termination of Ms Pinker's employment with the Department as an appropriate penalty. This recommendation is based on the belief that Ms Pinker's actions has caused a break down in the employer/employee relationship with regard to trust and integrity.

(exhibit Education 6)

- 196 On 16 April 2014 a memo was sent by Ms Cann through to Ms O'Neill. That memo summarised some of the submissions that SID had received on behalf of the applicant regarding the investigation. These included:
- The motivation of Mr Glenn Meinema for reporting the matter.
  - Mr Meinema's mental state.
  - Ms Pinker's emotional state and personal issues during 2010 and 2011 in respect to the breakdown of her relationship with Mr Meinema.
  - The evidence considered in determining a breach of discipline in respect to each allegation.
  - The seriousness of Ms Pinker's conduct and the subsequent harsh and severe penalty imposed.
- The concerns raised in relation to Ms Pinker's relationship with Mr Meinema and his motivation for reporting the matter are irrelevant in considering Ms Pinker's actions. By raising these concerns, it appears Ms Pinker fails to accept full ownership of her actions and places blame on Mr Meinema for her own conduct.
- (exhibit Education 7)
- 197 The respondent considered the issues impacting negatively on the applicant's life at the time including her difficult relationship with Mr Glenn Meinema, the separation, the family law proceedings and her mother's illness to be irrelevant. The Commission appreciates these issues occurred during a very difficult period in the applicant's life however, that does not mean that the respondent's standards can be avoided or short-tracked.
- 198 It appears the applicant was supported by her peers at SRC for all the right reasons during a very difficult period subsequent to the investigation commencing. Such an approach is laudable. However, it does appear that unrealistic expectations may have been created as to what the possible outcome with regard to penalty might have been arising from the respondent's investigations. Clearly, the decision-maker as to penalty was always to be the director general with a possible review by the Commission.
- 199 Having said that, the Commission considers it passing strange that the investigation did not include any interviews with current senior staff at SRC with the exception of a preliminary interview with Ms Pearse and an interview with Ms Andrade. Furthermore it is of concern that a regional staff member prohibited Ms Pearse from providing a reference of support for the applicant during the investigative process (exhibit Pinker 1 [17] - [18]).
- 200 Having regard for the submissions of both the applicant and the respondent and in consideration of the question whether the penalty is disproportionate to the conduct complained of by the respondent the Commission has had regard for a number of issues:
- The applicant's conduct in the investigation process where she attempted to play down the seriousness of the conduct complained of;
  - The fact that the respondent is well placed to determine the appropriate standard of conduct expected of staff and determine whether the seriousness of the allegation determined was such that dismissal was the appropriate penalty.
- 201 The Commission finds that in the respondent's determination the level of dishonesty and the breakdown of trust was significant in the face of the differing versions of the applicant's evidence in proceedings *Pantovic v Public Transport Authority of Western Australia* where it was said:
- Mr Pantovic's conduct in the investigation process, in attempting to mislead and obfuscate, was of itself, sufficient to have warranted the Authority losing confidence in the integrity of Mr Pantovic as a law enforcement officer. In such a position, Mr Pantovic was obliged to demonstrate the highest standards of conduct.
- 202 The Commission finds it is the director general, as the most senior person with the respondent, who sets the standard of conduct expected of staff as it is she who is ultimately responsible for holding staff members accountable. The decision making authority in relation to making findings and imposing penalties in relation to misconduct matters are issues of concern to the respondent which ultimately must be held to the highest level possible.
- 203 In relation to the personal circumstances that had been raised by the applicant at various stages of the dismissal process the Commission finds it was clear on the evidence presented that at the time the respondent made her final determination to terminate she had had regard for a number of issues. These had been raised in the previous paragraphs of my reasons and were referred to in exhibit Education 4, exhibit Education 5, exhibit Education 6 and exhibit Education 7. The Commission finds the director general had full regard for the applicant's circumstances prior to making her final determination to dismiss the applicant.
- 204 Ms Pearse's evidence in relation to the submission of references on behalf of the applicant in this matter (exhibit Pinker 1 [17] – [18]) was directly contradictory to Ms Cann's evidence from the witness box:
- So if Ms Everal Pearse wrote a character reference and gave it to you, you'd take it into consideration, for example? ---  
Yes.
- (ts 107)

#### Disbarment

- 205 Counsel for the applicant considered the penalty of dismissal for the applicant to be equivalent to disbarment. Smith C as she then was in *Lee v Director General, Department of Education and Training* (2004) WAIRC 13757 said of the dismissal of a teacher from the respondent:
- This case is different to the majority of unfair dismissal matters the Commission usually deals with. I make this observation not because of the relevant provisions of the PSM Act but because the Respondent employs a substantial proportion of teachers within the State of Western Australia; the penalty of dismissal, can be said to be akin to

disbarment, in that the Applicant has been precluded from seeking work in a large number of schools in Western Australia.

- 206 The Commission finds that the penalty of dismissal as applied by the director general in the case of the applicant is similar to disbarment in that the applicant has been 'precluded from seeking work in a large number of schools in Western Australia'. Having found the penalty of dismissal is similar to disbarment the Commission must consider whether such a finding would override the penalty as applied by the director general in terminating the applicant to ground a finding of unfair dismissal. The Commission has considered the issue with some care however, because of the number of serious breaches found as having been committed by the applicant, namely six, then the Commission is unable to apply an alternative penalty to dismissal.

Procedural unfairness

- 207 Counsel for the applicant asserted that the respondent had breached the principles of procedural fairness. In examining those principles the Commission has had regard for the decision of the Full Bench in the *Minister for Health v Drake-Brockman* where it was said:

Except if a departure results in actual unfairness, a decision-maker is bound by any principle of procedural fairness to adhere to a statement of intention as to the procedure to be followed in then in an investigation. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1, a departmental officer who was considering whether to recommend that Lam's visa be cancelled wrote a letter to Lam requesting contact details for the carer of Lam's children and said he wished to contact the carer to assess the impact that cancellation would have on the children. Lam provided the details but no contact by the department was made with the carer. The High Court held:

- (a) When a public authority represents that a particular procedure will be followed that may, but will not necessarily, affect the content of the requirements of procedural fairness;
- (b) To establish a breach of procedural fairness it must be demonstrated that the procedure adopted was unfair, not that an expectation engendered by a representation has been disappointed.

- 208 In the same decision, Gleeson CJ observed in *Lam* [34]:

[It] is clear that the content of the requirements of fairness may be affected by what is said or done during the process of decision-making, and by developments in the course of that process, including representations made as to the procedure to be followed.

- 209 His Honour said [37]:

A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations.

- 210 It may be argued that the applicant suffered a procedural unfairness when Ms Pearse was prohibited by a representative from regional office from submitting a reference on behalf of the applicant (exhibit Pinker 1 [18]). However having found that there may have been an unfairness in a procedural sense it ultimately is for the Commission to determine whether that unfairness in the Commission's view overrides the decision the respondent made to dismiss the applicant pursuant to Part 5 of PSMA. In this matter the respondent in fact did not learn of the alleged misconduct until 2013.

- 211 In the Commission's view, even if an element of procedural unfairness did occur by refusing Ms Pearse to make representation on behalf of the applicant to the investigation being undertaken by SID the conduct being complained of was so serious as to override the six allegations that were found to have been breached, having regard for the applicant's mitigating factors. In the Industrial Appeal Court decision in *The Shire of Esperance v Mouritz* (1991) 71 WAIG 891 it was said that:

No injustice will result if the employee could be justifiably dismissed. Here, as the reasons of the President and Rowland J. make apparent the issue of dishonesty as a basis for dismissal remains undetermined. The unfairness of the dismissal cannot be determined by the procedural unfairness alone.

- 212 The Commission has been invited to draw an adverse inference in accordance with the well-established principle in *Jones v Dunkel* on the basis that Mr Hayres was not called as a witness by the respondent. Mr Hayres was a support person and as a superior manager to Ms Harrison should not have been able to attend the interview. The applicant's counsel goes so far as to suggest 'his presence at the interview had the effect of intimidating Ms Harrison into submitting evidence unfavourable to the Applicant's position'. The Commission finds such a statement to be unusual in that I am unsure as to how such a leap of faith can be drawn from the evidence given by Ms Harrison to draw a conclusion such as has been however the Commission, given Ms Harrison's evidence to the Commission was some four years ago I do not consider it was her support person that was placed in conflict nor do I consider Mr Hayres ought to have been called in proceedings as a witness therefore I choose not to draw an adverse inference and instead have placed weight on the credibility of the witness under the relevant section. The applicant submitted that due to her otherwise unblemished record and having regard to her 2.9 position and impending completion of her masters which would have put her in a level 3 administrators role she should have been given by the respondent and alternative penalty under PSMA. For example the respondent could have:

- reduced the level of her classification;
- reduced the amount of money she was receiving;
- imposed a fine; or
- revoked the funding she was currently receiving for her master's programme.

In the view of the applicant such a penalty would have been more appropriate.

Repudiation of the employment contract

- 213 At issue the Commission is required to give consideration to is whether there was an intention to repudiate the employer's authority. Was the conduct of the applicant of such gravity as to indicate a rejection or repudiation of the contract by the applicant: *Samata v Fraser Chief Executive Officer Shire of Gingin* (2011) WAIRC 00116; (2011) 91 WAIG 1975.
- 214 The respondent in the current matter suggested the allegations that the conduct complained of was a matter that first occurred in January 2010. However, the evidence reveals that the applicant continued to be employed by the respondent through until 2014 which the applicant relies on to suggest the respondent condoned the behaviour. In this matter the respondent in fact did not learn of the alleged misconduct until 2013.
- 215 The applicant went on to implement the robotics programme at SRC with some distinction and for some years after the conduct complained of occurred the question is therefore is such prominent behaviour thereafter sufficient to recognise there was no intention on the part of the applicant to repudiate her employment contract.
- 216 The Commission considers the contract does not inevitably come to an end on the repudiation: see Macken, McCarry and Sappideen's *The Law of Employment* Sixth Ed (2008) at pp 319 - 328 and the authorities therein cited.
- 217 The Commission finds the applicant, in light of what the respondent found to be breaches of discipline in 2010 and 2011 at CBC and SRC by the gravity of the applicant's conduct in those years, and having regard for the respondent's own *Code of Conduct* and *Code of Ethics* took steps to bring her own contract to an end.

The respondent as a public body

- 218 Counsel for the applicant submitted that procedural matters in this case ought to be applied more stringently than procedural fairness matters would otherwise apply due to the fact the respondent is a public sector employer. If the respondent failed to adhere to the special requirements to which it was subject then that of itself may amount to an unfair dismissal: *Public Employment Industrial Relations Authority v Scorzelli* [1993] NSWIRC 48, The relevant disciplinary matter applying to the respondent at the time were:
- (a) PSMA;
  - (b) Commissioner's Instruction No. 3: Discipline-General;
  - (c) Public Sector Standard-Discipline; and
  - (d) The respondent's own policy – Staff Conduct Discipline
- 219 The Commission has had regard for PSMA, the aforementioned Instruction No 3 and the respondent's own policy on Staff Conduct Discipline together with the Public Sector Commission Guide to the Disciplinary Provisions contained in Part 5 of PSMA. Having regard for all of the documentation the Commission is of the view that in implementing the disciplinary proceedings against the applicant the respondent ensured the process was completed as soon as practicable and that at all stages the applicant was notified in writing:
- the conduct relating to possible breaches of discipline;
  - where breaches of discipline were found to have occurred;
  - where alleged breaches had been withdrawn; and
  - where action may be taken.
- 220 In addition the Commission is of the view that the applicant was given a reasonable opportunity to respond to the notification of proposed action. Seemingly the response given by the applicant in the view of the Commission was genuinely considered by the respondent. The Commission is unable to ascertain that the applicant was not dealt with fairly and stringently in terms of applying procedural fairness to each stage of the disciplinary process.

Totality Principle

- 221 The Commission is of the view that with respect to the penalty imposed by the respondent that the penalty is relative to the conduct complained of by the respondent. The Commission in making its decision, has had particular regard for the evidence of Mr Ryan and in particular:

And having regard to the seriousness of – of them and having considered all of those facts together with the high standards and expectations that the Director General sets for all of our staff, particularly those who interact with students in the schools, I was of the opinion that termination of employment was an appropriate penalty and I put forward that in the recommendations to the Director General.

(ts 149)

- 222 The Commission is satisfied that the penalty ultimately imposed by the respondent, that of dismissal, does bear a proper relationship to the overall wrongdoing of the applicant having regard for the six allegations as proved and taking into account the personal mitigating factors as submitted by the applicant.

Applicant's employment

- 223 The evidence is that the applicant was a swimming teacher for 10 years and a teacher with the respondent for a further nine years from 2005 to 2014 a total period with the respondent for some 19 years. Up until the conduct complained of the evidence demonstrates that the applicant's service with the respondent was unblemished in that the applicant had not been the subject of any disciplinary matters. Soon after her dismissal the applicant was employed on a casual basis at Curtin University.

Trust and Confidence

- 224 The applicant asserts that her conduct was not sufficiently serious to break the trust and confidence of the respondent. Evidence from Ms Pearse, Mr Erith, Mr O'Rourke, Mr Healy and Ms Harling all former colleagues from SRC expressly showed their trust and confidence in the applicant had never fractured and continued to this day. The applicant referred to Kenner C in *Leahy v Liquor, Hospitality and Miscellaneous Union* (2009) WAIRC 00580 [154] where the decision in *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 was cited suggesting that the conduct complained of must be 'destructive of the necessary confidence between employer and employee' so as to constitute dismissal '[b]ut the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and the relationship must be found.'
- 225 Having regard for the understanding and the established confidence of the senior staff at SRC in the applicant with regard to trust and integrity matters the Commission does not consider that the director general had trust and integrity in the applicant at the time leading up to her dismissal. She said in her letter of termination on 28 April 2014 (exhibit Education 5) to the applicant:
- The conclusions and recommendations reached following the investigation are based solely on the evidence obtained in respect to each allegation about your conduct and reasonably leads me to a loss of trust in you as an employee.
- 226 The Commission finds that it was the most senior person in the organisation that had lost trust in the applicant. While senior personnel at SRC retained trust and confidence in the applicant, for the purposes of applying the penalty of dismissal, such views had little or no bearing on the final decision of the respondent.
- 227 The evidence is clear and was unchallenged that the applicant has been respected and well liked in a professional capacity during her recent years at SRC. The Commission finds that the applicant has impressed the respondent at a number of schools, as well as students from lower socioeconomic groupings, her peers and parents in the development of the early robotics programmes both within Western Australia and nationally in a most remarkable manner.
- 228 PSMA in s 80A defines disciplinary action in relation to a breach of discipline by an employee, means any one or more of the following:
- (a) a reprimand;
  - (b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;
  - (c) transferring the employee to another public sector body with the consent of the employing authority of that public sector body;
  - (d) if the employee is not a chief executive officer or chief employee, transferring the employee to another office, post or position in the public sector body in which the employee is employed;
  - (e) reduction in the monetary remuneration of the employee;
  - (f) reduction in the level of classification of the employee;
  - (g) dismissal;
- 229 The Commission is satisfied that before taking the final decision to dismiss the applicant pursuant to PSMA the respondent had regard for significant matters as outlined in a memorandum to the director general from Ms Cann and Mr Riddle of SID dated 12 March 2014:
- (a) the nature and seriousness of the allegations;
  - (b) the impact the applicant's behaviour has had on her reputation, and the reputation of the Department;
  - (c) any mitigating and extenuating circumstances provided by the applicant in her submissions;
  - (d) the applicant's length of service with the Department;
  - (e) the applicant's admissions in respect of the some of the behaviour; and
  - (f) industrial advice received from the Labour Relations Directorate in respect to the appropriate action.
- (exhibit Education 6)
- 230 The Commission finds, taking into account the mitigating factors and having regard to the conduct complained of by the respondent and those aspects of conduct admitted to by the applicant including the expressed remorse, that of the penalties available to the respondent, dismissal is, in the Commission's view, the most applicable penalty under the provision of s 80A of PSMA in this circumstance. One additional factor the Commission has taken into account in addition to the seriousness of the breaches has been the frequency of the conduct complained of within the 2010/2011 school years (exhibit Education 2).
- 231 On balance the applicant has not established that the Commission should interfere with the respondent's decision to apply the penalty of dismissal to the applicant's employment.
- 232 An order will issue dismissing the application.
-

2014 WAIRC 01313

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
BELINDA PINKER **APPLICANT**

**-v-**  
DIRECTOR GENERAL DEPARTMENT OF EDUCATION **RESPONDENT**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** FRIDAY, 5 DECEMBER 2014  
**FILE NO/S** U 114 OF 2014  
**CITATION NO.** 2014 WAIRC 01313

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

*Order*

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

THAT this application be and is hereby dismissed.

[L.S.]

(Sgd.) S M MAYMAN,  
Commissioner.

2014 WAIRC 01283

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SAMPATH RAJAPAKSE **APPLICANT**

**-v-**  
CHINA SOUTHERN WEST AUSTRALIAN FLYING SCHOOL **RESPONDENT**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** WEDNESDAY, 26 NOVEMBER 2014  
**FILE NO/S** B 204 OF 2014  
**CITATION NO.** 2014 WAIRC 01283

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**Result** Application discontinued  
**Representation**  
**Applicant** Mr P Mullally  
**Respondent** Mr C Mahoney

*Order*

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979*;  
AND WHEREAS on 10 November 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 24 November 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.

## SECTION 29(1)(b)—Notation of—

Parties	Number	Commissioner	Result
Christopher James Marshall	U 168/2014	Chief Commissioner A R Beech	Discontinued
Hellen Patricia O'Reilly	U 156/2014	Commissioner S J Kenner	Discontinued
Hellen Patricia O'Reilly	B 156/2014	Commissioner S J Kenner	Discontinued

## CONFERENCES—Matters arising out of—

2014 WAIRC 01271

### DISPUTE RE ALLEGED DISCIPLINARY ACTION

#### WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2014 WAIRC 01271  
**CORAM** : COMMISSIONER S M MAYMAN  
**HEARD** : WEDNESDAY, 19 NOVEMBER 2014  
**DELIVERED** : **WEDNESDAY, 19 NOVEMBER 2014**  
**FILE NO.** : C 32 OF 2014  
**BETWEEN** : THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES,  
 WEST AUSTRALIAN BRANCH  
 Applicant  
 AND  
 THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA  
 Respondent

**CatchWords** : Industrial Law - Discovery - Practice and procedure - Relevant principles - *Industrial Relations Act 1979* (WA) s 27(1)(o)  
**Legislation** : *Industrial Relations Act 1979* (WA)  
**Result** : Application dismissed  
**Representation:**  
**Applicant** : Mr C Fogliani (of counsel)  
**Respondent** : Mr D Matthews (of counsel)

#### Case(s) referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Union (WA Branch) v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel (1995) 75 WAIG 1801

Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA 2001 WAIRC 03773

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers & Others v BHP Billiton Iron Ore Pty Ltd (2003) 2003 WAIRC 08568

The Liquor, Hospitality and Miscellaneous Union (WA Branch) v The Executive Director Department of Education and the Executive Director Labour Relations Division Department of Commerce 2010 WAIRC 00059

#### *Reasons for Decision*

*(Given extemporaneously at the conclusion of proceedings on 19 November 2014 and edited by the Commission)*

- The substantive proceedings in this application relate to a claim by the Australian, Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the applicant union) on behalf of a member, Ms Vimpany who was harshly, oppressively or unfairly dismissed on 8 October 2014. The applicant union lodged this application with the Western Australian Industrial

Relations Commission (the Commission) on 27 October 2014 seeking her reinstatement with the Public Transport Authority (the respondent). The respondent opposes the substantive application and seeks an order dismissing the application.

#### **Applicant Submissions**

- 2 The applicant union sought discovery of in particular the employment and disciplinary record of Mr Hammon, an employee of the respondent. The matter had been the subject of discussion at a previous conciliation conference and comments had been made by Mr Richard Farrell, comments that had been subsequently qualified by email from Mr Farrell dated 6 November 2014 whereby by Mr Farrell sought to qualify his comments having read the transcript of proceedings before KennerC in CR 3 of 2014, 2014 WAIRC 00824. In the applicant union's application for discovery it was said:

The RTBU has requested discovery of Mr Hammon's employment/disciplinary records from the PTA. The PTA have refused to provide those documents. Please see the **attached** email chain.

The RTBU would be much obliged if the Commissioner was minded to list an urgent directions hearing to deal with the issue of discovery.

(extract of email to the Commission dated 19 November 2014)

- 3 In an extract attached in correspondence to the respondent by the applicant union it was said:

Given your comments in the Commission the other day, we are of the view that there is a possibility that Mr Hammon's employment/disciplinary record may be helpful to the RTBU's case, or alternatively, may be destructive to the PTA's case.

(extract from the applicant union's email to the respondent 18 November 2014)

- 4 The respondent refused the application by the applicant union dated 18 November 2014 for Mr Hammon's employment/disciplinary records.
- 5 The claim made by the applicant union against the respondent in relation to discovery of the document was supported in particular by the decision of the Full Bench in *The Liquor, Hospitality and Miscellaneous Union (WA Branch) v The Executive Director Department of Education and the Executive Director Labour Relations Division Department of Commerce* 2010 WAIRC 00059 [17] is:

Generally speaking, if an order for discovery is made, it may be made requiring the parties to the proceedings to furnish a list to one another, setting out a list of documents which are or have been in the party's possession or power, relating to any matter in question in the proceedings. This will include documents which may advance a party's case or damage the case of its opponent, or otherwise which may fairly lead to a train of inquiry in connection with the subject matter of the proceedings: *Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* (1882) 11 QBD 55 per Brett LJ at 63.

- 6 In support of the applicant union's application for discovery Mr Fogliani raised that the decision by the respondent and Mr Steedman in particular to terminate Ms Vimpany was made independently of findings by Commissioner Kenner in CR 3 of 2014, 2014 WAIRC 00824. Therefore, in the view of the applicant union the decision in this matter and ultimately the memorandum of matters referred would not be restricted to Commissioner Kenner's findings of fact. The applicant union referred the Commission to [6] of the respondent's Notice of Answer in support of its claim with respect to relevance.

#### **Respondent's Submissions**

- 7 Counsel for the respondent submitted this application is pre-emptive in that there is a proper procedure in relation to discovery. It is the respondent's submission that the applicant union has handled the matter inappropriately. As there is a contest in so much as the respondent has refused to provide a specified document namely Mr Hammon's employment file to the union.
- 8 In the normal procedure for discovery for the applicant union under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) (the Act) to make application which then empowers the Commission to make orders. The respondent would then respond with its own list which would include any objections the respondent may have. If the applicant union is not satisfied at that stage then it is that matter which may be referred to the Commission and the matter is listed for a hearing.
- 9 At the moment the respondent submits all the Commission has is a broad request which the respondent submits is no more than a fishing expedition and on that basis it ought to be refused.

#### **Applicant in response**

- 10 The applicant union in response submitted the Commission is not restricted to general applications for discovery and lists do not need to be drawn up by each party. Counsel for the applicant union suggested there have been numerous occasions where there have been similar requests made of the Commission. Furthermore it is a reading down of the Act to adopt the approach suggested by the respondent.

#### **Conclusion**

- 11 The Commission has considered carefully the submissions of both the applicant union and the respondent including the documentation submitted.
- 12 Applications for an order for discovery in most part relate to general discovery. In addition, applications may specify documents and material that is to be discovered as part of general discovery. The Full Bench in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel* (1995) 75 WAIG 1801 described the purpose and procedures for discovery as:

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

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

...

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

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

...

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

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

13 In the same decision the Full Bench defines 'just' to mean:

It is for the applicant, for an order under s.27(1)(o), to establish that it is just for such an order to be made. The expression "just" means "right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right". (see Loxton v. Ryan [1921] State Reports (Qld) 79 at 84 and 88 per Lukin J).

14 The applicant union is correct in that the Commission is not restricted to general matters of discovery. However, where specific disputes for discovery relating to one document are dealt with they tend to be after a general order for discovery has issued. In this regard the Commission refers to the decision of Commissioner Kenner in *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers & Others v BHP Billiton Iron Ore Pty Ltd* (2003) 2003 WAIRC 08568.

15 Relevant factors the Commission considers go against the granting of the application are:

- there is a directions hearing in this matter listed for 1 December 2014 some eight working days away and the hearing proper is not expected to be listed until the end of January or early February 2015;
- the Commission does not accept the applicant union's argument that they are unable to draft the matters to be referred without Mr Hammon's employment records; and
- the applicant union has not established realistic grounds, based on the procedure required, that it is 'just' for an order to be made.

16 Having regard to the matters in dispute before the Commission I am not of the view that the applicant union's submissions allow for the Commission to issue an order for the production of the specified document having regard for the issues as raised in my conclusion. However the Commission does not rule out at a later stage an order issuing for the document referred to by the applicant union providing the germane procedural principles have been met and the Commission can be satisfied the relevant tests as set out above have been met.

17 An order will issue dismissing the application.

2014 WAIRC 01272

**DISPUTE RE ALLEGED DISCIPLINARY ACTION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

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

**APPLICANT**

**-v-**

THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

**RESPONDENT**

**CORAM**

COMMISSIONER S M MAYMAN

**DATE**

THURSDAY, 20 NOVEMBER 2014

**FILE NO/S**

C 32 OF 2014

**CITATION NO.**

2014 WAIRC 01272

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<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani (of counsel)
<b>Respondent</b>	Mr D Matthews (of counsel)

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*Order*

NOW THEREFORE the Western Australian Industrial Relations 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.) S M MAYMAN,  
Commissioner.

**2014 WAIRC 01273**

**DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA (INCORPORATED)  
**APPLICANT**

**-v-**

THE GOVERNING COUNCIL OF KIMBERLEY TRAINING INSTITUTE

**RESPONDENT**

**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT  
**DATE** FRIDAY, 21 NOVEMBER 2014  
**FILE NO/S** C 34 OF 2014  
**CITATION NO.** 2014 WAIRC 01273

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<b>Result</b>	Application for interim order dismissed
<b>Representation</b>	
<b>Applicant</b>	Mr M Amati
<b>Respondent</b>	Mr D Anderson of counsel and with him Ms G Husk

---

*Order*

WHEREAS this is an application pursuant to s 44 of the *Industrial Relations Act 1979* (the Act), filed on 17 November 2014, by which the applicant sought an urgent conference to deal with the dismissal of Mr James (Alex) Petticrew; and

WHEREAS on Wednesday the 19<sup>th</sup> day of November 2014 the Commission convened a conference pursuant to s 44 of the Act for the purpose of conciliating between the parties; and

WHEREAS the parties reached agreement in respect of a number of interim orders sought by the applicant in respect of Mr Petticrew remaining in his Government Regional Officer Housing until the matter had been heard and determined by the Commission and in respect of discovery of documents; and

WHEREAS the parties were unable to reach agreement as to the matter of Mr Petticrew's reinstatement; and

WHEREAS the applicant sought that the Commission issue an order pursuant to s 44(6)(ba)(ii) of the Act that Mr Petticrew be reinstated on full salary until the matter is heard and determined by the Commission; and

WHEREAS the applicant says that such an order would enable arbitration to resolve the matter:

1. That the maintenance of the status quo would allow the parties to participate in arbitration;
2. That if Mr Petticrew is not reinstated pending the hearing and determination of the matter then he will face significant disadvantage;
3. That if the applicant is successful in the matter then Mr Petticrew would receive payment for the interim period due to the application seeking orders that the respondent's decision to dismiss Mr Petticrew be quashed and that he be reinstated to his position without any break in service; and
4. That there may be delays in the hearing of the matter due to witness scheduling and other logistical matters; and

WHEREAS the respondent says that the interim order sought, if granted, would not have the effect required by s 44(6)(ba)(ii) of the Act in that such an order would not enable arbitration to resolve the matter in question. The respondent also says that the

preservation of the status quo is not necessary to facilitate arbitration. The respondent says that should the applicant be successful in the application then Mr Petticrew will be entitled to payment for the intervening period, however if the applicant is not successful there would be no capacity for the respondent to recoup the wages paid in the interim. On this basis the respondent says the balance of convenience is against the issuing of interim orders; and

WHEREAS the Commission took account of the parties' submissions and noted that the power contained within s 44(6)(ba)(ii) is a facilitative and machinery provision for the purpose of assisting in the process of preparation for and the conduct of the arbitration; and

WHEREAS the Commission was of the view that it had not been demonstrated what the failure to grant the order sought would mean in terms of disadvantage to Mr Petticrew other than to be without salary; or that Mr Petticrew's loss of wages may impinge on the applicant's or Mr Petticrew's capacity to participate in the hearing or prepare for arbitration and that the applicant, rather than Mr Petticrew, will be a party to that arbitration. The Commission also noted that should it be a consideration, then the balance of convenience is against the issuing of an interim order because if the applicant is not successful then the respondent would not have any capacity to recover lost wages, whereas if the applicant is successful then Mr Petticrew will receive payment for the intervening period. The Commission also noted that an expeditious hearing of the matter and in particular a preliminary point, will alleviate some of the applicant's inconvenience; and

WHEREAS on these bases the Commission determined that the application for an interim order that Mr Petticrew be reinstated pending the hearing and determination of the matter not be granted;

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

THAT the application for an interim order that Mr Petticrew be reinstated on full salary until the hearing and determination of the matter be, and is hereby dismissed.

[L.S.]

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

**2012 WAIRC 00800**

**DISPUTE RE WORKLOAD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

UNITED VOICE WA

**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 FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

**RESPONDENT**

**CORAM** COMMISSIONER J L HARRISON  
**DATE** MONDAY, 3 SEPTEMBER 2012  
**FILE NO/S** C 38 OF 2012  
**CITATION NO.** 2012 WAIRC 00800

**Result** Interim consent order issued  
**Representation**  
**Applicant** Mr S Dane  
**Respondent** Mr M Aulfrey (of counsel)

*Order*

WHEREAS on 25 June 2012 the applicant applied to the Commission for a conference pursuant to s 44 of the *Industrial Relations Act 1979* in relation to a dispute with respect to the workload of some of its members employed by the respondent at Rockingham General Hospital; and

WHEREAS on 10 July 2012 and 28 August 2012 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conference on 28 August 2012 the parties agreed on a process to facilitate further discussions to assist in the resolution of the issues in dispute; and

WHEREAS the Commission is of the view that in the circumstances and given the objects of the Act and equity and fairness and the public interest it is appropriate that an interim consent order issue containing the agreed process;

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

1. THAT the parties agree to adopt and abide by the terms and conditions of the attached schedule.
2. THAT this order and attached schedule are to remain in force until revoked or varied by the Commission.
3. THAT the parties have liberty to apply to vary this order and schedule.
4. THAT liberty to apply is granted to either party to request further conciliation and/or arbitration with respect to this application.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

SCHEDULE

1. By no later than close of business 14 September 2012 the respondent is to provide to the applicant copies of the daily reports and shift summaries for Rockingham General Hospital from 25 May 2012 to 27 July 2012 inclusive, relevant to the issues in dispute the subject of this application.
2. The respondent will not discipline any employee based on these reports or based on information provided by the applicant and subsequent discussions in relation to this application.
3. The applicant is to provide to the respondent the dates and shifts relating to the seven incidents identified in the report provided to the respondent on 9 August 2012.
4. The applicant is only to provide the information contained within the daily reports and shift summaries provided by the respondent to officials of the applicant and members of the applicant who are directly affected by the matter in dispute.

2014 WAIRC 01276

**DISPUTE RE WORKLOAD**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

UNITED VOICE WA

**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 FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

**RESPONDENT**

**CORAM** COMMISSIONER J L HARRISON  
**DATE** MONDAY, 24 NOVEMBER 2014  
**FILE NO/S** C 38 OF 2012  
**CITATION NO.** 2014 WAIRC 01276

<b>Result</b>	Order revoked
<b>Representation</b>	
<b>Applicant</b>	Mr S Dane
<b>Respondent</b>	Mr M Aulfrey (of counsel)

*Order*

This application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* seeking the Commission's assistance in relation to a dispute with respect to the workload of some of the applicant's members employed by the respondent at Rockingham General Hospital.

The Commission issued an interim consent order with respect to this application on 3 September 2012.

On 18 September 2014 the applicant advised the Commission that the file could be closed.

As the dispute between the parties the subject of this application has been resolved it is the Commission's view that the interim consent order which issued on 3 September 2012 should be revoked.

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

1. THAT the Order which issued in this matter dated 3 September 2012 is hereby revoked.
2. THAT this application otherwise be, and is hereby discontinued.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

**CONFERENCES—Matters referred—**

2014 WAIRC 01261

**DISPUTE RE INFORMATION CONTAINED IN EMPLOYMENT RECORDS**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

**APPLICANT**

-v-

DIRECTOR-GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING

**RESPONDENT****CORAM** ACTING SENIOR COMMISSIONER P E SCOTT**DATE** MONDAY, 17 NOVEMBER 2014**FILE NO/S** CR 66 OF 2012**CITATION NO.** 2014 WAIRC 01261**Result** Application dismissed**Representation****Applicant** Mr D Stojanoski of counsel**Respondent** Mr R Bathurst of counsel*Order*

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the *Industrial Relations Act 1979*; and  
 WHEREAS on the 11<sup>th</sup> day of July 2013, the Commission issued directions in respect of programming matters associated with the hearing of a jurisdictional issue; and

WHEREAS the hearing of the jurisdictional issue was to be scheduled for September 2013 following the completion of the matters the subject of the directions; and

WHEREAS by letter dated the 15<sup>th</sup> day of October 2013, the Commissioner's Associate advised the applicant that as a number of the matters the subject of the directions had not been attended to, the Commission did not intend to take any further action to list the matter for hearing until those matters had been attended to; and

WHEREAS nothing further was heard from the applicant; and

WHEREAS by Form 15 – Notice of Hearing dated the 3<sup>rd</sup> day of October 2014, the Commission listed the matter for mention on Monday the 27<sup>th</sup> day of October 2014; and

WHEREAS there was no appearance for or by the applicant at that hearing, and the hearing was adjourned until Thursday the 30<sup>th</sup> day of October 2014; and

WHEREAS at the hearing on Thursday the 30<sup>th</sup> day of October 2014, the respondent sought that the matter be dismissed for want of prosecution pursuant to s 27(1)(a); and

WHEREAS the applicant sought and was granted time in which to respond to the respondent's application to dismiss; and

WHEREAS on Friday the 31<sup>st</sup> day of October 2014 the applicant filed a Form 14 – Notice of withdrawal or discontinuance in respect of the whole claim;

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 Medical Association (WA) Incorporated	Department of Health	Kenner C	C 33/2014	N/A	Dispute re alleged forced pending transfer of member	Discontinued
Director General, Department of Education and Training	The Civil Service Association of Western Australia Incorporated	Harrison C	PSAC 3/2006	31/01/2006 16/02/2006 21/02/2006 15/03/2006 6/04/2006 13/04/2006 16/05/2006 20/06/2006	A dispute regarding proposed industrial action	Concluded
Health Services Union of Western Australia (Union of Workers)	Minister for Health	Scott A/SC	PSAC 31/2013	8/08/2014	Dispute re processes	Concluded
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)	Scott A/SC	PSAC 20/2014	N/A	Dispute re outcome of decision re alleged misconduct	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)	Harrison C	PSAC 17/2011	17/11/2011 18/11/2011	Dispute re treatment and changing of contractual hours of union member	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Culture and the Arts	Scott A/SC	PSAC 25/2014	16/10/2014 27/10/2014	Dispute re clause 23 - Public Service Award 1992 - Annual Leave	Discontinued
United Voice WA	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA)	Harrison C	C 225/2013	3/10/2013 7/10/2013	Dispute re negotiations to replace agreement	Concluded

**CORRECTIONS—**

2014 WAIRC 01279

**DEPARTMENT OF FISHERIES AGENCY SPECIFIC AGREEMENT 2014**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED, THE EXECUTIVE DIRECTOR LABOUR RELATIONS OF THE DEPARTMENT OF COMMERCE, ACTING AS AGENT FOR, AND ON BEHALF OF THE DIRECTOR GENERAL OF THE DEPARTMENT OF FISHERIES

**APPLICANT**

-v-

(NOT APPLICABLE)

**RESPONDENT**

**CORAM** COMMISSIONER S M MAYMAN  
**DATE** TUESDAY, 25 NOVEMBER 2014  
**FILE NO.** PSAAG 17 OF 2014  
**CITATION NO.** 2014 WAIRC 01279

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**Result** Correction order issued

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*Correction Order*

WHEREAS on Tuesday, 20 November 2014 the Department of Fisheries Agency Specific Agreement 2014 was registered in the Commission; and

WHEREAS on Monday, 24 November 2014, the parties advised they had provided the final email document in error and that corrections were therefore required to be made to the agreement; and

WHEREAS the Commission agreed to issue a Correcting Order;

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

THAT the Department of Fisheries Agency Specific Agreement 2014 be corrected in accordance with the following Schedule.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

## SCHEDULE

**1. Clause 3. – DEFINITIONS:**

Delete paragraph (i) and insert the following in lieu thereof:

- (i) “General Agreement” means the *Public Service and Government Officers General Agreement 2014 PSA AG 7 of 2014 or its replacement.*

**2. Clause 13.1. – ABROLHOS ISLANDS CLEANING AND MAINTENANCE ALLOWANCE:**

13.1 Delete the rate of \$0.85 per hour and insert \$0.71 per hour in lieu thereof.

13.2 Delete the rate of \$455.17 and insert \$380.00 in lieu thereof.

**3. Clause 14.3. – Commuted Overtime Allowance:**

After the preamble in paragraph (c) delete i), ii) and iii) and insert in lieu thereof:

- i) Field Duties 20%  
 20% = 15% overtime hours plus 5% for irregular and unusual hours  
       = 7.5 hours + 15% + breaks  
       = 7.5 x 15% ÷ 1.5 + 0.75 hour  
       = 9 hours on duty

(i.e. Minimum 0.75 hour break, e.g. 30 minute lunch plus minor break of 15 minutes)

- ii) Day Trip (Seagoing Vessel) 38%  
 38% = 33% overtime hours plus 5% irregular and unusual hours  
       = 7.5 hours + 33% + breaks  
       = 7.5 x 33% ÷ 1.5 + 1 hour  
       = 10 hours on duty

(i.e. Minimum 1 hour break, e.g. 30 minute lunch plus 2 breaks of 15 minutes)

- iii) Overnight Trip (Seagoing Vessel) 45%
  - 45% = 33% overtime hours plus 5% irregular and unusual hours plus 7% hard living allowance
  - = 7.5 hours + 33% + breaks
  - = 7.5 x 33% ÷ 1.5 + 1 hour
  - = 10 hours on duty

2014 WAIRC 01290

**PUBLIC TRANSPORT AUTHORITY RAILWAY EMPLOYEES (TRANSPERTH TRAIN OPERATIONS) INDUSTRIAL AGREEMENT 2014**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

**PARTIES**

**APPLICANT**

-v-

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

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** MONDAY, 1 DECEMBER 2014  
**FILE NO/S** AG 19 OF 2014  
**CITATION NO.** 2014 WAIRC 01290

**Result** Correcting order issued  
**Representation**  
**Applicant** Ms J Allen-Rana  
**Respondent** Mr P Robinson

*Correcting Order*

HAVING heard Ms J Allen-Rana on behalf of the applicant and Mr P Robinson on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders —

THAT the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014 as filed in the Commission on 30 October 2014 and as amended and registered by the order of 13 November 2014 and deposited in the office of the Registrar be and is hereby substituted and replaced in the terms of the following schedule.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

SCHEDULE  
**PUBLIC TRANSPORT AUTHORITY  
 RAILWAY EMPLOYEES  
 (TRANSPERTH TRAIN OPERATIONS)  
 INDUSTRIAL AGREEMENT 2014  
 AG 19 of 2014**

**1 APPLICATION AND OPERATION**

**1.1 Title**

This Agreement shall be known as the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014.

**1.2 Arrangement**

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<b>1.3</b>	<b>Area and Scope</b>	
1.3.1	This Agreement applies to and binds approximately 186 employees who are engaged by the Employer in the classifications listed at Schedule A of this Agreement and who are members of or are eligible to be members of the Union.	
1.3.2	This Agreement also applies to and binds the Employer and the Union.	
1.3.3	This Agreement is made in substitution for the <i>Public Transport Authority Railway Employees Industrial Agreement 2011</i>	
1.3.4	This Agreement is a standalone agreement. The provisions of the Award will not apply while this Agreement remains in force.	
1.3.5	This Agreement shall operate throughout the State of Western Australia.	
<b>1.4</b>	<b>Term of Agreement</b>	
1.4.1	This Agreement shall apply from the beginning of the first pay period on or after the date the Agreement is registered by the Commission (except where specifically provided) and will expire on 4 <sup>th</sup> September 2017.	
1.4.2	Upon expiry, the Agreement shall continue in force until replaced by a new Industrial Agreement.	
1.4.3	The parties to this Agreement agree to re-open negotiations for a replacement agreement at least six (6) months prior to its expiry.	
<b>1.5</b>	<b>Definitions</b>	
1.5.1	“2011 Agreement” means the Public Transport Authority Railway Employees Industrial Agreement 2011 – AG 24 of 2011;	
1.5.2	“Additional shifts” means shifts which are not rostered or which are beyond the maximum number permitted under subclause 3.3.3 or any applicable special provision.	
1.5.3	“Aggregated Wage Rate” means a wage rate calculated by reference to the Base Wage Rate, applicable allowances and entitlements and the applicable shift work roster in accordance with the Aggregate Methodology described in <i>Schedule D: Aggregation Methodology</i> .	
1.5.4	“Award” means the <i>Railways Employees Award No 18 of 1969</i> .	
1.5.5	“Base Wage Rate” means the rate of pay for ordinary hours worked excluding any allowances (referred to in previous agreements as the “flat” rate) as set out in Schedule A - Wages Table of this Agreement.	
1.5.6	“Chief Executive Officer” means the Chief Executive Officer appointed under the <i>Public Transport Authority Act 2003</i> , or his or her nominee, or where the Chief Executive has nominated the Managing Director, the Managing Director’s nominee.	
1.5.7	“Classification Definitions” means the classification definitions at subclause 4.11.1(a) of the Award.	
1.5.8	“Commission” means the Western Australian Industrial Relations Commission	

- 1.5.9 “Competency” means knowledge and skills and the application of the knowledge and skills to the standards of performance required in the workplace, consistent with any relevant criteria under the Australian Qualifications Framework (AQF) guidelines.
- 1.5.10 “Consultative Committee” means the Committee Established under subclause 7.3 of this Agreement;
- 1.5.11 “Emergency” means an event which is unplanned and/or not able to be reasonably predicted and does not include rostering errors and incorrect train scheduling.
- 1.5.12 “Employer” means the Public Transport Authority of Western Australia.
- 1.5.13 “Base Roster” means a roster described in subclause 3.3.6, also sometimes referred to as a Guide Roster or as a Master Roster.
- 1.5.14 “Head of Division” means the General Manager, Transperth Train Operations or nearest equivalent position.
- 1.5.15 “Higher Position” means a position which attracts a higher Base Wage Rate of pay than an employee’s ordinary classification.
- 1.5.16 “Job Description Form” means the current Job Description Form registered for a position by the Employer setting out the position’s title, role, responsibilities and selection criteria and replaces the classification definitions at subclause 4.11.1(a) of the Award.
- 1.5.17 “Operational Roster” means a roster described in subclause 3.3.10a), also sometimes referred to as a Working Roster.
- 1.5.18 “Ordinary Shifts” means rostered shifts within the maximum number permitted under subclause 3.3.3 or any applicable special provision.
- 1.5.19 “Ordinary Time Earnings” means, where shift work employee is rostered according to regular rostered hours of work each week, the earnings from the actual rostered time that would have been worked had the employee worked the shift or shifts allocated by the regular roster and shall include ordinary allowances paid for working the roster including the regular, expected shift allowances on the roster for that employee, and weekend penalties for rostered ordinary hours, but shall not include overtime or other line allowances, or other reimbursement allowances.
- 1.5.20 “Ordinary Wage Rate” means the Base Wage Rate referred to in Schedule A - Wages Table plus any applicable annualised leave loading calculated in accordance with subclause 6.3.10a) of this Agreement.
- 1.5.21 “Relief Line”: means a line so designated on a Base Roster for the purpose of covering leave, other absences and training. These lines are also sometimes referred to as a “spare lines” “relief links”, "spare links" or spelt “line”.
- 1.5.22 “Rostered Days or Shifts” means the days or shifts that have been rostered to make up the roster cycle.
- 1.5.23 “Shift Work” means work to which subclause 5.1 applies.
- 1.5.24 “Union” means the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.

## **1.6 Customer Service**

- 1.6.1 The parties to this Agreement acknowledge that the Public Transport Authority seeks to encourage greater use by the Western Australian community of the public transport system, and that this aim will be furthered by the provision of the highest standards of customer service.
- 1.6.2 The Employer operates under a performance agreement with Transperth and one of the key attributes of this is the maintenance of a safe and reliable service. Employees will make every reasonable endeavour to maintain and enhance the safe on-time running standard, reliability and integrity of the service.
- 1.6.3 On occasions employees may be required to make personal public address announcements including informing passengers of delays, altered platform arrangements, line closures and other courtesy announcements.
- 1.6.4 Employees are to ensure that all customer facilities and equipment is in good operating order, open and available to customers. Faults and/or anomalies that cannot be rectified by employees are to be reported promptly. For personal safety and security reasons, customer service employees are not required to rectify faults which require internal access to change machines and/or ticketing related equipment thereby publicly exposing cash containers from within the equipment.

## **1.7 No Further Claims**

- 1.7.1 The parties to this Agreement shall not, for the duration of the Agreement, make any claim for further wage increases except where expressly provided for in a State Wage Case decision.
- 1.7.2 The wage increases provided in this Agreement are in full and final settlement of:
- productivity improvements up to the date of commencement of the Agreement; and
  - any disputes and claims relating to the application of the classification definitions at subclause 4.11.1(a) of the Award to duties performed by the employees engaged in classifications covered by this Agreement up to the date of commencement of the Agreement.
- 1.7.3 A work value claim for a higher classification for a position under subclause 4.9 is not excluded by this subclause, and for the avoidance of doubt, the parties will not be prevented by subclause 1.7.2 from relying in such a work value claim on changes made to the work performed in a position prior to the commencement of the Agreement.

## **2 CONTRACT OF EMPLOYMENT**

### **2.1 Contract of Employment**

#### 2.1.1 Commencement

- a) The Employer shall advise each employee, prior to the time of engagement, if they are to be employed as a permanent full time, permanent part time, fixed term or casual employee.
- b) The Employer shall advise such employee that employment will be subject to the provisions of statutory and Employer rules, regulations and policies, as amended from time to time.

#### 2.1.2 Full Time Employee

- a) A full time employee is employed for the full ordinary hours nominated in Clause 3.2.1 of this agreement.

#### 2.1.3 Part Time Employee

- a) Employees engaged in classifications covered by this Agreement may be employed on a part time basis. Part time employees may be rostered to work in any classification covered by this Agreement, notwithstanding express provisions made under this Agreement for full time shift work hours applicable in each section.
- b) Part time employees shall be rostered for a minimum of 12 hours per week up to a maximum of 38 hours per week and shall have the number of guaranteed hours of work between 12 and 38 stipulated in their letter of appointment or later agreed between the Employer and the employee in writing.
- c) Part time employees shall be entitled to the same terms and conditions of employment as an equivalent full time employee and such entitlements shall be calculated on a pro rata basis according to the ratio of agreed part time hours to equivalent full time hours in an equivalent position or classification.
- d) An existing employee nominated in subclause 1.3.1 may request a temporary variation in the prescribed 12 hour minimum weekly part time hours for health or family reasons for a limited period of up to 18 months and on receipt of such a written request the Employer shall make all reasonable efforts to accommodate the employee's request any approval of which will be given in writing.

#### 2.1.4 Fixed Term Employee

- a) A fixed term employee is engaged for a specific period of time or for a specific task or tasks.

#### 2.1.5 Casual Employee

- a) A casual employee is engaged by the hour for less than one week continuously provided that this shall not include an employee who, when work is available, leaves their employment before the expiry of one week.
- b) A casual employee shall be paid a 20 per cent loading in addition to the Base Hourly Wage Rate prescribed for that classification under Schedule A Wages Table of this Agreement (without annualised leave loading).
- c) A casual employee shall have no entitlement to paid leave or other leave of absence, except for bereavement leave, and shall be informed of these conditions before starting work on these terms.

### **2.2 Probation**

#### 2.2.1 Probation for new employees.

- a) A new employee's appointment to a position in the Public Transport Authority will be subject to a probationary period of six months. The probationary period may be extended by express agreement between the parties.
- b) During the probationary period the employee's work performance will be monitored and advice on performance will be provided to the employee as appropriate. Subject to satisfactory performance an employee's appointment will be confirmed at the conclusion of the probationary period.
- c) During the probationary period, if the employee's performance is considered by the employer to be unsatisfactory, the Employer may terminate the contract of employment by giving the employee one week's notice or payment in lieu of notice.

#### 2.2.2 Probation for current employees.

- a) A current employee's appointment or promotion to a position will be subject to a probationary period of three months. The probationary period may be extended by express agreement between the parties.
- b) During the probationary period the employee's work performance will be monitored and advice on performance will be provided to the employee as appropriate. Subject to satisfactory performance, the employee will be appointed to the position at the conclusion of the probationary period.
- c) During the probationary period:
  - i) if the employee's performance is not satisfactory, the Employer may revert the employee to their previous substantive level by giving the employee one week's notice or payment in lieu of notice; or
  - ii) the employee may request a return to their previous substantive level.
- d) Where an employee returns to their previous level under this subclause, he or she will be given preference to transfer to their original position should a vacancy occur.

### 2.2.3 Preliminary Training

Where initial mandatory off the job training is necessary prior to commencing actual duties on the job at the designated classification level and pay rate, the relevant period of probation will include and will be automatically extended by the length of time required to be spent by the employee in preliminary training courses provided by the Employer.

## 2.3 Ordinary Duties

2.3.1 The Employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competency and training, including work which is incidental or peripheral to the employee's main tasks or functions, provided that such duties are not designed to promote deskilling.

2.3.2 An Employer may direct an employee to carry out such duties and use such tools and equipment as may be required provided that the employee has been properly trained in the use of such tools and equipment.

2.3.3 Any direction issued by an Employer pursuant to sub clauses 2.3.1 and 2.3.2 shall be consistent with the Employer's responsibilities to provide a safe and healthy working environment.

## 2.4 Job Share

2.4.1 The Employer may agree to two employees entering into a job share arrangement where a full time job is shared between the two employees. Applications to job share must be cost neutral to the Employer, and will be assessed on an individual basis for suitability to operational requirements. Employees entering into a job share arrangement must be employed in the same classification and work on the same roster.

2.4.2 The Employer and the relevant employees will enter into a written job share agreement covering operating conditions such as hours of employment, absence from employment due to Annual Leave, Sick Leave and any other relevant matters.

2.4.3 If the arrangement would comply with this Agreement if the work were being done by one employee, then where there is a conflict between the job share agreement and any other provision of this Agreement, the provisions of the job share agreement shall prevail.

2.4.4 The Employer may terminate the job share arrangement by giving four weeks' notice to the relevant employee/s if any of the following events occur:

- a) The employment of one of the employees involved in the job share arrangement is terminated by the Employer or the employee;
- b) The arrangement is no longer consistent with the operational requirements of the business.

2.4.5 In the circumstances of subclause 2.4.4 the job share employee(s) may apply for a full-time position with the Employer.

## 2.5 Higher Duties

2.5.1 An employee who is required by the Employer on a temporary basis to undertake duties attracting a higher rate of pay than the employee's ordinary classification, shall be paid the higher rate on the following basis:

- a) If an employee undertakes the substantial responsibilities of a Higher Position from the commencement of the first shift and the responsibilities of the Higher Position are not shared with other employees, then the employee shall be paid the higher rate of pay for the position from the commencement of the first shift.
- b) If paragraph (a) does not apply, then:
  - i) if the higher duties are performed for more than two (2) hours in any shift, the employee shall be paid the higher rate for the whole shift; and
  - ii) If the higher duties are performed for less than two (2) hours in any shift, the higher rate shall not be paid.
- c) If an employee undertakes the duties of a Higher Position for a period of up to a fortnight, then the employee shall be paid for those shifts at the Base Wage Rate plus any applicable penalties relevant to the Higher Position, including annualised leave loading – not the Aggregated Wage Rate (if applicable).
- d) If an employee undertakes the duties of a Higher Position for a continuous period of a fortnight or more then the employee shall be paid any applicable Aggregated Wage Rate for the Higher Position for that period.
- e) Where an employee undertakes the duties of a Higher Position for all the shifts worked by the employee in a pay period, the employee shall not be paid less in that pay period than the Aggregated Wage Rate (where applicable) or the Base Wage Rate payable in that employee's ordinary classification.

2.5.2 If an employee is required by the Employer on a temporary basis to undertake duties attracting a lower total rate of pay than the employee's ordinary classification, the employee's total weekly wage rate shall not be reduced whilst employed in such capacity.

2.5.3 If an employee is required by the Employer on a temporary basis to undertake higher duties continuously for a period of three months or more then the conditions of employment for that Higher Position, including accrued leave entitlements, shall apply to the employee.

2.5.4 Where an employee who is in receipt of higher duties allowance granted under subclause 2.5.1, and has been receiving the allowance for a continuous period of twelve months or more, proceeds on four weeks annual leave, (or five weeks, in the case of continuous shift employees), the employee shall continue to receive the allowance for the period of the leave.

- 2.5.5 Where an employee who is in receipt of higher duties allowance granted under subclause 2.5.1 and has been receiving the allowance for a continuous period of greater than three months but less than twelve months, and proceeds on any period of annual leave, that employee shall receive the allowance while on leave but only for that proportion of annual leave as accrued during the period of higher duties.
- 2.5.6 An employee who acts at the higher level for a continuous period of 12 months or more and proceeds on a period of normal annual leave or any other approved leave of 5 weeks or more shall be entitled to receive payment of such allowance on a pro rata basis during the period of leave, except for seven day or 24 hour rostered employees who shall receive payment of such allowance on a pro rata basis where the employee proceeds on a period of normal annual leave or any other approved leave of 6 weeks or more.

## **2.6 Information Acquired During Employment**

- 2.6.1 Except as expressly authorised by the Employer and required by the employee's duties, an employee shall not directly or indirectly reveal to any third party any confidential dealings, finances, transactions or affairs of the Employer or any of its clients which may come to the employee's knowledge during the course of employment.
- 2.6.2 The obligation imposed by sub clause 2.6.1 shall continue to apply after the termination of employment without limits in time.
- 2.6.3 All records, documents and other papers, together with any copies or extracts thereof, made or acquired by an employee in the course of employment, shall remain the property of the Employer and must be returned to the Employer on demand or otherwise no later than upon termination of employment.
- 2.6.4 Any changes, innovations and ideas initiated by an employee during the course of employment with the Employer shall belong to the Employer and the employee shall do all such things necessary to completely vest ownership of such matters in the Employer.
- 2.6.5 No Public Comment. An employee will not make any public comment or provide any information or comment to the media or any public forum about the Public Transport Authority's operations, activities, business, procedures or policies.

## **2.7 Unsatisfactory performance**

- 2.7.1 Where an employee engages in an employment related act or omission so that it appears to the Employer that the employee is unable or unwilling to utilise appropriate skills to carry out tasks associated with a particular job competently and in a manner that meets the reasonable expectations and service needs of the Employer, then the matter may be dealt with by the Employer under its Performance Management Policy and Procedure as amended from time to time or under any more specific procedure established by the Employer for unsatisfactory performance of that nature.
- 2.7.2 The outcome of a performance management process may include a transfer, a demotion or a dismissal. Where the Employer applies such an outcome for reasons of unsatisfactory performance, that outcome will not be a disciplinary penalty unless it is expressed to be so by the Employer, and may be reviewed by means of the Dispute Resolution Procedure, including by making an application to the WAIRC to deal with the matter.

## **2.8 Discipline**

### **2.8.1 Definitions**

- a) "Breach of Discipline" includes:
- i) an act of misconduct; or
  - ii) negligence or carelessness of an employee in the performance of his or her functions; or
  - iii) a conviction for an offence listed at subclause 2.8.19;
- b) "Chief Executive Officer" means the Chief Executive Officer or his or her nominated representative, and for the purpose of subclause 2.8.18 or 2.8.21, the Chief Executive Officer may only nominate the Managing Director of the Public Transport Authority or the General Manager.
- c) "First Notification" means a notification given under subclause 2.8.4
- d) "General Manager" means the General Manager, Transperth Train Operations.
- e) "Investigator" will be the person given responsibility to investigate on behalf of the Employer an alleged breach or breaches of discipline by an employee.
- f) "Misconduct" shall have its ordinary meaning.

- 2.8.2 This subclause describes the Employer's disciplinary procedure for dealing with an employee's unacceptable behaviour. The procedure will enable appropriate disciplinary action to be taken to deal with and prevent further unacceptable behaviour. The principles of procedural fairness apply to the Employer's disciplinary procedure.
- 2.8.3 Notwithstanding subclause 2.8.5, an employee will, if called upon, provide any report or statement required by the Employer in relation to an investigation into any incident occurring in the course of the employee's duties. Such a report or statement may be required and provided prior to the Employer determining that it reasonably suspects a breach of discipline and that further action is required.
- 2.8.4 *Step One: First Notification:* Where the Employer reasonably suspects that an employee has committed a breach of discipline, and the Chief Executive Officer decides that further action is required; the Chief Executive Officer must notify the employee of the nature of the suspicion. This first notification:
- a) will be in writing;

- b) will record the date on which the employee's act came to the attention of the Employer, being the earlier of the date on which the General Manager had first knowledge of the act or the date a substantive complaint or report was received by the Manager Investigations;
  - c) will be issued to the employee within 28 calendar days (exclusive of public holidays) of the date on which the act came to the attention of the Employer, failing which, subject to subclause 2.8.26 formal disciplinary action cannot be taken;
  - d) will record the nature of the Employer's suspicion sufficiently clearly to give the employee a reasonable opportunity to submit a written statement of events, an explanation or otherwise respond but need not be a formal allegation and is not required to include or refer to all evidence upon which the suspicion is based;
  - e) will nominate a date by which the employee may provide any response which allows a reasonable opportunity to respond in all the circumstances, provided that a period of 14 calendar days will usually be sufficient;
  - f) will nominate the date by which any disciplinary process must be completed, if formal disciplinary action is pursued, calculated by reference to this date of first notification in accordance with subclause 2.8.25; and
  - g) may also be a formal allegation of breach of discipline, where the Chief Executive Officer considers there are already sufficient grounds to make such an allegation and where it complies with subclause 2.8.11
- 2.8.5 After receiving a first notification, the employee may either respond or advise the Employer that he or she does not propose to respond. Any response provided by the employee will be treated as a preliminary response, taking into account the circumstances in which that response is given. An employee's choice whether to respond to the notification and the nature of the response may be a relevant consideration in any later disciplinary decision.
- 2.8.6 The Chief Executive Officer will consider whether there are sufficient grounds to make a formal allegation of a breach of discipline against the employee and whether the matter warrants being dealt with as a disciplinary matter, taking into account any first notification and any response, and will decide to:
- a) Initiate formal disciplinary action;
  - b) Refer the matter to be managed by the Employer under its Performance Management Policy and Procedure as amended from time to time;
  - c) Issue a warning to the employee that certain conduct is not acceptable (which will not be a finding that such conduct has occurred);
  - d) Refer the employee for counselling or for training and development; or
  - e) Take no further action.
- 2.8.7 The Employer will inform the employee in writing of the Chief Executive Officer's decision, including where relevant any finding by the Chief Executive Officer that there had not been a breach of discipline.
- 2.8.8 *Step Two: Formal Allegation of Breach Of Discipline:* Where the Chief Executive Officer decides to initiate formal disciplinary action, the Employer will notify the employee of the formal allegation of a breach of discipline against the employee and the notification will:
- a) be in writing;
  - b) record the nature of the allegation against the employee;
  - c) nominate the date by which any disciplinary process must be completed, recalculated in accordance with subclause 2.8.26; and either:
  - d) advise the employee that the allegation will be the subject of further investigation; or
  - e) where the employee's response to the first notification was an admission, advise the employee of any proposed adverse finding in relation to that allegation, which advice will comply with subclause 2.8.17.
- 2.8.9 *Step Three: Formal Disciplinary Investigation:* An Investigator conducting any disciplinary investigation may determine the procedure followed and will conduct the investigation with as little formality and technicality as the principles of procedural fairness, substantial compliance with the Employer's applicable policies and procedures and the circumstances of the matter permit.
- 2.8.10 An employee will, if called upon, provide any report or statement and/or attend an interview with the Investigator in relation to an investigation into a breach of discipline and will follow any lawful and reasonable instructions given by the Chief Executive Officer for the purposes of investigating the suspected breach.
- 2.8.11 An employee who is believed to be a witness to a suspected breach of discipline will, if called upon, follow any lawful and reasonable instructions given by the Chief Executive Officer for the purposes of investigating the suspected breach.
- 2.8.12 During a discipline process an employee may have an independent support representative present at any meeting. However that representative is only to provide support and is not to engage in the discussion unless the person conducting the investigation deems it appropriate to do so. The representative must be reasonably available and cannot be a person involved in the matter under investigation.
- 2.8.13 If during the course of an investigation it comes to the attention of the Employer that the employee may have committed other breaches of discipline which are not the subject of the investigation and which had not previously come to the attention of the Employer, then the Employer may investigate those matters. If the allegation or allegations are investigated as part of the investigation already being conducted, then the disciplinary process into the additional allegation or allegations will not be invalid for non-compliance with subclauses 2.8.4 to 2.8.8 but the Employer must

- inform the employee of any additional allegation in writing, the employee must be given a proper opportunity to the respond to the allegation and procedural fairness must be accorded to the employee in relation to any additional allegation. Where subclauses 2.8.4 to 2.8.8 are not complied with, the time for completion of the discipline process in relation to any additional allegation will be calculated from the date of the first notification of the initial allegation being investigated. Where subclauses 2.8.4 to 2.8.8 are complied with, the time for completion of the discipline process in relation to any additional allegation will be calculated from the date of the first notification of the additional allegation.
- 2.8.14 The Investigator will at the conclusion of the investigation report to the Chief Executive Officer on the investigation and on the findings open to the Chief Executive Officer.
- 2.8.15 At any time during or at the conclusion of the investigation, the Chief Executive Officer may decide to:
- a) Refer the matter to be managed by the Employer under its Performance Management Policy and Procedure as amended from time to time;
  - b) Issue a warning to the employee that certain conduct is not acceptable (which will not be a finding that such conduct has occurred);
  - c) Refer the employee for counselling or for training and development; or
  - d) Take no further action.
- 2.8.16 The Employer will inform the employee in writing of any such decision and the reasons for the decision, including where relevant any finding by the Chief Executive Officer that there had not been a breach of discipline.
- 2.8.17 *Step Four: Opportunity to Respond to Proposed Adverse Finding and any Proposed Penalty:* The Chief Executive Officer will advise the employee of:
- a) any proposed adverse finding in relation to the allegation of breach of discipline made against the employee or any other breaches of discipline which came to the attention of the Employer in the course of the investigation;
  - b) the results of the investigation and the evidence relied upon by the Chief Executive Officer in support of the proposed finding;
  - c) the range of penalties the Chief Executive Officer is considering applying if the finding is confirmed;
  - d) the time within which the employee is required to provide any written response as to the finding and as to the appropriate penalty, which will be not less than 14 days; and
  - e) the date by which any disciplinary process must be completed, recalculated in accordance with subclause 2.8.26
- 2.8.18 *Step Five: Final Determination:* After receiving any response from the employee to the advice of proposed adverse findings, or after the nominated date by which the employee was required to provide any response, the Chief Executive Officer will review the evidence, including the employee's response, and make a final determination on the allegation of breach of discipline and decide which if any penalty from the list of penalties in subclause 2.8.21 should be applied.
- 2.8.19 *Criminal Conviction of an Employee:* The Chief Executive Officer is able to take disciplinary action against employees who have been convicted of:
- a) offences which involve:
    - i) fraud or dishonesty; or
    - ii) wilful damage to or destruction of the property of others;
  - b) offences which are committed against the persons of others; or
  - c) offences which are punishable on conviction by imprisonment for two years or more.
- 2.8.20 An employee who has been convicted of such an offence shall notify the Employer and such a conviction may be taken as if a breach of discipline has been found to have been committed so that no further disciplinary investigation or finding is required. The Chief Executive Officer may choose to apply any of the penalties listed at subclause 2.8.21, subject to subclause 2.8.22. The Chief Executive Officer shall write to the employee and advise if he or she proposes to apply any penalty and the employee is to be provided with an opportunity to respond prior to a final determination as to penalty being made.
- 2.8.21 *Penalties:* Where a breach of discipline has been found to have been committed, the Chief Executive Officer may apply any of the following penalties:
- a) No penalty;
  - b) A reprimand (which may include a final reprimand);
  - c) A permanent or temporary transfer to another location within the Employer's business or to another employment position within the Employer's business, including to a position to which this Agreement does not apply;
  - d) A permanent or temporary demotion or reduction to a lower increment or to a lower grade or position to which this Agreement applies;
  - e) A permanent or temporary demotion to another position to which this Agreement does not apply; and/or
  - f) Dismissal.
- 2.8.22 The type of penalty applied must be proportionate to the conduct which gave rise to the breach of discipline or must be reasonably suitable in consideration of all of the circumstances of the case.

- 2.8.23 *Appeal:* Where a breach of discipline has been found to have been committed, the employee found guilty of the breach of discipline, shall have a right to appeal the decision of the Chief Executive Officer and any associated penalty, by notification and direct referral of a dispute to the WAIRC by a party on the employee's behalf under subclause 8.1.5 of this Agreement.
- 2.8.24 *Stand Down from Operational Duties:* During the course of an investigation, an employee may be stood down from Operational duties. The Chief Executive Officer may provide alternative duties or allow the employee not to attend the workplace. Where the employee is a shift employee, the employee will be paid a wage equivalent to weekly base rate plus afternoon shift penalties until a final determination is made. If a finding of breach of discipline is not made against the employee, the employee will be paid the difference between the weekly base rate plus afternoon shift penalties and the average of the employee's weekly pay in the three months prior to date the employee was stood down from operational duties.
- 2.8.25 *Time Frames:* The discipline process shall be completed within six months from the date of the first notification, or within such other extended period of time as is provided for in this Agreement.
- 2.8.26 The minimum periods specified in this subclause 2.8 in which a notification is to be given or a determination is to be made will be extended:
- By reason of a delay caused by the employee or their representative, to the extent of the delay;
  - By reason of the absence from duty of the affected employee through sickness or other authorised leave, to the extent of that absence;
  - By reason of the suspension of the Employer's disciplinary process during an investigation of the allegation by Police or by the Corruption and Crime Commission, to the extent of the duration of that investigation; or
  - By mutual agreement between the parties.

## 2.9 Stand Down

- 2.9.1 The Employer is entitled to stand down the employee and not pay the employee for the day or part of a day where the Employer is unable to provide useful work for the employee on that day or for that part of the day as a result of:
- industrial action, whether or not on the part of the Employer's employees; or
  - any cause outside of the Employer's control.
- 2.9.2 Subject to the Employer's approval the employee may elect to have the day or part of a day paid as annual leave provided the employee has such leave entitlement.

## 2.10 Termination

- 2.10.1 Subject to this subclause 2.10, the employment of an employee may be terminated by the Employer or employee giving notice as provided in the following table:

Employee's period of continuous service with the Employer	Period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

- 2.10.2 Where the employee is aged over 45 years and has more than two years continuous service, the period of notice shall be five weeks.
- 2.10.3 Where mutually agreed a shorter period of notice may be given without payment, or forfeiture of pay in lieu.
- 2.10.4 If the appropriate notice period is not given, payment or forfeiture of pay in lieu of the notice prescribed above shall be made. Employment may be terminated by part of the period of notice specified and providing part payment in lieu thereof. Wages so forfeited by the employee may be deducted from any wages due to such employee up to the time of the employee leaving the service of the Employer.
- 2.10.5 In calculating any payment or forfeiture of pay in lieu of notice, the wages an employee would have received in respect of the ordinary time they would have worked during the period of notice had their employment not been terminated shall be used.
- 2.10.6 Summary Dismissal. The Employer has the right to dismiss any employee without notice for serious misconduct and in such cases any entitlements under this Agreement are to be paid up to the time of dismissal only.
- 2.10.7 Subclauses 2.10.1 and 0 do not apply to casual employees, fixed term employees, probationary employees or trainees.
- 2.10.8 The employment of a casual employee may be terminated by one (1) hour's notice given by the Employer or the employee on any day.

## 2.11 Redundancy

- 2.11.1 The parties acknowledge that the Public Sector Management (Redeployment and Redundancy) Regulations 1994 or any relevant provisions replacing those regulations would apply to employees covered by this agreement.

### **3 HOURS OF WORK**

#### **3.1 Relationship Between General and Special Provisions**

3.1.1 The following general provisions of this clause shall apply in conjunction with special provisions for designated occupational groups under subclauses 3.4 to 3.5 and to the extent of any inconsistency the special provisions shall prevail.

#### **3.2 Hours of Work: General**

3.2.1 The ordinary hours of work for full time employees shall be an average of 40 hours per week averaged across a fortnight from the beginning of the roster cycle.

3.2.2 The maximum spread of hours shall be twelve hours, but the Employer shall arrange so far as practicable that shifts not exceed ten hours, except in cases of emergency when relief cannot be provided. The minimum length of a rostered ordinary shift shall be six hours, but the minimum hours for an additional shift shall be in accordance with subclause 3.6.6.

#### **3.3 Rostering Arrangements: General**

3.3.1 Ordinary hours shall be worked as continuous shift work Sunday to Saturday so that ordinary shifts and additional shifts may be worked on any day of the roster cycle.

3.3.2 The period of the roster cycle will be at the Employer's discretion, and will be deemed to be two weeks, unless the Employer specifies otherwise in the Base Roster.

3.3.3 Where the period of the roster cycle is two weeks, employees shall be rostered to work up to a maximum of ten (10) ordinary shifts per fortnight and will be rostered two Protected Days Off in each roster cycle. Where a different length of roster cycle is in place the maximum number of ordinary shifts per cycle and the number of Protected Days Off will be varied proportionately based on the prescription for two (2) weeks.

3.3.4 When the Employer is intending to introduce a change to the roster cycle under subclause 3.3.2 or significant permanent changes to shift patterns under subclause 5.1, for a group of employees, the Employer shall:

- a) give 21 days' notice of the start date to employees who would be affected by the change;
- b) consult with the Consultative Committee;
- c) advise the Union in accordance with Clause 7.2 – Introduction to Change; and
- d) take into consideration the views expressed by the employees, the Consultative Committee and the Union prior to implementing the change.

3.3.5 Base Roster: The Employer shall construct a Base Roster for each employee group following consultation with the elected Employee Rostering Representative for that group.

3.3.6 Base Rosters will:

- a) be readily available for perusal by employees;
- b) show lines of work for all rostered employees for a typical roster cycle;
- c) Show work day and rostered day off patterns and show start and finish times for each line of work;
- d) comply with fatigue management principles;
- e) be balanced, to the extent that it is reasonably practicable, so that all employees work a similar number of hours over the roster cycle;
- f) make all reasonable endeavours to maximize the number of weekends off in a roster cycle, to the extent that this is practicable taking into account the constraints and operational requirements for employees working 24/7 shift work;
- g) provide for Balanced Weeks where the conditions of subclause 3.3.7 are satisfied; and
- h) only be modified to accommodate changes expected to persist for at least three months.

3.3.7 Where the majority of employees to whom a Base Roster applies have notified the Employer prior to the implementation of a modification to that Base Roster that they would prefer their roster to provide for Balanced Weeks, then any modification to the Base Roster will provide for Balanced Weeks. A Base Roster will provide Balanced Weeks where an employee is not rostered to work more than 43 ordinary hours in any week of the roster cycle. Where the Employer receives later notification from the majority of employees to whom a Base Roster applies that they do not prefer their roster to provide for Balanced Weeks, then any modification to the Base Roster following that notification need not provide for Balanced Weeks.

3.3.8 Where the Employer proposes to implement a modified or new Base Roster, the Employer shall:

- a) give 3 weeks' notice to employees who would be affected by the change
- b) advise the Union, and consult with the Union regarding amendments which may be necessary to:
  - i) any Aggregated Wage Rate, under subclause 4.3; or
  - ii) annual leave loading calculations under subclause 6.3.9e); and
- c) Advise the Employee Committee Representatives on the Consultative Committee.

- 3.3.9 Operational Roster: The Employer shall post the operational roster at least two weeks prior to the day of its implementation. The Employer shall post a revised operational roster to incorporating approved "shift changes" and any other known operational contingencies at least 5 days prior the day of its implementation.
- 3.3.10 The Operational Roster:
- a) Is the actual roster that the Employer is requiring the employees to work and will show all shifts to be worked for the period of the roster;
  - b) Shall be based on employees working through each line of work on the Base Roster in sequence;
  - c) Shall take into account leave and other authorised absences and any other temporary customer, operational or organisational requirements including public holidays, special events and training;
  - d) shall display shift start and finish times and locations;
  - e) Shall not roster an employee to work an ordinary hours shift on a day shown on the Base Roster as a Protected Day Off or other rostered day off unless:
    - i) the employee has agreed to work that day;
    - ii) the employee is shown as working a relief line on the Base Roster and required to relieve another rostered employee; or
    - iii) the employee has been given at least four weeks' written notice of the Employer's intention to roster an ordinary shift on that day and the shift is required for employee training, or during Perth Royal Show or for another reason agreed between the Parties.
  - f) May at the time of initial posting include rostered overtime for an employee of up five hours in a fortnight or an additional rostered shift of up to eight hours for the purposes of a Special Event or other temporary operational requirements; and
  - g) Shall comply with Fatigue Management Principles.
- 3.3.11 The operational roster may be altered by the Employer during the roster cycle provided the Employer consults the affected employee or employees and:
- a) The affected employee agrees; or
  - b) The alteration is due to operational requirements which were not reasonably foreseeable and the Employer makes reasonable efforts to accommodate the views of the affected employee, where it is practicable to do so. Examples of such operational requirements include, but are not limited to, late notice of special event details or unplanned employee absences. Reduction of the length of a shift to avoid paying overtime for the extension of another shift within the roster cycle is not an alteration due to operational requirements for the purpose of this provision.
- 3.3.12 Where the Employer alters the operational roster during the roster cycle to extend the length of a shift and at least 48 hours' notice has been given of that alteration, then no overtime shall be payable by reason of that extension unless the extension causes the rostered hours worked in the fortnightly cycle to exceed or further exceed eighty (80) hours, not including hours paid as additional hours.
- 3.3.13 *Mutual Roster Changes*: Employees rostered on the same roster may apply in accordance with this provision to exchange shifts.
- 3.3.14 Any application to exchange shifts shall:
- a) be made in writing and signed by both employees in the form (if any) required by the Employer;
  - b) nominate ordinary time shifts within the same roster cycle
  - c) nominate shifts the exchange of which will not breach fatigue management principles for either employee;
  - d) be provided to the rostering officer nominated by the Employer at least 7 days before the implementation of the operational roster, provided that in exceptional unforeseen circumstances the rostering officer may approve a "late" shift exchange application to exchange shifts on the proviso that the application is received no later than 48 business hours prior to the earliest of the shifts commencing.
- 3.3.15 Applications will be considered on behalf of the Employer by the nominated rostering officer who will advise the applicant employees in writing whether their application has been accepted. The decision whether to accept a shift exchange application is in the discretion of the Employer, but at least one application per employee per roster cycle will not be unreasonably refused.
- 3.3.16 Where a shift exchange application is accepted:
- a) Implementation of the shift exchange will be cost neutral to the employer;
  - b) Each applicant employee will be paid for the ordinary hours and any shift allowances or weekend penalties applicable to the hours the employee actually worked; and
  - c) Overtime penalties or make-up pay shall not be paid to the applicant employees where it is caused by the exchange of shifts.

- 3.3.17 The following procedures shall be applied to employees rostered on duty and not required:
- a) Employees booked on duty but informed before the end of sign-on time that they are not required to commence duty: they will be paid two hours pay at the Base Hourly Wage Rate or, where applicable, the Aggregated Wage Rate; and may be called upon for further duty without any further prescribed period of rest.
  - b) When employees are rostered on duty and not required, the following provisions apply: Employees booked on duty will not be entitled to any allowance when at least two hours' notice that they are not required has been given to the employee. The Employer may notify employees by telephone, or by other such means as may be agreed between the Employer and the employee.
  - c) An employee shall not unreasonably refuse to work any rostered shift. An employee who fails to work a rostered shift shall not be paid for the shift and the absence may be investigated by the Employer. If the failure to work constitutes misconduct, the Employer may take disciplinary action against the employee. If there are other reasons for the absence, the Employer shall discuss with the employee any reasonable and appropriate means of addressing the issue, which may include but is not limited to: leave of absence, transfer, or regression, depending on all of the circumstances at the time.
- 3.3.18 Employee Rostering Representatives will be elected for each group employees on each roster. The Employee Rostering Representative positions as at the date of registration of this Agreement are listed at Schedule E. The parties may agree to change the positions to be elected to reflect changes in work organisation and any such agreement shall be recorded in writing. Any employee permanently working on a roster at the time of the election shall be entitled to nominate and vote for the employee rostering representative position for that roster. Elections shall be optional preferential ballots and shall be conducted in a manner agreed between the parties and failing agreement shall be conducted by the WA Electoral Commission or another independent body. The elected Employee Rostering Representative will hold the position for a two year term. Where a position falls vacant before the expiry of a term, the vacancy for the remainder of the term shall be filled in a manner agreed between the parties.
- 3.3.19 Where it is contended that employees working a roster have been disadvantaged because the Employer has not complied with the requirements of this subclause 3.3, the Employer shall discuss these issues with the elected Employee Rostering Representative for that group and with the Union, and will note the issue and any resolution on the agenda of the next meeting of the Consultative Committee. The Dispute Resolution Procedure will remain available to any affected employee or the Union.

#### **3.4 Special Provisions: Customer Service Branch**

- 3.4.1 Relief Lines on Customer Service Base Rosters will show "default" start/finish times and day on/day off patterns to be worked by the employee working each relief line if the employee is not required to cover leave, other absences or other temporary customer, operational or organisational requirements including public holidays, special events or training within a specific operational roster period.
- 3.4.2 There shall be a maximum of 12 ordinary rostered hours per shift.
- 3.4.3 Where a full time Customer Service Assistant /Passenger Ticketing Assistant works for more than 10 ordinary hours in a rostered shift ending from midnight Sunday to midnight Friday, a Long Shift Allowance shall be paid for time worked from the commencement of the eleventh rostered hour worked. The allowance will be paid at the rate of 0.84 times the Base Wage Rate.
- 3.4.4 Rostered ordinary shifts for Customer Service Assistants/Passenger Ticketing Assistants shall not be less than six (6) ordinary hours, but the Employer shall not roster successive six (6) hour shifts over a twelve hour period.

#### **3.5 Special Provisions: Central Monitoring Room Operators**

- 3.5.1 The ordinary hours for Central Monitoring Room Operators are currently worked on a rotating 24/7 continuous shift roster, Sunday to Saturday, so that subclause 5.1.1 is applicable.
- 3.5.2 In the event that a Central Monitoring Room Operators is required to work an additional shift and the shift is cancelled within 2 hours of its starting time, the employee will be compensated by payment of two hours' pay at the Aggregated Wage Rate.

#### **3.6 Overtime and Penalty Rates**

- 3.6.1 Additional Hours Overtime: Additional hours overtime is time worked by a full time or part time employee at the request of the Employer in excess of the employee's ordinary rostered hours *for the cycle*, including:
- a) time worked in excess of the rostered hours for a shift; and
  - b) shifts worked in addition to those rostered.
- 3.6.2 The Employer shall endeavour to allocate additional shifts to employees on a reasonable and equitable basis.
- 3.6.3 Reasonable Additional Hours: the Employer may require any employee to work reasonable overtime and the employee shall work overtime in accordance with such requirement. Where an employee is requested or rostered to work:
- a) additional hours immediately before or after the employee's rostered ordinary hours the employee shall not unreasonably refuse the request provided that the employee will not be required to remain on duty for more than two hours beyond the employee's rostered shift except in cases of emergency; and

- b) one additional shift per fortnightly roster cycle or additional shifts to meet exceptionally busy periods including, but not restricted to: Australia Day; Royal Show Week; Christmas Pageant; Major Sporting Events (e.g. football matches, soccer, rugby) and New Year's Eve, the employee shall not unreasonably refuse the request.
- 3.6.4 An employee shall be under no obligation to work an additional shift on a rostered day off shown on the Base Roster as a Protected Day Off. However, should an employee agree to work on their Protected Day Off, the employee will be paid at usual additional hours overtime rates. Notwithstanding this provision, under subclause 3.3.10e) the Employer can roster an ordinary hours shift on a day shown on the Base Roster as a Protected Day Off in the circumstances nominated in that provision.
- 3.6.5 Neither the Union nor any employee or employees to whom this Agreement applies shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements set out in subclause 3.6.3 hereof.
- 3.6.6 A full time shift work employee required to come into work for an additional shift will be paid a minimum of five hours pay at the rate applicable to the day. A part time shift work employee required to come into work for an additional shift will be paid a minimum of four hours pay at the rate applicable to the day.
- 3.6.7 Where an employee wishes to refuse to work requested or rostered overtime, the employee should notify the Employer at the time the overtime is requested or within 48 days of the roster being posted. Where the Employer determines an employee's refusal to be unreasonable and confirms the reasons for that determination to the employee in writing, the employee shall work the additional overtime as directed unless it is resolved otherwise under subclause 3.3.19 or under the Dispute Resolution Procedure prior to the shift.
- 3.6.8 Overtime Penalties:
- a) Additional hours worked as overtime midnight Sunday to midnight Friday shall be paid at the following rates:
- i) 1.84 times the Base Wage Rate for employees whose wages are not aggregated;
  - ii) 1.5 times the Aggregated Wage Rate for full-time employees whose wages are aggregated; and
  - iii) 1.7 times the Aggregated Wage Rate for part time employees whose wages are aggregated.
- b) additional hours worked on a Saturday or a Sunday shall be paid at:
- i) Double the Base Hourly Wage Rate for employees whose wages are not aggregated
  - ii) Double the Aggregated Wage Rate employees whose wages are aggregated; and
- c) Where more than one penalty applies to time worked, the highest penalty only will be paid.
- 3.6.9 Weekend Penalties: The following rates shall apply:
- a) Ordinary time worked on Saturday by continuous 24/7 shiftwork employees shall be paid at a rate of an additional fifty (50%) percent loading on the Ordinary Wage Rate.
  - b) Ordinary time worked on Sunday shall be paid at the rate of double the Ordinary Wage Rate.
  - c) Where a shift commences on one day and concludes on the following day, hours will be paid at the rate applicable to the day on which they were worked.
- 3.6.10 Penalties for Working on Public Holidays:
- a) Employees required to work on a Public Holiday shall, subject to sub clause 6.1.4, be paid at the rate of double time and a half, calculated on the ordinary rate, for all time worked on that day in lieu of all other penalties which may be payable for work on that day under this agreement.
  - b) Where an employee works into a day which is a Public Holiday, but does not work later than 0400 hours on the Public Holiday, the employee will be deemed not to have worked on a Public Holiday for the purposes of subclause paragraph a).

### 3.7 Shift Breaks

- 3.7.1 An employee who works a shift which is greater than five hours in duration shall be entitled to a paid shift break of twenty (20) minutes in duration, with five (5) minutes allowed either side of that break.
- 3.7.2 The Employer may stagger the time of shift breaks to meet operational requirements. Shift breaks shall not be rostered to commence before the third or after the fifth hour of duty.
- 3.7.3 An employee shall not be required to work longer than five (5) hours without a shift break, other than for special operational requirements such as delayed train services or emergencies.
- 3.7.4 Reasonable alternative shift break arrangements may be agreed between the parties to this Agreement after consultation with the employees affected, and where entered into, written records kept of any such alternative agreed arrangements and the period over which they would apply.
- 3.7.5 An employee shall be allowed a second shift break of twenty minutes without loss of pay where it is expected that the employee will work beyond ten hours in any one shift or has worked such hours extending beyond ten. The Employer shall make suitable arrangements for the employee to take the second shift break.

### 3.8 Minimum Time Off Duty

- 3.8.1 Subject to this subclause 3.8, an employee shall be allowed off duty for a minimum of ten hours.

- 3.8.2 No employee shall be called or booked up for duty without having been allowed the minimum period off duty while there is another qualified employee available who has had the minimum period off duty.
- 3.8.3 When an employee is brought back on duty without having been allowed the minimum period off duty, such employee shall:
- a) be paid at double time rates for all time worked from the commencement of his previous shift until released from duty, and
  - b) then be entitled to be absent until the employee has had the minimum period off duty without loss of pay for any time the employee had been rostered to work during such absence.

### **3.9 Guaranteed Week's Work**

- 3.9.1 Full Time Employees: The Employer shall guarantee each full time employee a full week's work of no less the ordinary hours nominated in subclause 3.2 or any applicable special provision averaged across the employee's roster. If the ordinary hours vary across a roster, but remain an average of the nominated ordinary hours, then those hours constitute the guaranteed full week's work and there is no obligation on the Employer to add extra "make up time" to the weekly wage rate for the purposes of bringing one week's total up to the nominated ordinary hours.
- 3.9.2 Part Time Employees: The Employer shall guarantee each part time employee a week's work of:
- a) twelve (12) ordinary hours; or
  - b) the higher number of hours per week expressly agreed in writing from time to time with the employee or the hours rostered for that employee, whichever is greater.
- 3.9.3 Exceptions: The guaranteed week may be reduced as follows:
- a) Any period where the Employer is wholly or partially unable to carry on the running of the trains by reason of any actions on the part of any employee or group of employees or for any other cause which is beyond the Employer's control;
  - b) Any period that an employee's hours are varied or not worked due to workers compensation, other authorised leave of absence for disciplinary reasons.

## **4 WAGES**

### **4.1 Wage Rates**

- 4.1.1 The Base Wage Rates (rounded to 2 decimal points) applying to positions covered by this Agreement are shown in *Schedule A: Wages Table* of this agreement.
- 4.1.2 The Ordinary Wage Rates are the Base Wage Rates plus any applicable annualised leave loading, calculated by multiplying the flat rate by 1.013 or 1.019 as the case may be. The product then forms the Ordinary Wage Rates under this Agreement.
- 4.1.3 Casual Wage Rates: The ordinary hourly wage rates for casual employees do not include annualised leave loading, penalties or other allowances, but do include a 20% loading on the Base Hourly Wage Rates listed in Schedule A.
- 4.1.4 Trainees: The wage rate applicable to Trainees shall be 85% of the Base Wage Rate applicable to the base classification of the calling for which the employee is being trained. This rate will apply to a Trainee for the duration of the training period. Where a Trainee is required to work such hours and/or shifts that ordinarily would attract penalty payments, the Trainee shall be paid the penalty rates calculated on the Trainee rate in this sub clause.
- 4.1.5 Workers Compensation: An employee, who in the course of performing their duties sustains a compensable injury under the *Workers Compensation Act 1981*, shall receive workers compensation payments in accordance with the *Workers Compensation and Injury Management Act 1981* or its replacement.

### **4.2 Wage Increases**

- 4.2.1 An Employee who is employed by the Employer on the date of registration of this Agreement will, on registration of the Agreement, receive a payment equivalent to the 2.75% additional wage that would have been paid had the wages in Schedule A of this Agreement been paid on and from 4<sup>th</sup> September 2014.
- 4.2.2 The second wage increase of 2.5% shall operate on and from 4<sup>th</sup> September 2015.
- 4.2.3 The third wage increase of 2.5% shall operate on and from 4<sup>th</sup> September 2016.
- 4.2.4 The wage increases provided in this Agreement are in full and final settlement of productivity improvements up to the date of commencement of the Agreement.
- 4.2.5 An Employee who resigns or retires or whose employment is otherwise terminated prior to the registration of this Agreement is not entitled to the retrospective payment provided in subclause 4.2.1.

### **4.3 Aggregation Of Wages**

- 4.3.1 Shift penalties and other allowances may be aggregated and added to the Base Wage Rate to establish an Aggregated Wage Rate. On registration of this Agreement, Aggregated Wage Rates are in place for Central Monitoring Room Operators and Customer Service Assistants.
- 4.3.2 Aggregated shift and weekend penalties are the total allowances and penalties for a shift work roster, averaged across all employees working over a full roster cycle, with annual leave discounted to enable Aggregated Wage Rates to be paid to employees on annual leave.

- 4.3.3 The Aggregated Wage Rate may include overtime rostered in the Base Roster where the Parties agree that it be included.
- 4.3.4 The methodology relating to the Aggregated Wage Rate calculations is described in detail in *Schedule C: Aggregation Methodology* of this Agreement.
- 4.3.5 While this Agreement is in force, notwithstanding subclause 4.3.4, the Aggregated Wage Rate for Customer Service Assistants rostered to work on the Armadale, Fremantle, Joondalup, Mandurah and Midland line rosters shall be calculated as if those Base Rosters were a single roster, provided that if a majority of all of those employees rostered to work on the Armadale, Fremantle, Joondalup, Mandurah and Midland line rosters notify the Employer that they wish to have their Aggregated Wage Rate recalculated based upon separate Base Rosters, then this subclause shall cease to have effect.
- 4.3.6 Where shift penalties and other allowances are not aggregated, penalties and allowances for ordinary shifts will be calculated and paid for individual employees based on the shifts actually worked by those employees.
- 4.3.7 Changes to Aggregated Wage Rates:
- a) This subclause applies where
    - i) the Employer modifies the Base Roster for a group of employees who are paid an Aggregated Wage Rate; and
    - ii) the roster modification will result in a difference of greater than five percent between that Aggregated Wage Rate and the sum a non-aggregated employee would be paid for the same period averaged over the modified Base Roster.
  - b) Where this subclause applies, the Employer will:
    - i) determine a new Aggregated Wage Rate in consultation with the Union using the methodology described in *Schedule C: Aggregation Methodology*;
    - ii) document any amendments to Aggregate Wage Rates in an Industrial Circular, a copy of which will be supplied to the Union;
    - iii) provide two weeks' notice of any reduction in Aggregated Wage Rates.
    - iv) pay the amended Aggregated Wage Rate from the first pay period commencing on or after the implementation of the modified Base Roster.

#### **4.4 Payment Of Wages**

- 4.4.1 Wages shall be paid fortnightly.
- 4.4.2 All wages shall be paid into accounts nominated by the employee with a bank, building society or credit union.
- 4.4.3 Overpayments: If an employee is required to repay an amount to the Employer, the amount to be repaid from any fortnightly pay will not exceed 10% of the employee's gross rostered pay unless another arrangement has been agreed to between the Employer and the employee. The repayment may be for, but not limited to, overpayment of Base Wage Rate, additional shifts, or allowances.
- 4.4.4 Underpayments: Where the Employer is informed by an employee that the employee has not been paid the full amount of remuneration due to the employee in a fortnightly pay the Employer shall quickly investigate the matter. Where an underpayment is confirmed and determined to be the fault of the Employer, the Employer shall pay the shortfall to the employee in the next fortnightly pay.
- 4.4.5 Where an employee can demonstrate that the employee has incurred a financial penalty due to the non remittance of remuneration by the day provided for in sub clause 4.4.1 to the nominated financial institution as provided for in sub clause 4.4.2 the employee may recoup the penalty from the Employer unless the late remittance was:
- a) Due to actions (or inactions) of the employee such as the late or non submission of banking information or of applicable timekeeping or other information evidencing the employee's entitlement to the remuneration; or
  - b) Due to no fault of or events outside the control of the Employer, such as bank funds transfer errors.
- 4.4.6 For the purpose of this clause, the Employer will not be responsible for any penalty incurred by an employee for non-remittance of funds into a Trust Account operated by the administrator, where the employee has entered into remuneration packaging arrangement.

#### **4.5 Remuneration Packaging**

- 4.5.1 An employee may, by agreement with the Employer, enter into a remuneration packaging arrangement in accordance with the Employer's Salary Packaging Guidelines and Agreement or any similar remuneration packaging arrangement offered by the Employer.
- 4.5.2 Remuneration packaging is an arrangement whereby the entitlements under this agreement, contributing toward the Total Employment Cost (as defined) of an employee, can be reduced by and substituted with another, or other benefits.
- 4.5.3 For the purposes of this clause, Total Employment Cost (TEC) is defined as the cost of salary and other benefits aggregated to a total figure or TEC, less the cost of Compulsory Employer Superannuation Guarantee Contributions.
- 4.5.4 The TEC for the purpose of remuneration packaging, is calculated by adding:
- a) The base salary;
  - b) other cash allowances, e.g. Annual leave loading

- c) non cash benefits, e.g. Superannuation, motor vehicle etc.
  - d) any Fringe Benefit tax liabilities currently paid; and
  - e) any variable components, where commuted or annualised.
- 4.5.5 Where an employee enters into a remuneration packaging arrangement the employee will be required to enter into a separate written agreement with the Employer that sets out the terms and conditions of the arrangement, including an irrevocable signed agreement to allow the Employer to deduct from the employee's wages any outstanding liabilities to be paid.
- 4.5.6 Notwithstanding any remuneration packaging arrangement the wage rates specified in Schedule A are the basis for calculating related entitlements specified in this Agreement.
- 4.5.7 The remuneration packaging arrangement must be cost neutral in relation to the total cost to the Employer.
- 4.5.8 The remuneration packaging arrangement must also comply with relevant taxation laws and the Employer will not be liable for any additional tax, penalties or other costs payable or which may become payable by the employee.
- 4.5.9 In the event of any increase or additional payments of tax or penalties associated with the employment of the employee or the provision of Employer benefits under the remuneration packaging arrangement, such tax, penalties and any other costs shall be borne by the employee.
- 4.5.10 In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to arrangements under this clause, the employee may vary or cancel a remuneration packaging arrangement.
- 4.5.11 The cancellation of a remuneration packaging arrangement will not cancel or otherwise affect the operation of this Agreement.
- 4.5.12 The Employer shall not unreasonably withhold agreement to remuneration packaging on request from an employee.
- 4.5.13 The Dispute Resolution Procedure contained in this Agreement shall be used to resolve any dispute arising from the operations of this clause.

#### **4.6 Deferred Wages Arrangement**

- 4.6.1 With the written agreement of the Employer, an employee may elect to receive, over a four-year period, 80% of the wage the employee would otherwise be entitled to receive in accordance with the relevant Agreement.
- 4.6.2 The Employer will assess each application for deferred salary on its merits and give consideration to the personal circumstances of the employee seeking the leave.
- 4.6.3 On completion of the fourth year, an employee will be entitled to 12 months leave and will receive an amount equal to 80% of the wage they were otherwise entitled to in the fourth year of deferment.
- 4.6.4 Where an employee completes four (4) years of deferred wage service and is not required to attend duty in the following year, the period of non-attendance shall not constitute a break in service and shall count as service on a pro-rata basis for all purposes.
- 4.6.5 An employee may withdraw from this arrangement prior to completing a four year period by written notice. An employee will receive a lump sum payment of wages forgone to that time but will not be entitled to equivalent absence from duty.
- 4.6.6 The Employer will ensure that superannuation arrangements and taxation effects are fully explained to the employee by the relevant authority. The Employer will put any necessary arrangements into place.

#### **4.7 Classification Structure**

- 4.7.1 The classifications of employees covered by this Agreement are based on the following criteria:
- a) Job requirements defined by the role, responsibilities, indicative tasks and qualifications;
  - b) AQF training and Competency Levels which are essential to perform the position, and
  - c) Relativities with Metal Trades Award classifications.

- 4.7.2 The Wages Table at Schedule A lists the classifications covered by this Agreement.

#### **4.8 Relationship Between Job Description Forms and Classification Definitions**

- 4.8.1 The role, responsibilities, duties and qualifications required in a position shall be defined by the Job Description Form (JDF) for the position, which for the life of this agreement will prevail over the Award Classification Definitions to the extent of any inconsistency in relation to the position's role, responsibilities, duties and qualifications.
- 4.8.2 The title of a position nominated in its Job Description Form (JDF) may vary slightly from the job titles used in the Classification Definitions for purposes such as marketing and advertising, but shall refer to the relevant job title in the Classification Definitions.
- 4.8.3 The parties agree that a review of the drafting of the Award's classification definitions can be conducted during the life of the Agreement.

#### **4.9 Reclassification And Review**

- 4.9.1 An existing position classified under this Agreement may be reclassified to a different level if there is a significant change in the work value after considering the role, skills and knowledge required in the position as would warrant a change in

classification level Any application for reclassification will be determined consistent with the State Wage Fixing Principles and having regard to the Classification Definitions.

4.9.2 To be eligible to be reclassified into a position, an employee must be the substantive occupant of the position and satisfy training and assessment requirements for the reclassified position.

4.9.3 Upward Reclassification – temporary allowance. If positions are reclassified upwards, the substantive incumbents of those positions shall be reclassified with the position if, for at least 12 months prior to the date the position was reclassified, they have performed the higher level duties of the reclassified position, and RTO assessments verify that the employees have already acquired the higher level skills and competencies the Employer stipulates as necessary for the reclassified job. If an employee is not competent to perform the reclassified position, or is not eligible for reclassification, then the reclassified position will be declared vacant and filled by advertising and selection on merit. The substantive occupant need not be assigned acting opportunities in the position.

4.9.4 Downward Reclassification – wage maintenance. If competency profiles and tasks indicate the position should be classified at a lower level, the substantive incumbents shall continue to be paid the wage rate for their original level for the purpose of income maintenance, consistent with the arrangements applied to redeployees. This will continue until such time as the employee can be transferred into an alternative position equivalent in classification level. Income maintenance allowance will be adjusted in line with movements to the Agreement rates.

## 5 ALLOWANCES AND FACILITIES

### 5.1 Shift Work Configurations And Allowances

#### 5.1.1 Seven Day Shift Work (24/7)

The Employer may, if the Employer so desires, work any part of its business on shifts in accordance with the following provisions;

- a) An afternoon shift, which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of \$3.09 per hour on all time paid at the ordinary rate.
- b) A night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of \$3.67 per hour on all time paid at ordinary rate.
- c) An early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of \$3.09 an hour for all time paid at ordinary rate.
- d) In addition to the hourly shift work allowance an employee will be paid an allowance of \$3.67 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.
- e) The allowances in subparagraphs a) to d) of this clause shall not apply to employees continuously on night shifts which start and finish between 1800 and 0600 hours. Instead, these employees will be paid a shift work allowance on ordinary time worked between 1800 and 0600 at the rate of \$6.97 per hour.
- f) Employees paid under this sub clause and working an average 40 hour week on continuous night shift or continuous shift work across a 24 hour/7 day roster are entitled to five weeks of annual leave with 1.9% annualised leave loading unless wages are disaggregated.
- g) Provided that shift penalties specified above do not apply to ordinary shiftwork hours on Saturday and Sunday, midnight to midnight, which is paid as follows: ordinary hours on Saturday are paid with a 50% loading and ordinary hours on Sunday are paid with a 100% loading, calculated on Ordinary Wage Rates.
- h) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

#### 5.1.2 Five Day Shiftwork (Monday to Friday)

- a) The Employer may, if the Employer so desires, work any part of the establishment on shift work as part of the ordinary hours per week, Monday to Friday. The Employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shiftwork. The Employer shall post the new shift work roster at least 21 days in advance of the start date and thereafter post the roster with fourteen days' notice.
- b) An employee shall be rostered to work no less than five consecutive afternoon or night shifts, for the roster to constitute shift work for the purposes of this sub clause.
- c) An employee who is not rostered to work five consecutive afternoon or night shifts, is not considered to be working shifts pursuant to this subclause. In which case, all time worked outside the ordinary spread of hours between 0600 to 1800 Monday to Friday, shall be paid at overtime rates of time and a half for the first two hours, and double time thereafter, with each day to stand alone. Proving that the five consecutive night shifts per roster cycle may be varied by agreement between the parties, in accordance with Fatigue Management Principles.
- d) For the purposes of this sub clause, day shift means an ordinary working shift commencing after 0600 hours and ending at or before 1800 hours, Mondays to Fridays; and night shift means a shift where ordinary time commences at or between 1800 hours and 0359 hours.
- e) All time worked on shifts except the day shift shall be paid at the rate of time and a quarter (1.25) times the Ordinary Hourly Wage Rate, for the first eight hours of the shift, and at the rate of time and a half thereafter.

- f) Unless prescribed otherwise elsewhere in this Agreement, when working additional hours outside rostered ordinary hours after (weekday) afternoon or night shifts, overtime rates are calculated on the ordinary hourly shift work rate inclusive of the 25% loading for afternoon or night shift, provided that in no circumstances shall the maximum payment exceed double time.
- g) Any time worked on Saturday and Sunday is considered additional hours for the purposes of this sub clause and is paid at weekend overtime rates of double the Ordinary Hourly Wage Rate from midnight Friday to midnight Sunday.
- h) Employees working Monday to Friday on day or afternoon shifts are entitled to four weeks annual leave with 1.3% annualised leave loading.

## 5.2 Travelling Time

- 5.2.1 Work Location: Employees are required to work at any designated location on the suburban rail system or otherwise within the suburban area and travel to and from such locations as rostered or otherwise directed, and this may include the employee driving in a motor vehicle or travelling as a passenger at any time during a shift.
  - 5.2.2 Changes to Work Location: Full-time employees will be appointed to a home line or base on the suburban rail system. The Employer reserves the right to:
    - a) permanently transfer an employee to another home line or base within the suburban area, including any location on the suburban rail system after reasonable consultation with the employee; or to
    - b) temporarily require an employee to start or finish work at a work location on the suburban rail system or otherwise within the suburban area other than the employee's home line or base.
  - 5.2.3 Travelling between home to work and return shall be in the employee's own time and at the employee's own expense unless expressly provided otherwise under this Agreement.
  - 5.2.4 Temporary Changes in Usual Travel Requirements: Where an employee is required to commence and finish their shift on a line or at a location other than their home line or base, the Employer shall return the employee at the end of the shift to the location of shift commencement except where otherwise agreed between the Employer and the employee.
  - 5.2.5 Other Line Allowance: On any day where the shift of a Passenger Ticketing Assistant or Customer Service Assistant is required to and does commence on a line or at a location other than the employee's home line or base, the employee shall receive an additional payment of one hour's pay at the Aggregated Wage Rate (where applicable) or the Base Wage Rate.
  - 5.2.6 Where a Passenger Ticketing Assistant or Customer Service Assistant is required to commence work on a line or at a location other than their home line or base but the travelling time can be incorporated within the shift, no additional payment will apply.
  - 5.2.7 For the purposes of subclause 5.2.5, "line" and "location" will be treated as other than the employee's home line or base where the work required to be done on that line or at that location is not rostered on the employee's usual roster.
  - 5.2.8 Travelling Time and Expenses: Where an employee other than a Passenger Ticketing Assistant or Customer Service Assistant is temporarily required to start or finish work at a work location other than the employee's home line or base within the suburban area, and the distance is further than ordinarily required from the employee's usual residence to the employee's home line or base, the following provisions may apply:
    - i) If the time taken in travelling between the employee's usual place of residence and the temporary work place exceeds the time normally taken in travelling between the usual place of residence and the employee's home line or base, the employee is entitled to be paid for such excess travelling time at the Ordinary Wage Rate, calculated on the basis of the mode of transport used on the day concerned. Travelling Time shall not be construed as overtime worked and is not payable at overtime rates.
    - ii) If the fares actually and reasonably incurred in such travelling exceed the fares normally paid by the employee in travelling between the employee's usual place of residence and the employee's home line or base, the Employer will be reimburse the difference.
    - iii) Subject to the prior approval of the General Manager, where an employee uses the employee's own means of transport to travel from the employee's usual place of residence to the temporary work place and the distance the employee is required to travel is greater than the distance the employee travels from the usual place of residence to the employee's home line or base, the employee will be paid the rate per kilometre as prescribed by the *Public Service Award 1992* Schedule F and G for any additional distance travelled. The rates payable in this sub clause shall be adjusted in accordance with adjustments to *Public Service Award 1992* Schedule F and G as notified by Department of Commerce Award Circular.
  - 5.2.9 The provisions of this subclause 5.2.8 do not apply to an employee whose Base Roster includes shifts that start or finish at locations other than the home line or base. Provided that if such an employee is not working in their usual job, the only applicable payment for which the employee is eligible for travelling would be any applicable payment due under this sub clause.
- ## 5.3 Fire Panel Allowance
- 5.3.1 Customer Service Assistants are currently the designated Fire Wardens at the Esplanade and Perth Stations. This includes the responsibility to:
    - a) Respond to an emergency alarm and attend the "Fire panel" within two minutes of its activation

- b) Operate the fire panel and liaise with other internal stakeholders in accordance with the emergency management procedure
- c) Liaise with external emergency services in accordance with the emergency management procedure

5.3.2 Response and attendance at the fire panel shall be achieved within two minutes of its activation in order to avoid the system initiating automatic evacuation including automated announcements to the public.

5.3.3 An allowance of \$5.85 per shift will be paid to the designated "Fire Warden" when the employee is rostered as being required to and actually does undertake the above responsibility. It is acknowledged that due to ongoing changes in technology this critical responsibility may become redundant in which case so will this allowance.

#### **5.4 Adjustments To Allowances**

Allowances contained within relevant clauses of this Agreement and as summarised in Schedule B Allowances (other than Shift Allowances) shall be reviewed and adjusted in line with the methodology described in each clause and updated administratively during the life of the Agreement by an Industrial Circular issued by the Employer.

### **6 LEAVE**

#### **6.1 Public Holidays**

6.1.1 The following days shall be observed as public holidays: New Year's Day, Australia Day, Labour Day, Good Friday, Easter Monday, Anzac Day, Foundation Day, Celebration Day, Christmas Day, Boxing Day, and any other day proclaimed as a general public holiday.

6.1.2 When any of the above mentioned days fall on a Saturday or Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

6.1.3 Any hours worked on a public holiday from midnight to midnight, shall be paid at double time and a half unless the rostered shift commenced before midnight and finished prior to 0300 hours, in which case time after midnight shall not be counted as time worked on a public holiday.

6.1.4 Employees may elect to accrue a portion of the time worked on a public holiday, and take this as time off in lieu of payment prescribed at 6.1.3, where this arrangement is requested and agreed by the Employer before working that public holiday. Where this arrangement applies, payment for hours worked on the public holiday will exclude payment for time nominated for accrual.

6.1.5 An employee who would have been rostered but is not required to work an ordinary shift because that shift falls on a public holiday, will be paid at the rate of ordinary time for the time the employee would have worked on that day had it not been a holiday.

6.1.6 If a public holiday falls on a day on which an employee is not rostered for work, the employee will be paid an additional 8 hours pay at the employee's Ordinary Wage Rate.

6.1.7 All time worked in excess of or outside of the usual working hours in any one day on a public holiday shall be paid at the rate of 'double time and one half' and it shall be the maximum penalty payable.

6.1.8 When a public holiday falls within a period of approved paid leave, except long service leave and parental leave, such day shall be paid as a public holiday consistent with the above provisions of this clause. All holidays to be computed at 8 hours per day on Ordinary Hourly Wage Rates.

6.1.9 An employee who finishes a shift no later than 0400 hours on any holiday and is not again booked for duty for that day shall be treated as having had a paid holiday pursuant to 6.1.5.

6.1.10 When an employee is off duty owing to leave without pay or sickness, including accidents on or off duty except time for which the employee is entitled to claim sick pay, any holiday falling during such absence shall not be treated as a paid holiday.

6.1.11 Where the employee, however, is on or is available for duty on the working day immediately preceding a paid holiday or resumes or is available for duty on the working day immediately following a holiday, the employee shall be entitled to a paid holiday on such holiday.

6.1.12 In accordance with the long service leave conditions for State Government wages employees any holiday occurring during the period in which an employee is on long service leave shall be calculated as portion of the long service leave and extra days in lieu shall not be granted.

#### **6.2 Rostering of Leave**

6.2.1 Every year the Employer shall post a roster showing the planned dates for clearance of leave by employees over the following financial year. The leave rostering arrangements shall provide for employees to share equitably the opportunity for clearance of leave at particular seasons and periods of demand.

6.2.2 During the Royal Show period, leave clearance will be minimised to meet increased service requirements

6.2.3 For purposes of constructing this roster, each employee will be required to nominate a preferred commencement date or dates for the clearance of the accrued leave, taking into account that

- a) Long Service Leave is to be taken at a mutually convenient time but the Employer may direct an employee to take a long service entitlement in accordance with sub clause 6.6.8.

- b) Unless otherwise agreed between the Employer and the employee, annual leave is to be taken within 12 months from the date at which the annual leave became due.
- c) Where an employee does not nominate dates for the clearance of leave the Employer may designate a date for clearance of the leave within 12 months of that leave falling due. Where directed, the Employer shall give 30 days' notice to employees of the day on which the annual leave is to commence.
- d) Employees seeking to cash out accrued annual leave or long service leave may request to do so as part of the leave rostering process in accordance with clause 6.8.
- e) Employees seeking a purchased leave arrangement must request to take that leave in the next financial year in accordance with clause 6.18.

### **6.3 Annual Leave**

6.3.1 Employees, other than those required to work over the seven days of the week or the twenty four hours of the day, shall be entitled to 160 hours (40 hour week employees) of annual leave per year after twelve months of continuous service.

#### **6.3.2 Additional Week of Annual Leave**

- a) Employees working 24 hour/7 day continuous shift work rosters, or continuously rostered on consecutive night shifts, shall be allowed an additional week's annual leave each year on full pay in addition to the leave prescribed under sub clause 6.3.1 above.(i.e.: 200 hours of annual leave per year)
- b) This provision of this sub clause shall also apply to any other employee whose ordinary hours of work can be extended over Saturdays and holidays and whose hours of duty vary throughout the twenty-four hours of the day and also work on Sundays.
- c) Notwithstanding anything elsewhere contained in this Agreement, this sub clause shall not apply to any employee whose ordinary hours of work must be completed between Monday to Friday inclusive, except where expressly provided for in a term of this Agreement

6.3.3 Annual leave entitlements shall accrue pro rata on a weekly basis as hours, as prescribed under the *Minimum Conditions of Employment Act 1993*.

6.3.4 A casual employee shall not be entitled to any paid holidays.

6.3.5 Employees shall be paid for annual leave at their graded rates of pay when such annual leave is taken: Provided that if within two weeks before such annual leave is taken the employee is acting in a higher capacity and has been so acting for a period of not less than two months the annual leave shall be paid for at the rate applicable to such higher capacity position.

6.3.6 No deduction shall be made from annual leave for the period any employee is off duty on paid sick leave. In the case of sick leave without pay for which a medical certificate has been provided only that period in excess of three months shall be deducted from qualifying service for annual leave

#### **6.3.7 Part Time employees**

- a) Part time employees will be granted annual leave in the proportion that the number of ordinary hours worked bear to full time employees and:
  - i) for employees who consistently worked a regular number of ordinary hours during the whole of their qualifying service, they will continue to be paid on that basis during their leave;
  - ii) for employees who worked a varying number of weekly hours during their qualifying service, they will be paid on the basis of the average ordinary hours worked during their qualifying service;
  - iii) For the purposes of this subclause 'qualifying service' means:
    - the 52 weeks immediately prior to the taking of the annual leave; or
    - where the employee has been employed in a part time capacity for less than 52 weeks, the period of part time employment.

#### **6.3.8 Clearing Leave Entitlements**

- a) Unless otherwise agreed between the Employer and the employee, annual leave is to be taken each year by the employee.
- b) Notwithstanding, paragraph a) above, annual leave may be cleared in more than one part, consistent with the following conditions:
  - i) An employee may, with the consent of the Employer, take short-term annual leave, not exceeding five days in any leave year
  - ii) With the consent of the Employer, annual leave may be deferred and accrue beyond one year's entitlement.
  - iii) The decision to grant or refuse the application will be at the Employer's discretion. At the time of the application, an employee seeking deferment must nominate specific provisional dates in the following year when the deferred leave can be taken and the Employer's decision to grant the application will constitute an agreement that the leave will be taken on those dates. The Employee may later submit a

further leave request for the deferred leave seeking to vary the provisionally agreed dates, which will be treated no less favourably than a new leave request.

- iv) The provisions of this sub clause are subject to Section 25 of the Minimum Conditions of Employment Act 1993 which provides that an employee may give the Employer two weeks' notice of the employee's intention to take annual leave, the entitlement to which accrued more than 12 months before that time, where the Employer and the employee have not agreed when the employee is to take his or her annual leave.
- v) Employees shall be consulted prior to the Employer changing annual leave arrangements and the Employer should make reasonable efforts to accommodate employee views prior to implementing changes, where practicable to do so.
- c) Where an employee is dismissed for misconduct the employee's wages, including all relevant accrued leave entitlements, will be paid only up to the time of dismissal.

#### 6.3.9 Annual Leave Loading

- a) Annual leave loading shall be paid to employees taking annual leave in blocks of one week or more per annum, and shall be paid in lieu of any other allowances and penalties paid in addition to the Base Wage Rate for employees while on annual leave. Wage rates during periods of annual leave exclude additional shift, weekend, and overtime penalties. For the purposes of this entitlement, an employee will be deemed to have taken annual leave in a block of one week or more if the employee clears annual leave during a period of absence from work of at least seven consecutive days.
- b) During annual leave taken over a continuous period of one or more weeks, those shift work employees whose wage rates are not aggregated may receive an annual leave loading calculated on the employee's applicable Base Wage Rate. Shift work employees whose wages are aggregated are paid an annualised leave loading as part of the Aggregated Wage Rate.
- c) Where wages are not aggregated, annual leave loading will be paid as follows:
  - i) Day workers – employees who would have worked on day work only had they not been on leave – will be paid a loading of 17 ½ per cent.
  - ii) Shift workers – employees working over seven days of the week or twenty four hours of the day had they not been on leave – will be paid whichever is the greater of a loading of 20 per cent; or the average shift loading (including relevant weekend penalty rates) as agreed between the parties under paragraph e) of this subclause.
- d) The loading shall not exceed the Average Weekly Total Earnings of all males in Western Australia as published by the Australian Bureau of Statistics for the September Quarter of the year immediately preceding that in which the leave commences.
- e) At the time of registration, the annual leave loading agreed between the parties to be payable for Passenger Ticketing Assistants was as set out in Schedule D to this Agreement. As part of the consultation about any change to Base Rosters covering disaggregated employees, there shall be an exchange of letters between the Employer and the Union agreeing the annual leave loading payable for the duration of the agreement (or until any further change to the roster) to employees whose substantive position is covered by that roster, based on the average of penalties earned under that roster and acknowledging that the annual leave loading cap figure from time to time (as referred to paragraph d) will prevail where applicable.
- f) Where an employee whose substantive position is not aggregated receives annualised leave loading as part of a higher duties allowance, this will not affect their entitlement to annual leave loading for the purposes of paragraph (c) of this provision.

#### 6.3.10 Annualised Leave Loading

- a) For the purpose of annualising leave loading, a value of 1.3% is added to the base wage rate and factored into the Ordinary wage rates for employees on four weeks annual leave and 1.9% is added to the base wage rate and factored into the ordinary wage rate for employees required to work over the seven days and/or 24 hours of the day
- b) The loading when annualised shall not exceed the Average Weekly Total Earnings of all males in Western Australia as published by the Australian Bureau of Statistics for the September Quarter of the year immediately preceding that in which the leave commences. Therefore the loading shall be adjusted in line with the annual Circular to Departments and Authorities on Annual Leave Loading issued by the Department of Commerce and notified by an Industrial Circular issued by the Employer.

### 6.4 Sick Leave

- 6.4.1 In the event of an employee being sick, the employee may be paid 80 hours of sick leave for each completed year of service for ordinary time lost from duty as a result of such sickness.
- 6.4.2 There is no entitlement to authorised sick leave other than in accordance with this subclause 6.4. Unused sick leave entitlements will accumulate from year to year and may be availed of the next or succeeding years.

- 6.4.3 Sick leave shall be paid at the following rates:
- a) employees whose wages are not aggregated are to be paid at their Base Wage Rate plus any applicable shift penalties; and
  - b) Employees whose wages are aggregated shall be paid at their Aggregated Wage Rate.
- 6.4.4 Paid sick leave will be debited for the actual number of rostered hours lost due to sickness that the employee would have otherwise worked had the employee not been absent.
- 6.4.5 Provided that if the employee was engaged on duties carrying a higher rate and was entitled to payment at that higher rate for the whole of the day or shift immediately prior to the employee ceasing duty the employee shall be paid for sick leave at that higher rate for the period the employee would have continued to work in the higher position had the employee not ceased duty because of ill health.
- 6.4.6 An employee who claims to be entitled to paid sick leave under clause 6.3.1 is to provide the Employer evidence that would satisfy a reasonable person of the entitlement for:
- a) Any absence due to sickness which occurs after three separate absences without a certificate in any one year; or
  - b) Absences due to sickness for two or more consecutive days.
- 6.4.7 Sick leave entitlements due under this clause will accrue pro rata on a weekly basis. In sub clause 6.4.1, “year” does not include any period of unpaid leave.
- 6.4.8 For the purpose of this clause the term “accruing year” means the year ending 30th June.
- 6.4.9 If an employee falls sick while on annual leave and produces at the time satisfactory medical evidence that the employee is or was confined to the employee’s place of residence or hospital for a period of at least one week the employee may, with the approval of the employer, be granted at a time convenient to the employer, additional leave equivalent to the period of sickness falling within the rostered period of annual leave .
- 6.4.10 Part time employees accrue sick leave pro rata according to ordinary hours worked.
- 6.4.11 Duty to notify absence: An employee unable to attend work as required due to illness or injury, must notify the Employer at least three hours before the required start time, or as soon as possible and in sufficient time as is reasonable to allow alternative relief arrangements to be made.
- 6.4.12 An employee who is absent from duty and whose next rostered working shift commences prior to 1200 must inform the Employer of the employee’s availability for duty by no later than 1500 hours the previous day. Where the employee’s next rostered shift commences at or after 1200 hours the employee must inform the Employer of the employee’s availability for duty by 0900 hours on the same day.
- 6.4.13 Notwithstanding any other provisions of this clause, the Employer may at the time the employee calls in sick, request the employee provide evidence that would satisfy a reasonable person of the authenticity of any absence claimed to result from illness. The evidence may be required regardless of whether or not the employee claims payment for the absence as sick leave in accordance with this clause.
- 6.4.14 Leave of absence due to illness or injury is not authorised sick leave unless taken as entitlement under the terms and provisions of this clause. Unauthorised absence shall be unpaid time and hours may be required to be made up without payment of additional time rates. Unauthorised absence shall be discussed between an Employer and employee and where no reasonable explanation is provided to the Employer, the absence may be construed as misconduct warranting institution of disciplinary procedures, which may include termination of contract for serious or chronic instances.
- 6.4.15 This clause shall not apply where the employee is entitled to workers’ compensation.
- 6.5 Bereavement Leave**
- 6.5.1 An employee, including a casual , shall be entitled to leave of absence without deduction of pay on the death of
- a) the employee’s spouse or de facto partner;
  - b) a child, step child or grandchild of the employee (including an adult child, step child or grandchild);
  - c) a parent, step parent or grandparent of the employee;
  - d) a sibling of the employee;
  - e) any other person who, at or immediately before the relevant time for assessing the employee’s eligibility to take leave, lived with the employee as a member of the employee’s household.
- 6.5.2 Such leave of absence, up to and including the day of the funeral, shall be for a period up to but not exceeding three working days, having regard for the circumstances of the case. These days need not be taken consecutively.
- 6.5.3 An employee who claims to be entitled to bereavement leave is to provide to the employer, if so requested by the employer, evidence that would satisfy a reasonable person as to the death that is subject to the leave sought and the relationship of the employee to the deceased person.
- 6.5.4 Payment in respect of bereavement leave shall be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with the roster, or on annual leave, long service leave, sick leave, workers’ compensation, family leave or leave without pay.
- 6.5.5 Employees requiring more than two (2) days bereavement leave in order to travel overseas or interstate in the event of the death overseas or interstate of a member of an employee’s immediate family may, upon providing adequate proof, in

addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

## **6.6 Family Leave**

- 6.6.1 An employee, other than a casual, may be granted up to five days paid leave per accruing year to care for a sick family member.
- 6.6.2 In sub clause 6.6.1a “family member” or “member of household” means any of the following persons —
- a) the employee’s spouse or de facto partner;
  - b) a child, step child or grandchild of the employee (including an adult child, step child or grandchild);
  - c) a parent, step parent or grandparent of the employee;
  - d) a sibling of the employee;
  - e) any other person who, at or immediately before the relevant time for assessing the employee’s eligibility to take leave, lived with the employee as a member of the employee’s household;
- 6.6.3 Leave granted shall be debited from accrued sick leave. Where there is insufficient accrued sick leave the employee may elect to use accrued annual leave or take unpaid leave.
- 6.6.4 The Employer may require reasonable proof, which may include a medical certificate or a statutory declaration, of the sickness of the family member.
- 6.6.5 An employee who claims to be entitled to paid family leave is to provide to the Employer evidence that would satisfy a reasonable person of the entitlement if requested by the Employer to do so.

## **6.7 Long Service Leave**

- 6.7.1 An employee shall be entitled to thirteen weeks paid long service leave on the completion of ten years continuous service and an additional thirteen weeks paid long service leave for each subsequent period of seven years of continuous service completed by the employee.
- 6.7.2 Where a public holiday falls within an employee’s period of long service leave such day shall be deemed to be a portion of the long service leave and no other payment or benefit shall apply.
- 6.7.3 Long service leave may be taken in periods of 4 weeks or more, at a mutually agreed time.
- 6.7.4 Long service leave shall be paid at the employee’s rate of pay as prescribed in the wages clause or as specified for rostered employees..
- 6.7.5 An employee will only be entitled to pro rata long service leave if his or her employment is terminated:
- a) by the Employer for other than disciplinary reasons; or
  - b) due to the retirement of the employee on the grounds of ill health; or
  - c) due to the death of the employee, in which case the payment would be made to the employee’s estate; or
  - d) due to employee’s retirement at the age of 55 years or over, provided 12 months continuous service has been completed prior to the day from which the retirement takes effect; or
  - e) for the purpose of entering an In vitro Fertilisation Programme, provided the employee has completed three years service and produces written confirmation from an appropriate medical authority of the dates of involvement in the programme; or
  - f) due to employee’s resignation for pregnancy, provided the employee has completed more than three years and produces certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner.
- 6.7.6 For the purposes of determining long service leave entitlement, the expression “continuous service” includes any period during which the employee is absent on paid leave but does not include any period exceeding two continuous weeks during which the employee is absent on parental leave or leave without pay.
- 6.7.7 Continuity of service shall not be broken by the absence of the employee on any form of approved paid leave or by the standing down of an employee under the terms of this Agreement.
- 6.7.8 If the ordinary hours of employment of an employee have varied during the qualifying period, the employee shall be paid a rate based on the average number of ordinary hours worked over the employee’s full qualifying period, consistent with clause 15 of the *State Government Wages Employees Long Service Leave General Order* made on 16 December 1985 [66 WAIG 319].
- 6.7.9 The employer may direct an employee to take a long service entitlement that has been accrued for more than 3 years.
- 6.7.10 Where an employee is directed to take long service leave entitlement, it will be taken within 12 months of the direction, at a time agreed between the employer and the employee.
- 6.7.11 Where a time cannot be agreed within the 12 month period, the employer will determine the date on which the employee will be required to start long service leave. Provided that the Employer shall give at least 30 days notice to the employee of the day on which the long service leave is to commence.

**6.8 Employee Initiated Cash Out Of Accrued Annual Leave or Long Service Leave**

- 6.8.1 The parties agree on the importance of employees taking annual leave and long service leave for the purposes of rest and recreation.
- 6.8.2 This clause, however, recognises that notwithstanding the importance of leave referred to in subclause 6.8.1 some employees may have excess annual leave or long service leave. This clause at the initiative of the employee provides for employees to receive payment in lieu of some of their unutilised accrued annual leave and long service leave.
- 6.8.3 Subject to subclause 6.8.4 the employer and employee may agree that the employee forego part of the employee's entitlement to accrued annual leave in exchange for equivalent payment at the rate which would have applied had the leave been taken at the time the agreement is made. The payment includes any applicable annual leave loading in accordance with subclause 6.3.9 of this Agreement, where the leave loading has not been annualised.
- 6.8.4 The following criteria shall apply to the cashing out of accrued annual leave:
- a) the employee initiates a written request, to their employer, to cash out accrued annual leave; and
  - b) the employer agrees in writing to the request by the employee; and
  - c) there is an annual leave entitlement that has accrued in previous years; and
  - d) no more than 50% of the employee's total accrued annual leave entitlement can be cashed out; and
  - e) the remaining entitlements are not less than two weeks accrued annual leave, which the employee agrees to take in that year; and
  - f) each instance of cashing out of annual leave must be a separate written agreement between the employer and employee; and
  - g) annual leave accruing in the year the request for cashing out is made cannot be cashed out in that year.
- 6.8.5 Subject to subclause 6.8.6 the employer and employee may agree that the employee forego part or all of the employee's entitlement to accrued long service leave in exchange for equivalent payment at the rate which would have applied had the leave been taken at the time the agreement is made.
- 6.8.6 The following criteria shall apply to the cashing out of accrued long service leave:
- a) there is an existing accrued long service leave entitlement; and
  - b) the employee initiates a written request, to their employer, to cash out at least four weeks of that accrued long service leave; and
  - c) the employer agrees in writing to the request by the employee; and
  - d) each instance of cashing out of long service leave must be a separate written agreement between the employer and employee.
- 6.8.7 It is the employee's responsibility to seek information on any taxation implications arising from the payout of annual leave or long service leave.

**6.9 Cultural and Ceremonial Leave**

- 6.9.1 Cultural and or ceremonial leave shall be available to all employees.
- 6.9.2 Such leave shall include leave to meet the employee's customs, traditional law and to participate in cultural and ceremonial activities.
- 6.9.3 Employees are entitled to time off without loss of pay for cultural or ceremonial purposes, subject to agreement between the employer and employee and sufficient leave credits being available.
- 6.9.4 The employer will assess each application for ceremonial or cultural leave on its merits and give consideration to the personal circumstances of the employee seeking the leave.
- 6.9.5 The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.
- 6.9.6 Cultural or ceremonial leave may be taken as whole or part days off. Each day, or part thereof, shall be deducted from:
- a) the employee's annual leave entitlements (where applicable);
  - b) the officer's accrued long service leave entitlements, but in full days only, or
  - c) accrued days off.
- 6.9.7 Time off without pay may be granted by arrangement between the employer and the employee for cultural or ceremonial purposes.

**6.10 Blood and/or Plasma Donors Leave**

- 6.10.1 Subject to operational requirements, employees shall be entitled to absent themselves from the workplace in order to donate blood and or plasma in accordance with the following general conditions:
- a) Prior arrangements with the supervisor has been made and at least two days notice has been provided; or
  - b) The employee is called upon by the Red Cross Blood Centre.
- 6.10.2 The notification period shall be waived or reduced where the line manager is satisfied that operations would not be unduly affected by an employee's absence.

- 6.10.3 Employees shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.
- 6.10.4 Employees shall be entitled to two hours of paid leave per donation for the purpose of donating blood or plasma to the Red Cross Blood Centre.

### **6.11 Witness And Jury Service**

#### Witness Service

- 6.11.1 An employee subpoenaed or called as a witness to give evidence in any proceeding shall:
- a) notify the Employer as soon as practicable; and
  - b) Provide to the Employer on request evidence that would satisfy a reasonable person of any entitlement claimed in relation to giving that evidence under this provision.
- 6.11.2 Where an employee is subpoenaed or called as a witness to give evidence in an official capacity, that employee shall be granted by the Employer leave of absence with pay, but only for such period as is required to enable the employee to carry out duties related to being a witness. If the employee is on any form of paid leave, the leave involved in being a witness will be reinstated. If the employee is on a rostered day off and has complied with paragraph 6.11.1, the Employer shall on request roster an alternative rostered day off. The employee is not entitled to retain any witness fee but shall pay all fees received into the Consolidated Fund. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the Employer.
- 6.11.3 An employee subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fee or travelling expenses as soon as practicable after the default, notify the Employer.
- 6.11.4 An employee subpoenaed or called, as a witness on behalf of the Crown and/or the State, not in an official capacity shall be granted leave with full pay entitlements. If the employee is on any form of paid leave, this leave shall not be reinstated as such witness service is deemed to be part of the employee's civic duty. The employee is not entitled to retain any witness fees but shall pay all fees received into the Consolidated Fund.
- 6.11.5 An employee subpoenaed or called as a witness under any other circumstances other than specified in subclauses 6.11.2 and 6.11.4 of this provision shall be granted leave of absence without pay except when the employee makes an application to clear accrued leave in accordance with the provisions of this Agreement.

#### Jury Service

- 6.11.6 An employee required to serve on a jury shall as soon as practicable after being summoned to serve, notify the supervisor/manager who shall notify the Employer.
- 6.11.7 An employee required to serve on a jury shall be granted paid leave of absence by the Employer, but only for such period as is required to enable the employee to carry out duties as a juror.
- 6.11.8 The parties acknowledge that as at the date of registration of this agreement the Employer is required under the Juries Act 1975 to pay an employee the earnings that the employee could reasonably expect to have been paid while doing jury service. Where an employee would have otherwise have been allocated to relief work while doing jury service, payment of the base rate plus a twenty percent (20%) loading will reflect the employee's reasonable expectation of payment during that period.
- 6.11.9 An employee granted leave of absence as prescribed in subclause 6.11.6 of this provision is not entitled to retain any juror's fees but shall pay all fees received into the Consolidated Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the Employer.

### **6.12 Maternity Leave**

#### 6.12.1 Eligibility

- a)
  - i) A pregnant permanent, fixed term contract or eligible casual employee is entitled to unpaid Maternity Leave on the birth of a child.
  - ii) The period of leave for a fixed term contract employee shall not extend beyond the term of that contract.
  - iii) An Employee is eligible, without concluding their Maternity Leave and resuming duty, for subsequent periods of Maternity Leave, including Paid Maternity Leave, in accordance with the provisions of this clause.
- b) A pregnant permanent or fixed term employee must have completed twelve months continuous service in the Western Australian public sector as defined under the *Public Sector Management Act 1994* immediately preceding the Maternity Leave in order to receive the forms of paid leave as provided for by this clause.
- c) An Employee on a period of leave without pay unrelated to Maternity Leave must resume duties prior to being entitled to Paid Maternity Leave in accordance with the eligibility entitlements.

#### 6.12.2

- a) A pregnant eligible casual Employee is entitled to unpaid Maternity Leave only.
- b) For the purposes of this clause an eligible casual Employee means a casual Employee employed by the Employer:

- i) on a regular and systematic basis for several periods of employment with a break of no more than three months between each period of employment and where the combined length of the periods of employment are at least 12 months and the breaks of employment were the result of the Employer's initiative or
  - ii) on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and, but for the birth or adoption of a child the Employee has a reasonable expectation of continuing engagement on a regular and systematic basis.
- c) Service performed by an eligible casual Employee for a public sector Employer shall count as service for the purposes of determining twelve months continuous service as per subclause 6.12.1 and 6.12.2 where:
- i) the eligible casual Employee has become a permanent or fixed term contract Employee with the same Employer and
  - ii) the break between the period of eligible casual employment and permanent or fixed term contract employment is no more than three months.

#### 6.12.3 Notice Requirements

- a) An eligible Employee shall give at least eight weeks written notice of:
  - i) their intention to proceed on paid or unpaid Maternity Leave;
  - ii) the date the Employee proposes to commence paid or unpaid Maternity Leave and
  - iii) the period of leave to be taken.
- b) An Employee who has given their Employer notice of their intention to take Maternity Leave shall provide the Employer with a medical certificate from a registered medical practitioner naming the Employee, confirming the pregnancy and the estimated date of birth.
- c) An Employee is not in breach of subclause 6.12.3 (a) by failing to give the required period of notice if such failure is due to the birth of the child taking place prior to the date the Employee had intended to proceed on Maternity Leave.
- d) An Employee proceeding on Maternity Leave may elect to take a shorter period of Maternity Leave to that provided by this clause and may at any time during that period elect to reduce or seek to extend the period stated in the original application, provided four weeks written notice is provided.

#### 6.12.4 General Entitlement To Maternity Leave

- a) Subject to the requirements of this clause an eligible Employee is entitled to 52 weeks unpaid Maternity Leave.
- b)
  - i) Subject to the requirements of this clause an eligible Employee is entitled to 14 weeks Paid Maternity Leave that will form part of the 52 week unpaid entitlement;
    - i) The 14 week period of Paid Maternity Leave is inclusive of any public holidays or repealed public service days in lieu falling within that time;
    - ii) The period of Paid Maternity Leave can be extended by the Employee taking double the leave on a half-pay basis and its effect is in accordance with subclause 6.12.14.
- c) An Employee must take Maternity Leave in one continuous period with the exception of Special Temporary Employment or Special Casual Employment pursuant to subclause 6.12.12.
- d) Except for leave provided under Clause 6.15 - Partner Leave of this Agreement, only one parent can proceed on Maternity, Adoption or Other Parent Leave at any one time.
- e) Where less than the 52 weeks Maternity Leave is taken paid or unpaid, the unused portion of the leave cannot be banked or preserved in any way.
- f)
  - i) Notwithstanding subclause 6.12.4(d) above, Paid Maternity Leave may be taken in more than one period by an Employee who meets the requirements of subclause 6.12.5 (d).
  - ii) Unpaid Maternity Leave may be taken in more than one continuous period where the Employee undertakes special temporary employment or special casual employment in accordance with subclause 6.12.12 – Employment During Unpaid Maternity Leave. In these circumstances, the provisions of subclause 6.12.12 – Employment During Unpaid Maternity Leave, shall apply.
- g)
  - i) Where both Employees are employed in the WA Public Sector an entitlement to paid or unpaid Maternity Leave, Adoption Leave or Other Parent Leave or parental leave provided for by another industrial agreement can be shared and
  - ii) the entitlement provided to the Employees shall not exceed the paid Maternity, Adoption or Other Parent Leave quantum for one Employee or its half pay equivalent and

- iii) the Employees may only proceed on paid and/or unpaid Maternity, Adoption or Other Parent Leave at the same time in exceptional circumstances with the approval of the Employer or as provided for under subclause 6.12.5 (d). This does not prevent an Employee from taking paid or unpaid Partner Leave as prescribed by Clause 6.15 – Partner Leave of this Agreement.

#### 6.12.5 Payment for Paid Maternity Leave

- a)
  - i) Subject to subclause 6.12.5 (c) a full time Employee proceeding on Paid Maternity Leave is to be paid according to their ordinary working hours at the time of commencement of Maternity Leave. Shift and weekend penalty payments are not payable during Paid Maternity Leave.
  - ii) Subject to subclause 6.12.5 (c) payment for a part time Employee is to be determined according to an average of the hours worked by the Employee over the preceding 12 months; or their ordinary working hours at the time of commencement of Maternity Leave, exclusive of shift and weekend penalties, whichever is greater.
- b) An Employee may elect to receive pay in advance for the period of Paid Maternity Leave at the time the Maternity Leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the Paid Maternity Leave.
- c) An Employee in receipt of a higher duties allowance for a continuous period of 12 months immediately prior to commencing Paid Maternity Leave, is to continue to receive the higher duties allowance for the first four weeks of Paid Maternity Leave.
- d) An Employee is entitled to remain on Paid Maternity Leave if the pregnancy results in other than a live child; or the Employee is incapacitated following the birth of the child; or the child dies or is hospitalised such that the Employee or the Employee's partner is not providing principal care to the child.
- e) Where an Employee is on a period of half pay Maternity Leave and their employment is terminated through no fault of the Employee, the Employee shall be paid out any period of unused Paid Maternity Leave equivalent to the period of leave the Employee would have accessed had they been on full pay Maternity Leave when their termination occurred.
- f) An Employee eligible for a subsequent period of Paid Maternity Leave as provided for under subclause 6.12.1 (a) (iii) shall be paid the Maternity Leave as follows:
  - i) According to the Employee's status, classification and ordinary working hours at the time of commencing the original period of Paid Maternity Leave and
  - ii) Not affected by any period of special temporary employment undertaken in accordance with subclause 6.12.12

#### 6.12.6 Commencement of Maternity Leave

- a) The period of leave can commence up to six weeks prior to the expected date of birth of the child.
- b)
  - i) If the Employer has reason to believe that the continued performance of duties by a pregnant Employee renders danger to herself, fellow Employees or the public, the Employee may be required to obtain and provide a medical certificate stating that the Employee is fit to work in her present position for a stated period.
  - ii) The Employer shall pay the fee for any such examination.
  - iii) Where an Employee is deemed to be unfit to work in her present position, the provisions of subclause 6.12.7 Modification of Duties and Transfer to a safe job, may apply.
- c)
  - i) Where the pregnancy of an Employee terminates other than by the birth of a living child, not earlier than 20 weeks before the expected date of the birth, the entitlement to Paid Maternity Leave remains intact and subject to the eligibility requirements of this clause.
  - ii) Such paid Maternity Leave cannot be taken concurrently with any paid personal leave taken in this circumstance.
- d) The period of Paid Maternity Leave must be concluded within 12 months of the birth of the child.
- e)
  - i) The Employer may in, in exceptional circumstances, allow an Employee to take Paid Maternity Leave that will result in the Employee being on Paid Maternity Leave more than 12 months after the birth of the child.
  - ii) An Employer may require evidence that would satisfy a reasonable person that the circumstances warrant allowing the Employee to take their period of Paid Maternity Leave such that it would result in the Employee being on Paid Maternity Leave more than 12 months after the birth of the child.

## 6.12.7 Modification of Duties and Transfer to a Safe Job

- a)
  - i) A pregnant Employee may work part time in one or more periods whilst she is pregnant where she provides her Employer with a medical certificate from a medical practitioner advising that part time employment is, because of her pregnancy, necessary or preferable.
  - ii) The terms of part time employment undertaken in accordance with subclause 6.12.7 (a) (i) shall be in writing.
  - iii) Such employment shall be in accordance with subclause 2.1.3 of this Agreement.
- b) In the absence of an alternative requirement, and unless otherwise agreed between an Employer and Employee, an Employee shall provide their Employer with four weeks written notice of an intention to:
  - i) vary part time work arrangements made under subclause 6.12.7 (a) or
  - ii) revert to full time employment during the Employee's pregnancy.
- c) An Employee reverting to full time employment in accordance with subclause 6.12.7 (b) (ii) will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the Employee's skill and abilities as the substantive position held immediately prior to undertaking part time employment.
- d) If an Employee gives her Employer a medical certificate from a medical practitioner, or some other form of evidence that would satisfy a reasonable person, and it contains a statement to the effect that the Employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:
  - i) illness, or risks, arising out of her pregnancy or
  - ii) hazards connected with that position
 then the Employer must modify the duties of the position or alternatively transfer the Employee to a safe job at the same classification level for the period during which she is unable to continue in her present position.
- e) If an Employee's Employer does not think it to be reasonably practicable to modify the duties of the position or transfer the Employee to a safe job:
  - i) the Employee is entitled to be absent from the workplace on full pay for the period during which she is unable to continue in her present position;
  - ii) An entitlement to be absent from the workplace on full pay as at sub clause 6.12.7 (e) (i) applies to an eligible casual Employee and
  - iii) An Employee who is absent from work pursuant to this subclause shall be paid the amount she would reasonably have expected to be paid if she had worked during that period.
- f) An entitlement to be absent from the workplace on full pay is in addition to any leave entitlement the Employee has.
- g) An entitlement to be absent from the workplace on full pay ends at the earliest of whichever of the following times is applicable:
  - i) the end of the period stated in the medical certificate;
  - ii) if the Employee's pregnancy results in the birth of a living child – the end of the day before the date of birth or
  - iii) if the Employee's pregnancy ends otherwise than with the birth of a living child – the end of the day before the end of the pregnancy.

## 6.12.8 Interaction with Other Leave Entitlements

- a) An Employee proceeding on unpaid Maternity Leave may elect to substitute any part of that leave with accrued annual and/or accrued long service leave.
- b) Where annual and/or long service leave is substituted that leave shall form part of the 52 weeks Maternity Leave entitlement.

## 6.12.9 Extended Unpaid Maternity Leave

- a) Subject to all other available leave entitlements being exhausted, an Employee shall be entitled to apply for leave without pay following Maternity Leave ('extended unpaid Maternity Leave') to extend their leave by up to two years.
- b) Where both parents work for the Western Australia Public Sector the total combined period of extended unpaid Maternity, Adoption and extended Other Parent Leave shall not exceed two years.
- c) The Employer is to agree to a request for extended unpaid Maternity Leave unless:
  - i) the Employer is not satisfied that the request is genuinely based on the Employee's parental responsibilities or
  - ii) agreeing to the request would have an adverse impact on the conduct of operations or business of the Employer and those grounds would satisfy a reasonable person.

- d) The Employer is to give the Employee written notice of the Employer's decision on a request for extended unpaid Maternity Leave under subclause 6.12.9 (a). If the request is refused, the notice is to set out the reasons for the refusal.
- e) An Employee who believes their request for extended unpaid parental leave under subclause 6.12.9 has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the Employer to demonstrate that the refusal was justified in the circumstances.

#### 6.12.10 Communication during Maternity Leave

- a) If the Employer makes a decision that will have a significant effect on the status, responsibility level, pay or location of an Employee's position whilst on Maternity Leave, the Employer must take all reasonable steps to give the Employee information about, and an opportunity to discuss, the effect of the decision on that position.
- b) An Employee shall also notify the Employer of changes of address or other contact details that might affect the Employer's capacity to comply with subclause 6.12.10 (a)

#### 6.12.11 Replacement Employee

- a) Should a replacement Employee be engaged, the replacement Employee is to be informed prior to engagement of the fixed-term nature of the employment and of the rights of the Employee, who is being replaced, including that the engagement may be subject to variation according to 6.12.3 (d) and ability to extend unpaid Maternity Leave as provided for under subclause 6.12.9.

#### 6.12.12 Employment during unpaid Maternity Leave

##### a) Special Temporary Employment

- i) For the purposes of this subclause, "temporary" means employment of an intermittent nature; for a limited, specified period; and undertaken during unpaid Maternity Leave or extended unpaid Maternity Leave.

- ii) Notwithstanding any other provision of the Maternity Leave clause, an Employee may be employed by their Employer on a temporary basis provided that:

- both parties agree in writing to the special temporary employment;
- employees are only employed on a temporary basis in connection with their substantive office, post or position;
- any such period of service shall not change the Employee's employment status in regard to their substantive employment and
- any period of special temporary employment shall count as qualifying service for all purposes under the Agreement.

##### b) Special Casual Employment

- i) For the purposes of subclause 6.12.12, 'casual' means employment on an hourly basis for a period not exceeding four weeks in any period of engagement for which a casual loading is paid. It excludes employment undertaken in accordance with 6.12.12 (a) – Special temporary employment.

- ii) An Employee can be engaged on special casual employment provided that:

- both parties agree in writing to the special casual employment;
- Employees are employed at the level commensurate to the level of the available position under the Agreement;
- in the case of a fixed term contract employee, the period of the casual employment is within the period of the current fixed term contract;
- any such period of service shall not break the employee's continuity of service nor change the Employee's employment status in regard to their substantive employment and
- any period of special casual employment shall not count as qualifying service other than with respect to entitlements a casual employee would ordinarily be entitled to for any other purpose under any relevant award, agreement or industrial instrument.

- c) The provisions of this clause only apply to employment during unpaid Maternity Leave, and extended unpaid Maternity Leave taken in conjunction with Maternity Leave as provided for in subclause 43.9 – Extended unpaid Maternity Leave.

- d) An Employer cannot engage an Employee in special temporary employment or special casual employment whilst the Employee is on a period of Paid Maternity Leave, annual leave or long service leave taken concurrently with a period of unpaid Maternity Leave.

##### e) Effect of special temporary employment and special casual employment on unpaid Maternity Leave

- i) Subject to subclause 6.12.12 (e) (ii), a period of special temporary employment or special casual employment shall be deemed to be part of the Employee's period of unpaid Maternity Leave or extended unpaid Maternity Leave as originally agreed to by the parties.

- ii) An Employee who immediately resumes unpaid Maternity Leave or extended unpaid Maternity Leave following the conclusion of a period of special temporary employment or special casual employment.
  - is entitled, on written notice, to extend their period of unpaid Maternity Leave or extended unpaid Maternity Leave by the period of time in which they were engaged in special temporary employment or special casual employment and
  - shall give not less than four weeks' notice in writing to their Employer of the new date they intend to return to work and so conclude their period of Maternity Leave or extended unpaid Maternity Leave.
- iii) An Employee who does not immediately resume their period of unpaid Maternity Leave or extended unpaid Maternity Leave at the conclusion of a period of special temporary employment or special casual employment cannot preserve the unused portion of leave for use at a later date.

#### 6.12.13 Return to Work on Conclusion of Maternity Leave

- a)
  - i) An Employee shall confirm their intention in writing to conclude their Maternity Leave not less than four weeks prior to the expiration of Maternity Leave or extended unpaid Maternity Leave.
  - ii) An Employee who intends to return to work on a modified basis in accordance with subclause 6.12.13 (d) shall advise their Employer of this intention by notice in writing not less than four weeks prior to the expiration of Maternity Leave or extended unpaid Maternity Leave.
- b) An Employee on return to work following the conclusion of Maternity Leave or extended unpaid Maternity Leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the Employee's skill and abilities as the substantive position held immediately prior to proceeding on Maternity Leave
- c) Where an Employee was transferred to a safe job or was absent from the workplace on full pay as provided for in subclause 6.12.7 – Modification of Duties or Transfer to a Safe Job, the Employee is entitled to return to the position occupied immediately prior to the transfer or their absence from the workplace on full pay.
- d) Right to Return to Work on a Modified Basis
  - i) An Employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position as determined by the Employer at the same classification level in accordance with the part time employment provisions this Agreement.
  - ii) An Employee may return on a modified basis that involves the Employee working on different days or at different times, or both; or on fewer days or for fewer hours or both, than the Employee worked immediately before starting Maternity Leave.
- e) Right to Revert
  - i) An Employee who has returned on a part time or modified basis in accordance with subclause 6.12.13 (d) may subsequently request permission from the Employer to resume working on the same basis as the Employee worked immediately before starting Maternity Leave or full time work at the same classification level.
  - ii) A request made under subclause 6.12.13 (e) (i) must be in writing and must be made at least four weeks before the day on which the Employee wishes to resume working on the same basis as the Employee worked immediately before starting Maternity Leave or full time work at the same classification level.
  - iii) An Employer is to agree to a request to revert made under subclause 6.12.13 (e) (i) unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the Employer and those grounds would satisfy a reasonable person.
  - iv) An Employer is to give the Employee written notice of the Employer's decision on a request to revert under clause 6.12.13 (e) (i). If the request is refused, the notice is to set out the reasons for the refusal.
  - v) An Employee who believes their request to revert under subclause 6.12.13 (e) (i) has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the Employer to demonstrate that the refusal was justified in the circumstances.

#### 6.12.14 Effect of Maternity Leave on the Contract of Employment

- a)
  - i) Paid Maternity Leave will count as qualifying service for all purposes under this Agreement.
  - ii) Qualifying service for any purpose under this Agreement is to be calculated according to the number of weeks of Paid Maternity Leave that were taken at full pay or would have been had the Employee not taken Paid Maternity Leave at half pay. Employees who take Paid Maternity Leave on half pay do not accrue entitlements beyond those that would have accrued had they taken the leave at full pay.

- b)
  - i) Absence on unpaid Maternity Leave or extended unpaid Maternity Leave shall not break the continuity of service of Employees.
  - ii) Where an Employee takes a period of unpaid Maternity Leave or extended unpaid Maternity Leave exceeding 14 calendar days in one continuous period, the entire period of such leave shall not be taken into account in calculating the period of service for any purpose under any relevant award, agreement or industrial instrument. Periods of unpaid leave of 14 days or less shall, however, count for service.
- c) An Employee on Maternity Leave may terminate employment at any time during the period of leave by written notice in accordance with subclause 2.10.1 of this Agreement.
- d) An Employer shall not terminate the employment of an Employee on the grounds of the Employee's application for Maternity Leave or absence on Maternity Leave but otherwise the rights of the Employer in respect of termination of employment are not affected.

### 6.13 Adoption Leave

#### 6.13.1 Eligibility

- a)
  - i) A permanent, fixed term contract or eligible casual Employee is entitled to 52 weeks unpaid adoption leave on the placement of a child for adoption as provided for under this clause.
    - i) The period of leave granted to a fixed term contract Employee shall not extend beyond the term of that contract.
    - ii) An Employee is eligible, without concluding their adoption leave and resuming duty, for subsequent periods of adoption leave, including paid adoption leave, in accordance with the provisions of this clause.
- b) A permanent or fixed term contract Employee must have completed twelve months continuous service in the Western Australian public sector as defined under the *Public Sector Management Act 1994* immediately preceding the adoption leave in order to receive the forms of paid leave as provided for by this clause.
- c) An Employee on a period of leave without pay unrelated to adoption leave must resume duties prior to being entitled to paid adoption leave in accordance with the eligibility entitlements.
- d) An eligible casual Employee as defined under Clause 6.12 - Maternity Leave of this Agreement is entitled to unpaid Adoption Leave as provided by this clause.

#### 6.13.2 General entitlement to Adoption Leave

- a) Subject to the requirements of this clause an eligible Employee is entitled to 52 weeks unpaid Adoption Leave.
- b)
  - i) Subject to the requirements of this clause an eligible Employee is entitled to 14 weeks paid Adoption Leave that will form part of the 52 week unpaid entitlement.
  - ii) The 14 week period of paid Adoption Leave is inclusive of any public holidays or repealed public service days in lieu falling within that time.
  - iii) The period of paid Adoption Leave can be extended by the Employee taking double the leave on a half-pay basis and its effect is in accordance with clause 6.12 – Maternity Leave of this Agreement.
- c) An Employee must take Adoption Leave in one continuous period with the exception of Special Temporary Employment or Special Casual Employment pursuant to Clause 6.12 – Maternity Leave of this Agreement.
- d) Except for leave provided under Clause 6.15- Partner Leave of this Agreement only one parent can proceed on Maternity, Adoption or Other Parent Leave at any one time.
- e) Where less than the 52 weeks Adoption Leave is taken paid or unpaid, the unused portion of the leave cannot be banked or preserved in any way.
- f) Unpaid Adoption Leave may be taken in more than one continuous period where the Employee undertakes special temporary employment or special casual employment in accordance with the provisions at Clause 6.12.12 – Employment During Unpaid Maternity Leave of this Agreement. In these circumstances, the provisions of clause 6.12.12 – Employment During Unpaid Maternity Leave of this Agreement shall apply.
- g)
  - i) Where both Employees are employed in the Western Australia public sector an entitlement to paid or unpaid Maternity Leave, Adoption Leave or Other Parent Leave or Parental Leave provided for by another industrial agreement can be shared and
  - ii) The entitlement provided to the Employees shall not exceed the paid Maternity, Adoption or Other Parent Leave quantum for one Employee or its half pay equivalent and
  - iii) The Employees may only proceed on paid and/or unpaid Maternity, Adoption or Other Parent Leave at the same time in exceptional circumstances with the approval of the Employer or as provided for

under Clause 6.12.5 (d) – Maternity Leave of this Agreement. This does not prevent an Employee from taking paid or unpaid Partner Leave as prescribed by Clause 46 of this Agreement.

6.13.3 Payment for Paid Adoption Leave

- a)
  - i) Subject to subclause 6.13.4 (c) a full time Employee proceeding on paid Adoption Leave is to be paid according to their ordinary working hours at the time of commencement of Adoption Leave. Shift and weekend penalty payments are not payable during paid Adoption Leave.
  - ii) Subject to subclause 6.13.4 (c) Payment for a part time Employee is to be determined according to an average of the hours worked by the Employee over the preceding 12 months; or their ordinary working hours at the time of commencement of Adoption Leave, exclusive of shift and weekend penalties, whichever is greater.
- b) An Employee may elect to receive pay in advance for the period of paid Adoption Leave at the time the Adoption Leave commences or may elect to be paid the entitlement on a fortnightly basis over the period of the paid Adoption Leave.
- c) An Employee in receipt of a higher duties allowance for a continuous period of 12 months immediately prior to commencing paid Adoption Leave is to continue to receive the higher duties allowance for the first four weeks of paid Adoption Leave.
- d) Where an Employee is on a period of half pay Adoption Leave and their employment is terminated through no fault of the Employee, the Employee shall be paid out any period of unused paid Adoption Leave equivalent to the period of leave the Employee would have accessed had they been on full pay Adoption Leave when their termination occurred.
- e) An Employee eligible for a subsequent period of paid Adoption Leave as provided for under subclause 6.13.1 (a) (iii) shall be paid the Adoption Leave as follows:
  - i) According to the Employee's status, classification and ordinary working hours at the time of commencing the original period of paid Adoption Leave and
  - ii) Not affected by any period of special temporary employment or special casual employment undertaken in accordance with Clause 6.12.12 – Employment during Unpaid Maternity Leave of this Agreement.
- f) Where less than the 52 weeks Adoption Leave is taken paid or unpaid, the unused portion of the leave cannot be banked or preserved in any way.
- g) An eligible casual Employee provided for under subclause 6.13.1 (d) is not entitled to paid adoption leave.
- h) The 'day of placement', in relation to the adoption of a child by an Employee, means the earlier of the following days:
  - i) the day on which the Employee first takes custody of the child for the adoption;
  - ii) the day on which the Employee starts any travel that is reasonably necessary to take custody of the child for the adoption.
- i) An Employee is not entitled to adoption-related leave unless the child that is, or is to be, placed with the Employee for adoption
  - i) is, or will be, under 16 years old as at the day of placement, or the expected day of placement, of the child and
  - ii) has not, or will not have, lived continuously with the Employee for a period of six months or more as at the day of placement, or the expected day of placement, of the child and
  - iii) is not (otherwise than because of the adoption) a child or stepchild of the Employee or the Employee's partner.
- j)
  - i) An Employee seeking to adopt a child is entitled to two days unpaid leave to attend interviews or examinations required for the adoption procedure.
  - ii) An Employee working or residing outside of the Perth metropolitan area is entitled to an additional day's unpaid leave.
  - iii) The Employee may take any paid leave entitlement to which the Employee is entitled to in lieu of this leave.
- k)
  - i) If an application for adoption leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid adoption leave is terminated.
  - ii) Employees may take any other paid leave entitlement to which they are entitled in lieu of the terminated adoption leave or return to work.

## 6.13.4 Commencement of Adoption Leave

- a) An eligible Employee can commence adoption leave from the day of placement of the child.
- b) The period of paid adoption leave must conclude within 12 months of the day of placement except under exceptional circumstances as provided under Clause 6.12.6 (e) - Maternity Leave of this Agreement but as it relates to Adoption Leave.

## 6.13.5 Notice and Variation Requirements

- a) An Employee shall give no less than eight weeks written notice to the Employer of:
  - i) the date the Employee proposes to commence paid or unpaid adoption leave and
  - ii) the period of leave to be taken.
- b) An Employee is not in breach of subclause 6.13.5 (a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.
- c) An Employee proceeding on adoption leave may elect to take a shorter period of adoption leave to that provided by this clause and may at any time during that period elect to reduce or seek to extend the period stated in the original application, provided four weeks written notice is provided.

## 6.13.6 Other Provisions

The following provisions, as provided under Clause – 6.12 Maternity Leave have application to Adoption Leave:

- 6.12.8 - Interaction with Other Leave Entitlements;
- 6.12.9 – Extended unpaid Maternity Leave;
- 6.12.10 – Communication during Maternity Leave;
- 6.12.11 – Replacement Employee;
- 6.12.12 – Employment during unpaid Maternity Leave;
- 6.12.13 – Return to work on conclusion of Maternity Leave and
- 6.12.14 – Effect of Maternity Leave on the contract of employment of this Agreement.

**6.14 Other Parent Leave**

## 6.14.1 For the purposes of this Clause:

- a) The “*Other Parent*” may or may not be the biological parent, and does not necessarily have to be the partner of the birth parent and is the primary care giver of the child.
- b) The “*primary care giver*” means the Employee will assume the principal role for the care and attention of a child aged under 12 months or a newly adopted child.
- c) Only one person can be the primary care giver of the child at any one time.

## 6.14.2 Eligibility

- a)
  - i) Where an eligible Employee, other than an Employee entitled to Paid Maternity Leave under Clause 6.12.2 or Adoption Leave under Clause 6.13.1 in this Agreement, is the other parent and primary care giver of a child under the age of 12 months or newly adopted child the provisions of this clause will apply.
  - ii) An Employer may require an Employee to provide confirmation of their primary carer status with evidence that would satisfy a reasonable person.
- b) An eligible casual Employee as defined under Clause 6.12.1 - Maternity Leave of this Agreement is entitled to unpaid Other Parent Leave as provided by this clause.
  - i) A permanent, fixed term contract or eligible casual Employee is entitled to 52 weeks unpaid Other Parent Leave in accordance with this clause.
  - ii) An eligible permanent or fixed term contract Employee is entitled to 14 weeks paid Other Parent Leave in accordance with this clause.
  - iii) An Employee employed on a fixed term contract shall have the same entitlement to other parent leave; however, the period of leave granted shall not extend beyond the term of that contract.
  - iv) An Employee is eligible, without concluding their other parent leave and resuming duty, for subsequent periods of other parent leave, including paid other parent leave, in accordance with the provisions of this clause.
- c) A permanent or fixed term contract Employee must have completed twelve months continuous service in the Western Australian Public Sector as defined under the *Public Sector Management Act 1994* immediately preceding the Other Parent Leave in order to receive the forms of paid leave as provided for by this clause.

- d) An Employee on a period of leave without pay unrelated to Other Parent Leave must resume duties prior to being entitled to paid other parent leave in accordance with the eligibility entitlements.

6.14.3 General Entitlement to Other Parent Leave

- a) Subject to the requirements of this clause an eligible Employee is entitled to 52 weeks unpaid Other Parent Leave.
- b)
- i) Subject to the requirements of this clause an eligible Employee is entitled to 14 weeks paid Other Parent Leave that will form part of the 52 week unpaid entitlement.
- ii) The 14 week period of paid Other Parent Leave is inclusive of any public holidays or repealed public service days in lieu falling within that time.
- iii) The period of paid Other Parent Leave can be extended by the Employee taking double the leave on a half-pay basis and in its effect is in accordance with clause 6.12 – Maternity Leave of this Agreement.
- c) An Employee must take Other Parent Leave in one continuous period with the exception of Special Temporary Employment or Special Casual Employment pursuant to Clause 6.12.14 – Maternity Leave of this Agreement.
- d) Except for leave provided under Clause 6.15 - Partner Leave of this Agreement only one parent can proceed on Maternity, Adoption or Other Parent Leave at any one time.
- e) Where less than the 52 weeks Other Parent Leave is taken paid or unpaid, the unused portion of the leave cannot be banked or preserved in any way.
- f) Unpaid Other Parent Leave may be taken in more than one continuous period where the Employee undertakes special temporary employment or special casual employment in accordance with the provisions at Clause 6.12.12 – Employment During Unpaid Maternity Leave in this Agreement. In these circumstances, the provisions of Clause 6.12.12 – Employment During Unpaid Maternity Leave of this Agreement, shall apply.
- g)
- i) Where both Employees are employed in the WA public sector an entitlement to paid or unpaid Maternity Leave, Adoption Leave or Other Parent Leave or Parental Leave provided for by another industrial agreement can be shared and
- ii) The entitlement provided to the Employees shall not exceed the paid Maternity, Adoption or Other Parent Leave quantum for one Employee or its half pay equivalent and
- iii) The Employees may only proceed on paid and/or unpaid Maternity, Adoption or Other Parent Leave at the same time in exceptional circumstances with the approval of the Employer or as provided for under subclause 6.14.3 (i). This does not prevent an Employee from taking paid or unpaid Partner Leave as prescribed by Clause 6.15 – Partner Leave of this Agreement.
- h) An eligible casual Employee provided for under subclause 6.14.2 (b) is entitled to unpaid Other Parent Leave only.
- i) If both parents work in the Public Sector and the mother is able to remain on paid parental leave despite her incapacity to be her child's principal care giver, the Employees may choose which parent will access the paid leave.
- If the mother chooses to remain on Paid Maternity Leave, the other parent may access unpaid other parent leave for the period they are their child's principal care giver.
  - If the other parent chooses to be the primary care giver of the child and accesses paid other parent leave the mother may access unpaid Maternity Leave.
  - Where the other parent accesses paid leave in accordance with this sub clause, the mother is entitled to resume Paid Maternity Leave if/when she becomes her child's principal care giver, subject to the provisions of subclause 6.12.3 (i).

6.14.4 Payment for Paid Other Parent Leave

- a)
- i) Subject to subclause 6.14.4 (c) a full time Employee proceeding on paid Other Parent Leave is to be paid according to their ordinary working hours at the time of commencement of Other Parent Leave. Shift and weekend penalty payments are not payable during paid Other Parent Leave.
- ii) Subject to subclause 6.14.4 (c) payment for a part time Employee is to be determined according to an average of the hours worked by the Employee over the preceding 12 months; or their ordinary working hours at the time of commencement of Other Parent Leave, exclusive of shift and weekend penalties, whichever is greater.
- b) An Employee may elect to receive pay in advance for the period of paid Other Parent Leave at the time the Other Parent Leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid Other Parent Leave.

- c) An Employee in receipt of a higher duties allowance for a continuous period of 12 months immediately prior to commencing paid Other Parent Leave, is to continue to receive the higher duties allowance for the first four weeks of paid Adoption Leave.
- d) An Employee is entitled to remain on Paid Other Parent Leave if the pregnancy results in other than a live child; or the mother is incapacitated following the birth of the child; or the child dies or is hospitalised such that the Employee or the Employee's partner is not providing principal care to the child.
- e) Where an Employee is on a period of half pay Other Parent Leave and their employment is terminated through no fault of the Employee, the Employee shall be paid out any period of unused paid Other Parent Leave equivalent to the period of leave the Employee would have accessed had they been on full pay Other Parent Leave when their termination occurred.
- f) An Employee eligible for a subsequent period of paid Other Parent Leave as provided for under subclause 6.14.2 (c) (iv) shall be paid the Other Parent Leave as follows:
  - i) According to the Employee's status, classification and ordinary working hours at the time of commencing the original period of paid Other Parent Leave and
  - ii) Not affected by any period of special temporary employment or special casual employment undertaken in accordance with Clause 6.12.12 – Maternity Leave of this Agreement.
- g) Where less than the 52 weeks Other Parent Leave is taken paid or unpaid, the unused portion of the leave cannot be banked or preserved in any way.
- h) An eligible casual Employee provided for under subclause 6.14.2 (b) is not entitled to paid Other Parent Leave.

#### 6.14.5 Commencement of Other Parent Leave

- a) An eligible Employee identified as the primary care giver of the child can commence Other Parent Leave from the child's birth date or placement, or a later date nominated by the Employee.
- b) The period of paid Other Parent Leave must conclude within 12 months of the birth or placement of the child except under exceptional circumstances as Clause 6.12.6 (e) – Maternity Leave of this Agreement but as it relates to Other Parent Leave.

#### 6.14.6 Notice and Variation Requirements

- a) An Employee shall give no less than eight weeks written notice to the Employer of:
  - i) the date the Employee proposes to commence paid or unpaid Other Parent Leave; and
  - ii) the period of leave to be taken.
- b)
  - i) An Employee is not in breach of subclause 6.14.6 (a) by failing to give the required period of notice if such failure is due to the requirement of the Employee to take on the role of primary care giver due to the birth parent or other adoptive parent being incapacitated to take on the principal caring role.
  - ii) In such circumstances the Employee shall give notice as soon as reasonably possible.
- c) The granting of leave under this clause is subject to the Employee providing the Employer with evidence that would satisfy a reasonable person detailing the reasons for and the circumstances under which the leave application is made and the relationship the Employee has with the child.
- d) An Employee proceeding on Other Parent Leave may elect to take a shorter period of Other parent Leave to that provided by this clause and may at any time during that period elect to reduce or seek to extend the period stated in the original application, provided four weeks written notice is provided.

#### 6.14.7 Other Provisions

The following provisions, as provided under Clause – 6.12 Maternity Leave have application to Other Parent Leave:

- 6.12.8 - Interaction with Other Leave Entitlements;
- 6.12.9 – Extended unpaid Maternity Leave;
- 6.12.10 – Communication during Maternity Leave;
- 6.12.11 – Replacement Employee;
- 6.12.12 – Employment during unpaid Maternity Leave;
- 6.12.13 – Return to work on conclusion of Maternity Leave and
- 6.12.14 – Effect of Maternity Leave on the contract of employment

of this Agreement.

### 6.15 Partner Leave

6.15.1 An Employee who is not taking parental leave is entitled to one week's partner leave as prescribed by this clause in respect of the:

- a) birth of a child to the Employee's partner; or

- b) adoption of a child who is not the natural child or the stepchild of the Employee and/or the Employee's partner; is under the age of five; and has not lived continuously with the Employee for six months or longer.
- 6.15.2 The entitlement to one week's partner leave shall be taken as
- a) paid annual and/or long service leave;
  - b) unpaid partner leave.
- 6.15.3 Partner leave must be taken immediately following the birth or, in the case of adoption, the placement of the child.
- 6.15.4
- a) Subject to subclause b) b), the taking of partner leave by an Employee shall have no effect on their or their partner's entitlement, where applicable, to access paid maternity leave as provided by Clause 6.12 of this Agreement, paid Adoption Leave as provided by Clause 6.13 of this Agreement and paid Other Parent Leave as provided for by Clause 6.14 of this Agreement.
  - b) Where applicable, unpaid partner leave taken by an Employee shall be counted as part of the Employee's unpaid parental leave entitlement.
- 6.15.5 Any public holidays that fall during partner leave shall be counted as part of the partner leave and do not extend the period of partner leave.
- 6.15.6 Right to Request Additional Unpaid Partner Leave
- An Employee is entitled to request an extension to the period of unpaid partner leave up to a maximum of eight weeks.
- 6.15.7 The Employer is to agree to an Employee's request to extend their unpaid partner leave made under subclause 6.15.6 unless:
- a) having considered the employee's circumstances, the employer is not satisfied that the request is genuinely based on the employee's parental responsibilities; or
  - b) there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the employer and those grounds would satisfy a reasonable person. These grounds include, but are not limited to:
    - i) cost;
    - ii) lack of adequate replacement staff;
    - iii) loss of efficiency; and
    - iv) impact on the production or delivery of products or services by the employer.
- 6.15.8 The Employer is to give the Employee written notice of the Employer's decision on a request to extend their unpaid partner leave. If the Employee's request is refused, the notice is to set out the reasons for the refusal.
- 6.15.9 An Employee who believes their request to extend unpaid partner leave has been unreasonably refused may seek to enforce it as a minimum condition of employment and the onus will be on the Employer to demonstrate that the refusal was justified in the circumstances.
- 6.15.10 Where an Employer agrees to an Employee's request to extend their period of unpaid partner leave under subclause 6.15.6, the Employer must allow an Employee to elect to substitute any part of that period of unpaid partner leave with accrued annual leave or long service leave.
- 6.15.11 An Employee on unpaid partner leave is not entitled to paid personal leave.
- 6.15.12 The total period of partner leave provided by this clause shall not exceed eight weeks.
- 6.15.13 Notice
- a) The Employee shall give not less than four week's notice in writing to the Employer of the date the Employee proposed to commence partner leave, stating the period of leave to be taken.
  - b) An Employee who has given their Employer notice of their intention to take partner leave shall provide the Employer with a medical certificate from a registered medical practitioner naming the Employee, or the Employee's partner, confirming the pregnancy and the estimated date of birth.
- 6.15.14 Effect of Partner Leave on the Contract of Employment
- The provisions of Clause 6.11 – Maternity Leave of this Agreement concerning the effect of partner leave on the contract of employment shall apply to Employees accessing partner leave, with such amendment as necessary.
- 6.15.15 Eligible Casual Employees
- An eligible casual Employee, as defined in Clause 6.12– Maternity Leave of this Agreement, is only entitled to unpaid partner leave.
- 6.16 Leave Without Pay**
- 6.16.1 Subject to the provisions of subclause 6.16.2 of this clause, the employer may grant an employee leave without pay for any period and is responsible for that employee on their return. There is no obligation to offer leave without pay unless otherwise provided for by agreement or policy provisions.

6.16.2 Every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

- a) The work of the employer is not inconvenienced; and
- b) All other leave credits of the employee are exhausted.
- c) A reasonable period of notice has been provided in advance of the date the leave of absence is requested to start; and the proposed reason for absence shall be considered before any decision is made in relation to approval or refusal of the employee's application.

6.16.3 An employee on a fixed term appointment may not be granted leave without pay for any period beyond that employee's approved period of engagement.

6.16.4 Leave Without Pay For Full Time Study: The employer may grant an employee leave without pay to undertake full time study, subject to a yearly review of satisfactory performance. Leave without pay for this purpose shall not count as qualifying service for leave purposes.

6.16.5 Leave Without Pay For Australian Institute Of Sport Scholarships: Subject to the provisions of subclause 6.16.2 of this clause, the employer may grant an employee who has been awarded a sporting scholarship by the Australian Institute of Sport, leave without pay.

### **6.17 Study Leave**

6.17.1 Conditions for Granting Time Off

- a) An employee may be granted time off with pay for part time study purposes at the discretion of the Employer.
- b) Part time employees are entitled to study leave on the same basis as full time employees. Employees working shift work or on fixed term contracts also have the same access to study leave as all other employees.
- c) Time off with pay may be granted up to a maximum of five hours per week, including travelling time, where subjects of approved courses are conducted during normal working hours. The equivalent applies if studying by correspondence.
- d) Employees who are obliged to attend educational institutions for compulsory block sessions may be granted time off with pay, including travelling time, up to the maximum annual amount allowed to an employee in paragraph (c) of this sub clause.
- e) Employees shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study or for the mature age entrance examination for tertiary admission conducted by the Tertiary Institution Service Centre.
- f) In every case the approval of time off to attend lectures and tutorials will be subject to:
  - i) The Employer's convenience;
  - ii) The course being undertaken on a part time basis;
  - iii) Employees undertaking an acceptable form of study load in their own time;
  - iv) Employees making satisfactory progress with their studies; and
  - v) The course being relevant to the employee's career in the public sector and being of value to the state.
- g) A service agreement or bond will not be required.

6.17.2 Payment of Fees and Other Costs

- a) Cadets and Trainees
  - i) Employers are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a post secondary institution. Employees who, of their own volition, attend such institutions to gain higher qualifications will be responsible for the payment of fees.
  - ii) This assistance does not include the cost of textbooks or Guild and Society fees.
  - iii) An employee who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.
- b) All Employees

Notwithstanding sub clause 6.17.10, the Employer has the discretion to reimburse an employee for the full or part of any reasonable costs of enrolment fees, Higher Education Contribution Surcharge, compulsory textbooks, compulsory computer software, and other necessary study materials. Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of successful completion of the subject for which reimbursement has been claimed. The Employer and employee may agree to alternative reimbursement arrangements.

6.17.3 Approved Courses

- a)
  - i) First degree or Associate Diploma courses at a post secondary institution.
  - ii) Diploma courses and two year full time certificate courses at Technical and Further Education (TAFE).

- iii) Secondary courses leading to the Tertiary Entrance Examination (see paragraph (i) of sub clause 6.17.4 or courses preparing students for the mature age entrance conducted by the Tertiary Institutions Service Centre.
    - iv) Courses recognised by the National Authority for the Accreditation of Translators and Interpreters (NAATI) in a language relevant to the needs of the public sector.
  - b) Except as outlined in paragraph d) of this sub clause employees are not eligible for study assistance if they already possess one of the qualifications specified in paragraph 6.17.3 a) i).
  - c) An employee who has completed a Diploma through TAFE is eligible for study assistance to undertake a degree course at any of the tertiary institutions in subparagraph i). An employee who has completed a two year full-time Certificate through TAFE is eligible for study assistance to undertake a Diploma course specified in sub clause 6.17.3 a) ii) of this clause, or a degree or Associate Diploma course specified in sub clause 6.17.3 a) i) of this clause.
  - d) Assistance towards additional qualifications including second or higher degrees may be granted in special cases in a specialist area of benefit to the public sector as well as the employee.
- 6.17.4 For the Purposes of this Clause:
- a) In determining the Employer's convenience, Employers should give due emphasis to the employee's career aspirations .
  - b) An acceptable part time study load should be regarded as not less than five hours per week of formal tuition or the equivalent if studying by correspondence with at least half of the total formal study commitment being undertaken in the employee's own time, except in special cases such as where the employee is in the final year of study and requires less time to complete the course, or the employee is undertaking the recommended part time year or stage and this does not entail five hours formal study.
  - c) The relevance of a course should be determined from a public sector rather than an Employer perspective. For instance, an employee may be undertaking a course of study which is of no special relevance to the employee's work or Employer but which may well be particularly significant in some other section of the public sector.
  - d) A first degree or Associate Diploma course does not include the continuation of a degree or Associate Diploma towards a higher postgraduate qualification.
  - e) In cases where employees are studying subjects that require fortnightly classes, the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.
  - f) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the employee's normal place of work.
  - g) An employee shall not be granted more than five hours' time off with pay per week except in exceptional circumstances where the Employer may decide otherwise.
  - h) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.
  - i) Study leave for attendance at courses leading to the Tertiary Entrance Examination will generally only be granted if the employee has already unsuccessfully attempted to enter tertiary studies through the mature age entrance examination conducted by the Tertiary Institutions Service Centre. However, this condition will not apply if a pass in certain subjects is a prerequisite for entry into an intended course of non-tertiary study or training that meets the requirements specified in this clause.
- 6.17.5 Subject to the provisions of subclause 6.17.6, the Employer may grant an employee full time study leave with pay to undertake:
- a) Post graduate degree studies at Australian or overseas tertiary education institutions; or
  - b) Study tours involving observations and/or investigations; or
  - c) A combination of postgraduate studies and study tours.
- 6.17.6 Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:
- a) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of sub clauses 6.17.1 to 6.17.5 of this clause and the Leave Without Pay provisions of this Agreement.
  - b) It must be a highly specialised course with direct relevance to the employee's profession.
  - c) It must be highly relevant to the Employer's corporate strategies and goals.
  - d) The expertise or specialisation offered by the course of study should not already be available through other employees employed within the organisation.
  - e) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an employee is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.

- f) A fixed term contract employee may not be granted study leave with pay for any period beyond that employee's approved period of engagement.
- 6.17.7 Full time study leave with pay may be approved more than 12 months subject to a yearly review of satisfactory performance.
- 6.17.8 Where an outside award is granted and the studies to be undertaken are considered highly desirable by an Employer, financial assistance to the extent of the difference between the employee's normal wage and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria, then part or full payment of wages may be approved at the discretion of the Employer.
- 6.17.9 The Employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.
- 6.17.10 Where recipients are in receipt of a living allowance, this amount should be deducted from the employee's wages for that period.
- 6.17.11 Where the Employer approves full time study leave with pay, the actual wage contribution forms part of the Employer's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.
- 6.17.12 Where study leave with pay is approved and the Employer also supports the payment of transit costs and/or an accommodation allowance, the Employer will gain approval for the transit and accommodation costs as required.
- 6.17.13 Where employees travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the Employer together with some local transit and accommodation expenses providing it meets the requirements of subclause 6.17.6 of this clause. Each case is to be considered on its merits.
- 6.17.14 The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for employees under this Agreement.

#### **6.18 Purchased Leave**

- 6.18.1 The employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to four (4) weeks additional leave.
- 6.18.2 The employer will assess each application for 48/52 wage arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement and to the Employers' operational requirements.
- 6.18.3 Access to purchased leave will be subject to subclauses 6.18.1-6.18.2 and to:
- the employee having satisfied the Employer's accrued leave management policy;
  - the employee having not more than in excess of ten (10) weeks accrued Annual Leave, Long Service Leave, days in lieu and/ or Credit Days balance at the time the employee requests access to purchased leave;
  - the employee not qualifying for a period of Long Service Leave during the financial year for which the purchased leave is requested; and
  - the employee having nominated when the purchased leave will be taken as part of the Leave Roster Process, which can only be altered by approval of the Employer.
- 6.18.4 The PTA reserves the right to withdraw from the purchased leave arrangement where the employee:
- Is internally transferred or promoted; or
  - Where there are operational requirements warranting such action
- 6.18.5 Purchased leave arrangements run over a financial year concluding on 30 June. employees participating in a purchased leave arrangement who wish to continue in the arrangement in the following year must apply to do so annually as part of the leave rostering process in accordance with subclause 6.2
- 6.18.6 The employee can agree to take a reduced wage spread over the 52 weeks of the year and receive the following amounts of additional purchased leave:

Number of weeks wages spread over 52 weeks	Number of weeks purchased leave
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

- 6.18.7 The purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the additional leave not taken. In the event that the employee is unable to take such purchased leave, their wage will be adjusted on the last pay period in July to take account of the fact that time worked during the year was not included in the wage. Untaken purchased leave will be paid out at the rate at which it was purchased.
- 6.18.8 Where an employee who is in receipt of a higher duties allowance proceeds on any period of additional purchased leave, the employee shall not be entitled to receive payment of the allowance for any period of purchased leave.

- 6.18.9 In the event that a Part Time Employee's ordinary working hours are varied during the year, the wage paid for such leave taken will be adjusted on the last pay in July to take into account any variations to the employee's ordinary working hours during the previous year.
- 6.18.10 An employee may withdraw from this arrangement prior to completing the 52 week period by four (4) weeks written notice. The employee will be entitled to pay in lieu of wages forgone to that time but will not be entitled to equivalent absence from duty.
- 6.18.11 Where an employee or the Employer withdraws from a purchased leave arrangement, payment in lieu of wages forgone will be paid out at the rate at which it was purchased.

#### **6.19 Emergency Services Leave**

- 6.19.1 Subject to operational requirements, paid leave of absence shall be granted by the employer to an employee who is an active volunteer member of State Emergency Service, St John Ambulance Brigade, Volunteer Fire and Rescue Service, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or FESA Units, in order to allow for attendances at emergencies as declared by the recognised authority.
- 6.19.2 The employer shall be advised as soon as possible by an employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.
- 6.19.3 The employee must complete a leave of absence form immediately upon return to work.
- 6.19.4 The application form must be accompanied by a certificate from the emergency organisation certifying that the employee was required for the specified period.
- 6.19.5 An employee who, during the course of an emergency, volunteers their services to an emergency organisation shall comply with all provisions of this clause.

#### **6.20 Defence Force Reserves Leave**

- 6.20.1 The Employer must grant leave of absence for the purpose of Defence service to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.
- 6.20.2 Leave of absence may be paid or unpaid in accordance with the provisions of this subclause.
- 6.20.3 Application for leave of absence for Defence service shall, in all cases, be accompanied by at least 6 weeks' notice and evidence of the necessity for attendance. At the expiration of the leave of absence granted, the employee shall provide a certificate of attendance to the Employer.
- 6.20.4 Paid leave
- a) An employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for Defence service, subject to the conditions set out hereunder.
  - b) Part Time Employees shall receive the same paid leave entitlement as Full Time Employees but payment shall only be made for those hours that would normally have been worked but for the leave.
  - c) On written application, an employee shall be paid salary in advance when proceeding on such leave.
  - d) An employee is entitled to paid leave for a period not exceeding 105 hours on full pay in any period of twelve months commencing on 1 July in each year.
  - e) An employee is entitled to a further period of leave, not exceeding 16 calendar days, in any period of twelve months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the employee and the Defence Force payments to which the employee is entitled if such payments do not exceed normal salary. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered days off is to be excluded, and no account is to be taken of the value of any board or lodging provided for the employee.
- 6.20.5 Unpaid leave: Leave of absence for the purpose of Defence service shall be unpaid where:
- a) the absence exceeds the paid entitlement prescribed in subclause 6.20.4 of this Agreement; or
  - b) the employee fails to provide the Employer with at least 6 weeks' notice and evidence of the necessity for attendance as required by subclause 6.20.3 of this Agreement.
- 6.20.6 Use of other leave
- a) An employee may elect to use Annual or Long Service Leave credits for some or all of their absence on Defence service, in which case they will be treated in all respects as if on normal paid leave.
  - b) The Employer cannot compel an employee to use Annual Leave or Long Service Leave for the purpose of Defence service.

#### **6.21 Paid Leave For English Language Training**

- 6.21.1 Leave during normal working hours without loss of pay shall be granted to employees from non-English speaking backgrounds who are unable to meet standards of communication to advance career prospects, or who constitute a safety hazard or risk to themselves and/or fellow employees, or are not able to meet the accepted production requirements of that particular occupation or industry to attend English training conducted by an approved and authorised authority. The selection of employees for training will be determined by consultation between the Commission and the Union.

- 6.21.2 Leave will be granted to enable the employees selected to achieve an acceptable level of vocational English proficiency. In this respect the tuition content with specific aims and objectives incorporating the pertinent factors at subclause 3 of this clause, shall be agreed between the Employer, the Union, and the Adult Migrant Education Service or other approved authority conducting the training.
- 6.21.3 Subject to appropriate needs assessment participation in training will be on the basis of minimum of 100 hours per employee per year.
- 6.21.4 The agreed desired proficiency level will take account of the vocational needs of an employee in respect of communication, safety and welfare, and productivity within the employee's current position, as well as those positions to which the employee may be considered for promotion or redeployment. It will also take account of issues in relation to training, retraining and multi-skilling, award restructuring, industrial relations and safety provisions, and equal opportunity employment legislation.

## **6.22 Leave To Attend Union Business**

- 6.22.1 The employer shall grant paid leave during ordinary working hours to an employee.
- who is required to give evidence before any Industrial Tribunal.
  - who is a union nominated representative of the employees is required to attend negotiations and/or conferences between the union and employer.
  - when prior agreement between the union and employer has been reached, for the employee to attend official union meetings preliminary to negotiations or industrial hearings.
  - who as a union nominated representative of the employees and is required to attend joint union/management consultative committees or working parties.
- 6.22.2 The granting of leave pursuant to this clause shall only be approved.
- Where an application for leave has been submitted by an employee a reasonable time in advance.
  - For the minimum period necessary to enable the union business to be conducted or evidence to be given.
  - For those employees whose attendance is essential; or.
  - When the operation of the organisation is not unduly affected and the convenience of the employer is not impaired.
- 6.22.3 Leave of absence will be granted at the Ordinary Wage Rate, or where the employee works part of a shift, at the rate the employee would have earned had the employee not been absent from his or her rostered shift.
- 6.22.4 The employer shall not be liable for any expenses associated with an employee attending to union business. Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.
- 6.22.5 Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for union business. An employee shall not be entitled to paid leave to attend union business other than as prescribed by this clause.
- 6.22.6 The provisions of this clause shall not apply to special arrangements made between the parties which provide for unpaid leave for employees to conduct union business.
- 6.22.7 The provisions of this clause shall not apply when an employee is absent from work without the approval of the employer.
- 6.22.8 The employer shall grant leave without pay for a continuous period to the secretary of each applicant union (should such secretary be employed by the employer) to enable the secretary to attend exclusively to union work.

## **7 CONSULTATION**

### **7.1 Consultation**

- 7.1.1 The parties recognise the need for effective communication to improve the business and operational performance and working environment in the Public Transport Authority.
- 7.1.2 The parties acknowledge that decisions will continue to be made by the Employer who is responsible and accountable to Government for the effective and efficient operation of the Public Transport Authority.

### **7.2 Introduction Of Change**

- 7.2.1 This term applies if:
- the Employer has made a definite decision to introduce a major change to production, program, organisation, structure, or technology in relation to its enterprise; and
  - the change is likely to have a significant effect on employees of the enterprise.
- 7.2.2 The Employer must notify the relevant employees and the Union of the decision to introduce the major change.
- 7.2.3 As soon as practicable after making its decision, the Employer must:
- discuss with the relevant employees and the Union:
    - the introduction of the change; and
    - the effect the change is likely to have on the employees; and

- iii) measures the Employer is taking to avert or mitigate the adverse effect of the change on the employees; and
  - b) for the purposes of the discussion — provide, in writing, to the relevant employees and the Union:
    - i) all relevant information about the change including the nature of the change proposed; and
    - ii) information about the expected effects of the change on the employees; and
    - iii) any other matters likely to affect the employees.
- 7.2.4 However, the Employer is not required to disclose confidential or commercially sensitive information to the relevant employees.
- 7.2.5 The Employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.
- 7.2.6 If a term in the enterprise agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the Employer, the requirements set out in subclauses 7.2.2, 7.2.3 and 7.2.5 are taken not to apply.
- 7.2.7 In this provision, a major change is “likely to have a significant effect on employees” if it results in:
  - a) The termination of the employment of employees; or
  - b) Major change to the composition, operation or size of the Employer’s workforce or to the skills required of employees; or
  - c) The elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
  - d) The alteration of hours of work; or
  - e) The need to retrain employees; or
  - f) The need to relocate employees to another workplace; or
  - g) The restructuring of jobs.
- 7.2.8 In this provision, “relevant employees” means the employees’ who may be affected by the major change.
- 7.3 Consultative Committee**
- 7.3.1 The Parties acknowledge that decisions will continue to be made by the Employer who is responsible and accountable to Government for the effective and efficient operation of Transperth Train Operations.
- 7.3.2 The Parties recognise that effective communication and consultation can assist to improve the working environment and operational performance within Transperth Train Operations.
- 7.3.3 Transperth Train Operations will have a Customer Service Consultative Committee, which will be a forum for consultation on collective employment issues including but not limited to:
  - a) Helping to identify and implement continuous improvements to the standards of customer service levels delivered by Transperth Train Operations to our passengers;
  - b) General rostering issues, including balancing the quality, safety and cost-effectiveness of the customer service offered to our passengers with the attractiveness of the roster to employees;
  - c) Specific Rostering Issues, including tabling any changes to Base Rosters and noting in accordance with subclause 3.3.19 any disputes or complaints arising about rostering;
  - d) Changes to work organisation and/or work practices occurring in the workplace; and
  - e) Industrial issues.
- 7.3.4 Matters not resolved through the Consultative Committee can be dealt with in accordance with clause 8 – Dispute Resolution Procedure.
- 7.3.5 The Consultative Committee will comprise the Manager Customer Services or nominee, the Branch Secretary of the Union or nominee, seven elected Employee Committee Representatives and up to seven Employer-nominated representatives.
- 7.3.6 The seven Employee Committee Representatives will be elected in a single proportional representation ballot. Any employee holding a substantive position as a Customer Service Assistant or a Passenger Ticketing Assistant shall be entitled to nominate and vote for the Committee Representative positions. The seven representatives elected will have to satisfy the following qualifications:
  - a) There will be at least two Customer Service Assistants and at least three Passenger Ticketing Assistants;
  - b) There will be at least one representative from each of the following five lines/roster groups:
    - i) Armadale;
    - ii) Fremantle/Midland (treated as one line for this purpose);
    - iii) Joondalup;
    - iv) Mandurah
    - v) Perth.

- 7.3.7 Two proxies, being the nominees who gained the highest quota of votes without successfully being elected as representatives, will be available to attend committee meetings in place of any elected Employee Committee Representative who is unavailable to attend.
- 7.3.8 The Elections shall be conducted in a manner agreed between the parties and failing agreement shall be conducted by the WA Electoral Commission or another independent body. The elected Employee Committee Representatives will hold the position for a two year term.
- 7.3.9 Where, due to a change in an Employee Committee Representative's classification or roster placement, the seven elected representatives do not satisfy the qualifications required by subclause 7.3.6, then the position held by that employee shall be deemed vacant.
- 7.3.10 Where a position falls vacant before the expiry of a term, the vacancy will be filled by recounting the votes cast in the original election, so that the unelected nominee with the highest votes who qualifies for the position will be declared elected. If the position is unable to be filled by recount, the vacancy for the remainder of the term shall be filled in a manner agreed between the parties.
- 7.3.11 The chairing of the Consultative Committee will alternate between the Parties to the Agreement.
- 7.3.12 Any employee to whom this Agreement applies may attend a Consultative Committee meeting in their own time as an observer.
- 7.3.13 The Consultative Committee will convene within 28 days of a written request being received from either party to discuss matters specified in that request. The Parties shall not be required to participate in more than one meeting of the Consultative Committee in any 3 month period, but may agree to meet more frequently.
- 7.3.14 The Consultative Committee will otherwise determine its own operating procedures.

#### **7.4 Consultation Arrangements for Parking Attendants and Central Monitoring Room Operators**

- 7.4.1 Informal arrangements will be established for ongoing consultation for Parking Attendants and Central Monitoring Room Operators while the Agreement is in force.

### **8 DISPUTE RESOLUTION**

#### **8.1 Dispute Resolution Procedure**

- 8.1.1 Any questions, disputes or difficulties arising under this Agreement or in the course of the employment of employees covered by this Agreement shall be dealt with in accordance with this Clause.
- 8.1.2 The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three (3) working days. An employee may be accompanied by a union representative.
- 8.1.3 If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's superior and an attempt made to find a satisfactory solution, within a further three (3) working days. An employee may be accompanied by a union representative.
- 8.1.4 If the dispute is still not resolved, it may be referred by the employee/s or union representative to the Employer or his/her nominee.
- 8.1.5 Where the dispute cannot be resolved within five (5) 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 Commission.
- 8.1.6 The period for resolving a dispute may be extended by agreement between the parties.
- 8.1.7 At all stages of the procedure the employee may be accompanied by a union representative.
- 8.1.8 Notwithstanding the above the union may raise matters directly with representatives of the Employer. In each case the union and the Employer shall endeavour to reach agreement. If no agreement is reached either party may refer the dispute to the Commission for conciliation and/or arbitration.
- 8.1.9 The parties covered by this Agreement will maintain and will not disrupt the provision of services to the public while disputes are being dealt with under this procedure.

### **9 REGISTERED ORGANISATION MATTERS**

#### **9.1 Facilities For Workplace Delegates**

- 9.1.1 The Employer recognises the rights of the union to organise and represent its members. Union representatives (delegates) in the organisation have a legitimate role and function in assisting the union in the tasks of recruitment, organising, communication and representing members' interests in the workplace and the organisation.
- 9.1.2 The Employer will recognise union representatives in the organisation and will allow them to carry out their role and functions.
- 9.1.3 The union will advise the Employer in writing of the names of the union representatives in the organisation and their role and authorities.
- 9.1.4 Subject to prior approval, the Employer shall recognise the authorisation of each union representative in the organisation and shall provide them with the following:
- a) Reasonable paid time off from normal duties:
    - i) to perform their functions as a union representative such as organising, recruiting, individual grievance handling, and collective bargaining; and

- ii) to attend union business in accordance with Clause 6.22.1 of this Agreement.
  - b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of lockable filing cabinets, meeting rooms, telephones, fax, email, Internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal Employer protocols.
  - c) A notice board for the display of union materials including broadcast email facilities. Broadcast email facilities will need to be in accordance with the established policies, procedures and guidelines of the Employer. This means prior approval for emailed materials must be issued by executive management.
  - d) Paid access to periods of leave for the purpose of attending union training courses in accordance with Clause 9.2 of this Agreement.
  - e) Notification of the commencement of new employees and, as part of their induction, time to discuss the benefits of union membership with them.
  - f) Access to a sheltered area for meetings of members.
  - g) Access to work locations, names, and rostered hours of work of employees. This information and access will also be provided to union officials upon request.
  - h) Access to awards, agreements, policies and procedures.
  - i) Access to information on matters affecting employees in accordance with the consultation provisions under this Agreement.
  - j) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.
- 9.1.5 The Employer agrees, upon receiving written authorisation from an employee, to provide to the union with five (5) working days the employee's bank account details and subsequent changes from time to time for the purpose of enabling the employee to establish direct debit facility for the payment of union dues. Employers must be indemnified against financial accountability related to these transactions.
- 9.1.6 Group inductions: Where the Employer conducts a group induction, which may be on or off site, the union shall be given at least 14 days notice of the time and place of the induction. The union will be entitled to at least thirty minutes to address new employees without Employer representatives being present.
- 9.1.7 Subclause 2.7 Discipline prevails over this subclause to the extent of any inconsistency.
- 9.1.8 The Employer recognises that it is paramount that union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a union representative.
- 9.2 Trade Union Training Leave**
- 9.2.1 Subject to the convenience of the employer and the provisions of this clause:
- a) The Employer shall grant paid leave of absence to employees who are nominated by the Union to attend short courses relevant to the public sector or the role of union workplace representative, conducted by the Union party to this Agreement or its nominated provider.
  - b) The Employer shall grant paid leave of absence to attend similar courses or seminars as from time to time approved by agreement between the Employer and the relevant Union.
- 9.2.2 An employee shall be granted up to a maximum of five (5) days paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five days and up to ten (10) days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten days.
- 9.2.3 Leave of absence will be granted at the Ordinary Wage Rate and shall not include shift allowances, penalty rates or overtime.
- 9.2.4 Where a public holiday or rostered day off (including a rostered day off as a result of working a 38 hour week) falls during the duration of a course, a day off in lieu of that day will not be granted.
- 9.2.5 Part time employees shall receive the same entitlement as full time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.
- 9.2.6 The granting of leave pursuant to the provisions of this clause is subject to the operation of the organisation not being unduly affected and to the convenience of the employer.
- 9.2.7 Any application by an employee shall be submitted to the employer for approval at least four weeks before the commencement of the course, provided that the employer may agree to a lesser period of notice.
- 9.2.8 All applications for leave shall be accompanied by a statement from the union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the organisation that is conducting the course.
- 9.2.9 A qualifying period of 12 months service shall be served before an employee is eligible to attend courses or seminars of more than one half-day duration. An employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than 12 months service.

- 9.2.10 The employer shall not be liable for any expenses associated with an employee's attendance at trade union training courses.
- 9.2.11 Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

### 9.3 Right Of Entry

The parties acknowledge that the Act empowers authorised representatives of the union to exercise a right to enter the Employer's premises in the circumstances and for the purposes specified in Part 11 Division G of the Act.

## 10 MISCELLANEOUS PROVISIONS

### 10.1 Training

- 10.1.1 Training may be delivered on or off the job. Wherever possible, the Employer will ensure that the training is competency based and nationally recognised training with clearly defined programs and agreed performance standards. Provided the Employer determines the training to be required, the Employer will meet all reasonable costs associated with the training. Provided that training time may be allowed for in relief lines within a drop down roster. An Employer shall not unreasonably withhold paid training leave.
- 10.1.2 No trainee shall be permanently appointed at full base classification rates unless prescribed training requirements are assessed and satisfactorily completed within the stipulated time period. Provided such time periods may be extended by written agreements between the parties.
- 10.1.3 Overtime and shift work shall not be worked by trainees except to enable the requirements of training to be effected. When overtime and shift work are worked, the relevant allowances and penalties based on the training wage nominated at subclause 4.1.4 shall apply. No trainee shall work overtime or shift work on their own.
- 10.1.4 Training of Existing Employees
- a) Each employee must be prepared to undertake training, refresher training, and maintain the qualifications necessary to carry out the employee's role to the required standard.
  - b) **Assessment** – The level of skills possessed by each employee shall be determined by the assessment conducted by the Registered Training Organisation or such other independent and accredited assessor as agreed between the parties, based on; relevant training packages and competency profiles, certification requirements for specific tasks, and the work experience necessary to perform a stipulated role.
  - c) **Competency Standards** – Where training packages have been developed by the industry, those training packages shall be adopted in respect of matters relating to training in the industry and callings covered by this Agreement. Training standards shall include but not be limited to the following; standards and competencies for skills required for each calling; curricula development; training courses; articulation and accreditation requirements for both on and off the job training; on the job training guidelines.
  - d) Where it is agreed by the Employer that additional training should be undertaken by any employee, training may be undertaken either on or off the job. All time involved with training shall be paid at the actual time displayed on the roster on the day
  - e) No employee will be forced to retrain, although a refusal to retrain may have adverse consequences on the employee's contract of employment, should the employee fail to meet the required competencies for a classified position under this Agreement.

### 10.2 Uniforms, Clothing and Protective Equipment

- 10.2.1 Employees as required will wear specialised clothing for particular operations. The Employer will establish a uniform committee in consultation with the Union.
- 10.2.2 The employer shall supply uniforms and protective clothing; as agreed from time to time between the employer and the Union.
- 10.2.3 An employee shall sign an acknowledgement on receipt of uniforms and/or protective clothing thereof, and on leaving employment shall return the same to the employer.
- 10.2.4 An employee shall be responsible for any loss or damage thereto, with fair wear and tear attributable to ordinary use excepted.

### 10.3 Fitness For Duty

- 10.3.1 To ensure that an employee is medically fit to carry out duties in a satisfactory and safe manner the employee will, if required, undergo a medical examination or health assessment with the employer's Occupational Physician. The level of examination or assessment undertaken will be take into consideration the activities the employee is required to undertake and be in accordance with the requirements of the National Health Assessment for the Rail Industry.
- 10.3.2 The employer will pay the costs of any medical examination or assessment conducted by the employer's Occupational Physician. However, subject to any policy to the contrary, the employee is responsible for any costs associated with any treatment of a condition identified by the employer's Occupational Physician.

- 10.3.3 The employee will, as required, undergo drug and alcohol testing in accordance with the employer's policies on the safety of personnel working on or about the railway system.
- 10.3.4 The employee will not be required to undergo a medical examination for the purposes of the National Health Assessment for the Rail Industry while such employee is on workers compensation, except and only when an employee returns from workers compensation and is medically cleared to recommence paid remuneration or a circumstance where a health assessment is required for the purpose of alternative duties.

**SIGNATURES OF PARTIES BOUND**

**Signed** \_\_\_\_\_ **Date:** \_\_\_\_\_

Paul Robinson

Branch Secretary, **The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch**

**Signed** \_\_\_\_\_ **Date:** \_\_\_\_\_

Customer Service Bargaining Representative

**Signed** \_\_\_\_\_ **Date:** \_\_\_\_\_

Customer Service Bargaining Representative

**Signed** \_\_\_\_\_ **Date:** \_\_\_\_\_

Customer Service Bargaining Representative

**Signed** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Reece Waldock**

Chief Executive Officer. **The Public Transport Authority of Western Australia**

SCHEDULE A – WAGES TABLES

BASE WAGE RATES

Classification	2013				2014 from 4 <sup>th</sup> September 2014 (+2.75%)				2015 from 4 <sup>th</sup> September 2015 (+2.5%)				2016 from the 4 <sup>th</sup> September 2016 (+2.5%)			
	Base hourly rate	Base 38 hour weekly rate	Base 40 hour weekly rate	Base hourly rate	Base 38 hour weekly rate	Base 40 hour weekly rate	Base hourly rate	Base 38 hour weekly rate	Base 40 hour weekly rate	Base hourly rate	Base 38 hour weekly rate	Base 40 hour weekly rate	Base hourly rate	Base 38 hour weekly rate	Base 40 hour weekly rate	
Level 1	\$21.01		\$840.27	\$21.59		\$863.51	\$22.13		\$885.10	\$22.68		\$907.23				
Level 2	\$22.19		\$887.40	\$22.80		\$912.01	\$23.37		\$934.81	\$23.95		\$958.18				
Level 3 – Parking Attendant (formerly Car Park Attendant)	\$23.26	\$883.97	\$930.50	\$23.90		\$955.99	\$24.50		\$979.89	\$25.11		\$1,004.38				
Level 4 (Passenger Ticketing Assistant)	\$24.74		\$989.75	\$25.42		\$1,016.81	\$26.06		\$1,042.23	\$26.71		\$1,068.29				
Level 5 (Customer Service Assistant)	\$26.28		\$1,051.24	\$27.00		\$1,080.11	\$27.68		\$1,107.11	\$28.37		\$1,134.79				
Level 6 (CMR Operator)	\$26.93		\$1,077.27	\$27.67		\$1,106.82	\$28.36		\$1,134.49	\$29.07		\$1,162.86				

(Application of subclause 6.3.10)

**ORDINARY WAGE RATES**

Classification	Applicable annualised Leave Loading rate	2014 from the operative date			2015 from the anniversary of the operative date			2016 from the second anniversary of the operative date		
		Ordinary hourly rate	Ordinary 38 hour weekly rate	Ordinary 40 hour weekly rate	Ordinary hourly rate	Ordinary 38 hour weekly rate	Ordinary 40 hour weekly rate	Ordinary hourly rate	Ordinary 38 hour weekly rate	Ordinary 40 hour weekly rate
Level 3 - Parking Attendant (formerly Car Park Attendant)	N/A	\$ 23.90		\$955.99	\$ 24.50		\$979.89	\$ 25.11		\$1,004.38
Level 4 (Passenger Ticketing Assistant)	N/A	\$ 25.42		\$1,016.81	\$ 26.06		\$1,042.23	\$ 26.71		\$1,068.29
Level 5 (Customer Service Assistant)	1.90%	\$27.52		\$1,100.63	\$28.20		\$1,128.15	\$28.91		\$1,156.35
Level 6 (CMR Operator)	1.90%	\$28.20		\$1,127.85	\$28.90		\$1,156.05	\$29.62		\$1,184.95

**SCHEDULE B – ALLOWANCES**

2014 Clause no	Allowance	How paid and rounding	Methodology for adjustment in this Agreement	From 4 September 2014
5.1.1	Shift Work	per hour = round to nearest 1 c	Fixed for the life of this Agreement consistent with the methodology for shift work allowances PTA has adopted in previous agreements.	Afternoon - \$3.09 per hour Night- \$3.67 per hour Early morning - \$3.09 per hour Early/late - \$3.67 per shift
5.1.2 e)	Shifts other than day and > 5 consecutive nights		Adjusts with Wage Rate	Time and a quarter on the Ordinary Hourly Wage Rate for the 1 <sup>st</sup> 8 hours and at the rate of time and a half thereafter
3.4.3	Long Shift Allowance	For time worked from the commencement of the eleventh rostered hour worked in a shift.	Adjusts with Wage Rate	0.84 times the Base Wage Rate.
5.2.8	Travelling Time and Expenses	Rate per km for additional distance travelled	Adjusted in line with variations to Schedule F and G of the Public Service Award 1992.	Refer table below
5.3	Fire Panel Allowance		Fixed for the Life of this Agreement	\$5.85 per shift to designated Fire Warden
CI 5.2.8 Travelling Time				
Metropolitan Area				
Rate (cents) per kilometre Motor vehicle Engine Displacement (in cubic centimetres)				
Over 2600cc	Over 1600cc to 2600cc	1600cc and under		
89.5	64.5	53.2		
Metropolitan Area				
Rate (cents) per kilometre Motor cycle allowance				
31.0				

**SCHEDULE C - AGGREGATION METHODOLOGY****WAGE AGGREGATION**

Where shift penalties and other allowances usually paid to shift work employees are aggregated, the allowances and penalties payable under their Base Roster are totalled and averaged across the full roster, and discounted for annual leave.

Establishing an Aggregated Wage Rate allows an employee working shift work to receive the same weekly wage rate (before additional hours overtime) for each pay period regardless of the shift 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 Wage Rate paid to an employee under the following methodology is intended by the parties to be a reasonable approximation of the sum the employee would otherwise be paid averaged over the Base Roster.

**METHODOLOGY****1. Aggregate Component Calculation**

- a. Start with the relevant Base Hourly Wage Rate for the rostered employees as shown in the Wages Table at Schedule A.
- b. Determine the Ordinary Hourly Wage Rate by multiplying the Base Hourly Wage Rate by the Annualised Leave Loading factor applicable to the employee group (see subclause 6.3.10a) of this Agreement) and round to 2 decimal points.

- c. Determine the Ordinary Weekly Wage Rate by multiplying that Ordinary Hourly Wage Rate by the average number of ordinary hours per week for the rostered employees (see subclause 3.2.1 of the Agreement and any relevant Special Provisions in Clause 3.4 to 3.5.)
- d. Using the Base Roster, establish for the rostered employees:
- the overall number of hours for early Morning, Afternoon or Night shifts – refer subclause 5.1;
  - the number of Late Shifts – refer to subclause 5.1.1d);
  - For Passenger Ticketing Assistants and Customer Service Assistants, the total time rostered to be worked greater than 10 hours in any shift;
  - the number of rostered hours on a Saturday shift up to the maximum number of daily ordinary hours applicable to the rostered employees – refer to subclauses 3.2.2, 3.4 or 3.5
  - the number of rostered hours on a Sunday shift up to the maximum number of daily ordinary hours applicable to the rostered employees – refer to subclauses – refer to subclauses 3.2.2, 3.4 or 3.5; and (where the parties agree)
- e. the number of rostered hours, if any, in excess of the weekly ordinary hours (i.e. the number of hours rostered over the entire Base Roster less the product of the number of weeks covered by the roster and the nominated ordinary weekly hours applicable to the rostered employees) - refer to subclause 3.2.1 Calculate the Aggregate Component by calculating the following items and then summing all the values to give the Aggregate Overall Roster Component for that Base 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;
  - For Passenger Ticketing Assistants and Customer Service Assistants, the total time rostered to be worked greater than 10 hours in any shift multiplied by 0.84 time the applicable Base Wage Rate;
  - the number of shift hours on a Saturday up to the maximum number of daily ordinary hours multiplied by half the applicable Ordinary Hourly Rate;
  - the number of shift hours on a Sunday up to the maximum number of daily ordinary hours multiplied by the applicable Ordinary Hourly Wage Rate; and (where the parties agree)
  - the number of rostered hours, if any, in excess of the weekly ordinary hours multiplied by twice the applicable Ordinary Hourly Wage Rate.

## 2. Average Weekly Aggregate Component Calculation

Determine the Average Weekly Aggregate Component by dividing the Aggregate Overall Roster Component by the number weeks covered by the Working Lines in the Base Roster.

## 3. Discounting the Averaged Aggregate Component

The Average Aggregate Component is then ‘discounted’ to allow the Aggregated Wage Rate to be paid during periods of annual leave, by multiplying by:

- 47/52 (in the case of employees working 24 hour/7 Day continuous shift rosters - Refer subclause 6.3.2); or
- 48/52 (in the case of other employees – Refer subclause 6.3.1).

## 4. Aggregated Wage Rate Calculation

The Aggregated Weekly Wage Rate for the rostered employees is established by adding the Discounted Average Weekly Aggregate Component to the Ordinary Weekly Wage Rate.

## SCHEDULE D – AGREED ANNUAL LEAVE LOADING FOR PASSENGER TICKETING ASSISTANTS AS AT DATE OF REGISTRATION

In accordance with Clause 6.3.9 e), the annual leave loading agreed between the parties to be payable to Passenger Ticketing Assistants at the date of registration of the Agreement will be:

	Passenger Ticketing Assistant Base rate per week	Annual leave loading expressed as % of base rate based on <u>current</u> average penalties per fortnight (based on all 7 <u>current</u> Passenger Ticketing Assistant Base Rosters) (Refer Cl 6.3.9c) ii)	Annual leave loading amount per week based on <u>current</u> average shift penalties (equivalent \$ amount of % of average shift penalties)	Annual leave loading amount for 5 weeks A/L (equivalent \$ amount of % of average shift penalties)	Annual Leave Loading cap for 2011 (from 1 Oct 2010) (Refer Cl 6.3.10 b)
From registration date 2014	\$1,016.81	29.54%	\$300.37	\$1,501.83	\$2,019.80
From 4 Sept 2015	\$1,042.23	29.54%	\$307.87	\$1,539.37	to be advised
From 4 Sept 2016	\$1,068.29	29.54%	\$315.57	\$1,577.86	to be advised

Paragraph 6.3.9 c) ii) provides that Shift workers – employees working over seven days of the week or twenty four hours of the day had they not been on leave – will be paid whichever is the greater of a loading of 20 per cent; or the average shift loading (including relevant weekend penalty rates) as agreed between the parties under paragraph 6.3.9e) of this subclause.

Clause 6.3.9 e) provides that where there is any change to Base Rosters (as per Rostering Arrangements –General CI 3.3.6 h) covering Passenger Ticketing Assistants , there shall be an exchange of letters between the Employer and the Union agreeing the annual leave loading payable for the duration of the agreement (or until any further change to the roster), based on the average of penalties earned under that roster and acknowledging that the annual leave loading cap figure from time to time (as referred to paragraph 6.3.10 b) will prevail where applicable.

#### **SCHEDULE E – EMPLOYEE ROSTERING REPRESENTATIVES**

<b>Roster</b>	<b>No. of Reps</b>
Armadale Passenger Ticketing Assistants	1
Armadale Customer Service Assistants	1
Fremantle Passenger Ticketing Assistants	1
Fremantle Customer Service Assistants	1
Joondalup Passenger Ticketing Assistants	1
Joondalup Customer Service Assistants	1
Mandurah Passenger Ticketing Assistants	1
Mandurah Customer Service Assistants	1
Midland Passenger Ticketing Assistants	1
Midland Customer Service Assistants	1
Perth Passenger Ticketing Assistants	2
Perth Customer Service Assistants	1
Central Monitoring Room Operators	1
Car Park Attendants	1

## **PROCEDURAL DIRECTIONS AND ORDERS—**

**2014 WAIRC 01311**

### **WESTERN AUSTRALIAN PHARMACY ASSISTANTS AWARD 2014**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

THE PHARMACY GUILD OF WESTERN AUSTRALIA (ORGANISATION OF EMPLOYERS)  
AND OTHERS

**APPLICANT**

-v-

(NOT APPLICABLE)

**RESPONDENT**

**CORAM**

ACTING SENIOR COMMISSIONER P E SCOTT

**DATE**

THURSDAY, 4 DECEMBER 2014

**FILE NO/S**

A 1 OF 2014

**CITATION NO.**

2014 WAIRC 01311

**Result**

Consent Order issued

**Representation**

**Applicant**

Mr A Drake-Brockman of counsel and with him Mr B Jackson of counsel

**Shop, Distributive**

**and Allied**

**Employees’**

**Association**

**of Western**

**Australia**

Mr S Millman of counsel

*Order*

WHEREAS this is an application for a new award to be known as the *Western Australian Pharmacy Assistants Award 2014* pursuant to Section 37 of the *Industrial Relations Commission Act 1979*; and

WHEREAS the parties have provided a minute of consent order, signed by each counsel, and the Commission has formed the opinion that such a consent order is appropriate to issue;

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

THAT the report back conference listed on Friday the 5<sup>th</sup> day of December 2014 at 10.30 am be adjourned to an available date.

[L.S.]

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

**2014 WAIRC 01296**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	SANDRA PETRICH	<b>APPLICANT</b>
	-v-	
	GENTLEMENS HAIR LOUNGE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S M MAYMAN	
<b>DATE</b>	TUESDAY, 2 DECEMBER 2014	
<b>FILE NO/S</b>	B 183 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01296	

<b>Result</b>	Change of respondent's name
<b>Representation</b>	
<b>Applicant</b>	Ms Sandra Petrich
<b>Respondent</b>	Ms Julliet Meneghello

*Order*

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

AND WHEREAS at the conference held on 10 November 2014 it became clear that the respondent had been incorrectly named;

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

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

THAT the name Julliet Meneghello be deleted and Gentlemens Hair Lounge be inserted in lieu thereof.

[L.S.]

(Sgd.) S M MAYMAN,  
Commissioner.

**2014 WAIRC 01266**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	DEANNE MARLOW	<b>APPLICANT</b>
	-v-	
	SOUTH COAST REALTY PTY LTD T/AS RENTAL SOLUTIONS	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S M MAYMAN	
<b>DATE</b>	WEDNESDAY, 19 NOVEMBER 2014	
<b>FILE NO/S</b>	B 208 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01266	

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<b>Result</b>	Change of respondent's name
<b>Representation</b>	
<b>Applicant</b>	Mrs D Marlow
<b>Respondent</b>	Mr K Turner

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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 at the conference held on 17 November 2014 it became clear that the respondent had been incorrectly named;  
AND WHEREAS the Commission formed the view that it was appropriate to amend the respondent's name;  
NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the name South Coast Realty Pty Ltd be deleted and South Coast Realty Pty Ltd t/as Rental Solutions be inserted in lieu thereof.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

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**2014 WAIRC 01352**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
CLAYTON MCBRIDE

**PARTIES**

**APPLICANT**

**-v-**

CITY OF ARMADALE

**RESPONDENT**

**CORAM** CHIEF COMMISSIONER A R BEECH  
**DATE** FRIDAY, 12 DECEMBER 2014  
**FILE NO.** B 223 OF 2014  
**CITATION NO.** 2014 WAIRC 01352

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<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr P Mullally (by written correspondence)
<b>Respondent</b>	Mr S Roffey (by written correspondence)

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*Direction*

WHEREAS a claim of a denied contractual benefit was lodged in the Commission pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act, 1979* on 4 November 2014;

AND WHEREAS on 20 November the respondent requested further and better particulars of the claim from the applicant and an extension of time in which to file its Notice of Answer;

AND WHEREAS on 24 November 2014 the applicant filed further and better particulars of the claim;

AND WHEREAS the applicant's further and better particulars were not served on the applicant until 10 December 2014 and on that day the respondent requested an extension of time in which to file its Notice of Answer;

AND WHEREAS the parties have agreed that the time for the respondent to file a Notice of Answer be extended to 16 January 2015;

AND WHEREAS the Commission considers the time should be extended to that agreed date;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under Regulation 36 of the *Industrial Relations Commission Regulations 2005* hereby direct:

THAT the time for filing any answering statement in this application be extended to 16 January 2015.

(Sgd.) A R BEECH,  
Chief Commissioner.

[L.S.]

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2014 WAIRC 01274

**DISPUTE RE ROSTERING PRACTICES**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST  
AUSTRALIAN BRANCH**APPLICANT****-v-**

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

**RESPONDENT****CORAM** COMMISSIONER S J KENNER**DATE** FRIDAY, 21 NOVEMBER 2014**FILE NO.** CR 29 OF 2012**CITATION NO.** 2014 WAIRC 01274**Result** Directions issued**Representation****Applicant** Mr C Fogliani of counsel**Respondent** Mr R Farrell of counsel*Directions*

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

- (1) THAT the issue to be determined is the coverage of the pm shift at Victoria Park.
- (2) THAT the parties are to identify and file a list of issues to be specifically determined no later than 14 days prior to the hearing.
- (3) THAT the matter will be heard and determined based on those parts of the evidence and exhibits tendered in the proceedings at first instance as agreed between the parties and as supplemented by further evidence, as the case may be.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

2014 WAIRC 01303

**DISPUTE RE ALLEGED DISCIPLINARY ACTION**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST  
AUSTRALIAN BRANCH**APPLICANT****-v-**

THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

**RESPONDENT****CORAM** COMMISSIONER S M MAYMAN**DATE** WEDNESDAY, 3 DECEMBER 2014**FILE NO.** CR 32 OF 2014**CITATION NO.** 2014 WAIRC 01303**Result** Directions issued**Representation****Applicant** Mr C Fogliani (of counsel)**Respondent** Mr D Matthews (of counsel)

Ms J Rhodes (of counsel)

*Directions*

THE COMMISSION has heard from Mr C Fogliani (of counsel) on behalf of the applicant union and Mr D Matthews (of counsel) and Ms J Rhodes (of counsel) on behalf of the respondent and in order to expedite the hearing the parties have agreed to a number of directions. Accordingly, the Commission in accordance with the powers conferred on it under the *Industrial Relations Act 1979* hereby directs –

1. THAT the hearing be set down for 2 days on Monday, 9 February and Tuesday, 10 February 2015, commencing at 10.30am;
2. THAT discovery be informal;
3. THAT the parties email Commissioner Mayman's chambers on [chambers-mayman@wairc.wa.gov.au](mailto:chambers-mayman@wairc.wa.gov.au), an agreed statement of facts by close of business on Friday, 6 February 2015;
4. THAT the applicant file in the Commission their outline of submissions by close of business on Tuesday, 27 January 2015;
5. THAT the respondent file in the Commission their outline of submissions by close of business on Monday, 2 February 2015; and
6. THAT the parties have liberty to apply at short notice.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

**2014 WAIRC 01341**

**WA HEALTH - HSUWA - PACTS INDUSTRIAL AGREEMENT 2014**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

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

**APPLICANT**

**-v-**

HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

**RESPONDENT**

**CORAM**

PUBLIC SERVICE ARBITRATOR  
COMMISSIONER S M MAYMAN

**DATE**

WEDNESDAY, 10 DECEMBER 2014

**FILE NO**

PSAAG 19 OF 2014

**CITATION NO.**

2014 WAIRC 01341

**Result**

Directions issued

**Representation**

**Applicant**

Mr D Matthews (of counsel)

**Respondent**

Mr D Stojanoski (of counsel)

*Directions*

HAVING heard Mr D Matthews (of counsel) on behalf of the applicant and Mr D Stojanoski (of counsel) on behalf of the respondent and by consent the Western Australian Industrial Relations Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs -

1. THAT the matter be set down for hearing for hearing before a Commission in Court Session for 4 days, 23, 24, 25 and 26 February 2015.
2. THAT the parties have leave in these proceedings to appear and be heard by legal practitioners.
3. THAT by 21 January 2015 the applicant file and serve:
  - a. A document setting out the relief sought and the grounds and reasons in support;
  - b. Witness statements; and
  - c. A bundle of documents upon which it intends to rely.

4. THAT by 11 February 2015 the respondent file and serve:
  - a. Witness statements; and
  - b. A bundle of documents upon which it intends to rely.
5. THAT discovery otherwise be informal;
6. THAT there be liberty to apply at short notice.

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

[L.S.]

**2014 WAIRC 01295**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SANDRA PETRICH	<b>APPLICANT</b>
	-v-	
	GENTLEMENS HAIR LOUNGE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S M MAYMAN	
<b>DATE</b>	TUESDAY, 2 DECEMBER 2014	
<b>FILE NO/S</b>	U 183 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01295	

<b>Result</b>	Change of respondent's name
<b>Representation</b>	
<b>Applicant</b>	Ms Sandra Petrich
<b>Respondent</b>	Ms Julliet Meneghello

*Order*

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979;  
AND WHEREAS at the conference held on 10 November 2014 it became clear that the respondent had been incorrectly named;  
AND WHEREAS the Commission formed the view that it was appropriate to amend the respondent's name;  
NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the name Julliet Meneghello be deleted and Gentlemens Hair Lounge be inserted in lieu thereof.

(Sgd.) S M MAYMAN,  
Commissioner.

[L.S.]

**2014 WAIRC 01265**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SIMON SMITH	<b>APPLICANT</b>
	-v-	
	THE DEPARTMENT OF EDUCATION (WA)	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	TUESDAY, 18 NOVEMBER 2014	
<b>FILE NO.</b>	U 200 OF 2014, B 200 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01265	

<b>Result</b>	Directions amended
<b>Representation</b>	
<b>Applicant</b>	Mr S Smith on his own behalf
<b>Respondent</b>	Mr D Matthews of counsel

*Direction*

WHEREAS these are applications pursuant to Sections 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and  
WHEREAS on Tuesday the 28<sup>th</sup> day of October 2014 the Commission issued Directions ([2014] WAIRC 01222) in preparation for the hearing of these matters; and

WHEREAS by email on Monday the 17<sup>th</sup> day of November 2014 the applicant requested an extension of time to comply with Direction 1 and Direction 2; and

WHEREAS by email on Tuesday the 18<sup>th</sup> day of November 2014 the respondent advised that it does not object to the applicant's request; and

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

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

1. THAT Direction 1 of [2014] WAIRC 01222 be amended by replacing "November" with "December".
2. THAT Direction 2 of [2014] WAIRC 01222 be amended by replacing "November" with "December".

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

[L.S.]

## INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Fisheries Agency Specific Agreement 2014 PSAAG 17/2014	20/11/2014	The Civil Service Association of Western Australia Incorporated, The Executive Director Labour Relations of the Department of Commerce, acting as agent for, and on behalf of the Director General of the Department of Fisheries	(Not applicable)	Commissioner S M Mayman	Agreement registered
Parliamentary Employees General Agreement 2014 PSAAG 18/2014	2/12/2014	The Civil Service Association of Western Australia Incorporated, Media, Entertainment and Arts Alliance of Western Australia (Union of Employees), United Voice WA	(Not applicable)	Commissioner S M Mayman	Agreement registered
Public Transport Authority Railway Employees (Network and Infrastructure) Industrial Agreement 2014 AG 18/2014	13/11/2014	The Public Transport Authority Of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner S J Kenner	Agreement registered
Public Transport Authority Railway Employees (Trades) Industrial Agreement 2014 AG 20/2014	1/12/2014	The Public Transport Authority Of Western Australia	The Automotive, Food, Metals, Engineering Printing & Kindred Industries Union of Workers - Western Australian Branch, Electrical Trades Union WA	Commissioner S J Kenner	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014 AG 19/2014	13/11/2014	Public Transport Authority of Western Australia	The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Commissioner S J Kenner	Agreement registered
WA Health – HSUWA – PACTS – Industrial Agreement 2014 PSAAG 19/2014	8/12/2014	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, and WA Country Health Service	Health Services Union of Western Australia (Union of Workers)	Commissioner S M Mayman	Agreement registered

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## NOTICES—Appointments—

2014 WAIRC 01280

APPOINTMENTADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner S M Mayman to be an additional Public Service Arbitrator for a period of one year from the 10<sup>th</sup> day of November, 2014.

Dated the 18<sup>th</sup> day of November, 2014.



(Sgd.) A.R. BEECH

CHIEF COMMISSIONER A.R. BEECH

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## RECLASSIFICATION APPEALS—

2014 WAIRC 01319

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

**PARTIES****APPLICANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF HEALTH

**RESPONDENT****CORAM**PUBLIC SERVICE ARBITRATOR  
COMMISSIONER J L HARRISON**DATE**

MONDAY, 8 DECEMBER 2014

**FILE NO**

PSA 22 OF 2012

**CITATION NO.**

2014 WAIRC 01319

**Result**

Discontinued

**Representation****Applicant**

Ms L Kennewell

*Order*

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

On 25 November 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 01315**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	JOHN RAYMOND DONOVAN	<b>APPLICANT</b>
	-v-	
	WA DEPARTMENT OF COMMERCE	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	FRIDAY, 5 DECEMBER 2014	
<b>FILE NO</b>	PSA 1 OF 2014	
<b>CITATION NO.</b>	2014 WAIRC 01315	

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**Result** Application dismissed

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*Order*

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

WHEREAS on the 3<sup>rd</sup> day of December 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.

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

[L.S.]

**2014 WAIRC 01318**

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	TAMARA REINHARD-GREBERT	<b>APPLICANT</b>
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE WA COUNTRY HEALTH SERVICE	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON	
<b>DATE</b>	MONDAY, 8 DECEMBER 2014	
<b>FILE NO</b>	PSA 18 OF 2012	
<b>CITATION NO.</b>	2014 WAIRC 01318	

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<b>Result</b>	Discontinued
<b>Representation</b>	
<b>Applicant</b>	Ms P Marcano (as agent)

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*Order*

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

On 24 November 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.

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**2014 WAIRC 01317**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CHRISTOPHER JAMES SANDFORD	<b>APPLICANT</b>
	-v-	
	MR JOHN YOUENS CONSTRUCTION INDUSTRY LSL BOARD	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON	
<b>DATE</b>	MONDAY, 8 DECEMBER 2014	
<b>FILE NO</b>	PSA 9 OF 2011	
<b>CITATION NO.</b>	2014 WAIRC 01317	

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<b>Result</b>	Discontinued
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Mr J Youens

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*Order*

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

On 27 November 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.

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