Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 3 WEDNESDAY 25 MARCH, 2015 Vol. 95—Part 1

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

95 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeals against decision of Commission under s.33S of the Police Act 1892—

[2015] WASCA 46

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	POLIZZI -v- COMMISSIONER OF POLICE [2015] WASCA 46
CORAM	:	BUSS J
		MURPHY J
		LE MIERE J
HEARD	:	13 FEBRUARY 2015
DELIVERED	:	11 MARCH 2015
FILE NO/S	:	IAC 2 of 2014
BETWEEN	:	MARK POLIZZI
		Appellant
		AND
		COMMISSIONER OF POLICE
		Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	BEECH CC
		KENNER C
		MAYMAN C
Citation	:	POLIZZI -v- COMMMISSIONER OF POLICE [2014] WAIRC 00302
File No	:	APPL 27 of 2013

Catchwords:

Industrial Appeal Court - Whether court has jurisdiction to hear appeal

Legislation:

Industrial Relations Act 1979 (WA)

Police Act 1892 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Mr G J Huggins

Solicitors:

Appellant	:	In person
Respondent	:	Commissioner of Police

Case(s) referred to in judgment(s):

Gordon v Commissioner of Police [2011] WASCA 168; (2011) 210 IR 448

Wall v Commissioner of Police [2012] WASCA 170

1 **JUDGMENT OF THE COURT**: The appellant was formerly a member of the Western Australian Police Service.

2 On 4 April 2013, the respondent (the Commissioner), in exercise of the powers conferred by s 8(1) and s 33L of the *Police Act 1892* (WA), removed the appellant from his office as a non-commissioned police officer.

3 On 2 May 2013, the appellant appealed to the Western Australian Industrial Relations Commission (the Commission) under s 33P of the *Police Act* on the ground that the Commissioner's decision to take removal action relating to him was harsh, oppressive or unfair.

4 On 22 April 2014, the Commission dismissed the appeal. It held that the Commissioner's decision to remove the appellant was not harsh, oppressive or unfair. The Commission said in its reasons published on 14 April 2014:

> When matters of public interest (as understood by reference to s 33Q(4) of the Act) and the special relationship between [the appellant] and the Commissioner of Police which emphasises a duty to obey and uphold the standards of policing are taken into account, we do not see that the decision to remove him from the Police Force was harsh, oppressive or unfair. [The appellant] has not shown that he was not given a fair go all round and his appeal is dismissed [211].

5 On 13 May 2014, the appellant filed a notice of appeal in this court. He purports to appeal against the Commission's decision.

6 On 31 July 2014, the Commissioner filed a notice of motion in this court for an order that the appellant's appeal be dismissed on the ground that this court does not have jurisdiction to entertain the purported appeal and, consequently, the purported appeal is incompetent. Each of the parties filed and served written submissions in relation to the Commissioner's notice of motion. On 13 February 2015, this court heard oral submissions on the notice of motion.

7 This court's jurisdiction under s 90(1) of the *Industrial Relations Act 1979* (WA), as modified and applied by s 33S read with s 33U of the *Police Act*, to hear an appeal by a former member of the Police Service against a decision of the Commission was examined by this court in ***Gordon v Commissioner of Police*** [2011] WASCA 168; (2011) 210 IR 448 and ***Wall v Commissioner of Police*** [2012] WASCA 170.

8 It was held in those cases that the right of appeal conferred on a former member of the Police Service under s 90(1) of the *Industrial Relations Act*, as modified and applied by s 33S read with s 33U of the *Police Act*, does not include a right of appeal from a decision of the Commission that the Commissioner's decision to remove the police officer was not harsh, oppressive or unfair. See ***Gordon*** [8] - [10], [13] - [23]; ***Wall*** [9] - [11].

9 In the present case, the appellant purports to appeal from a decision of the Commission that his appeal be dismissed because the Commissioner's decision to remove him was not harsh, oppressive or unfair.

10 Although the appellant's grounds of appeal to this court allege, amongst other things, that:

(a) the Commission erred in law in its interpretation that psychological evidence is medical evidence, contrary to a definition in the *Police Force Regulations 1979* (WA);

(b) the Commission erred in law in its interpretation of the effect of prescribed medication upon behaviour;

(c) the appellant was not afforded the right to be heard before the Commission; and

(d) the Commission's decision will cause the appellant to suffer injustice if the Commission does not seek a medical opinion in relation to information relating to the appellant upon which the Commission has relied,

the breadth of those grounds of appeal cannot alter the proper characterisation of the decision of the Commission which is sought to be challenged before this court.

11 This court does not have jurisdiction to entertain the purported appeal. The purported appeal is therefore incompetent. The contention in the notice of motion has been made out and the appeal must be dismissed.

2015 WAIRC 00232

APPEAL AGAINST THE DECISION OF THE COMMISSION IN APPL 27 OF 2013 GIVEN ON 22 APRIL 2014

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	MARK ANTHONY POLIZZI
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	BUSS J
	MURPHY J
	LE MIERE J
DATE	WEDNESDAY, 11 MARCH 2015
FILE NO/S	IAC 2 OF 2014
CITATION NO.	2015 WAIRC 00232

Result	Appeal dismissed
Representation	
Appellant	Mr M Polizzi, in person
Respondent	Mr G Huggins, Counsel

Order

It is hereby Ordered that:

1. The appeal be dismissed.

(Sgd.) S BASTIAN,
[L.S.] Clerk of Court.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2015 WAIRC 00173

PUBLIC SERVICE AND GOVERNMENT OFFICERS GENERAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED AND OTHERS
	APPLICANTS
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 12 FEBRUARY 2015
FILE NO	PSAAG 20 OF 2014
CITATION NO.	2015 WAIRC 00173

Result	Agreement varied

Order

WHEREAS on Tuesday, 16 September 2014, the Public Service Arbitrator issued an Order ([2014] WAIRC 01016) for the registration of the Public Service and Government Officers General Agreement 2014 (the Agreement); and

WHEREAS following the registration of the Agreement, the parties became aware of necessary variations and corrections; and

WHEREAS the parties agree to the variation of the Agreement in accordance with s 43(1) of the *Industrial Relations Act 1979*;

NOW THEREFORE, having heard from Ms C Moxey on behalf of the employer parties to the Agreement and Mr W Claydon of counsel on behalf of The Civil Service Association of Western Australia Incorporated, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Public Service and Government Officers General Agreement 2014* be varied in accordance with the following Schedule and that such variation shall have effect on and from 1 January 2015.

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

SCHEDULE

1. Clause 1. TITLE: Delete this clause and insert the following in lieu thereof:

This General Agreement shall be known as the Public Service and Government Officers General Agreement 2014. This General Agreement varies PSAAG 7 of 2014 which cancelled and replaced the Public Service and Government Officers General Agreement 2011 (PSAAG 7 of 2011).

2. Clause 24. ADOPTION LEAVE: Delete subclause 24.5(b) and insert the following in lieu thereof:

(b) The period of paid adoption leave must conclude within twelve months of the day of placement except under exceptional circumstances as provided under clause 23.7 (f) of the Maternity Leave clause, but as it relates to Adoption Leave.

3. Clause 25. OTHER PARENT LEAVE: Delete subclause 25.5(b) and insert the following in lieu thereof:

(b) The period of paid Other Parent Leave must conclude within twelve months of the birth or placement of the child except under exceptional circumstances as per clause 23.7 (f) of the Maternity Leave clause, but as it relates to Other Parent Leave.

4. Clause 26. PARTNER LEAVE: Delete subclause 26.2(a) and insert the following in lieu thereof:

(a) paid personal leave, subject to clause 26.7;

5. Clause 32. ANNUAL LEAVE LOADING FOR SHIFT WORK EMPLOYEES AND EMPLOYEES ON COMMUTED ARRANGEMENTS THAT INCORPORATE ANNUAL LEAVE LOADING: Delete subclause 32.4(b)(ii) and insert the following in lieu thereof:

(ii)	Commencing on or after 1 January 2015	$1,676.91

6. Clause 37. PUBLIC SECTOR FIRST AID ALLOWANCE: Renumber the second subclause numbered 37.4 as 37.5.

7. Schedule 4: AGENCY SPECIFIC AGREEMENTS: In subclause (2), after the line containing 'Department for Planning and Infrastructure Agency Specific Agreement 2007', insert the following:

Department of the Premier and Cabinet	State Law Publisher Agency Specific Agreement 2012	PSAAG 2 of 2012

2015 WAIRC 00174

SOCIAL TRAINERS GENERAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED AND ANOTHER

APPLICANTS

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE THURSDAY, 12 FEBRUARY 2015

FILE NO PSAAG 21 OF 2014

CITATION NO. 2015 WAIRC 00174

Result Agreement varied

Order

WHEREAS on Tuesday, 16 September 2014, the Public Service Arbitrator issued an Order ([2014] WAIRC 01019) for the registration of the Social Trainers General Agreement 2014 (the Agreement); and

WHEREAS following the registration of the Agreement, the parties became aware of necessary variations and corrections; and

WHEREAS the parties agree to the variation of the Agreement in accordance with s 43(1) of the *Industrial Relations Act 1979*;

NOW THEREFORE, having heard from Ms C Moxey on behalf of the employer and Mr W Claydon of counsel on behalf of The Civil Service Association of Western Australia Incorporated, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Social Trainers General Agreement 2014* be varied in accordance with the following Schedule and that such variation will have effect on and from 1 January 2015.

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

SCHEDULE

1. Clause 1. TITLE: Delete this clause and insert the following in lieu thereof:

This General Agreement shall be known as the Social Trainers General Agreement 2014. This General Agreement varies PSAAG 10 of 2014 which cancelled and replaced the Social Trainers General Agreement 2011 (PSAAG 12 of 2011).

Clause 27. ADOPTION LEAVE: Delete subclause 27.5(b) and insert the following in lieu thereof:

(b) The period of paid adoption leave must conclude within twelve months of the day of placement except under exceptional circumstances as provided under clause 26.7 (f) of the Maternity Leave clause, but as it relates to Adoption Leave.

2. Clause 28. OTHER PARENT LEAVE: Delete subclause 28.5(b) and insert the following in lieu thereof:

(b) The period of paid Other Parent Leave must conclude within twelve months of the birth or placement of the child except under exceptional circumstances as per clause 26.7 (f) of the Maternity Leave clause, but as it relates to Other Parent Leave.

3. Clause 29. PARTNER LEAVE: Delete subclause 29.2(a) and insert the following in lieu thereof:

(a) paid personal leave, subject to subclause 29.7 of this clause;

4. Clause 33. ANNUAL LEAVE LOADING FOR SHIFT WORKERS AND EMPLOYEES ON COMMUTED ARRANGEMENTS THAT INCORPORATE ANNUAL LEAVE LOADING: Delete subclause 33.4(b)(ii) and insert the following in lieu thereof:

(ii)	Commencing on or after 1 January 2015	$1,676.91

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2015 WAIRC 00175

PARLIAMENTARY EMPLOYEES AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE GOVERNOR OF WESTERN AUSTRALIA IN COUNCIL AND OTHERS

RESPONDENTS

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 16 FEBRUARY 2015

FILE NO/S P 9 OF 2014

CITATION NO. 2015 WAIRC 00175

Result Award varied

Order

HAVING heard Mr S Dane on behalf of The Civil Service Association of Western Australia Incorporated and United Voice WA and Mr C Bretnall as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Parliamentary Employees Award 1989 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 13th day of February 2015.

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

SCHEDULE

1. Clause 16. – Parliamentary Support Services Employee Wages: Delete subclauses (3) and (4) of this clause and insert the following in lieu thereof:

(3) The following allowances shall be paid to PSSEs indexed according to State Wage decisions and shall be:-

(a)	Chef	
	1st year	$142.90 per fortnight
	2nd year	$285.60 per fortnight
(b)	Tradesperson Cook (Sous Chef)	
	1st year	$92.80 per fortnight
	2nd year	$142.90 per fortnight
(c)	Stewards to Speaker and President	$71.30 per fortnight

(4) An allowance of $41.30 per fortnight shall be paid to all PSSEs employed in the kitchen, dining room and bar areas.

2. Clause 19. – Meal Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) An employee who is required to work overtime under Clause 10. – Overtime, and where such overtime extends beyond 5.00 p.m., a meal allowance shall be paid in accordance with the provisions of Clause 22. - Overtime of the Public Service Award 1992 as amended. Provided that where such overtime extends beyond 6.00 a.m. the following day, an allowance of $15.80 or the amount charged by the House, whichever is the higher, for such a three course meal shall be paid.

3. Clause 23. – Uniforms and Clothing: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) Such uniforms supplied shall be laundered and/or dry cleaned by the employer and remain the property of the employer, provided that in lieu of the employer laundering and/or dry cleaning same, an employee shall be paid $8.90 per week for such laundering and/or dry cleaning, excepting any person employed as a Cook who shall be paid $13.70 per week for laundering and/or dry cleaning.

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2015 WAIRC 00177

HOSPITAL SALARIED OFFICERS (WORKPOWER) AWARD OF 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 17 FEBRUARY 2015
FILE NO/S	APPL 75 OF 2007
CITATION NO.	2015 WAIRC 00177
Result	Application dismissed

Order

WHEREAS this is an application made on the Commission's Own Motion pursuant to Section 40B of the *Industrial Relations Act 1979* to vary the Hospital Salaried Officers (Workpower) Award of 1996; and

WHEREAS on the 13th day of January 2015 the Commission wrote to the parties to the Award noting that the matter had not proceeded as there was uncertainty as to whether any employees are covered by the Award, and seeking their advice as to whether any employees are covered by the Award; and

WHEREAS by email dated the 16th January 2015, the respondent responded to the Commission's enquiry by advising that it is a national system employer and does not have any employees covered by the Award; and

WHEREAS the Commission is of the opinion that the application ought to be dismissed;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00170

SALARIED OFFICERS (ASSOCIATION FOR THE BLIND OF WESTERN AUSTRALIA) AWARD, 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 12 FEBRUARY 2015
FILE NO/S	APPL 76 OF 2007
CITATION NO.	2015 WAIRC 00170

Result Application dismissed

Order

WHEREAS this is an application made on the Commission's Own Motion pursuant to Section 40B of the *Industrial Relations Act 1979* to vary the Salaried Officers (Association for the Blind of Western Australia) Award, 1995; and

WHEREAS on the 13th day of January 2015 the Commission wrote to the parties to the Award seeking their views by the 27th day of January 2015 to the Commission dismissing the application due to there being no employees covered by the Award; and

WHEREAS there was no response from the parties;

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

THAT this application be, and is hereby dismissed.

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

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00204

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2015 WAIRC 00204
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 22 OCTOBER 2014, THURSDAY, 23 OCTOBER 2014, WEDNESDAY, 4 FEBRUARY 2015, THURSDAY, 5 FEBRUARY 2015
DELIVERED	**:**	THURSDAY, 26 FEBRUARY 2015
FILE NO.	**:**	M 186 OF 2013
BETWEEN	**:**	KYRA PHILLIPS
		CLAIMANT
		AND
		MVJ ENTERPRISES PTY LTD
		RESPONDENT

Catchwords	**:**	Alleged failure to comply with Educational Services (Post-Secondary Education) Award 2010; claim alleging underpayment
Legislation	**:**	*Workplace Relations Act 1996* *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* *Fair Work Act 2009* *Minimum Conditions of Employment Act 1993* *Industrial Relations Act 1979*
Instruments	**:**	Educational Services (Post-Secondary Education) Award 2010 (MA000075) 2009 State Wage Order **(**2009 WAIRC 00402)

Result	**:**	Claim proven to the extent of $375.82
Representation:		
Claimant	**:**	Mr N Marouchak of MKI Legal appeared for the Claimant
Respondent	**:**	Mr G J Douglas of Douglas Cheveralls Lawyers appeared for the Respondent

REASONS FOR DECISION

Parties

1 MVJ Enterprises Pty Ltd (the Respondent) operates Perth College of Beauty Therapy (the College). The College offers nationally recognised vocational training courses in beauty and make-up.

2 The Claimant, Ms Kyra Phillips (Ms Phillips), is a qualified beauty therapist. Between 17 August 2009 and about 20 September 2013 the Respondent employed her as a casual teacher. She taught students enrolled at the College who were undertaking a Certificate II course in Nail Technology.

Claim

3 Ms Phillips alleges that the Respondent had underpaid her. Initially she sought $49,081.00 but now says that she is owed either $65,721.96, or alternatively, $32,823.59, depending on whether or not certain transitional provisions of the Educational Services (Post-Secondary Education) Award 2010 (MA000075) (the Award) had application.

4 The Respondent denies underpaying Ms Phillips, however concedes that on the most favourable assessment of her claim Ms Phillips will be entitled to recover $375.82.

Employment Contract

5 On 17 August 2009 Ms Phillips and the Respondent entered into a written contract of employment. The contract did not make reference to an award but provided that she was to be paid at an hourly rate of $27.

6 At the time Ms Phillips entered into that contract she did not possess any formal teaching qualification despite asserting significant teaching experience. The lack of formal teaching qualifications was problematic for the Respondent. Consequently it was a condition of the contract of employment that Ms Phillips, as a matter of priority, obtained the appropriate teaching qualification (Certificate IV in Training and Assessment). The agreement provided that until such time that occurred, her teaching would be under supervision. It suffices to say that Ms Phillips did not attain that qualification until 4 July 2013. Notwithstanding that, she was, prior to the attainment of that qualification, permitted to teach without supervision.

History of Dispute

7 This dispute between the parties can be tracked back to 23 July 2013, when the Respondent asked Ms Phillips to sign a new contract of employment. The new contract made reference to the Award, a Modern Award, made under the Fair Work Act 2009 (FW Act).

8 Upon reading the new contract, Ms Phillips was alerted to the existence of the Award, of which she had no prior knowledge. Ms Phillips read the Award and then sought advice from Fair Work Australia and the Fair Work Ombudsman. Having done so, she formed the view that she had been paid at a lesser rate than that to which she believed she was entitled. She also concluded that she was entitled to certain allowances which had not been paid to her.

9 On 17 September 2013, Ms Phillips wrote to the Respondent alleging underpayment. Upon receipt of her correspondence, the Respondent sought advice from its lawyer and asked Ms Phillips not to discuss her claim with other employees.

10 On 18 September 2013, Ms Phillips received an email from the Respondent which she says implied that she had been discussing the issue with other staff members. Ms Phillips denies having discussed the matter with other employees of the Respondent.

11 Late on Thursday, 19 September 2013, Ms Phillips perused the www.seek.com.au website and discovered what she believed to be her job being advertised. Upset and distressed by what she had discovered, the next morning, she attended the College to retrieve her personal belongings.

12 Later that day, Ms Phillips spoke to the College's Deputy Principal, Ms Andrea Granagan, about her job having been advertised. Ms Granagan told her that her job had not been advertised, but rather the advertisement was aimed at providing her with an assistant. Ms Phillips did not accept that explanation. She was, because of what had happened to other employees, convinced that her employment was about to be terminated. Ms Phillips resigned from her employment before her employment could be terminated.

13 Ms Phillips subsequently corresponded with the Respondent in an attempt to recover entitlements that she believes are owed to her. The Respondent has resisted her claims.

Issues

14 The issues to be determined in this matter are:

1. the applicable legislation and/or instruments that governed Ms Phillips' employment; and
2. whether Ms Phillips was paid in accordance with the applicable legislation and/or instruments; and
3. if not, the amount owed to her.

Applicable Legislation and/or Instruments

15 At all material times, the Respondent was a national system employer, pursuant to the *Workplace Relations Act 1996* (WR Act) and the *Fair Work Act 2009* (FW Act). Around the commencement of Ms Phillips' employment, federal employment laws were in the process of significant reform. The FW Act replaced the WR Act on 1 July 2009, with some provisions commencing on 1 January 2010. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) provided that certain provisions of the WR Act were to remain in force notwithstanding the repeal of the WR Act. The preserved provisions of the WR Act involved minimum conditions of employment that had been transitioned from the jurisdiction of state legislature, to the federal jurisdiction.

16 The *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) had provided, with some exceptions, that a minimum wage be paid to all employees in the state of Western Australia. The exceptions are not relevant to this matter. The MCE Act is a pre-reform instrument contemplated by section 208 of the WR Act. The operation of the MCE Act was preserved as a pre-reform instrument until the Award (a Modern Award for the purpose of the FW Act) came into force on 1 July 2010.

17 It follows that, prior to 1 July 2010 Ms Phillips' rate of remuneration was governed by the MCE Act and thereafter, by the Award. The Award displaced the MCE Act (see Clause 11 of Schedule 9 of the Transitional Act).

18 Pursuant to the Award, if the minimum conditions under a previously existing award or Australian Pay and Classification Scale (APCS) applicable under Division 2 of Part 7 of the WR Act (in this instance the MCE Act) were different to the minimum conditions under the Award, transitional provisions applied to transition the employee's minimum entitlements from the previous applicable rate under the MCE Act to the Award rate. That is clear from what is contained in Schedule A of the Award.

19 It follows that whilst Ms Phillips' employment was subject to the MCE Act, the minimum wage to which she was entitled was that under the 2009 State Wage Order (2009 WAIRC 00402) (*State Wage Order*) (see section 11 of the MCE Act and section 50A of the *Industrial Relations Act 1979* (WA)).

20 From the commencement of her employment and up until 30 September 2009, Ms Phillips was entitled to be paid an hourly rate of $17.90 ($14.67 plus 20% casual loading) and then between 1 October 2009 and 31 December 2009 her hourly rate was $17.99 ($14.99 plus 20% casual loading). Between 1 January 2010 and 1 July 2010, Ms Phillips' hourly rate of pay continued to be $17.99 because of what is contained in Clause A.2.3 of Schedule A of the Award. Up until 1 July 2010 Ms Phillips was not entitled to payment for any overtime, public holiday or other penalty rate.

21 From 1 July 2010 onwards, the minimum wage payable under the Award was the applicable annual rate, divided by 26 and further divided by five, to arrive at an hourly rate, less 80% of the difference between the Award rate and the APCS rate. The 80% deduction decreased each subsequent year on 1 July, by 20% (see Clause A.2.5 of Schedule A of the Award).

Was Ms Phillips Paid Her Correct Entitlements?

MCE Act

22 I find that during the period that the MCE Act applied, being from the commencement of her employment up until 1 July 2010, Ms Phillips was paid an hourly rate in excess of that required under that Act. As indicated earlier, Ms Phillips was not entitled to any overtime, payment for public holidays or any other penalty rates.

Award

23 Whether or not Ms Phillips was paid her correct entitlements under the Award will in part depend upon her classification, and her level under that classification.

24 Clause 13 of the Award provides:

> "***13. Classifications***
>
> ***13.1*** *All employees covered by this award must be classified according to the classification descriptors set out in Schedule B-Classifications-Academic Teachers, Schedule C-Classifications-Teachers and Tutor/instructors or Schedule D-General Staff, and paid the minimum weekly rate or the minimum annual salary for the classification level in clause 14-Minimum wages. Employers must advise their employees in writing of their classification level and of any changes to their classification level.*
>
> ***13.2*** *The classification by the employer must be according to the principal functions and skill requirements of the employment as determined by the employer.*"

25 Ms Phillips asserts that she falls within Schedule C - Classifications - Teachers and Tutor/instructors of the Award (Award Schedule). Clause C.3 of the Award Schedule provides:

> "***C.3 Teachers other than TESOL teachers***
>
> ***C.3.1*** *A teacher other than a TESOL teacher will be classified in accordance with the following:*
>
> ***(a)*** ***Category A*** *- a teacher with a five year degree or equivalent at university level in a field relevant to the teaching area.*
>
> ***(b)*** ***Category B*** *- a teacher with a four year degree or equivalent at university level in a field relevant to the teaching area.*
>
> ***(c)*** ***Category C*** *- a teacher with a three year degree or equivalent at university level in a field relevant to the teaching area.*
>
> ***(d)*** ***Category D*** *- any other teacher, including a Vocational Education and Training (VET) tutor who has the qualifications required by the accredited curriculum or training package*

and who delivers and/or assesses nationally recognised competency based training which may result in a qualification or Statement of Attainment under the Australian Recognition Framework (ARF).

C.3.2 *For the purpose of this schedule experience will mean full-time adult teaching experience or equivalent part-time or casual experience.*

C.3.3 *Casual experience will be credited on the basis that 800 face-to-face teaching hours is equivalent to one year of full-time experience.*"

26 A "Teacher" is defined in Clause 3.1 of the Award as follows:

"***teacher*** *means an employee engaged to teach students where a teaching qualification is mandatory or required by the employer, and where the work required involves teaching a course of study or units of work recognised within or pursuant to the Australian Qualifications Framework or accredited by a relevant state or territory authority and which is neither the work of an academic teacher nor a tutor/instructor*".

27 The Respondent concedes that Ms Phillips is a ***Category D*** teacher. At paragraph 23 of its submissions lodged on 15 October 2014, the Respondent said:

"*23. At the time the claimant was employed by (the) College, her highest educational qualification was a Diploma in Beauty Therapy, and she held no teaching qualifications or certificates. Accordingly, the claimant was a Category D teacher.*"

28 I agree that Ms Phillips was a Category D teacher because she was conducting an accredited course.

29 I now move to consider the appropriate rate of pay payable to Ms Phillips. Relevantly, Clause C.1 of the Award Schedule provides:

"***C.1*** *Teachers and tutor/instructors will be paid according to the salary scale set out in clause 14.3.*

C.1.1 *On appointment a teacher will be placed on a salary level commensurate with the minimum salary for their qualifications and experience as determined by this schedule. The progress for a teacher classified as Category A, B, C, or D will be as follows:*

(a) *Category A commences at Level 4 and progresses to a maximum of Level 12.*

(b) *Category B commences at Level 3 and progresses to a maximum of Level 12.*

(c) *Category C commences at Level 2 and progresses to a maximum of Level 12.*

(d) *Category D commences at Level 1 and progresses to a maximum of Level 9.*

Provided that a Category D employee who achieves Level 9 may be promoted beyond that level where that employee can demonstrate that they are able to carry on the full duties of a Category A, B, or C teacher.

C.1.2 *If an employer does not accept (fully or in part) the qualifications or experience of a teacher, the employer will advise the teacher in writing what qualifications or experience are not accepted or the extent to which they are not accepted.*

C.1.3 *Subject to the continuing satisfactory conduct, diligence and performance of a teacher and the acquisition and utilisation of skills and knowledge through experience, progression from one salary level to the next will occur on the completion of a year of full-time experience or equivalent part-time experience.*

C.1.4 *Where the employer considers that the conduct, diligence or performance of a teacher is not satisfactory or the teacher has not acquired and utilised increased skills and knowledge which could reasonably be expected to be acquired and utilised and for that reason considers that progress to the next salary level is not warranted, a formal review will be undertaken by the employer prior to the date when the increment is due.*

C.1.5 *When a teacher achieves the further experience or qualifications which entitle the teacher to an increase in salary the increase will be calculated on and from the first pay period after the results of the course are announced or the experience is gained.*"

30 A teacher will advance to the next salary level on the satisfactory completion of a year of "experience". Experience is defined in Clause C.3.2 of the Award Schedule (supra) as full-time teaching experience or part-time casual experience. Clause C.3.3 of the Award Schedule provides that casual experience is credited on the basis of 800 face to face teaching hours.

31 Clause C.5 of the Award Schedule sets out when an employee is eligible to move between pay points. It provides:

"***C.5*** ***Movement between pay points***

C.5.1 *An employee will be eligible for movement to the next pay point within the classification structure after each 12 month period, following a performance review which the employer will complete before the end of the 12 month period.*

C.5.2 *Where an employee has been absent for in excess of three months, in aggregate, during the 12 month period the performance review will be delayed by the period of the absence. Any resultant increase will also be delayed by the same period.*

> ***C.5.3*** *Where, due to the employer's operational requirements, a performance review is not completed before the end of the 12 month period any resultant increase will take effect from the day on which the next 12 month period commenced.*
>
> ***C.5.4*** *Movement to the next pay point will only occur when the employee has, over the preceding 12 months:*
>
> ***(a)*** *acquired and utilised additional skills, experience and competencies within the ambit of the classification level and in accordance with the priorities of the employer; and*
>
> ***(b)*** *demonstrated satisfactory performance.*
>
> ***C.5.5*** *If the requirements in clause C.5.4 are not met at the conclusion of the 12 month period the employee will not progress to the next pay point until such time as the requirements are met.*"

32 Clause C.1.1 of the Award Schedule required the identification of Ms Phillips' salary level upon "appointment". That was a necessary pre-condition to any consideration of movement between salary levels. In order to give meaning to Clause C.1.1 "on appointment" must be read to mean "on commencement" of the Award.

33 It is not in dispute that upon commencement of the Award the Respondent failed to classify Ms Phillips based on her functions and skills. No classification process occurred thereafter.

34 In the end result, the parties are now at odds as to Ms Phillips' correct classification and her pay rate.

35 Ms Phillips asserts that upon commencement of the Award, the appropriate level for her classification was Level 9, particularly taking into account her estimated 15,000 teaching hours experience accumulated prior to her being employed by the Respondent.

36 The Respondent says that, based on the role performed by Ms Phillips (teaching four units of a Certificate II level course), and taking into account her qualifications and experience, her appropriate level on commencement of the Award would have been Level 1.

37 As indicated earlier Clause 13.2 of the Award provides:

> "***13.2*** *The classification by the employer must be according to the principal functions and skill requirements of the employment as determined by the employer.*"

38 It follows that the experience of the employee alone is not determinative of classification. Clause C.1.1 of the Award Schedule provides that upon appointment, a teacher will be placed on a salary level commensurate with the minimum salary for their qualifications and experience. The progress for a Category D teacher is from Level 1 to Level 9.

39 The Respondent says that the language of Clause C.1.1 of the Award Schedule is prescriptive, meaning that Category D teachers all must start at Level 1 and progress up through the various levels.

40 I reject that contention. Clause C.1.1 of the Award Schedule in fact requires the employer to assess the teacher upon appointment and then pay the teacher the minimum salary for that level. The assessment will require taking into account the teacher's qualifications and experience. If the Respondent's contention was correct, it would mean that a Category D Level 9 teacher changing employers but doing the same job would automatically revert to being a Level 1 teacher. Such an outcome would be absurd. In any event, the Respondent's argument would render Clause 13.2 of the Award otiose.

41 As a result of the Respondent failing to classify Ms Phillips when required, I am called upon to determine her proper classification as at the commencement of the Award.

Ms Phillips' Teaching Experience

42 Ms Phillips testified that she has worked continuously in nail therapy since attaining her qualification in November 1988. Her work history is that she worked at the Merlin Hotel for approximately one year before moving to the Gold Coast where she started her own salon. Her primary business at the salon was that of "nails". She then moved to a different location in Queensland and conducted a business in nails and training. She trained girls on Mondays and at night for a period of two years before returning to Perth in about 1993.

43 In 1993 and 1994, Ms Phillips ran a nail salon in the Perth central business district. In 1994 she started her own business known as ***Kyra's Nail Studio***. She asserts that as part of that business, she carried out accredited training on Mondays and at night. She continued that until 2004 when she moved her business to her home. She has since continued to run her business from home, providing nail services and acting as a wholesaler of nail products.

44 Ms Phillips says that since 1991, she has regularly provided training to staff and others. She estimates that she has accumulated experience well in excess of that required for appointment to that of a Level 9.

45 In a publication produced by the College, entitled ***Student Handbook*** (Exhibit 34), reference is made to Ms Phillips' teaching experience. When the handbook was produced, the statement contained within it about Ms Phillips' teaching experience was based on her representations to the Respondent about the same. It pronounces for students and others to see that Ms Phillips had been teaching nails since 1993. It is apparent from the evidence given by the College's Principal Ms Jones, and it's Deputy Principal Ms Granagan, that the Respondent accepted, without verification, Ms Phillips' representations about her teaching experience.

46 The onus is on Ms Phillips to establish, on the balance of probabilities, that she has accumulated the number of casual teaching hours required to permit her classification level being Level 9. She asserts extensive teaching experience. However other than her bare assertions about her teaching experience there is little to support her contentions. Indeed there is a lack of documentary evidence to corroborate what she has said about her teaching experience. Further she has not called former students and/or employees to support her claim about her teaching experience.

47 The Respondent submits that Ms Phillips should not be believed about her teaching experience, her qualifications, and the hours worked for the Respondent. The Respondent says that she has made false statements about each of those matters.

48 Ms Phillips' claim is contingent upon my accepting her evidence about various issues, but particularly about her teaching experience. However, Ms Phillips' credibility was found to be wanting particularly when cross-examined. When cross-examined about a document she had prepared which asserted certain qualifications (see Transcript, pages 114 - 116), she was forced to admit that she did not possess some of the qualifications asserted (e.g. Bachelor of Laws and MBA), but rather, that she had undertaken courses to achieve those qualifications.

49 More significantly however it is apparent that Ms Phillips signed a certificate (Exhibit 2) which falsely asserted that she held CIBTAC and CIDESCO qualifications. When challenged about that under cross-examination, she said that she had almost completed those courses but failed to do so because she was ill when the final assessment was conducted. Notwithstanding that, she was told by her trainer that she could attribute those qualifications to herself. I find her explanation about what she was told to be inherently incredible. In any event she knew that she had not attained those qualifications and yet represented she had. Irrespective of how she now seeks to rationalise that, her representation was plainly false which fundamentally undermines her credibility.

50 It appears that Ms Phillips will say anything to further her own cause, including the making of false statements. Ms Phillips' propensity to be less than accurate with the truth is demonstrated also by other evidence. I do not propose to exhaustively list examples of the same. However, one such example is her over charging the Respondent with respect to a course attended on a Sunday. She charged the Respondent at double-time for the course which she has now admitted included 15 minutes to "set up" and the lunch hour break.

51 Ms Phillips was not credible.

52 A finding that it is more probable than not, that Ms Phillips has accumulated the teaching experience she asserts cannot be made based on her uncorroborated testimony. Indeed, it is impossible to determine how much teaching experience she in fact had. It follows that she has failed to prove that her previous teaching experience was such that upon commencement of the Award she should have been classified as being at Level 9 or otherwise at a level exceeding Level 1.

Classification

53 I find that when the Award commenced, Ms Phillips' proper pay level under her classification was that of Level 1.

54 Clause C.3.3 of the Award Schedule provides that casual experience is to be credited on the basis that 800 face to face hours is equivalent to 12 months' full-time experience. Accordingly, Ms Phillips would have been entitled to progress from Level 1 to a higher level after completing 800 face to face teaching hours during her employment with the Respondent.

55 Ms Phillips completed the following face to face teaching hours during her employment:

Year	**Number of Hours**
2009	96.0
2010	680.0
2011	540.0
2012	582.0
2013	415.5

56 Accordingly, Ms Phillips would have only been eligible to progress pay levels on two occasions. Once in 2011 and once in 2012. Clause C.5.4 of the Award Schedule facilitates the movement between pay points if the employee has, over the preceding 12 months:

> ***(a)*** *acquired and utilised additional skills, experience and competencies within the ambit of the classification level and in accordance with the priorities of the employer; and*
>
> ***(b)*** *demonstrated satisfactory performance.*

57 The Respondent did not increase Ms Phillips' pay level from Level 1 to Level 2 after she had completed 800 hours of face to face teaching. She had not at that stage met her employer's priorities. It was clear from the evidence of Ms Granagan that any movement in pay was contingent upon Ms Phillips obtaining a Certificate IV in Training and Assessment.

58 In 2013 the National Skills Standards Council introduced a new standard for Registered Training Organisations which included the Respondent. From 1 July 2013, all trainers were required to hold a Certificate IV in Training and Assessment. Ms Phillips eventually completed the requirements of the Certificate IV in Training and Assessment a few days after the introduction of the minimum standard.

59 Ms Phillips did not meet the criteria for movement between pay points until such time as she met her employer's criteria and achieved her Certificate IV in Training and Assessment qualification. In July 2013 she progressed to Level 2.

Applicable Pay Rates

17 August 2009 to 30 June 2010

60 From 17 August 2009 until 30 June 2010, Ms Phillips was, by operation of the MCE Act, entitled to a minimum wage as set out in the ***State Wage Order*** (supra). There was no provision for the payment of penalty rates, or for work undertaken on

public holidays or weekends. It suffices for my purposes to observe that Ms Phillips was, during that period, paid at an hourly rate which included a casual loading which was greater than that required by the MCE Act.

1 July 2010 to 30 June 2011

61 The Award minimum wage for a Level 1 teacher was $38,926.78. At that time, the minimum wage under the ***State Wage Order*** (supra) was $15.45. In accordance with the applicable transitional provisions, Ms Phillips' hourly rate of pay was calculated as follows:

$38,926 *divided by* 261 *divided by* 5 *equals* $29.83;

$29.83 *minus* $15.45 *equals* $14.38;

$14.38 *multiplied by* 0.8 *equals* $11.50;

$29.83 *minus* $11.50 *equals* $18.33.

62 Ms Phillips' minimum wage for the period was $18.33, without any casual loading.

63 Pursuant to the ***State Wage Order*** (supra), Ms Phillips was entitled to a casual loading of 20% of her agreed hourly rate of pay, however under the Award she was entitled to a 25% casual loading. The transitional provisions of the Award provided that the casual loading payable under the Award was to be phased in over five years, commencing on 1 July 2010.

64 The casual loading that applied to Ms Phillips in the first year of the Award was 21%. Her minimum hourly rate was therefore $18.33 x 1.21 = $22.18 per hour.

65 Clause 14.5 of the Award provides:

> "***14.5 Casual rates—teachers, tutor/instructors and general staff***
>
> ***(a)*** *A teacher and a tutor/instructor will be paid a daily rate except where the engagement is for less than five hours when payment will be at the hourly rate. Where an hourly rate is paid, it will be payable for each hour of attendance other than for timetabled tea breaks (in respect of which no more than 15 minutes will be deducted) and timetabled lunch breaks.*
>
> ***(b)*** *Other than as specified above, casual rates for staff will be calculated as follows:*

Category	***Calculation***
General staff	*Weekly applicable rate for full-time employees divided by 38 plus 25%*
Teachers	*Daily rate: annual salary divided by 261 plus 25%*
	Hourly rate: daily casual rate divided by 5
Tutor/instructors	*Daily rate: annual salary divided by 261 plus 25%*
	Hourly rate: daily casual rate divided by 5"

66 The transitional provisions in the Award do not affect the provision of a daily rate. Consequently, a daily rate was applicable from 1 January 2010. The daily rate that applied from 1 July 2010 to 30 June 2011 was $110.90, inclusive of casual loading.

Remaining Years

67 Using the same formulae referred to above, and taking into account movements in the State Minimum Wage and the transitional requirements, I determine that the following pay rates applied to Ms Phillips' employment from 1 July 2011 and onwards:

1 July 2011 to 30 June 2012 (Level 1)	
Hourly Rate	$ 26.74
Daily Rate	$133.71
1 July 2012 to 30 June 2013 (Level 1)	
Hourly Rate	$ 31.55
Daily Rate	$157.75
1 July 2013 to Termination (Level 2)	
Hourly Rate	$ 36.95
Daily Rate	$184.75

Penalty Rates

68 Clause 14.5 of the Award provides that a casual teacher is to be paid a daily rate, except where the engagement is less than five hours. There is no contemplation within that provision of overtime or penalty rates. The penalty provision within the Award is found in Clause 23, which is entitled *Penalty rates - general employees*. The term *general employee* is not defined in the Award. The term *general staff* is defined as employees employed in non-teaching roles. There is only one other reference to *general employee* found in the Award.

69 That is within Clause 17, which provides:

> "***17. Higher duties***
>
> *An employee who is required to perform the duties of a position in a classification higher than their usual classification for, in the case of a general employee classified at Level 7 or below, more than two weeks or in the case of a general employee classified at Level 8 or 9 or a member of the teaching staff, more than four weeks will be paid for all time worked at the higher level rate.*"

70 The use of the term *general employee* in Clause 17 of the Award clearly excludes teaching staff. The construction of the term *general employee* in Clause 23 of the Award must be the same as that which arises from Clause 17. It follows that penalty rate provisions apply only to non-teaching staff.

71 Ms Phillips' remuneration as a casual employee is fully set out in Clause 14.3 of the Award. It provides for the payment of a daily rate, and where applicable, hourly rates without provision for penalty rates or overtime. It mattered not that Ms Phillips may have taught a morning class and then an evening class in the same day. A daily rate applied for the whole day. I reject the submission made on behalf of Ms Phillips that there were two engagements each day, one in the morning and one in the evening. The daily rate contemplates all work done over any given day, irrespective of the hours actually worked or the spread of hours over which the work is undertaken.

Working Through Lunch

72 Ms Phillips asserts that she was required to attend regular lunch time meetings and was not given a break, as contemplated by Clause 22.3 of the Award. Clause 22.3(c) provides:

> "***22.3 All employees***
>
> …
>
> ***(c)*** *If an employee is required to work through their normal meal break the employee will be paid double time for all time so worked until such time as the meal break is given.*"

73 In Exhibit 30, being the spreadsheet that details Ms Phillips' claim, she has set out numerous occurrences of lunch time meetings. She has claimed double-time for all time worked during the lunch time meetings, and following, during the relevant day.

74 Clause 22 of the Award does not specify the length of a *normal meal break* (lunch break). Notwithstanding that, Clause 22.3(d) of the Award provides:

> "***22.3 All employees***
>
> …
>
> ***(d)*** *An employee working overtime will be allowed a meal break of 20 minutes without deduction of pay after each four hours of overtime worked.*"

75 It is possible to construe from that provision that the normal meal break contemplated by the Award is that of 20 minutes. The evidence given by Ms Granagan (see Transcript pages 278 - 279) was that employees had 15 to 20 minutes to eat lunch, which was provided by the Respondent, before the meetings commenced. That evidence was corroborated by Ms Paula Simone Hill, the Respondent's Education Co-ordinator.

76 I accept the evidence of Ms Granagan and Ms Hill. They were both credible and reliable witnesses. Ms Granagan in particular was an extremely impressive witness. She appeared to be a witness of truth, making concessions where necessary.

77 Based on the evidence given by Ms Granagan and Ms Hill, which I prefer to that of Ms Phillips, I find that on each occasion when a lunch time meeting was held, there was a sufficient break that enabled Ms Phillips and other employees to eat their lunch and have a break, without having to work. Given that Ms Phillips was allowed a break, her participation at the lunch time meeting does not trigger the payment of double-time for the remainder of the day on each day that a lunch time meeting was held.

Timesheets and Hours Worked

78 The Respondent suggests that the timesheets submitted by Ms Phillips and recorded in the spreadsheets adduced in support of her claim demonstrate that she exaggerated her hours, working unnecessarily, and charging them to the Respondent. In addition, the Respondent suggests that that pattern of time keeping and recording supports the conclusion that Ms Phillips was progressively taking advantage of the Respondent's trust in her. It is asserted that Ms Phillips became consistently bolder in claiming additional time before and after classes, she became consistently bolder in claiming working through lunch and claiming the time between the day and evening classes. Numerous examples of the same were referred to in the submissions received.

79 Although much was made about Ms Phillips' alleged overcharging in submissions and during the course of the Trial, the reality was that the Respondent accepted that she had worked such hours and paid her for the same. It was incumbent upon Ms Granagan to have challenged Ms Phillips about the hours claimed at or about the time that the timesheets were lodged. Ms Granagan did not do so. She accepted Ms Phillips' claim for hours worked on trust. Perhaps she should not have done so. Any particular scrutiny of the accuracy of the hours claimed would have been appropriate then, at the time the time sheets were submitted for payment. It is hardly appropriate now, ex post facto years down the track to delve into timesheets fishing for anomalies. A revisitation or reassessment of the hours worked based on extrinsic materials and hazy recollections is fraught with danger. Such reconstruction is entirely inappropriate.

80 The Respondent's payment of the hours claimed by Ms Phillips is an acknowledgement or acceptance that she in fact worked those hours. The Respondent can hardly now resile from that acceptance of hours worked. Although the evidence before me may engender a suspicion that at least some of the Respondent's contentions may be correct, that is as far as it goes.

81 In the end result, the claim must be assessed based on the hours that Ms Phillips has worked, as accepted by the Respondent. The hours worked by Ms Phillips during the material period are those that are reflected in her spreadsheet (Exhibit 30), and in the Respondent's calculation of Award entitlements.

Laundry Allowance

82 Clause 15.1(c) of the Award provides that when an employee is required to wear and launder a uniform the employee will be paid a laundry allowance.

83 The evidence given by Ms Granagan and Ms Hill indicates that Ms Phillips was required to wear a uniform. Ms Jones' evidence was to the contrary. Ms Jones was, however, clearly wrong about that and other things. It was apparent from her evidence that she does not have a good or intimate knowledge of the day to day running of the College.

84 Ms Phillips' contention that she should have been paid a laundry allowance is clearly established.

Underpayments

85 The Respondent has prepared a spreadsheet of Award entitlements that is based on Ms Phillips' spreadsheet (Exhibit 30). That spreadsheet records a comparison between the MCE Act and Award rate on the one hand, and the payroll amount received on the other. The amounts shown in the *Difference* column signify the difference between the two.

86 I accept that the detail contained in the Respondent's spreadsheet, sourced from evidence which is before me, accurately represents payments, entitlements and shortfalls in payments made to Ms Phillips.

87 Having considered the applicable rates to which I referred earlier, I find that there have been a number of instances when the correct payment has not been made. Underpayment has occurred by reason of not paying the applicable daily or hourly rate, as the case may be, and/or because the laundry allowance was not paid.

Amounts Underpaid

88 The laundry allowance payable under the Award was $3.55 per week, amounting to $7.10 per fortnight. Except for the pay dates below, the fortnightly payment made to Ms Phillips exceeded the Award entitlements by more than $7.10. In those instances there has not been any underpayment. The following table sets out the occasions when there has been an underpayment resulting from the failure to pay a laundry allowance:

Date	**Underpayment**
12 December 2011	$1.83
27 June 2012	$1.32
11 July 2012	$7.10
4 November 2012	$7.10
1 December 2012	$7.10
13 July 2013	$7.10
Total Underpayment	**$31.55**

89 The following table sets out when the underpayments occurred, by reason of the failure to pay the correct daily or hourly rate, and the amount of that underpayment:

Date	**Underpayment**
11 July 2012	$ 3.17
14 November 2012	$ 23.80
1 December 2012	$ 15.30
13 July 2013	$329.00
Total Underpayment	**$371.27**

Conclusion

90 During the material period Ms Phillips was underpaid $402.82. That amount, however, needs to be adjusted to take into account the admitted overpayment of $27.00 for lunch on 4 August 2013.

91 I find that Ms Phillips has been underpaid $375.82.

92 Insofar as the claim exceeds $375.82 it has not been proven.

G CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00211

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIMITRA ANTONIOU
	APPLICANT
	-v-
	ROTORWEST PTY LTD HELIWEST GROUP DAVID GRIMES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 4 MARCH 2015
FILE NO/S	B 231 OF 2014
CITATION NO.	2015 WAIRC 00211

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr D Grimes

Order

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

The Commission listed a conciliation conference for 4 March 2015.

On 18 February 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* and the conference was vacated.

The respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00207

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NICOLA KATHLEEN BUJOK
	APPLICANT
	-v-
	THE HEBDEN FAMILY TRUST AND THE KINDRED FAMILY TRUST T/AS GENSTAR
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 3 MARCH 2015
FILE NO/S	U 196 OF 2014
CITATION NO.	2015 WAIRC 00207

Result	Application dismissed

Order

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

WHEREAS on the 24th day of February 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00184

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIPA CHAPMAN
	APPLICANT
	-v-
	METAMORPHOSIS ART GALLERY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 18 FEBRUARY 2015
FILE NO/S	U 21 OF 2015
CITATION NO.	2015 WAIRC 00184

Result Application dismissed

Order

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

WHEREAS by a Notice of Hearing dated the 5th day of February 2015, the Commission advised the applicant that a hearing would be convened on the 18th day of February 2015 at 9.00 am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 18th day of February 2015 there was no appearance for or by the applicant;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00209

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00209
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	WEDNESDAY, 12 NOVEMBER 2014, TUESDAY, 2 SEPTEMBER 2014
DELIVERED	**:**	TUESDAY, 3 MARCH 2015
FILE NO.	**:**	U 119 OF 2014
BETWEEN	**:**	PATRICK EDWARD CONNOR Applicant AND THE TRUSTEE FOR THE FANCHETTI FAMILY TRUST T/A FUSHA HAIR AND BEAUTY Respondent

CatchWords	**:**	Industrial law - Termination of employment - Applicant summarily dismissed - Relevant principles applied - Applicant unfairly dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s23A, s27(1)(d) and s 29(1)(b)(i)
Result	**:**	Order issued - compensation awarded
Representation:		
Applicant	**:**	Mr D Brajevic (of counsel)
Respondent	**:**	No appearance

Case(s) referred to in reasons:

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

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Byrne v Australian Airlines (1995) 61 IR 32

Capewell v Cadbury Schweppes Australia Ltd (1997) 78 WAIG 299

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285

Myers v Myers (1969) WAR 19

Narwal v Aldi Foods Pty Ltd [2012] FWA 2056; BC 201271417

Newmont Australia Ltd v Australian Workers' Union, West Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677

Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch (1995) 75 WAIG 813

Shire of Esperance v Mouritz (1991) 71 WAIG 891

The Minister for Health v Drake-Brockman (2012) WAIRC 00150; (2012) 92 WAIG 203

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

Reasons for Decision

1 This is an application by Mr Patrick Edward Connor (the applicant) filed pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) alleging that the applicant was harshly, oppressively and unfairly dismissed from his employment with the Trustee for the Fanchetti Family Trust t/as Fusha Hair and Beauty (the respondent) by email on 5 May 2014. The applicant does not seek reinstatement or re-employment, rather an order for compensation.

2 At no stage was a Form 5 - Notice of answer filed by the respondent despite a number of requests having been made. Further, the respondent failed to attend both the first and second conferences. At the conclusion of the second conference held on 12 August 2014 the applicant requested the application be referred for hearing and determination.

3 The Commission listed the application at a for mention hearing on 2 September 2014. The respondent failed to attend the hearing and as a result the Commission issued an order (2014) WAIRC 00979; (2014) 94 WAIG 1540 setting the matter down for formal hearing and determination on 30 September 2014. Prior to the hearing telephone contact was made with the respondent confirming that the matter was listed for hearing on 30 September 2014. The respondent indicated that she would be more than happy to attend the hearing and apologised for not attending the conference held on 12 August 2014 advising that she had been unwell.

4 On 22 September 2014 the Commission received a request from the applicant for an adjournment of the hearing set down for 30 September 2014 due to the unavailability of a witness. Before making a decision on whether to grant the adjournment the Commission sought the views of the respondent. In the absence of a response the Commission decided to grant the adjournment consistent with ***Myers v Myers*** (1969) WAR 19 and the hearing was rescheduled for 12 November 2014. The respondent was notified of the date however failed to attend the hearing. The Commission is satisfied that the respondent knew of the hearing but chose not to attend. The Commission dealt with the matter in the absence of the respondent having regard to the powers granted to the Commission under s 27(1)(d) of the Act.

Background

5 The applicant commenced employment with the business on 8 January 2007, initially as a senior stylist and was later promoted to the role of salon manager. When the applicant commenced employment the business was known as Skatt. The owner at that stage had more than one salon. As artistic director the role of the applicant was teaching, working with staff members and the owner of the business. In about 2012 the applicant was promoted to manager of Skatt's Claremont salon. This role mainly consisted of day to day duties, making sure that the salon was running correctly, that clients were happy and the staff were providing a service. Most clients had been there for seven years and staff and clients had very close relationships. Staff first heard of the potential sale of Skatt in mid-2013. The applicant was kept informed on what was happening.

6 On 21 December 2013 the business, including the premises and all business assets, was sold to Ms Elena Fanchetti and renamed as Fusha Hair and Beauty. The applicant was advised by the previous owner that the new owner was retaining the current staff, recognising their existing service and entitlements. Prior to the sale the applicant, in his capacity as Claremont manager, sought and was provided with details of all staff entitlements, leave balances, holiday balances, commission and start dates (exhibit Connor 1).

Applicant's Evidence

7 Mr Patrick Edward Connor gave evidence that 21 December 2013 was the first day the employees at Claremont met the new owner. Given it was one of the busiest days (four days prior to Christmas) there was general nervousness coupled with excitement. The new owner spoke to all staff individually. Little changed with the exception of signage. The applicant gave evidence he did not receive any new correspondence from the respondent. There was no new plant or equipment until some months later when the respondent took on some new employees. It was business as usual and the applicant remained as manager. The witness gave evidence Ms Fanchetti, the new owner interacted well with everyone.

8 The applicant gave evidence he had over the seven years with Skatt formed close relationships with a number of clients and felt that he needed to be upfront with his clients and let them know that the business was being sold and that hopefully he

would continue to work well with the new owner. Being unsure as to his future with the new respondent the applicant accessed the work computer to obtain details of long term loyal clientele as they had expressed a desire to be contacted if this was not the case.

9 At the time of the handover the applicant was not provided with a new contract of employment or any correspondence. The business carried on as with the previous owner and nothing changed. Around January 2014 the receptionist left Fusha Hair and Beauty and the applicant commenced the duties of forwarding employee timesheets to the respondent's bookkeeper. Up until that date the task of forwarding the employee timesheets had been that of the receptionist.

10 Following the busy Christmas period in 2013/2014 the new employer gave the applicant a cheque for $500 and a bottle of champagne. The applicant construed this as being confirmation that the respondent was happy with his performance. In February 2014 the respondent met with the applicant and expressed her concern at the applicant having taken client records in the previous year. In the applicant's mind that matter was resolved when an SMS message was exchanged on 1 March 2014 from Ms Fanchetti referring to the meeting:

> I'm glad it's over!
>
> You need to be extremely vigilant in Bali especially where you choose to dine & drink it's not worth your lives or health!
>
> Wishing you both a fabulous holiday.
>
> Kind regards,
>
> ELENA
>
> FUSHA CLAREMONT

(exhibit Connor 4, SMS 35)

And the applicant in response:

> I am loyal to a T to fusha and you Elena;)
>
> We will be very careful in bali I will see you when we get back have a lovely weekend.
>
> Patrick :)

(exhibit Connor 4, SMS 35)

11 The applicant gave evidence in his mind the concerns raised by the respondent had been resolved. Throughout Ms Fanchetti's dealings with the applicant she appeared to place the applicant in high regard and sent him a series of complimentary comments by way of SMS (exhibit Connor 4). The applicant had every reason to feel confident with the new owner.

12 About April 2014 the applicant gave evidence he attended a meeting with Ms Fanchetti where she raised concerns with respect to the applicant's management of staff leave. The applicant had approved leave for several staff members over the Easter break, a practice based on the past years as manager and many years' experience in the industry the applicant knew this to be a very quiet time in the salon. During the meeting the applicant felt intimidated by the respondent's approach. It was the respondent's view that only two staff members should be off at one time. The applicant was told he was on his first warning and that he was not doing his job as manager. The applicant was not given any guidelines or directions regarding his role as manager and left the meeting unsure of what he was to do. The witness was unsure as to where he stood as to the employees who were on leave. One was a junior, one was a beauty therapist and one was a stylist. This did not in the applicant's mind mean that too many staff were off at any one time.

13 The applicant gave evidence that on 1 May 2014 Ms Fanchetti sought a further meeting however due to client commitments the applicant was unable to attend the meeting prior to the respondent leaving the salon. In the applicant's absence the respondent informed other staff members that the applicant had been demoted from the role of salon manager. That evening when the applicant arrived home he received a voicemail message from the respondent to the effect:

> 'You're not man enough to face me'

(ts 13)

The words were referring to the applicant having not attended the meeting. The following evening the respondent sought a meeting with the applicant (2 May 2014). At that meeting the respondent informed the applicant that he had been demoted from the position of manager. When the applicant requested to know what had he done the respondent said the applicant was incapable of carrying out his role.

14 The applicant explained in evidence he did not have access to the message service on the phone. The applicant rang a friend to ask her advice who suggested to the applicant that he should be given an opportunity to improve in his role. She advised the applicant to take notes if there was a meeting with the respondent. The respondent at the meeting the following day asked for a further meeting. At that meeting she raised concerns about a number of issues and she demoted the applicant as manager. The applicant enquired as to what he had done to which the respondent replied:

> And she basically said stuff like – that I'm incapable.

(ts 13)

15 The notes taken by the applicant (exhibit Connor 2) explained in brief terms what had occurred at the meeting on 2 May 2014. Ms Fanchetti explained she would provide the reasons the applicant was being removed as manager at a later time although she added the applicant did not lead by example. Further in evidence the applicant described Ms Fanchetti outlined he was accused of being incompetent. The respondent raised the issue that the applicant had contacted a plumbing service to unblock drains and receive a quote on installing new hoses, holiday rostering, and an evader ritual claiming the applicant had ruined a whole month's takings with respect to the business. The respondent indicated that the applicant was providing the bookkeeper

with incorrect information and suggested the applicant was on drugs. The respondent also accused the applicant of taking clients' information. In response the applicant was seeking a reasonable opportunity to improve the respondent said 'You're a manager. You shouldn't need it' (ts 14). The notes (exhibit Connor 2) indicate the applicant was accused by the respondent to be:

> I'm pathetic and disgusting and my attitude is disgusting. In your eyes and your little pea brain nothing happens.
>
> (exhibit Connor 2)

16 At this point the applicant was starting to get distressed and requested he have a support person with him should the meeting continue. This request was denied by the respondent. The meeting was terminated with Ms Fanchetti instructing the applicant to get out of her sight. The applicant resumed work the following day demoted to a senior stylist, a cutter with no responsibility. While at work the applicant received a message from the respondent that he was still an employee but no longer a manager.

17 On 6 May 2014 following a rostered day off, the applicant arrived at work and was met at the door by the respondent. The applicant gave evidence that the following exchange took place:

> I was actually met at the door by Ms Fanchetti and – to the words of, 'What – what are you doing here?' and I – I – I didn't know how to respond.
>
> Her response to me was, 'Have you not read your email? You need to read your email. Your services are no longer required.'
>
> (ts 17, 18)

18 The applicant gave evidence that he did not check his emails every day and had not seen this email. When the applicant went home he checked the email he had been sent around 9.00 pm on the evening of 5 May 2014. It said:

> Dear Patrick,
>
> I attached a letter to inform you about the immediate termination of your employment with Fusha Hair & Beauty.
>
> You are not required to return to work any more.
>
> Regards
>
> Elena Fanchetti.
>
> Business Proprietor
>
> Fusha Hair & Beauty
>
> (exhibit Connor 3, email to applicant dated 5 May 2014)

19 The attached correspondence included the following correspondence:

> **Private and confidential**
>
> Mr Patrick Edward Connor
>
> 29 Madang Lane
>
> Doubleview WA 6018
>
> Dear Patrick,
>
> **Termination of your employment**
>
> I am writing to you about the termination of your employment with The Trustee for The Fanchetti Family Trust trading as Fusha Hair & Beauty.
>
> I refer to our meetings during January to May 2014 which were attended by you. During the meetings we discussed:
>
> 1. The falsification of staff hours worked since the start of Fusha Hair & Beauty on 21 December 2013 to today.
> 2. Breach of confidentiality by manually copying and taking home client details.
> 3. Incompetent staff leave management, such as approving staff holiday leave for staff members all at the same time, approving staff holiday leave when the staff member has no holiday leave entitlements available and not notifying the business proprietor of the impending leave.
>
> As discussed during the meeting, your conduct during that incident:
>
> - caused a serious and imminent risk to the profitability of the Employer's business.
> - was conduct in the course of your employment engaging in fraud, and in the circumstances your continued employment during a notice period would be unreasonable.
>
> We consider that your actions constitute serious misconduct warranting summary dismissal.
>
> You will be paid any accrued entitlements and outstanding remuneration, including superannuation, up to and including the date of this letter.
>
> Yours sincerely,
>
> Elena Fanchetti
>
> Business Proprietor
>
> (exhibit Connor 3)

The attached letter of termination referred to meetings during January to May 2014, falsification of staff hours, and breach of confidentiality by manually copying and taking home client details and incompetent staff leave management. The applicant was summarily dismissed for serious misconduct. The incident regarding the accessing of client details had occurred prior to the business being taken over by the current respondent and had been dealt with at a meeting with the respondent in February 2014. This was confirmed by amicable text message from the respondent on 1 March 2014 stating 'I'm glad it's over'.

20 The witness gave evidence that he understood in the attached letter of termination item one to refer to the fact that since Ms Fanchetti had taken over the business the applicant had been sending through to the bookkeeper/accountant staff hours incorrectly. The witness indicated he did not agree with the word 'falsified'. It seemed to be a very strong word. The applicant was continuing the process he had always carried out from the old business and had not changed anything. To explain at the end of each fortnight the managers or the receptionists at each salon would send the hours of all the staff members of the company in that particular salon had worked. The applicant gave evidence it was a spreadsheet so it was quite easy for the bookkeeper to read and for the manager to input. Such days were numbered with the overarching objective being that the hours were collected at the salon and processed outside the workplace by the owner accumulating employees' entitlements. What occurred in the Claremont salon was in January 2014 the receptionist left and under the new owners they tried to remove as much responsibility as possible from the managers so undertaking stock orders and hours were given to the receptionist to do to allow the manager to continuing undertaking their normal day to day responsibilities, however once the receptionist left the responsibility fell back onto the manager. The previous owner introduced a system for the salon called shortcuts:

> So basically what would happen you would come into the salon in the morning and you would enter your personal private pin and when you've done that the computer screen opens up. You would then press a button that says, "Log on," and at that point your – the timer starts for the day and then if you were to go on break, you would log off and then log back on when you come back from break and then at the end of a day you would log off again. So it gives you an accurate amount of hours of what you worked for – for that day and – and for that fortnight.
>
> So if some has worked, you know, in my work it's like a Bundy system but an electronic one. You clock on, clock off for – for start of day, end of day, breaks and all the rest of it? ---Yeah.
>
> Would – would – and so I'd like to take you – do you still have exhibit Connor 4, the - the SMS's, the coloured ones, please [sic]? I'd like to take you to tab or number, sorry, 25. So it's in about the middle top left hand corner. There's subject:
>
> "Clarification, 8 Feb 2014, Sat."

(ts 24, 25)

21 The witness read to the Commission:

> Subject: Clarification. Thanks for your clarification and explanation RE: clocking on and off. I feel responsible for this and cigarette breaks as I go out to puff, to smoke, as well. They are going to be disappointed with me. I wasn't aware when they've clocked off. I wasn't aware when they clock off to have a puff. The computer doesn't allow clocking back on until 15 minute intervals. Example: So they take 2 to 4 minutes each time yet cannot clock back on as it won't allow them to.

(ts 25)

22 The witness was asked what he understood this falsification to be. In response he suggested that what happened was that not everyone was regimented when they clocked on and off. Some people might not even clock on for a whole day or someone might clock on in the morning but not clock off until the evening so it was the applicant's responsibility as set out by the previous owners to go through the computer and peruse the fortnightly hours and make sure everyone has clocked on and clocked off ensuring each person had worked as recorded and if not then the applicant would go through and manually change the hours, to edit them and make sure they were the correct hours.

> What you do is you had the spreadsheet to one side, you would print off the fortnight's worth of hours for employees and then you would just go through and cross each name and check it on the computer just to ensure that, let's say for instance, you worked on a Monday and you – you had your 45 minute break but you didn't actually clock off until the evening; so we would go in, put that 45 minute break in and change that.
>
> So it could mean and - and – and correct me if I'm wrong, it could mean that someone's hasn't clocked off and would it – if – without the manual adjustment been paid too much - - - ? - - - Yeah

(ts 26)

23 The witness explained if someone had not clocked off in the evening then that clock would continue to tick over during the night. The witness gave evidence that he had a meeting at one stage with Ms Fanchetti or a discussion whereby she informed him that he was doing the hours incorrectly and the accountant also said he was doing the hours wrong. Apparently he was supposed to know if staff had certain entitlements accrued or holiday days accrued however the computer only informed him of the hours they had worked so the applicant was unaware as to what each employee's entitlements had accrued. The entitlements were placed into a spreadsheet that was held by the accountant bookkeeper. That person had access to the entitlements. Such information was not something he had knowledge of. Such information was held off-site. He sent an email basically because he had had a conversation with Ms Fanchetti who had said that he was not carrying out the recording of information correctly. This email that was sent by the applicant to the bookkeeper was identified as exhibit Connor 5.

> Um, so I would send - at the end of the fortnight, I would send the emails through either the Saturday or the Sunday to - to get to Debbie and I - I had actually gone through, ah, on - on the back of this is actually like the, um, spreadsheet which

> shows the base hours, public holidays, holidays, et cetera. Um, I - I'd actually added up one of the - the staff members, ah, Natasha, I'd actually added up her hours wrong. Um, I - I'd gone through the system and - and I'd - I'd - I'd added it up wrong. I'd actually - I'd given her an extra holiday day. Um, so I - I had already sent the email and the spreadsheet through to - to the accountant, Debbie, so then what I did was I rewrote the spreadsheet taking that hour off and then just writing an apology saying, "I - I'm very sorry that" - I - I'd - I'd just made a mistake.
>
> You were fixing up a mistake? Yeah.
>
> Okay.
>
> (ts 29)

The applicant tendered into evidence the Gmail dated 7 November 2013 and correcting the error and was tendered into evidence as exhibit Connor 6.

24 The accusation of the falsification of records relates to the preparation of spreadsheets by the applicant to be sent to the respondent's accountant/bookkeeper. Prior to being sent to the bookkeeper the applicant collected the hours the staff worked or non-work hours when the staff were absent because they could not attend due to sickness or some other reason. The computer system only indicated the actual hours worked and did not show entitlements such as sick or holiday leave. The applicant also gave evidence that he manually adjusted breaks that were not recorded by staff. In the applicant's view he had insufficient training in order to prepare the spreadsheets. The applicant had been advised he was doing the spreadsheet incorrectly however had never been accused of falsifying the records.

25 The applicant gave evidence that following his termination he was employed at a salon in Mosman Park already known to him on a lower hourly rate of pay. When the applicant commenced employment at the Mosman Park salon he received $25.88 per hour with an increase to $27.00 per hour in mid to late May 2014. The overtime rate was $40.50 however there was very little overtime worked. During his employment with the respondent the applicant received $30.00 per hour with an overtime rate of $45.00 per hour (approximately 70 hours worked per annum). In addition, the applicant teaches at Challenger TAFE as well as at salons, businesses and companies that do in-house training.

Applicant's Closing Submissions

26 Counsel for the respondent submitted a document which outlined a:

- chronology of events; and
- summarised the applicant's loss undergone as a result of the termination:
  - 4 weeks' notice – 38 hours ($30.00 per hour) – $4,560.00
  - 6.3 weeks pro-rata long service leave – 239 hours ($30 per hour) – $7,170.00
  - Difference in earnings – over a 6 month period:

    988 ordinary hours ($3.00 less per hour) which equals $2,964.00

    17.03 overtime hours ($4.50 per hour) which equals $76.64

    Total loss - $14,770.64

27 Counsel for the applicant submitted that the applicant should not have been summarily dismissed. If the Commission was of the view that the applicant was not unfairly dismissed that impacts on the applicant's ability to challenge the issue of long service leave in another jurisdiction. Counsel for the applicant raised a submission that to reflect the applicant's dismissal as a summary dismissal was a vehicle to disentitle the applicant to notice and to his standard entitlements such as notice.

28 Counsel for the applicant confirmed that the applicant accepts that he was wrong to access the confidential client information when the business was in the throes of being sold and was remorseful for his actions. With respect to the assertions regarding employee records counsel for the applicant submitted that there was a less than perfect working relationship and understanding between the applicant and the external bookkeeper. The respondent needed to establish their relative roles.

29 The Commission's attention was drawn to the Full Bench decision in ***The Minister for Health v Drake-Brockman*** (2012) WAIRC 00150; (2012) 92 WAIG 203 in particular the question of the onus of proof in the case of a termination for serious misconduct. Where there is an allegation of serious misconduct the bar is raised both in terms of the procedural fairness that needs to be afforded the employee in question and also from point of view of the evidentiary onus. In the ***Drake-Brockman*** decision [65] the Full Bench stated:

> 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.

30 The applicant's representative submitted that the respondent basically bullied the applicant in the meeting of 2 May 2014. The applicant conceded that there was discussion around the confidential information in March 2014, the hours of work, the leave management issues and some emails indicating that the applicant at times was wrong however it was unreasonable to elevate that to the status that justified serious misconduct in the circumstances. Counsel for the applicant submitted that the applicant did not deserve to be summarily dismissed.

31 On the issue of remedy counsel for the applicant pointed out that the applicant had mitigated his circumstances. Reinstatement in the view of the applicant would be untenable therefore the claim is for compensation. The amount sought is six months remuneration at the difference in the amount that would have been earned if the applicant had remained with the respondent and what the applicant is currently receiving plus notice.

Conclusions

32 The Commission has considered the evidence and submissions given in these proceedings and reviewed the documentation tendered at the hearing. It is the Commission's view that the evidence given by the applicant was given clearly and to the best of his recollection. I consider the applicant's evidence to have been given in a reliable, credible and honest manner exampled in the candid way in which he gave evidence with regard to the client records issue demonstrating remorse regarding the incident.

33 The Commission finds that the applicant was first employed by Skatt on 8 January 2007 through until 21 December 2013 when the business was taken over by the current respondent. The applicant submitted his contract with the previous employer was unchanged at the point of sale and furthermore the entitlements owing prior to sale were forwarded to Ms Fanchetti (the respondent):

> Commission was worked on 1 week! Plus I added the Expo dollars to everyone's commission as I can't take any of you to expo next year :(
>
> Also attached is the holiday and sick hours owing that I have sent through to Elena. She is now responsible for paying this when someone takes holidays and is sick. I wanted you to have a copy in case there is any confusing.
>
> (extract from exhibit Connor 1)

34 With respect to the applicant the indication from the previous employer was he was owed 32.853 annual leave hours, 24.921 sick leave hours and his start date was recognised as 8 January 2007. The Commission finds the previous owner of the business transferred the existing entitlements of the applicant at the point of sale to the respondent.

35 The Commission finds from the evidence given by the applicant that from the point of sale the applicant's contract of employment remained unchanged. It was largely business as usual with the physical layout of the salon also remaining unchanged. For the first few months the respondent appeared happy with the applicant's employment. He received a $500 cheque and a bottle of champagne for his birthday shortly after Christmas. The relationship seemed to be going well.

36 The applicant gave evidence of having recorded 15 to 20 of his closest client details sometime halfway through 2013 when the business was still owned by the previous owner. The Commission finds this matter was dealt with and resolved satisfactorily with Ms Fanchetti in March 2014 by way of a meeting followed by an exchange of SMS messages (exhibit Connor 4). The Commission finds the applicant confirmed and accepted in his evidence that he was wrong to access the confidential client information when the business was in the process of being sold and expressed remorse for his actions. The Commission finds that the meeting in February 2014 and subsequent exchange of SMS messages in March 2014 between Ms Fanchetti and the applicant concluded the matter.

37 The notice of termination came as a shock to the applicant and was unexpected. Before May 2014 the applicant had no knowledge of his impending termination, nor was he warned by his employer of any performance concerns other than his demotion from the position of manager on 1 May 2014 and a meeting with Ms Fanchetti back in February 2014 relating to the recording of client details in 2013. This latter aspect however may not render a termination unfair as was recognised by the Industrial Appeal Court, in particular by Nicholson J, in ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891. The Commission finds in this matter there was not an acceptable reason for the dismissal as the matter relied upon by the respondent for the dismissal included in part an issue that had already been dealt with in February 2014 and concluded by Ms Fanchetti. The applicant was then disciplined for an incident that occurred in mid-2013. The respondent in February 2014:

> met with the applicant;
>
> expressed her disappointment that the applicant had procured some 20 or so client details back in 2013;
>
> received from the applicant an acknowledgement that to access such information was incorrect and the applicant apologised;
>
> the respondent asked that it not happen again; and
>
> the issue was concluded by an exchange of amicable SMS text messages between Ms Fanchetti and the applicant (exhibit Connor 4, SMS 35).

In this matter the respondent in February 2014 became aware of the applicant's conduct and promptly reacted and dealt with the issue in accordance with the nature and severity of the particular matter as per the decision in ***Narwal v Aldi Foods Pty Ltd*** [2012] FWA 2056; BC 201271417. The Commission finds the respondent in February 2014 did not consider the behaviour of the applicant warranted termination.

38 When the respondent made the decision to terminate the applicant on 5 May 2014 the letter of dismissal (exhibit Connor 3) Ms Fanchetti referred to the same incident of February 2014. The applicant however had already been counselled for that incident concerned some three months prior to his termination. The Commission considers the respondent was disciplining the applicant a second time however, on this occasion he was being terminated. At no stage did the respondent take into account that the applicant had already been disciplined for the same event.

39 The applicant's letter of termination letter refers also to fraud. The definition of 'fraud' from Butterworths Concise Australian Legal Dictionary, 3rd edition, 2004 specifies:

> **fraud** – An intentional dishonest act or omission done with the purpose of deceiving.
>
> *Insurance* A dishonest act or omission by the insured or insurer designed to obtain a material advantage over the other party. Fraud must be knowing (*Purcell v State Insurance Office* (1982) 2 ANZ 60-145) or reckless: *Engel v South British Insurance Co Ltd* (1983) 2 ANZ Ins case 60-516). See also Uberrimae fidei.

The same word as defined by the Macquarie Dictionary Online defines fraud to mean:

> **fraud –** noun 1. deceit, trickery, sharp practice, or breach of confidence, by which it is sought to gain some unfair or dishonest advantage.
>
> a particular instance of such deceit or trickery: election frauds.
>
> any deception, artifice, or trick.
>
> someone who makes deceitful pretences; impostor.
>
> Law (a). (in common law) advantage gained by unfair means, as by a false representation of fact made knowingly, or without belief in its truth, or recklessly, not knowing whether it is true or false.
>
> (b). (in equity) violation, intentional or otherwise, of the rules of fair dealing.
>
> [Middle English fraude, from Old French, from Latin fraus cheating, deceit]

40 The respondent refers to 'the falsification of staff hours' and 'incompetent staff leave management' in the termination letter together with the incident earlier referred to and among other things defines these to be 'fraud'. Given the error made in recording staff hours was, when identified, followed up with an email from the applicant to the bookkeeper together with an apology (exhibit Connor 6) on 27 April 2014 followed by a query as to whether sick leave entitlements had been recorded incorrectly for Charlotte (exhibit Connor 5) the Commission finds the issue relating to staff hours to be at best, a trivial matter.

41 For the respondent to categorise such examples as 'fraud' in the new arrangements seem somewhat heavy handed. The applicant, on the evidence, when learning of an error corrected the fault promptly and courteously. The Commission finds the applicant's actions were not undertaken with the purpose of cheating or deceiving the respondent. These acts by the applicant did not, in the Commission's view warrant Mr Connor's dismissal summarily by Ms Fanchetti as per ***Laws v London Chronicle (Indicator Newspapers) Ltd*** [1959] 2 All ER 285. There is an evidential onus upon the employer to prove that summary dismissal is justified, as per the decision in ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677. The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree as per the decision in ***Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch*** (1995) 75 WAIG 813. In most cases the employee should be given an opportunity to defend allegations made against them. In this matter however the applicant was given no such opportunity. In ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224 the Full Bench of the South Australian Commission stated when dealing with a summary dismissal that an employer will satisfy the evidentiary onus on it to demonstrate that before dismissing the employee it conducted a full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances. The employer must also give the employee every reasonable opportunity and sufficient time to answer all allegations. If the employer then believes and has reasonable grounds for deciding that the employee, in this case, the applicant, was guilty of the misconduct alleged and after taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, it may decide whether such misconduct justifies dismissal.

42 A failure to satisfactorily establish any of those matters may render the dismissal harsh, unjust or unreasonable. The Commission finds that the respondent did not give the applicant a reasonable opportunity or sufficient time to answer any of the allegations against him. The Commission finds that the respondent did not demonstrate that the applicant misconducted himself with respect to any of the issues relied on by the respondent to terminate the applicant. The Commission is satisfied that the applicant was not guilty of misconduct justifying summary dismissal.

43 The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate 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 established by the applicant. Terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair, as per the ***Mouritz*** decision and ***Byrne v Australian Airlines*** (1995) 61 IR 32. In the ***Mouritz*** decision Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

44 The Commission is satisfied that the applicant was treated unfairly and harshly because he was not given sufficient opportunity to defend himself with respect to the reasons relied upon by the respondent to effect his termination. He was not afforded 'a fair go all round' as per the well settled decision of the Industrial Appeal Court ***Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385.

45 The Commission finds on the day the applicant was terminated 5 May 2014 he was required to cease his employment and did not receive payment in lieu of notice. The applicant was not given an opportunity to respond to any of the allegations raised, merely asked what he was doing at work and 'have you not read your email?' (ts 18). The Commission finds that the respondent unfairly dismissed the applicant based on the well settled ***Undercliffe*** decision.

46 It is for the Commission pursuant to s 23A of the Act to form a view as to whether reinstatement or re-employment is impracticable in all the circumstances of the case. From the evidence and submissions received the Commission is satisfied that the relationship between the parties has reached the point that an order of reinstatement or re-employment would be impracticable.

47 I am satisfied that it is appropriate to consider in the alternative compensation of five months. The Commission is satisfied the applicant mitigated his loss in that he was employed the day after his termination by the respondent. The Commission finds the hourly rate of the applicant's new employment was $3.00 per hour less than the rate he had received from the respondent and furthermore the overtime rate was $5.50 per hour less than that received from the respondent. The Commission's decision on

compensation is based on the decisions of ***Capewell v Cadbury Schweppes Australia Ltd*** (1997) 78 WAIG 299 and ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635 having regard for the evidence and submissions the Commission is satisfied the applicant has suffered a five month loss as a result of his unfair dismissal. The Commission has taken into account the applicant's previous service in considering the issue of compensation. The Commission has not taken into account the issue of the applicant's long service leave, given that was acknowledged by counsel for the applicant during proceedings to be a consideration for an enforcement jurisdiction.

48 The applicant has been employed at another workplace since his termination. The Commission considers the applicant's loss, taking into account his hourly rate of pay at his new workplace to be:

-	4 weeks' notice – 38 hours per week at $30.00 per hour	$4,560.00
-	Difference in hourly earnings - 812.5 ordinary hours at $3.00 per hour	$2,470.00
-	14 overtime hours at $4.50 per hour	$63.00
	Total	**$7,093.00**

49 Accordingly, the Commission will issue a minute containing a declaration requiring the respondent to pay to the applicant the sum of $7,093.00 within 14 days of the final order issuing.

2015 WAIRC 00217

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PATRICK EDWARD CONNOR

APPLICANT

-v-

THE TRUSTEE FOR THE FANCHETTI FAMILY TRUST T/A FUSHA HAIR AND BEAUTY

RESPONDENT

CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 6 MARCH 2015
FILE NO/S	U 119 OF 2014
CITATION NO.	2015 WAIRC 00217

Result	Order issued
Representation	
Applicant	Mr D Brajevic (of counsel)
Respondent	No appearance

Order

HAVING HEARD from Mr D Brajevic of counsel on behalf of the applicant and there being no appearance by the respondent, the Western Australian Industrial Relations Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby:

1. DECLARES that the applicant was unfairly dismissed by the respondent.
2. ORDERS that the respondent pay the applicant $7,093.00 (gross) within 14 days of the final order issuing.

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

2014 WAIRC 00370

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TRACEY LOUISE FERGUSSON

APPLICANT

-v-

THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST AS THE TRUSTEE FOR THE SALVATION ARMY (WA) SOCIAL WORK TRADING AS SALVOS STORES

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 5 MAY 2014
FILE NO/S	B 44 OF 2014
CITATION NO.	2014 WAIRC 00370

Result	Order issued
Representation	
Applicant	Mr J Fiocco of counsel and with him Ms L Haygarth of counsel
Respondent	Mr J Reid

Order

HAVING heard Mr J Fiocco of counsel and with him Ms L Haygarth of counsel on behalf of the applicant and Mr J Reid on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the name of the respondent on the notice of application be amended by deleting the name "The Salvation Army (Victoria) Property Trust T/A Salvos Stores" and inserting in lieu thereof the name "The Salvation Army (Western Australia) Property Trust as the Trustee for The Salvation Army (WA) Social Work trading as Salvos Stores."

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

2014 WAIRC 01042

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01042
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	WRITTEN SUBMISSIONS TUESDAY, 3 JUNE 2014; WEDNESDAY, 11 JUNE 2014; TUESDAY 26 AUGUST 2014; MONDAY, 1 SEPTEMBER 2014
DELIVERED	**:**	MONDAY, 22 SEPTEMBER 2014
FILE NO.	**:**	B 44 OF 2014
BETWEEN	**:**	TRACEY LOUISE FERGUSSON Applicant AND THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST AS THE TRUSTEE FOR THE SALVATION ARMY (WA) SOCIAL WORK TRADING AS SALVOS STORES Respondent
Catchwords	**:**	Industrial law (WA) – Contractual benefits claim – Whether the Commission has jurisdiction – Characterisation of the claim – Claim for leave – Claim for ordinary wage or salary – Whether the claimed denied contractual benefits arise under the contract of employment – Principles applied – Non-excluded matter – Incorporation of an award – Ready, willing and able – Above award wage – Jurisdiction found – Declaration that the Commission has jurisdiction to hear the claim
Legislation	**:**	*Commonwealth Constitution* s 77(iii) *Fair Work Act 2009* (Cth) ss 12, 27(1)(c) *Industrial Relations Act 1979* (WA) ss 7, 12, 26(2), 29(1)(b)(ii), 83(3) *Judiciary Act 1903* (Cth) s 39
Result	**:**	Jurisdiction found
Representation:		
Counsel:		
Applicant	**:**	Mr J Fiocco of counsel
Respondent	**:**	Mr J Reid
Solicitors:		
Applicant	**:**	Slater & Gordon Lawyers

Case(s) referred to in reasons:

Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Australian Workers' Union v BHP Iron-Ore Pty Ltd (2001) 102 IR 410

Balfour v Travelstrength Limited (1980) 60 WAIG 1015

Byrne v Australian Airlines Limited; Frew v Australian Airlines Limited (1995) 185 CLR 410

Gramotnev v Queensland University of Technology [2013] QSC 158

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Lang v Telecom Australia (1989) 70 WAIG 186

Leontiades v FT Manfield Pty Ltd (1980) 43 FLR 193

Mason v Bastow (1990) 70 WAIG 19

Matthews v Cool or Cosy Pty Ltd (2004) 84 WAIG 2152

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

Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment (2012) 250 CLR 343

Queensland v Together Queensland, Industrial Union of Employees (2012) 301 ALR 457

Roberts v Groome (1984) 64 WAIG 774

Soliman v University of Technology, Sydney (2008) 176 IR 183

Steele v Tardiani (1946) 72 CLR 386

Stylianou v Country Realty Pty Ltd as trustee for the Marcelli Family Trust (2010) 91 WAIG 2029

Triantopoulos v Shell Company of Australia Ltd (2011) 91 WAIG 67

Case(s) also cited:

Abdalla v Viewdaze Pty Ltd (2003) 122 IR 215

Comley v Blessing Holdings Pty Ltd as Trustee for the PJS Family Trust [2013] FWC 5008

Davidson v Aboriginal & Islander Child Care Agency (1998) 105 IR 1

Higgins v Gateway Printing (2010) 90 WAIG 525

Raizada v NR Tax Savers and Professionals Pty Ltd (2012) 92 WAIG 478

Rowley v BHP Billiton Iron Ore (2013) 94 WAIG 539

Schultz v Asphar (Asphar Survey Pty Ltd) (2013) 93 WAIG 1557

Urban Transport Authority of New South Wales v Nweiser (1992) 28 NSWLR 471

Reasons for Decision

1 The respondent is a not for profit social welfare organisation. The applicant was employed as a retail sales assistant in one of the respondent's retail stores in Perth. She remains employed.

2 Circumstances were such that from about mid June 2013 the applicant did not attend work on the grounds that the respondent considered that she was not fit for duty, for medical reasons, arising from a prior workplace injury. As a result of medical reports from the applicant's doctor in September, October and early November 2013, the applicant contends that she was declared fit for duty and able to return to work, and able to perform her full range of ordinary duties. Despite this, it is common ground that the applicant was not permitted to return to work until about 15 November 2013.

3 As a consequence of these events, the applicant said that she was "forced" to take sick, annual and unpaid leave, when she was in fact fit for duty. Thus, the applicant contended that she was required by the respondent to use her leave entitlements. The applicant now contends that this "enforced" leave should be paid to her, as a denied contractual benefit. Whilst Ms Fergusson's claim is couched in this way, it is clear from the agreed facts filed by the parties, that most of Ms Fergusson's absence from the workplace was unpaid. Of the total of 281.2 hours of absence, only 34.15 hours were attributable to annual leave. The rest was "unpaid leave", until she returned to work on 15 November. Thus, with respect, the particulars of claim have somewhat mischaracterised the applicant's claim. In reality, she contends that she should be paid her normal wages for the majority of the period that she was not permitted to resume work.

4 There is a twist in this case. It is also common ground that the applicant's employment was and is covered by the General Retail Industry Award 2010, made under the Fair Work Act 2009 (Cth). Accordingly, the respondent submitted that the Commission has no jurisdiction to "enforce" the award, and the applicant's contract of employment does not specify a benefit in relation to annual leave and sick leave, independently of the Award. For the applicant, it was submitted that the Commission does have jurisdiction because the only exclusion to the contractual benefits jurisdiction, is in relation to State awards made under the Industrial Relations Act 1979.

5 Given the issue raised, it was agreed that the Commission would deal with this preliminary issue of jurisdiction "on the papers", by written submissions.

Contentions

6 The applicant submitted that there is no issue raised by the respondent that the Commission has jurisdiction to deal with an industrial matter of the present kind, involving the determination of a contractual benefit, against a constitutional corporation: *Stylianou v Country Realty Pty Ltd as Trustee for the Marcelli Family Trust* (2010) 91 WAIG 2029; *Triantopoulos v Shell Company of Australia Ltd* (2011) 91 WAIG 67. The applicant also referred to the various elements required to be established in a denied contractual benefits claim, they being that the claim must relate to an industrial matter under s 7 of the Act; the claimant must be an employee; the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service; the relevant contract must be a contract of service; the benefit claimed must not arise under an award or order of the Commission; and the benefit must have been denied by the employer: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704; *Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867. So much is not controversial.

7 Additionally, the applicant referred to "benefit" for the purposes of s 29(1)(b)(ii) of the Act, as being defined very broadly to allow an employee to bring to the Commission a matter in which the employee believes he or she has been deprived of some advantage, entitlement, right, superiority, favour, good or perquisite by the action of the employer in contravention of a provision of the contract of service: *Balfour v Travelstrength Limited* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

8 The applicant submitted that the contentious issue in this matter is whether the benefit claimed by her arises under an award or order of this Commission. It was submitted that the relevant award referred to in the applicant's contract of employment in clauses 7 and 10 is a federal award made under the FW Act, and not an award or order of this Commission. Consequently, the applicant submitted that the Commission has jurisdiction to enforce payments of the benefit under the applicant's contract of employment, "in the terms set out in the Award".

9 The applicant acknowledged, in my view quite correctly, that based on *Byrne v Australian Airlines Limited; Frew v Australian Airlines Limited* (1995) 185 CLR 410, awards are independent from contracts of employment and incorporation of their terms will not be lightly inferred. However, it was submitted that in this case, the Award provides the "measure or standard upon which the Applicant is to be remunerated but the conferral of the benefit is under the contract not under the Award".

10 For the foregoing reasons, the applicant contended that the Commission has jurisdiction to entertain her contractual benefits claim.

11 For the respondent, it was acknowledged that the Commission has held that it may determine contractual benefit claims against constitutional corporations: see *Stylianou*. However, in this case, the respondent submitted that the benefits claimed were legislative, and not contractual, and fall exclusively within the federal jurisdiction. It was contended by the respondent that the applicant's contract of employment, relevantly refers to the employment relationship as being, in cl 2 "covered by the National Employment Standards as well as the General Retail Industry Award 2010". The respondent further submitted that cl 10 refers to the applicant's entitlement to annual leave and sick leave in the terms of "as per the General Retail Industry Award 2010".

12 Accordingly, the respondent submitted that the true origin of the benefits claimed in this case arise from the Award and not the contract of employment. The submission was that the Commission has no jurisdiction to enforce a federal award rather, that such matters need to be pursued in the federal courts in accordance with the relevant provisions of the FW Act.

Consideration

13 There is no question as to the Commission's capacity to enforce a contract of employment, as a denied contractual benefit, against a national system employer. Such a matter is a "non-excluded matter" for the purposes of s 27(1)(c) of the FW Act: *Stylianou*; *Triantopoulos*; *Matthews v Cool or Cosy Pty Ltd* (2004) 84 WAIG 2152.

14 It is also the case that from the plain terms of ss 7 and 29(1)(b)(ii) of the Act, the express exclusion from the Commission's denied contractual benefits jurisdiction, applies to those who allege that the relevant benefit arises under an award or order of this Commission, made under the Act. It is also clear that the enforcement of an award or order of the Commission is, by virtue of s 83(3) of the Act, exclusively within the jurisdiction of the Industrial Magistrates Court. However, the key issue in this case is whether the claimed denied contractual benefit is one that arises "under" (i.e. by virtue of or pursuant to) the relevant contract: *Lang v Telecom Australia* (1989) 70 WAIG 186. Furthermore, the ascertainment of a denied contractual benefit involves the determination of an applicant's "entitlement", which means the "existence of an enforceable legal right": *Leontiades v FT Manfield Pty Ltd* (1980) 43 FLR 193 per Keely J.

15 Thus, the question in this case arises as to whether, subject to what I say further below as to an alternative characterisation of the applicant's claim, the claim for annual leave by the applicant, is one involving the enforcement of her contract of employment as a non-excluded matter under s 27(1)(c) of the FW Act. Other interesting issues may arise, as to whether, in any event, this Commission, as a court of record under s 12 of the Act, is also a "court of a State" for the purposes of the enforcement provisions of the FW Act. Despite respectable arguments that this Commission can be so described, at least for the purposes of s 77(iii) of the Commonwealth Constitution and s 39 of the Judiciary Act 1903 (Cth) (see *Queensland v Together Queensland, Industrial Union of Employees* (2012) 301 ALR 457; *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343; cf *Lang*), the prescription of "eligible State and Territory courts", by list in s 12 of the FW Act, for the purposes of the enforcement of federal industrial instruments, may be determinative against such jurisdiction being exercised by this Commission in relation to employees covered by federal awards. However, as the issue has not been raised and argued in the present case, it is best left to another occasion.

16 As to whether the provisions of the Award in this case constitute benefits "under" the applicant's contract of employment, for the following reasons, I think that it is doubtful that they are. The language of cl 10 – Leave, and for that matter, cl 11 – Jury Service of the applicant's contract of employment, refers to the relevant provision in terms of "as per" the Award. As noted

above, the incorporation of a term of an award into a contract of employment is not to be lightly inferred. The mere mention of an award, or a provision of one, will not provide a basis to conclusively determine that the award is contractually binding. As the learned authors in Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment* (7th ed, 2011) 266 say:

> Nevertheless, mere mention of the existence of an award or enterprise agreement which binds the parties will not conclusively determine that the award or agreement clauses are incorporated into and binding in contract. It may be that on proper construction of the contract document, the reference to the award or agreement manifests nothing more than an acknowledgment by the parties of the statutory instruments which will also govern their relationship, according to the terms of the statute. Mention of industrial instruments in a contract document may serve to identify 'relevant information capable of affecting the parties contractual relations rather than documents intended to be binding and enforceable as part of their contractual relations'.

17 Thus, the reference to industrial instruments in contracts of employment in terms such as "are prescribed by"; "are as prescribed"; "subject to and governed by", have been held to be insufficient to constitute words of incorporation: *Gramotnev v Queensland University of Technology* [2013] QSC 158; *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 IR 410; *Soliman v University of Technology, Sydney* (2008) 176 IR 183.

18 In my view, in this case, the use of the language "as per" are words of explanation to describe the industrial instrument to which the particular provision of the contract directs attention. It is not the case in my opinion, that the reference to the Award in the applicant's contract, creates the "standard upon which the Applicant is to be remunerated", as contended by the applicant.

19 Based on the above analysis, arguably therefore, the only way that the applicant may seek to recover what she alleges to be the denied rights to annual leave, which as I have mentioned above only represents a small portion of her overall claim, would be for her to seek to enforce the terms of the Award in the appropriate federal court, or an eligible State or Territory court, as defined in s 12 of the FW Act.

20 However, as noted above, there is a different characterisation of the applicant's claim which places a wholly different complexion on the issue of jurisdiction. After the written submissions were received from the parties, and following further consideration by the Commission, I requested my Associate to write to the parties setting out an issue upon which I sought further submissions. That issue relates to whether the applicant's claim could be properly characterised as a claim for a denial by the respondent to the applicant, of her ordinary wage or salary over the relevant period. This is on the basis that the applicant contends she was fit for duty, and was ready, willing and able to perform under her contract of employment over this period.

21 Despite this, the applicant contended that she was effectively excluded from the respondent's premises, and annual leave benefits were appropriated to her, with the great majority of the time being a period of unpaid leave. If the applicant's claim can be characterised in this way, then by cl 7 – Wage Rate of her contract of employment, it is specified that an annual wage rate for her position is $37,130.15, an annual rate of wage above the Award.

22 If considered in this way, then two issues arise. The first issue is that the contract of employment itself specifies the annual rate of wage. The second is that the annual wage exceeds that prescribed by the Award. It has been held by the Commission that where an employee is paid in excess of the relevant award rate of pay, irrespective of whether it is a State or federal award, then the employee may recover the whole amount claimed as a non-award payment, as a contractual benefit: *Roberts v Groome* (1984) 64 WAIG 774; *Steele v Tardiani* (1946) 72 CLR 386; *Mason v Bastow* (1990) 70 WAIG 19.

23 As the Commission, in enquiring into and dealing with an industrial matter, is not, by s 26(2) of the Act, restricted to the specific claim made or to the subject matter of the claim, the Commission invited further submissions as to this issue. The parties accordingly, made the following further written submissions.

24 For the applicant it was contended that this characterisation has great force and supports the proposition that her claim is within the jurisdiction of the Commission.

25 For the respondent, it was submitted that the Commission should not characterise the applicant's claim in the alternative as outlined above. The submission was that to do so would be to impose an impermissibly broad construction on Ms Fergusson's contract of employment when in reality, the entirety of her claim should be considered in the federal courts as an enforcement of the Award or the federal legislation. Furthermore it was submitted by the respondent that to adopt the alternative characterisation of the claim, would involve an overemphasis on the implication of a term of the applicant's ongoing access to the workplace, in order to perform work and earn wages under the contract of employment. In relation to the contract it was accepted by the respondent that as observed by the Commission, under her contract of employment, the applicant was paid in excess of the relevant amount prescribed by the Award and that furthermore, an over-award payment, could be recovered as an entire debt due, without being characterised as an award enforcement.

26 Furthermore, the respondent reiterated its earlier submissions that the onus still remained with the applicant to establish that her claim fell within the Commission's jurisdiction and that she had failed to discharge that onus.

Conclusion

27 In my view, for the following brief reasons, the applicant's claim is within the jurisdiction of this Commission and it may be dealt with as a claim for an alleged denied contractual benefit.

28 A significant difficulty for the respondent's submission is the implicit contention that the entirety of the applicant's claim involves the enforcement of a term of the Award. This is not correct. From the agreed facts as filed by the parties, it is clear that the majority of time over which wages are claimed, involved no payment at all to the applicant. That is, as noted above, she was not paid her ordinary wage or salary for 247.05 of the total of 281.2 hours over which she was absent from the workplace. Thus, it is clear, that in reality, the applicant is not claiming the effective benefit of a "re-crediting" of leave

entitlements, because in the main, she has not received them. The essence of the dispute is that the applicant maintains, consistent with the medical advice that she received, that she was fit, willing and able to return to duty on 19 September 2013.

29 She further contends that in effect, wrongfully, the employer precluded her from doing so and failed to pay her for the majority of the time she was absent, until her return to duty on 15 November 2013. Whilst, as noted, in light of the agreed facts, that may not have been adequately particularised in the claim, the claim in my view can only be properly characterised as a claim for payment of her ordinary wage and salary, for the period over which she contends that she was wrongfully prevented from returning to duty. When viewed in the context of the agreed facts, which the matter must be, the claim plainly substantively relates to the enforcement of the applicant's contract of employment, by way of denied contractual benefits, in the form of payment of her wages over the relevant period. Whilst the applicant's claim, on the facts as agreed, may raise interesting issues of the "wages-work bargain", as a matter of common law that is not a question of jurisdiction. The applicant's claim is plainly an industrial matter, and relates to a claim for the enforcement of her contract of employment, by way of a benefit arising under it, which she says has been denied to her.

30 Accordingly, the Commission will take steps to re-list the application in due course.

2014 WAIRC 01065

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRACEY LOUISE FERGUSSON
	APPLICANT
	-v-
	THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST AS THE TRUSTEE FOR THE SALVATION ARMY (WA) SOCIAL WORK TRADING AS SALVOS STORES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 25 SEPTEMBER 2014
FILE NO.	B 44 OF 2014
CITATION NO.	2014 WAIRC 01065

Result	Declaration issued
Representation	
Applicant	Mr J Fiocco of counsel
Respondent	Mr J Reid

Declaration

HAVING heard Mr J Fiocco of counsel on behalf of the applicant and Mr J Reid on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby declares –

THAT save for the claim for annual leave, the Commission has jurisdiction to hear and determine the applicant's claim.

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

2014 WAIRC 01314

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRACEY LOUISE FERGUSSON
	APPLICANT
	-v-
	THE SALVATION ARMY (WESTERN AUSTRALIA) PROPERTY TRUST AS THE TRUSTEE FOR THE SALVATION ARMY (WA) SOCIAL WORK TRADING AS SALVOS STORES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 5 DECEMBER 2014
FILE NO.	B 44 OF 2014
CITATION NO.	2014 WAIRC 01314

Result	Declaration and Order Issued
Representation	
Applicant	Mr S Millman of counsel and with him Mr D Rafferty and Ms T Fergusson
Respondent	Mr B Robinson

Declaration and Order

HAVING heard Mr S Millman of counsel and with him Mr D Rafferty and Ms T Fergusson on behalf of the applicant and Mr B Robinson on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby –

(1) DECLARES that the respondent is indebted to the applicant in respect of salary in the sum of $4,627.34.

(2) ORDERS that on payment by the respondent to the applicant of the sum in par (1) above the application be and is hereby discontinued.

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

2015 WAIRC 00112

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JARED GILBERT
	APPLICANT
	-v-
	GMT (GROVES MANUFACTURING AND TOOLING)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 FEBRUARY 2015
FILE NO/S	B 175 OF 2014
CITATION NO.	2015 WAIRC 00112

Result	Application discontinued
Representation	
Applicant	Mr J Gilbert
Respondent	Mr S Groves

Order

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

THAT the application be and is hereby discontinued by leave.

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

2015 WAIRC 00185

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRLEY LORRAINE GRIFFIN
	APPLICANT
	-v-
	ROBERT ROBSON
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 18 FEBRUARY 2015
FILE NO/S	B 163 OF 2008
CITATION NO.	2015 WAIRC 00185

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr R Gifford (as agent)

Order

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

After two conciliation conferences the matter was adjourned for a lengthy period pending the outcome of other proceedings.

The applicant informed the Commission that she wished to proceed with the matter and a hearing was listed for 23 October 2013.

On 17 October 2013 the respondent lodged an amended *Form 5 – Notice of answer and counter-proposal* containing a counterclaim.

At the hearing on 23 October 2013 the respondent made submissions about why the Commission should deal with the respondent's counterclaim and the matter was adjourned for the respondent to consider its position with respect to jurisdiction.

The matter was listed for hearing on 8 April 2014 to deal with the respondent's counterclaim. At the commencement of the hearing the applicant sought to amend her application to include additional entitlements.

The matter was part heard and a hearing to finalise the matter was listed for 30 January 2015.

On 28 January 2015 the Commission was advised that a settlement had been reached in relation to the matter and the hearing was vacated.

On 29 January 2015 each party filed a *Form 14 - Notice of withdrawal or discontinuance*.

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

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00111

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL HAYWARD-SMITH
	APPLICANT
	-v-
	VANCAL PTY LTD T/AS GMT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 FEBRUARY 2015
FILE NO/S	B 174 OF 2014
CITATION NO.	2015 WAIRC 00111

Result	Application discontinued
Representation	
Applicant	Mr M Hayward-Smith
Respondent	Mr S Groves

Order

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

THAT the application be and is hereby discontinued by leave.

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

2015 WAIRC 00172

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KHEMRAJ KANHYE
	APPLICANT
	-v-
	HARDWARE ZONE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 12 FEBRUARY 2015
FILE NO/S	U 249 OF 2014, B 249 OF 2014
CITATION NO.	2015 WAIRC 00172

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr A Chin

Order

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

The Commission listed a conciliation conference for 9 February 2015.

On 3 February 2015 the applicant advised the Commission that the matters had been resolved and filed a *Form 14 - Notice of withdrawal or discontinuance*.

The conference was vacated and the respondent consents to the matters being discontinued.

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

THAT these applications be, and are hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00212

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLAYTON MCBRIDE
	APPLICANT
	-v-
	CITY OF ARMADALE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 4 MARCH 2015
FILE NO/S	B 223 OF 2014
CITATION NO.	2015 WAIRC 00212

Result	Discontinued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Mr S Roffey (as agent)

Order

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

On 27 January 2015 the applicant advised the Commission that the matter had been resolved.

On 20 February 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00230

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOSH MCDOUGALL
	APPLICANT
	-v-
	CHAMFORD INTERIORS
	MEGAN & BEN DAVEY
	THE TRUSTEE FOR THE TERPSTRA DAVEY DISCRETIONARY TRUST
	ABN 77 409 692 927
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 12 MARCH 2015
FILE NO/S	U 203 OF 2013
CITATION NO.	2015 WAIRC 00230
Result	Application dismissed

Order

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

WHEREAS on the 5th day of March 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00189

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRISTY MILLS
	APPLICANT
	-v-
	QANTAS AIRWAYS LTD, QANTAS CENTRE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 19 FEBRUARY 2015
FILE NO/S	B 31 OF 2014
CITATION NO.	2015 WAIRC 00189

Result	Application dismissed
Representation	
Applicant	Mr M Gresham of counsel
Respondent	Ms P Emery of counsel

Order

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

WHEREAS on the 12th day of February 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00169

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL MOORE-CROUCH
	APPLICANT
	-v-
	GOLDFIELDS INDIVIDUAL AND FAMILY SUPPORT ASSOCIATION (INC.) T/AS GIFSA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 12 FEBRUARY 2015
FILE NO/S	U 227 OF 2014
CITATION NO.	2015 WAIRC 00169

Result	Application discontinued
Representation	
Applicant	Ms S Lyon of counsel
Respondent	Mr B Jackson of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

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

2015 WAIRC 00158

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN OSWALD
	APPLICANT
	-v-
	WALBROOK INVESTOR RELATIONS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 9 FEBRUARY 2015
FILE NO/S	B 203 OF 2014
CITATION NO.	2015 WAIRC 00158

Result	Application discontinued
Representation	
Applicant	Mr G Buchholz
Respondent	Mr B Knowles

Order

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

AND WHEREAS on 11 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 6 February 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00171

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MUGE OZCAN
	APPLICANT
	-v-
	BLUE ROCK LAW PTY LTD (ACN 140 636 479)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 12 FEBRUARY 2015
FILE NO/S	B 225 OF 2014
CITATION NO.	2015 WAIRC 00171

Result	Application dismissed
Representation	
Applicant	Mr S Heathcote of counsel
Respondent	Mr G Haros of counsel

Order

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

WHEREAS on the 18th day of December 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 4th day of February 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00192

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00192
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	FRIDAY, 6 FEBRUARY 2015
DELIVERED	**:**	FRIDAY, 20 FEBRUARY 2015
FILE NO.	**:**	U 183 OF 2014
BETWEEN	**:**	SANDRA PETRICH Applicant AND GENTLEMENS HAIR LOUNGE Respondent

CatchWords	**:**	Termination of employment – Claim of harsh, oppressive and unfair dismissal – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission concluded applying principles that discretion should not be exercised – Application dismissed
Legislation	**:**	*Industrial Relations Act (WA)* s 29(1)(b)(i),(2)&(3)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Ms S Petrich (in person)
Respondent	**:**	Ms J Meneghello (by way of written submissions)

Case(s) referred to in reasons:

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

Reasons for Decision

1 On 25 August 2014 Ms Sandra Petrich referred a claim of unfair dismissal to the Western Australian Industrial Relations Commission (the Commission). Ms Petrich's employment was terminated on 5 July 2014 under s 29(2) of the *Industrial Relations Act 1979* (the Act). Claims of unfair dismissal must be referred to the Commission no later than 28 days after the day the employment is terminated. The claim by Ms Petrich is 23 days out of time.

2 The Commission may accept a claim of unfair dismissal that is out of time if the Commission considers it would be unfair not to do so. Ms Petrich's claim was set down for hearing to allow the applicant and Gentlemens Hair Lounge (the respondent) an opportunity to be heard as to whether it would be unfair not to accept the claim.

The Hearing

3 On the day of the hearing Ms Petrich appeared on her own behalf. She elected to make submissions rather than give evidence under oath. Ms Petrich did not call any witnesses. The respondent did not attend but rather chose to submit written submissions on 9 February 2015. Ms Petrich was given an opportunity to respond to the respondent's submissions in writing and did so on 10 February 2015.

Consideration

4 Section 29(2) of the Act requires that applications that are lodged under s 29(1)(b)(i) of the Act are filed within 28 days on which an employee is terminated. Section 29(3) of the Act reads as follows:

> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

5 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time the Commission takes into account the factors outlined in the Industrial Appeal Court decision in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** [2004] WASCA 51; (2004) 84 WAIG 683 (***Malik***) as follows:

1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.

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

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

When considering the issue of fairness, Heenan J also observed the following in ***Malik***:

> I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.

6 In applying these guidelines the Commission is aware that the Act specifies a 28 day time frame in which to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

Consideration of Submissions

7 This application was received in the Commission on 25 August 2014. The applicant was terminated on 5 July 2014 so this application is 23 days outside of the required time frame. Section 29(2) of the Act requires that applications pursuant to s 29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated.

8 The applicant was given ample opportunity to provide an acceptable reason for the delay of 23 days in lodging this application. The applicant submitted she first went via Fair Work Australia (FWA) and advised that FWA did not direct the applicant that an application could be lodged in the Commission. It was not until the applicant consulted a lawyer that Ms Petrich formed a genuine belief that she could lodge this application.

9 The Commission has had the benefit of hearing quite limited evidence with respect to the claim by Ms Petrich. The Commission therefore finds that when considering the issue of merit as a factor to extend time to file this application there is insufficient evidence to establish that the applicant has an arguable case that she was unfairly dismissed.

10 Considering the Form 5 – Notice of Answer filed by the respondent the Commission finds that the prejudice suffered by the respondent would be greater than that suffered by the applicant if this application were to be accepted. The principal reason for the termination of Ms Petrich was that the respondent's business was running at a loss. Even though the applicant would not have the opportunity to prosecute her claim no specific merit to the claim was highlighted by Ms Petrich other than the alleged stress suffered as a result of the termination. The Commission finds that it is unfair for an employer to meet a claim alleging unfair termination sometime after the employee was terminated particularly when the reason for doing seemingly lacked substance. Further, by Ms Petrich's admission the respondent was unaware that the applicant would be contesting her termination prior to receiving this application until almost two months after her termination.

11 Ms Petrich submitted as a result of the termination she became stressed. Ms Petrich considered she saved the respondent marketing money however in the face of business difficulties being experienced by the respondent Ms Petrich was seeking higher hourly rates of pay and secure employment. Certainly Ms Petrich seemed shocked when terminated by the respondent although the applicant was aware the respondent was having financial problems. Ms Petrich was being kept informed of this issue by the respondent.

12 At no stage was the respondent made aware that Ms Petrich was actively contesting the unfair dismissal until such time as documentation was received from the Commission. Throughout the time that Ms Petrich was working for the respondent she was made aware of the financial issues the business was facing which ultimately resulted in the respondent having to terminate Ms Petrich's services. At the time of her termination the respondent provided Ms Petrich with a reference, annual leave payout documentation and one week's notice. The respondent was contacted by Ms Petrich and thanked for acting promptly in terms of providing a reference following the termination. This conversation included:

> During this time I discussed with Sandra that if things improved over the next year with the business that we would be happy to re-employ her. Sandra advised that she was thankful for the opportunity to work with us and would be happy to return if the business could improve. This was why I was really shocked to learn that she felt unfairly dismissed as this was never mentioned to me at all at any time during our discussion during and after her employment.
>
> (Extract from respondent's submissions 9 February 2015)

Findings

13 In considering whether it would be unfair not to accept Ms Petrich's claim out of time in that the legislative time limit of 28 days following the termination of her employment ought to be complied with unless there is an acceptable explanation for the delay which makes it equitable to so extend the time. As outlined in the ***Malik*** decision special circumstances are not necessary but the Commission must be positively satisfied that the time limit prescribed in s 29(2) of the Act should be so extended. The Commission is not so satisfied.

14 When taking into account these findings and the relevant factors to consider with respect to filing an application of this nature and the issue of fairness to both parties, I find that it would be unfair for the Commission to exercise its discretion to grant an extension of time within which to file this application. For these reasons an extension of time in order to lodge this application will not be granted. Ms Petrich has not positively satisfied the Commission that it would be unfair not to accept Ms Petrich's application out of time. I also cannot consider why the Commission should prefer her submissions over the respondent's submissions.

15 In this circumstance Ms Petrich has failed to convince the Commission to exercise its discretion in her favour to allow the granting of an extension of time within which to file this application. Therefore an order will issue declaring that it would be unfair for the Commission to grant an extension of time and dismissing Ms Petrich's claim.

2015 WAIRC 00195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANDRA PETRICH
	APPLICANT
	-v-
	GENTLEMENS HAIR LOUNGE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 20 FEBRUARY 2015
FILE NO/S	U 183 OF 2014
CITATION NO.	2015 WAIRC 00195

Result	Declaration & Order issued
Representation	
Applicant	Ms S Petrich (in person)
Respondent	Ms J Meneghello (by way of written submissions)

Declaration & Order

HAVING HEARD Ms S Petrich and Ms J Meneghello (by way of written submissions), the Western Australian Industrial Relations Commission (the Commission), pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) (the Act), hereby:

(1) DECLARES that it would be unfair for the Commission to grant an extension of time under s 29(3) of the Act for Ms Petrich to file her application.

(2) ORDERS that the application be dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2015 WAIRC 00110

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAULA ELAINE RUCHOTZKE
	APPLICANT
	-v-
	VANCAL PTY LTD T/AS GMT (GROVES MANUFACTURING AND TOOLING)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 FEBRUARY 2015
FILE NO/S	B 173 OF 2014
CITATION NO.	2015 WAIRC 00110

Result	Application discontinued
Representation	
Applicant	Ms P E Ruchotzke
Respondent	Mr S Groves

Order

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

THAT the application be and is hereby discontinued by leave.

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

2015 WAIRC 00168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIRI STOWELL
	APPLICANT
	-v-
	MATTHEW QUAIN KINSELLA
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 11 FEBRUARY 2015
FILE NO/S	U 233 OF 2014
CITATION NO.	2015 WAIRC 00168

Result	Application dismissed
Representation	
Applicant	Mr P Mullally
Respondent	Mr S Farrell

Order

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

WHEREAS on the 23rd day of January 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to the matter being listed for hearing; and

WHEREAS on the 30th day of January 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00182

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00182
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 17 FEBRUARY 2015
DELIVERED	**:**	TUESDAY, 17 FEBRUARY 2015
FILE NO.	**:**	B 219 OF 2014
BETWEEN	**:**	NORMAN WILLIAM TOWER
		Applicant
		AND
		JAMES SINCLAIR THOMSON - TRADING AS MUNDARING HIRE SERVICE / J.S.T PROJECTS
		Respondent

CatchWords	:	Denied contractual entitlements – Payment of wages – Contract of employment
Legislation	:	*Industrial Relations Act 1979* s 29(1)(b)(ii)
Result	:	Decision issued
Representation:		
Applicant	:	Mr N W Tower
Respondent	:	No appearance

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings

taken from transcript as edited by the Commission)

1 This is a matter referred to the Commission under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act).

2 The applicant says that he was employed by the respondent from 9 September to 27 September 2014 in a capacity assisting the respondent in its equipment hire business. He says that the respondent has not paid him any wages except for an amount of $400 and that he is owed $3,100, being wages for 140 hours worked at the contracted rate of $25 per hour.

3 I note that the respondent has not appeared at the hearing of this matter. A Notice of hearing was sent to the respondent on 23 January 2015, to three separate addresses, two of which Notices were returned to the Commission with the envelopes marked 'Return to sender'. The third, which was not returned, was directed to the respondent's post office box address contained within an email dated 23 December 2014 which Mr Thompson sent to the applicant and to which the Associate was copied by Mr Thompson. Further, I note that the Associate has been in communication with the respondent over a number of weeks and as recently as yesterday left messages for both Mr Thompson and a Mr Toft who, according to the Commission's records, is the respondent's Operations Manager. In the circumstances, the hearing proceeded in the respondent's absence.

Findings and conclusions

4 The applicant has given evidence which is uncontroverted and which I find to be credible evidence. In accordance with that evidence I find that the respondent operates a business of equipment hire and that the applicant entered into an oral contract of employment following discussions with Mr Thompson. That contract provided for the condition that he be paid $25 per hour, which I take to be a gross amount.

5 There is no evidence before me to suggest that the employment was covered by any award or order of the Commission.

6 The applicant worked for the respondent under the contract of employment from 9 September to 27 September 2014, working a total of 140 hours. He was paid $300 in cash and had the benefit of a further $100. Otherwise, he has not been paid for the hours worked and is owed an amount of $3,100 before tax. The respondent has promised to pay the applicant the amount, but has not done so.

7 I conclude that the applicant is entitled to be paid by the respondent a benefit arising under his contract of employment, which has not been paid, of $3,100 less tax, and I intend to issue an order accordingly.

8 The payment is to be made within 14 days of today's date. Minutes of Proposed Order will issue.

2015 WAIRC 00190

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NORMAN WILLIAM TOWER
	APPLICANT
	-v-
	JAMES SINCLAIR THOMSON - TRADING AS MUNDARING HIRE SERVICE / J.S.T PROJECTS
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 19 FEBRUARY 2015
FILE NO/S	B 219 OF 2014
CITATION NO.	2015 WAIRC 00190

Result	Order issued

Order

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

THAT the respondent pay the applicant an amount of $3,100 less any amount due to the Australian Taxation Office within 14 days from the 17th day of February 2015.

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

2015 WAIRC 00179

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00179
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 20 JANUARY 2015
DELIVERED	**:**	TUESDAY, 17 FEBRUARY 2015
FILE NO.	**:**	U 191 OF 2014
BETWEEN	**:**	CHARLES TYSOE Applicant AND THE OWNERS OF STRATHEARN SP 1082 ABN 37397560589 C/- SMITHWICK STRATA SERVICES ABN 36995277562 Respondent

Catchwords	**:**	Termination of employment - Claim of harsh, oppressive or unfair dismissal - Termination due to redundancy - Principles applied - Applicant not harshly, oppressively or unfairly dismissed - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* s 26(1)(a), s 27(1) and s 29(1)(b)(i) *Minimum Conditions of Employment Act 1993* s 40, s 41, s 42 and s 43
Result	**:**	Dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Ms D Thornton

Case(s) referred to in reasons:

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

Bridge Shipping Pty Ltd v Grand Shipping SA and Anor [1991] 173 CLR 231

Byrne v Australian Airlines (1995) 61 IR 32

Gilmore v Cecil Bros and Ors (1996) 76 WAIG 4434

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Shire of Esperance v Mouritz (1991) 71 WAIG 891

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

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

Reasons for Decision

1 Charles Tysoe (the applicant) claims that he was unfairly dismissed by The Owners of Strathearn SP 1082 ABN 37397560589 C/- Smithwick Strata Services ABN 36995277562 (the respondent) on 22 August 2014. The respondent disputes the applicant's claim.

Name of the respondent

2 During the proceedings it became apparent that the respondent had been incorrectly named. Given the Commission's powers under s 27(1) of *Industrial Relations Act 1979* (the Act) and as it is appropriate for the respondent to be correctly named, I will issue an order that The Owners of Strathearn SP 1082 ABN 37397560589 C/- Smithwick Strata Services ABN 36995277562

be deleted as the named respondent in this application and be substituted with The Owners of Strathearn (see ***Rai v Dogrin Pty Ltd*** (2000) 80 WAIG 1375 and ***Bridge Shipping Pty Ltd v Grand Shipping SA and Anor*** [1991] 173 CLR 231).

Background

3 The applicant, who was the only person employed by the respondent, was employed as a full-time live-in caretaker at premises located in Kings Park Avenue, Crawley (the complex) between 1 October 2007 and 22 August 2014. His annual salary at termination was $60,979 and he worked approximately 40 hours per week. The applicant was required to complete after hours emergency work at the complex and in return was given one day off each month. The applicant lived free of charge in a flat at the complex and was not required to pay his utility costs. The applicant's duties included cleaning the complex, liaising with residents, supervising contractors and undertaking minor day-to-day maintenance.

4 The respondent contracted Smithwick Strata Services (Smithwick) to manage the complex. Smithwick's managing director, Mr Henry van Es liaised with the applicant about work to be undertaken at the complex and matters relating to the applicant's employment. They had a good working relationship. Mr van Es also liaised with the respondent's council of owners about overseeing the running of the complex and he usually attended council of owners meetings and the respondent's Annual General Meeting (AGM). Prior to the respondent's 2014 AGM held on 16 June 2014 some of the respondent's owners contacted Mr van Es about the possibility of altering the applicant's full-time caretaker position to that of a part-time contract position to save costs. After completing some research Mr van Es advised the owners at the 2014 AGM that other complexes using caretakers did not employ them on a full-time basis. After a discussion about this issue at the 2014 AGM the respondent decided that the council of owners would review how the caretaker position could be undertaken and review alternatives. Mr van Es visited the applicant the following day and as a courtesy told him that the position of a full-time caretaker may no longer be required by the respondent. After their discussion the applicant sent the following email to Mr van Es on 26 June 2014:

> Thank you for informing me of the possible redundancy of my position at Strathearn. I would like to extend to you the same courtesy and let you know that I am currently seeking permanent employment elsewhere and should any of these applications prove sussesfull [sic] I will give the standard 10 days [sic] notice.
>
> I would prefer to remain at Strathearn but I need full time employment for at least the next 19 months.
>
> (Exhibit A2)

Mr van Es forwarded this email to the chair of the council of owners, Mr Allan Green, on 26 June 2014.

5 The respondent's council of owners met on 8 July 2014 to discuss alternatives to having a full-time live-in caretaker position at the complex (see the minutes of this meeting - exhibit R1). A person who could possibly undertake a part-time contract position to replace the applicant was then interviewed by the council of owners. At a further meeting of the council of owners on 16 July 2014 the council, on behalf of the respondent, decided to employ a part-time non live-in caretaker and the person who the council of owners had interviewed would be appointed to undertake this role. Mr Green then sent the following email to Mr van Es on 16 July 2014 confirming this decision and requesting Mr van Es to terminate the applicant:

> This morning, Dorothy, Elizabeth, Greg and I met with Wendy Sweeting and had a fruitful discussion. We are unanimous in agreeing that she be appointed as Strathearn caretaker for a 3 month mutual trial period. Please take the appropriate steps to inform Charles that his position as live- in caretaker has been made redundant and give him the legal length of notice that his services are no longer required.
>
> Thanks for your contribution in carrying out this process.
>
> (Exhibit R3)

6 On behalf of the respondent Mr van Es wrote a letter to the applicant on 25 July 2014 advising him of his termination. This letter reads in part:

> **Termination of your employment by reason of redundancy**
>
> The purpose of this letter is to confirm the outcome of the decision by the council of owners that the role of live-in care taker was no longer required by Strathearn. On Wednesday 9th July 2014 Henry van Es of Smithwick Strata services had a discussion with yourself regarding this intention and this letter confirms the role will no longer be required from Monday 25th August 2014.
>
> Regrettably this means your employment will terminate. This decision is not a reflection on your performance.
>
> Based on your length of service, your notice period is 4 weeks. Therefore your employment will end on Friday 22nd August 2014.
>
> (Exhibit A3)

Evidence

Applicant

7 Mr van Es visited the applicant on 17 June 2014 and told him that the respondent had decided that his position may be made redundant because the respondent was reviewing alternatives to having a full-time live-in caretaker to reduce costs. The applicant formally responded to Mr van Es about this issue by email on 26 June 2014. After this meeting with Mr van Es the applicant had no discussions with Mr van Es or the respondent about his ongoing employment with the respondent or

alternatives to his termination. Even though Mr van Es referred to having a discussion with the applicant on 9 July 2014 in the applicant's letter of termination the applicant could not recall speaking to him on that date. The applicant gave evidence that if he had the opportunity to talk to the respondent about alternatives to his termination he would have considered reducing the hours he worked to continue working with the respondent and/or move out of the complex and rent a place elsewhere. He would now not consider working in the part-time caretaker position because of the way he was treated by the respondent and he believes the working environment would be hostile.

8 The applicant is currently employed as a casual caretaker, which is not a live-in position, working an average of 14 hours per week at a resort in Mandurah and he started this job a week after ceasing employment with the respondent. He earns $23 per hour in this role. The applicant is seeking compensation of 59 weeks' pay up to when he retires, $250 per week for that period covering the value of his accommodation and utilities and $50 as reimbursement for the application fee.

9 Under cross-examination the applicant maintained that when he had a discussion with Mr van Es after the 2014 AGM he did not tell Mr van Es that he only wanted to continue working with the respondent on a full-time basis. He maintained that Mr van Es told him that the respondent was considering making the caretaker position redundant and he did not provide him with any detail at the time about what may occur.

Respondent

10 Ms Donna Thornton has been a member of the respondent's council of owners since June 2014. At the 2014 AGM a number of owners wanted the applicant's full-time live-in caretaker position reviewed to cut costs and the respondent decided that the council of owners would manage this process. Ms Thornton was aware that Mr van Es had a discussion with the applicant the day after the 2014 AGM because Mr van Es told her that he did so and he told her the applicant was informed that the council of owners was deciding if the caretaker position could be undertaken on a part-time basis. The council of owners met on 8 July 2014 to discuss how the applicant's duties could be undertaken and the possibility of the caretaker position being completed on a part-time basis. The council of owners decided at this meeting that the applicant's role could be done part-time and a possible contractor for the position was to be interviewed for this role (see exhibit R1).

11 Ms Thornton maintained that the applicant was not legally entitled to the redundancy payment given to him by the respondent. Ms Thornton confirmed that the respondent did not have any discussions with the applicant about alternatives to him being terminated once the respondent decided to terminate him.

12 Mr van Es stated that the respondent discussed whether it was appropriate to continue employing the applicant on a full-time basis at the 2014 AGM. Mr van Es visited the applicant the following day and told him that employing a full-time caretaker at the complex could change and in response the applicant told him that he needed to work full-time up to when he retired. Mr van Es promised to keep the applicant informed of any decisions made about his position. Mr van Es could not recall having any discussions with the applicant about his termination after his meeting with the applicant on 17 June 2014 and even though the applicant's letter of termination refers to him meeting the applicant on 9 July 2014 he could not recall this meeting taking place. Mr van Es confirmed that after the council of owners decided to terminate the applicant on 16 July 2014 Mr Green instructed him to write to the applicant informing him of this decision.

13 Under cross-examination Mr van Es stated that he reviewed alternatives to the caretaker position being undertaken on a full-time basis prior to the 2014 AGM after some owners had raised the possibility of changing the terms of this position. Mr van Es confirmed that the new contractor is a former employee of Smithwick.

14 Mr Green has been the chairperson of the respondent's council of owners for 11 years. Mr Green was aware that prior to the 2014 AGM some owners wanted to review the full-time caretaker position at the complex with a view to saving costs. Mr Green stated that at the 2014 AGM owners decided to consider having a change to the applicant's full-time position and the council of owners was to investigate cheaper options after the 2014 AGM. The council of owners met on 16 July 2014 to discuss a revised caretaker arrangement and later that day an email was sent to Mr van Es confirming that the applicant was to be terminated because the respondent had decided to employ a contractor in his position working less hours than the applicant (exhibit R3).

15 Mr Green gave evidence that the cost difference of having a non live-in contractor working fewer hours than the applicant in his caretaker role was significant. Employing a part-time contractor was approximately $60,000 per annum compared to the cost of employing a full-time caretaker which was approximately $100,000 per annum. A further saving was delivered to the respondent from income the respondent would receive from renting out the applicant's flat at the complex. Mr Green stated that no discussions were held with the applicant about canvassing alternatives to his termination because the applicant had told Mr van Es that he only wanted to be employed on a full-time basis in his email dated 26 June 2014 (exhibit A2).

16 Ms Marilyn Watts is employed by Smithwick. Ms Watts drafted a positive reference for the applicant and spoke favourably about his skills and attributes to a prospective employer after he was terminated.

Submissions

Applicant

17 The applicant claims that his termination was unfair because the respondent had no discussions with him about alternatives to his termination. The applicant maintains that there was no motion at the 2014 AGM to make his position redundant and as a contractor has been engaged to undertake the work of the caretaker position the position is not redundant. The applicant claimed that his position was not made redundant even though the new contractor was working less hours than he was employed to work and he claimed that the contractor who replaced him was appointed to his former position because she had a

connection to Smithwick and knew one or more owners of the complex. The applicant believes that the compensation he is seeking is adequate recompense for being unfairly dismissed and losing his long-term employment with the respondent.

Respondent

18 The respondent claims that prior to 16 July 2014, when the decision was made to terminate the applicant, the applicant sent an email to Mr van Es which was communicated to the respondent that he was not interested in continuing to work with the respondent on a part-time basis. The respondent therefore did not have any discussions with the applicant about the possibility of him remaining employed at the complex once it decided to have the caretaker role at the complex filled on a part-time basis. By abolishing the applicant's full-time position, the savings to the respondent are approximately $50,000 per year. This includes reduced employment costs as well as income from letting the flat lived in by the applicant. The respondent treated the applicant fairly and endeavoured to assist him by giving him 11 weeks in redundancy payments as well as a positive reference. The quantum the applicant is seeking is unreasonable and the applicant obtained alternative employment one week after ceasing employment with the respondent, which should be taken into account.

Consideration

Witness Credit

19 In my view the witnesses who gave evidence for the respondent gave their evidence in a clear and considered manner and I find that they gave their evidence to the best of their recollection. I therefore accept their evidence.

20 I find that most of the evidence given by the applicant was given honestly and to the best of his recollection. However, I do not have confidence in the applicant's evidence that he may have accepted working on a part-time basis and/or would have considered moving out of the flat he lived in free of charge at the complex so that he could continue his employment with the respondent if given the opportunity to consider these options. I also question the applicant's claim that he was unaware of a possible reduction in hours of his caretaker position prior to his termination. I have already indicated that I have confidence in the veracity of the evidence given by Mr van Es. I find that during a discussion between Mr van Es and the applicant on 17 June 2014 the applicant told him that he needed to work full-time until he retired when told of the possibility that his existing role may be reduced to a part-time job in the future. In support of this conclusion I rely on the content of the email the applicant sent to Mr van Es after Mr van Es visited him on 17 June 2014 where the applicant indicated that even though he would like to remain working with the respondent he needed full-time employment for at least the next 19 months until his retirement (see exhibit A2). Apart from the applicant's evidence about this issue, I accept the other evidence he gave.

Was the applicant unfairly dismissed?

21 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant (see ***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch*** (1985) 65 WAIG 385). The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate 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. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employee in a manner which is procedurally irregular may not mean the dismissal is unfair (see ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891 and ***Byrne v Australian Airlines*** (1995) 61 IR 32). In ***Shire of Esperance v Mouritz***, Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

22 Redundancy is defined in the Termination, Change and Redundancy General Order as occurring 'where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone' (2005 WAIRC 01715; 85 WAIG 1667). When an employee's position has been abolished and that employee is terminated due to their position being made redundant this is a sufficient reason for dismissal (***Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd*** (1987) 67 WAIG 733).

23 I find that the respondent had a valid reason for terminating the applicant. I find that the applicant was terminated because the council of owners, on behalf of the respondent, decided that his full-time live-in caretaker position was no longer required to be filled by any employee on 16 July 2014. The applicant's position therefore became redundant. I find that because the applicant had indicated to the respondent via Mr van Es that he only wanted to continue working as a caretaker at the complex on a full-time basis he was not considered by the respondent to be employed in the new part-time caretaker position. The applicant's position was abolished and as there was no other position available for him to undertake as the applicant was the respondent's only employee I find that the respondent had sufficient reason for terminating the applicant. I find that a significant factor in the respondent deciding to abolish the applicant's position was the considerable savings which were delivered to the respondent by ceasing to employ a full-time caretaker and instead employing a part-time non live-in contractor to complete the tasks previously undertaken by the applicant. As the applicant would not be occupying the flat on the premises free of charge this allowed the respondent to also receive income from renting this flat out. Even though no income from rent has been received by the respondent to date I accept this is because the flat has recently been renovated.

24 The *Minimum Conditions of Employment Act 1993* (MCE Act) is implied into the applicant's contract of employment. A failure to comply with the mandatory requirements of Part 5 of the MCE Act is a factor to be taken into account in deciding whether a dismissal is unfair (see ***Gilmore v Cecil Bros and Ors*** (1996) 76 WAIG 4434 (4445); ***WA Access Pty Ltd v Vaughan*** (2000) 81 WAIG 373 (378)).

25 The relevant sections of the MCE Act read as follows:

Part 5 — Minimum conditions for employment changes with significant effect, and redundancy

40. Terms used

(1) In this Part —

employee does not include a casual employee or an apprentice;

redundant means being no longer required by an employer to continue doing a job because the employer has decided that the job will not be done by any person.

(2) For the purposes of this Part, an action of an employer has a significant effect on an employee if —

(a) there is to be a major change in the —

(i) composition, operation or size of; or

(ii) skills required in,

the employer's work-force that will affect the employee; or

(b) there is to be elimination or reduction of —

(i) a job opportunity; or

(ii) a promotion opportunity; or

(iii) job tenure,

for the employee; or

(c) the hours of the employee's work are to significantly increase or decrease; or

(d) the employee is to be required to be retrained; or

(e) the employee is to be required to transfer to another job or work location; or

(f) the employee's job is to be restructured.

41. Employee to be informed

(1) Where an employer has decided to —

(a) take action that is likely to have a significant effect on an employee; or

(b) make an employee redundant,

the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).

(2) The matters to be discussed are —

(a) the likely effects of the action or the redundancy in respect of the employee; and

(b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,

as the case requires.

42. Employer not bound to disclose prejudicial information

Nothing in this Act requires an employer, when providing information or holding a discussion under section 41(1) to disclose information that may seriously harm —

(a) the employer's business undertaking; or

(b) the employer's interest in the carrying on, or disposition, of the business undertaking.

43. Paid leave for job interviews, entitlement to

(1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.

(2) The 8 hours need not be consecutive.

(3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(4) Payment for leave under subsection (1) is to be made in accordance with section 18.

26 Section 41 of the MCE Act requires that when an employer has decided to make an employee redundant, which was the case in this instance, that employee is to be informed by the employer of the decision to make him or her redundant in a timely manner after that decision has been made and the employer is required to discuss the effect of the redundancy on the employee and measures that may be taken to minimise the impact of the redundancy on the employee. Section 43 of the MCE Act provides that an employee is entitled to paid leave of up to eight hours to attend interviews for other employment and the eight hours need not be consecutive.

27 The applicant complained that the way in which he was terminated was unfair as he had no opportunity to discuss alternatives to his termination with the respondent prior to being given notice of his termination. The applicant claimed that if he had the opportunity to have discussions with the respondent prior to his termination he might have considered leaving the flat he was living in rent free and the possibility of working part-time hours to continue his employment at the complex. It was not in dispute and I find that the respondent did not have any discussions with the applicant about alternatives to his termination or minimising the impact of the redundancy on him after the respondent decided on 16 July 2014 that the applicant's position was redundant and the applicant was to be terminated. Given the circumstances of this case, I find that it was unnecessary for the respondent to have discussions with the applicant about alternatives to his termination and minimising the impact of his termination on him once the respondent decided that the applicant's position would be abolished and replaced with a part-time non live-in contractor. I find that even if the respondent had discussions with the applicant about alternatives to his termination once the decision was made to abolish his position these discussions would not have resulted in the applicant agreeing to work less than full-time hours or to move out of the free accommodation provided by the respondent. I have already found that the applicant's evidence with respect to his claim that he would consider alternatives to his full-time live-in caretaker role at the complex is not to be believed. The applicant had made it clear to Mr van Es during their discussion on 17 June 2014 when Mr van Es foreshadowed the possibility of the applicant's position becoming part-time that he was only interested in continuing to work with the respondent on a full-time basis. The applicant confirmed this in the email he sent to Mr van Es which was forwarded to Mr Green on 26 June 2014. The applicant also did not raise the possibility of continuing to work at the complex on a non live-in basis in this email (see exhibit A2). I therefore find that it was acceptable for the respondent not to have discussions with the applicant about alternatives to his termination after it decided to make the applicant's position redundant and replace him with a non live-in contractor working on a part-time basis.

28 The applicant did not seek nor was he given paid leave to attend a job interview after he was notified that he was to be terminated (see s 43 MCE Act). I find that this issue is of no consequence as the applicant could have raised access to this entitlement with the respondent during the four weeks of his notice period but he did not do so. He also did not demonstrate that not accessing paid leave to attend a job interview caused him any disadvantage.

29 The applicant claimed that the person who was contracted to replace him was connected with Smithwick and at least one member of the council of owners and that this was relevant when determining whether his termination was unfair. I find that the applicant's claim that he was possibly terminated to give another employee his job has no substance as I have found that the applicant was terminated due to a genuine redundancy situation as the respondent was seeking to reduce its operating costs.

30 In all of the circumstances, and when taking into account s 26(1)(a) of the Act considerations and equity, good conscience and substantial merit, I find that there was a valid reason for the applicant's termination and that he was afforded a fair go all around. He was therefore not unfairly terminated (***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch***).

31 An order will now issue dismissing this application.

2015 WAIRC 00191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLES TYSOE
	APPLICANT
	-v-
	THE OWNERS OF STRATHEARN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 20 FEBRUARY 2015
FILE NO/S	U 191 OF 2014
CITATION NO.	2015 WAIRC 00191

Result	Dismissed
Representation	
Applicant	In person
Respondent	Ms D Thornton

Order

HAVING HEARD the applicant on his own behalf and Ms D Thornton on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

1. THAT the name of the respondent be deleted and The Owners of Strathearn be substituted in lieu thereof.
2. THAT the application otherwise be and is hereby dismissed.

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

2015 WAIRC 00205

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRLEY VINE
	APPLICANT
	-v-
	YOUTH LEGAL SERVICE INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 26 FEBRUARY 2015
FILE NO/S	U 213 OF 2014
CITATION NO.	2015 WAIRC 00205

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms M Kavanagh (of counsel) and Ms T Tvede (of counsel)

Order

This application was lodged under s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 9 December 2014 the Commission convened a conciliation conference and no agreement was reached between the parties.

A hearing was set down for 24 February 2015 to determine whether the application should be accepted out of time.

A *Form 14 - Notice of withdrawal or discontinuance* (*Form 14*), which was signed by the applicant, was filed in respect of the application on 4 February 2015 and the respondent consented to the matter being discontinued.

On 11 February 2015 the Commission issued a Minute of Proposed Order (the Minute) to discontinue the application.

On 18 February 2015 the applicant requested a speaking to the Minute.

A speaking to the Minute was held on 23 February 2015. The applicant claimed that as the respondent had breached the terms of a signed Deed of Settlement and Release (the Deed) the terms of which were agreed between the parties prior to 4 February 2015 in settlement of this application, no order should issue discontinuing this application. The alleged breach related to comments made about the applicant by the respondent's Director soon after the *Form 14* was lodged in the Commission with respect to this application. As the comments were made in breach of the terms of the Deed soon after the *Form 14* was lodged in the Commission it is in the public interest that this application not be discontinued.

The respondent argued that the Commission should issue the order to discontinue this application. A *Form 14* was signed by the applicant and was lodged in the Commission and the respondent had agreed to this application being discontinued. Additionally, payments due to the applicant as set out in the Deed in settlement of this application had been received by the applicant.

Consideration

The Commission is of the view that the order to discontinue this application should issue. The parties agreed to discontinue this application and did so after they reached an agreement to settle this application. The recitals in the order therefore accurately reflect the parties' intentions and actions to discontinue this application. It is also my view that a dispute about a possible breach of the Deed is not a relevant consideration with respect to whether the order to discontinue this application should issue as the Deed was finalised outside of the Commission.

NOW HAVING HEARD the applicant on her own behalf and Ms M Kavanagh of counsel and Ms T Tvede of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00186

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEITH NORMAN WILLIAMS
	APPLICANT
	-v-
	SHORT TERM ACCOMODATION FOR YOUTH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 18 FEBRUARY 2015
FILE NO/S	U 242 OF 2014
CITATION NO.	2015 WAIRC 00186

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms A Brunelli

Order

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

The Commission listed a conciliation conference for 6 February 2015.

The applicant advised the Commission on 30 January 2015 that he did not wish to proceed with his application and the conference was vacated.

On 4 February 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Eveline Wiyenka Fombason	Kimberley Individual and Family Support Association Incorporated	B 184/2014	Commissioner S J Kenner	Discontinued
Mr Steven Gravett	Dawson Contracting	B 177/2014	Commissioner S J Kenner	Discontinued
Stuart Diggory Kidd	Applabs Technologies Ltd	B 206/2014	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters referred—

2015 WAIRC 00229

DISPUTE RE ALLEGED DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00229
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	MONDAY, 9 FEBRUARY 2015
DELIVERED	**:**	WEDNESDAY, 11 MARCH 2015
FILE NO.	**:**	CR 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 – Unfair dismissal application – Procedural application by respondent to part dismiss on public interest grounds – Relevant principles applied – Application part dismissed – Remaining matters: whether respondent had reasonable grounds to determine applicant was guilty of the misconduct alleged, procedural fairness and penalty.
Legislation	:	*Industrial Relations Act 1979* (WA) s 6, s 6(c), s 7(1), s 26, s 26(1), 26(1)(a), s 27, s 27(1)(a), s 27(1)(a)(ii), s 44
Result	:	Application part dismissed
Representation:		
Applicant	:	Mr C Fogliani (of counsel)
Respondent	:	Mr D Matthews (of counsel)

Case(s) referred to in reasons:

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

Briginshaw v Briginshaw (1938) 60 CLR 336

Queensland Electricity Commission; Ex-parte Electrical Trade's Union of Australia (1987) 21 IR 151

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

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2013] WAIRC 00754; (2013) 93 WAIG 1431

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 00824; (2014) 94 WAIG 1462

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 01367

The Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Preliminary Reasons for Decision

1 The substantive application in this matter is one by The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the applicant) on behalf of Ms Janet Vimpany that she was unfairly dismissed as a Passenger Ticketing Assistant (PTA) on 8 October 2014 following an exchange between herself and Mr Hammon which occurred on 27 April 2013.

2 The dispute was referred and was listed for hearing on 9 February 2015. On the day of the hearing the parties sought to amend the memorandum of matters as referred in light of the findings of the Full Bench decision in ***Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority*** (2014 WAIRC 01367) (***FB ARBTIU 2014***).

3 The amended memorandum as referred:

Background

1. Ms Janet Vimpany, a member of the applicant, was employed by the respondent as a Passenger Ticketing Assistant.

2. On 27 April 2013 Ms Vimpany was involved in an exchange with Mr David Hammon, who was employed by the respondent as a Station Co-ordinator and who was, at the time of the exchange, Ms Vimpany's direct line manager.

3. The incident on 27 April 2013 led to Ms Vimpany being found to have committed breaches of discipline which were dealt with by the respondent by the imposition of a reprimand.

4. As a result of accounts of the incident on 27 April 2013 given by Ms Vimpany in the course of the disciplinary proceedings referred to above, and elsewhere, the respondent commenced a disciplinary process in relation to allegations that Ms Vimpany had deliberately given the respondent false accounts.

5. The applicant, by application filed on behalf of Ms Vimpany in this Commission on 11 February 2014 (Application No C 3 of 2014), challenged the findings and penalty imposed in relation to the events of 27 April 2013 and sought an order restraining the respondent from continuing the disciplinary process in relation to the allegations that Ms Vimpany had deliberately given the respondent false accounts.

6. The matter went to a contested hearing before Commissioner Kenner.

7. Commissioner Kenner made an order and gave reasons for decision in Application C 3 of 2014 on 1 August 2014 (*ARTBIU v PTA* 2014 WAIRC 00824).

8. Commissioner Kenner dismissed the application with the result that the disciplinary findings and penalty stood and the respondent was allowed to continue the disciplinary process in relation to the alleged false accounts.

9. In the course of his reasons for decision Commissioner Kenner made findings of fact.

10. Commissioner Kenner also wrote the following in relation to Ms Vimpany's conduct after 27 April 2013 (the findings have been explained in the Full Bench Decision on appeal, 2014 WAIRC 01367):
    a. Ms Vimpany had been less than frank in her characterisation of the events which occurred on 27 April 2013, when they were first reported to the respondent, and in the subsequent investigation, earlier in 2013; and
    b. it was open to conclude that Ms Vimpany had demonstrated a lack of candour in relation to the events of 27 April 2013.

11. The disciplinary process in relation to the alleged dishonesty continued and by letter dated 7 October 2014 the respondent informed Ms Vimpany that it found the allegations in relation to the dishonesty proven and that her employment would be terminated effective 8 October 2014.

Applicant's issues for hearing and determination

Oppressiveness of the dismissal

12. Was Ms Vimpany's account of the event 'knowingly false' or 'deliberately false'?

13. Did the respondent have an 'integrity test'? If the answer is yes, then:
    a. did the respondent inform Ms Vimpany of the content of that integrity test before it dismissed her?
    b. did Ms Vimpany fail the integrity test?

14. Was Ms Vimpany's dismissal oppressive?

15. Does Commissioner Kenner's decision restrict the Commission in this matter?

Unreasonableness/unfairness of the dismissal

16. Does the mere fact that Ms Vimpany's account of the event was different to that of the other people who were present mean that Ms Vimpany's account was dishonest?

17. Did Mr Steedman have sufficient evidence to reasonably conclude that Ms Vimpany had been dishonest?

18. Was Ms Vimpany's dismissal unreasonable or unfair?

Harshness of the dismissal

19. Was the respondent's decision to dismiss Ms Vimpany a disproportionate response to the alleged conduct?

20. Was Ms Vimpany's dismissal harsh?

Orders sought by the applicant

Primary Orders

21. The applicant is seeking the following:
    a. an order requiring the respondent to reinstate Ms Vimpany into her former position;
    b. an order requiring the respondent to recognise Ms Vimpany's continuity of service; and,
    c. an order requiring the respondent to pay Ms Vimpany the remuneration lost, or likely to be lost, by Ms Vimpany because of the dismissal.

Alternate Orders

22. In the event that the Commission considers that reinstatement would be impracticable, then the applicant seeks the following:
    a. an order that the respondent re-employ Ms Vimpany in to an another available and suitable position;
    b. an order requiring the respondent to recognise Ms Vimpany's continuity of service; and,
    c. an order requiring the respondent to pay Ms Vimpany the remuneration lost, or likely to be lost, by Ms Vimpany because of the dismissal.

23. In the event that the Commission considers that reinstatement and re-employment would be impracticable, the applicant seeks an order that the respondent pay to Ms Vimpany an amount of compensation for loss or injury caused by the dismissal.

Respondent's issues

24. The issue of what relevantly occurred on 27 April 2013 has been finally determined by Commissioner Kenner in his decision in *ARTBIU v PTA*.

25. It would be contrary to the common law and the objects of the *Industrial Relations Act 1979* (the Act) set out in s 6 of the Act, and in particular s 6(c), and the guiding principles of the Act set out in s 26, and in particular s 26(1)(a), for the Commission as presently constituted to revisit in any way the matter of what relevantly occurred on 27 April 2013 this having been finally determined by Commissioner Kenner.

26. The only issues for determination before the Commission, as presently constituted, are as follows:
    a. whether Ms Vimpany gave deliberately false accounts in relation to what occurred on 27 April 2013 to the respondent and, if so;

b. whether the penalty of dismissal was within the reasonable range of disposition by the respondent and, if not;

c. what was the appropriate penalty?

Respondent's issues on misconduct

27. The accounts given by Ms Vimpany set out in [3] of the Schedule to the respondent's Notice of Answer were indisputably inaccurate in material ways.
28. No explanation has ever been given as to how Ms Vimpany's accounts could be both inaccurate and genuine or honest.
29. The respondent was entitled to conclude that, on the balance of probabilities, the inaccuracies were the result of Ms Vimpany giving deliberately false accounts.
30. The findings of Commissioner Kenner that:
    a) Ms Vimpany had been less than frank in her characterisation of the events which occurred on 27 April 2013, when they were first reported to the respondent, and in the subsequent investigation, earlier in 2013; and
    b) it was open to conclude that Ms Vimpany had demonstrated a lack of candour in relation to the events of 27 April 2013

    stand (as explained by the Full Bench in its Decision on appeal, 2014 WAIRC 01367) and, while not determinative of the matter before the Commission as presently constituted, must be accorded significant respect consistent with the common law and the objects and guiding principles of the Act.

Respondent's issues on penalty

31. Ms Vimpany attempted to deliberately mislead her employer both in writing and orally and in formal processes.
32. The conduct was repeated on several occasions and constitutes a course of conduct.
33. The falsehoods were in relation to material matters, not incidental or minor matters.
34. The nature of the falsehoods was such that, if believed, they may have had serious consequences for another employee.
35. Ms Vimpany abandoned her obligations to her employer and standards of fairness and decency in relation to another human being in pursuit of self-interest and self-preservation.
36. The respondent makes reference to all of the matters set out in [18] of the Schedule to the Notice of Answer.
37. Dismissal was not only within the range of reasonable disposition, and therefore should not be interfered with, but was the only reasonable disposition of the matter.

Orders sought by the respondent

38. The respondent seeks an order that the application be dismissed.

The course of the proceedings

4 The hearing was listed for two days commencing on Monday 9 February 2015. The first day of proceedings involved hearing evidence from the applicant's witnesses:

- Mr Charles Rahim, a polygraph examiner from New South Wales (by telephone);
- Ms Jennifer Blake, a passenger ticketing assistant (PTA);
- Mr Malcolm Lionel Willi Heatherly, a PTA;
- Mr Robert Hall, a PTA;
- Mr David Scott, a carpark attendant (CPA);
- Mr Aleksander Sekulovski, a PTA;
- Mr John Raymond Noble, a customer service assistant (CSA);
- Mr Mark Peter Counsel, a CSA;
- Ms Helen Martin, a PTA;
- Mr Barry Keith Watts, a CSA; and
- Ms Janet Vimpany, a PTA.

5 These are unusual proceedings in that findings of fact in relation to what occurred on 27 April 2013 had been determined by Kenner C in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Public Transport Authority of Western Australia*** (2014) WAIRC 00824 (the ***ARTBIU***). This decision had been the subject of appeal and in ***FB ARBTIU 2014*** relevantly at [46] it was said:

> It is not clear what the learned Commissioner meant by this finding other than it is clear that he did not find Ms Vimpany's and Ms Blake's version of events to be credible.

6 The Public Transport Authority of Western Australia (the respondent) submitted that it had gone to some efforts in these proceedings to invite Ms Vimpany and other witnesses to give evidence on issues that would ultimately make the conclusions reached by the respondent to be considered unreasonable. For example perhaps there was something on the face of the documents or something occurring in Ms Vimpany's life at the time. If so, it was important for the witness to inform the

Commission as to what had made the circumstances unreasonable. The respondent suggested neither the evidence nor the documents indicated the same:

> Was there something affecting your memory, was there something affecting your judgement, your insights, perceptions, something – "No". Categorical rejection of any such proposition and a maintenance that she's telling the truth and that the other witnesses have got it wrong, Mr Steedman got it wrong, Commissioner Kenner has got it wrong. She's gone all in in relation to this matter. When it first came up she got reprimanded for what happened on 27 April 2013. And that could have very well been the end of it. She's gone all in on the matter and at least you can say this about her; that when she goes all in, she goes all in. She gave the same version to Commissioner Kenner and even in the face of Commissioner Kenner's unchallenged findings she still maintains that her version is the truthful account.
>
> (ts 88)

Procedural application by respondent

7 The respondent submitted that pursuant to s 27(1)(a) of the Act the Commission ought refrain from hearing part of the matter, in particular the Commission ought hear no further the question of whether Ms Vimpany gave false accounts of what occurred on 27 April 2013. Kenner C has determined the facts relating to the incident on that day. Also Ms Vimpany must accept that her version of events and that of others as found by Kenner C are irreconcilable.

8 The respondent accepts that the applicant on behalf of Ms Vimpany has raised the issue of procedural fairness and the Commission therefore should receive submissions with respect to that issue and certainly the Commission has yet to receive submissions on the question of penalty. Certainly in relation to the s 27(1)(a) application the respondent does not seek to reject the application in relation to penalty or procedural fairness.

9 The respondent considers it would be desirable that all other matters in relation to the application other than procedural fairness and the question of penalty cease pursuant to s 27(1)(a) in so far as they are testing whether Ms Vimpany gave false accounts and whether she did so knowingly and importantly whether the employer was entitled to be reasonably satisfied that those two things were the case.

10 Counsel for the applicant in response to the s 27(1)(a) application made by the respondent objected to the application by the respondent and raised the decision in ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224. The applicant raised the test of dishonesty as a circumstance where an employee is stealing from their employer which is not about an employer attempting to protect their business. The current circumstances from all accounts on the evidence already led were as described by the applicant a 'small spat in the workplace and the PTA are saying that an employee was dishonest in responding to their version of the events of what happened' (ts 90). In referring to dishonesty this was not a circumstance where Ms Vimpany had been accused of stealing anything in circumstances where property had been damaged or allegations had been made of fraud, for example, therefore the applicant drew a different type of example although agreeing that it was a type of dishonesty.

11 The applicant referred the Commission to ***Briginshaw v Briginshaw*** (1938) 60 CLR 336) test as one described as a test of fairness and common sense. The applicant submitted:

> Now, my learned friend's invited the Commission not to consider two things. He's invited the Commission not to consider whether the statements were false. We agree – we actually – we don't want the Commission to go there because it potentially puts you in conflict with Commissioner Kenner's decision. But in terms of whether Mr Steedman had sufficient evidence to have reasonable belief that the misconduct occurred – we think that's a live contest and we believe because of what's contained in the reasons - - -
>
> …
>
> FOGLIANI, MR: The second part of what my learned friend invited the Commission not to consider, that is whether there's sufficient evidence to deal with – whether there was sufficient evidence before Steedman for him to come to a reasonable conclusion that misconduct had occurred, we say that's a live issue and there is a contest there. Now, nothing in Commissioner Kenner's decision making or his reasons for decision would stop this Commission from dealing whether - with dealing with the issue of whether Mr Steedman had sufficient evidence to reasonably conclude that the misconduct actually occurred. That's a live issue and it's something that this Commission has jurisdiction to deal with and it's something we say the Commission should deal with.
>
> (ts 90, 91)

12 The applicant submitted contrary views to the respondent's submissions in particular whether there was sufficient evidence for Mr Steedman to enable him to come to reasonable conclusion that misconduct had occurred. The applicant submitted that the ***FB ARBTIU 2014*** matter at [48] set out the issue:

> the two questions required findings of fact to be made whether Ms Vimpany, Mr Hammon or any other PTA employee conducted themselves 'dishonestly by', initiating a claim 'they knew to be false', or giving an account to investigators 'they knew to be false'. By forming issue 3 in this way, to make a finding of fact that answered the question put as yes, the Commission would have to be satisfied that in respect of an employee in question, that prior to the employee making the claim or giving an account, or at the time the claim was made, or the account given to the investigators, that the employee intended to give an account that was not truthful. To make such findings the learned Commissioner would have had to find that Ms Vimpany or any other employee of the PTA had formed an intention to give a false account and that in doing so their conduct was dishonest.

Conclusion

13 This is a procedural application by the respondent seeking a dismissal in whole or in part of proceedings pursuant to s 27(1)(a) of the Act. In this case the respondent submits that the relevant section to be applied to an exercise of the Commission's discretion is that conferred by s 27(1)(a)(ii) of the Act, to refrain from further hearing in the public interest the matter with the exception of these matters in relation to procedural fairness and penalty.

14 Counsel for the applicant suggests the ***ARBTIU*** findings as they related to Ms Vimpany's credibility ([64] and [65]) have the potential to place the Commission in conflict with Kenner C's decision.

15 The applicant agreed that the issues of procedural fairness and penalty remained matters yet to be dealt with in the proceedings and submitted further the issue of whether the respondent had sufficient evidence to reasonably conclude that the misconduct actually occurred was an issue yet to be raised.

Statutory Framework

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

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

Principles in applications of public interest

17 The principles to be applied to an exercise of discretion as conferred by this particular section of the Act were identified by Kenner C in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch -v- Public Transport Authority of Western Australia*** [2013] WAIRC 00754; (2013) 93 WAIG 1431. Kenner C in referring to s 27(1)(a) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter observed as follows:

> The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ).

Kenner C in the same decision went on to say:

> The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

18 Substantively, this is a case where the applicant in the present proceedings seeks the reinstatement of Ms Vimpany into her former position as a PTA recognising continuity of service and payment for any remuneration lost or likely to be lost as a result of the dismissal. Alternatively, if the Commission considers that reinstatement would be impracticable then in the alternative the applicant seeks an order that the respondent re-employ Ms Vimpany into another available and suitable position with the respondent. The applicant requests the Commission issue an order requiring the respondent recognise Ms Vimpany's service and issue an order requiring entitlements be paid for any remuneration lost as a result of the dismissal. In the event that the Commission considers that reinstatement and re-employment would be impracticable the applicant seeks an order the respondent pay to Ms Vimpany an amount of compensation for loss or injury caused by the dismissal.

19 In the amended memorandum of matters as referred the respondent summarised Kenner C's findings in ***ARTBIU*** with respect to Ms Vimpany:

> a. Ms Vimpany had been less than frank in her characterisation of the events which occurred on 27 April 2013, when they were first reported to the respondent, and in the subsequent investigation, earlier in 2013; and

b. it was open to conclude that Ms Vimpany had demonstrated a lack of candour in relation to the events of 27 April 2013.

20 The respondent submitted it remains to be determined and would be contrary to the common law and the objects of the Act set out in s 6 of the Act, and in particular s 6(c), and the guiding principles of the Act set out in s 26, in particular s 26(1)(a), for the Commission as presently constituted to revisit in any way the matter of what relevantly occurred on 27 April 2013 this having been finally determined by Kenner C.

21 The only issues the respondent seeks for determination before the Commission as presently constituted are as follows:

a. whether Ms Vimpany gave deliberately false accounts as to what occurred on 27 April 2013 and, if so;

b. whether the penalty of dismissal was within the reasonable range of disposition by the respondent and, if not;

c. what was the appropriate penalty?

(extract from amended memorandum, 10 February 2015)

22 The applicant by separate application on behalf of Ms Vimpany on 11 February 2014 before Kenner C, in relation to the events of 27 April 2013, sought to restrain the respondent from carrying out a disciplinary process against Ms Vimpany suggesting that she had deliberately given the respondent false accounts of 27 April 2013. Kenner C dismissed the application and gave reasons for his decision ***ARTBIU***. The respondent continued the disciplinary process against Ms Vimpany which led ultimately to her termination by correspondence on 8 October 2014.

23 In cross-examination in these proceedings Ms Vimpany was taken to four documents. The first of those documents was the HSC Incident Report Form (exhibit A1 at tab 8). Counsel for the respondent put the following question to Ms Vimpany:

> I put it to you that what you represent as the facts in the first document I took you to, the HSC Incident Report Form are not true, accurate or honest and in fact that is a false account of what happened on 27 April 2013? - - - No. It is a true, accurate - - -
>
> …
>
> You deny that? - - - - - that's – it's – it's all true what I said.

(ts 78)

24 The respondent went on to question the second version of events found in exhibit A1 at tab 6 of the blue book. Counsel put to Ms Vimpany:

> And what I put to you just so that it's plain, is that in the material particulars that is to the extent it portrays Mr Hammon as the aggressor and yourself as the victim of his aggression, it was false. That's what I'm putting to you as accurate and what is your response?-- - - What – what I wrote was true.
>
> Okay. And you reject my assertion that it was false? - - - I reject that. Yes.

(ts 78)

25 Referring to exhibit A1 at tab 11 which was Ms Vimpany's substantive response from the original notification from Mr Heaysman:

> Again, you accept that this document portrays Mr Hammon as the aggressor and yourself as the victim of his aggression? - - - Mr Heaysman, did you say?
>
> No. Mr Hammon. It was a – it was in response to the notice from Mr Heaysman, but what I put to you and I am repeating myself, but that it portrays Mr Hammon as the aggressor and yourself as the victim of his aggression? - - - Yes.
>
> All right. And I put it to you that in that material particular it is a false account? - - - It's not a false account. It's a true account.

(ts 78)

26 Finally counsel referred Ms Vimpany to exhibit A1 at tab 13 which carried with it a serious of tracked changes that had been added by Ms Vimpany:

> You agree with me that it portrays Mr Hammon as the aggressor on 27 April 2013 and yourself as the victim of that aggression? - - - With my changes. Yes, that's true.
>
> …
>
> And you don't offer up to the Commission any suggestion, do you that your versions given may have been affected in terms of their dependability or reliability by stress, overwhelmed feelings, intimidation by the employer, or anything else? - - - No. That's a true account. They're all true accounts of what happened on that day.

(ts 78, 79)

27 In response to the submissions in cross-examination of Ms Vimpany, counsel asked of the witness whether she intended to give false statements. In her response Ms Vimpany declared that at no stage did she ever give any false statements. The question was asked again by counsel for the applicant, and in response:

> I never gave intention to give false statements.
>
> Never? - - - Never.
>
> (ts 79)

28 In response the respondent submitted that the test in matters of dishonesty, the issue that Ms Vimpany was ultimately dismissed for on 8 October 2014 was accurately set out by the applicant in their outline of submissions in [7] namely:

> The employer does not need to establish that the employee was actually guilty of the misconduct. Instead, the employer's 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. Described another way, the employer is obliged to show that there was "sufficient evidence" to establish the facts said to constitute the misconduct.

29 The applicant cites ***The Minister for Health v Drake-Brockman*** (2012) 92 WAIG 203, (2012) WAIRC 00150 (***Drake Brockman***) and the respondent in essence cites the ***Bi-Lo*** test as essentially applying to cases of dishonesty. Was it reasonable on the information before the employer having conducted a proper inquiry to come to the conclusion that the employer did.

30 The second point made by the respondent was that the system has already determined by way of the matter heard by Kenner C the facts of what occurred on 27 April 2013:

> There is and can be no criticism or comment other than by way of agreement with Commission Kenner's characterisation of the versions given by Ms Vimpany and the versions given by others as being diametrically opposed. That is a correct, with respect, characterisation from Commissioner Kenner. Nothing's been said against it, nothing could reasonably be said against that characterisation.
>
> Similarly, nothing could sensibly be said about Commissioner Kenner's finding that there was a gulf between the two versions of events that cannot be explained away, as often happens, by matters of emphasis, nuance, perception, stand point – those kind of things.
>
> (ts 86)

31 Whilst the Commission recognises its discretion in matters pursuant to the Act s 27(1)(a) is broad. Having regard to the exercise of my discretion I am required in all matters before me to have regard to my statutory obligations under s 26(1) of the Act as per ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1987) 68 WAIG 4 (***Robe River***) and in so doing recognise that this application as referred to the Commission as an *industrial matter* as defined under s 7(1) of the Act. This matter can be properly characterised as 'affecting or relating or pertaining to' the termination of Ms Vimpany. The Commission is being asked to consider that further proceedings, with the exception of submissions on procedural fairness and submissions on penalty ought cease.

32 It is important to note that neither the ***ARTIBU*** decision nor the ***FB ARBTIU 2014*** decision comment on the issue of Ms Vimpany's honesty. In fact Kenner C in the ***ARTIBU*** decision specifically chose not to do so.

33 Findings of fact in the ***ARTIBU*** decision cannot be revisited. The problem for the applicant who is prosecuting the case is that becomes a little difficult when Ms Vimpany seems to persist with her evidence in the face of clear findings on credibility from Kenner C on that issue. I will for the record repeat them in full because clearly Kenner C's decision at first instance cannot now be overturned. This was recognised by counsel for the applicant. For the record the Commission reflects on those issues. At [64] and [65] of ***ARTIBU***:

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

34 Having regard for the procedural implication submitted by the respondent pursuant to s 27(1)(a) of the Act and the associated submissions together with the response the Commission has considered those submissions together with the principles to be applied to an exercise of discretion as conferred by this particular section of the Act. Further the Commission in making its decision has had regard to its statutory obligations pursuant to s 26(1)(a) of the Act in accordance with the principles as reflected in ***Robe River***.

35 The Commission is of the view that the following are issues yet to be visited in proceedings currently before the Commission:

- were there reasonable grounds for the respondent to hold the belief that Ms Vimpany was guilty of the misconduct alleged, having regard for the principles reflected in ***Drake-Brockman***;

- procedural fairness; and
- penalty.

36 All other matters in these proceedings are dismissed pursuant to s 27(1)(a)(ii) of the Act. These are the Commission's preliminary reasons for decision. A declaration will issue reflecting my decision. The proceedings have supported in part the dismissal of proceedings pursuant to s 27(1)(a)(ii) of the Act.

37 The Commission, in hearing the matters referred to in [35] of these reasons, cautions the parties on the need to quarantine the findings already made on credibility (particularly as those findings relate to Ms Vimpany) by Kenner C in the ***ARTIBU*** and indeed the Full Bench in ***FB ARTBIU 2014***.

38 The Commission will be in contact with the parties to relist the proceedings.

2015 WAIRC 00234

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	FRIDAY, 13 MARCH 2015
FILE NO/S	CR 32 OF 2014
CITATION NO.	2015 WAIRC 00234

Result	Order issued
Representation	
Applicant	Mr C Fogliani (of counsel)
Respondent	Mr D Matthews (of counsel)

Order

HAVING HEARD Mr Cory Fogliani (of counsel) of behalf of the applicant and Mr Damien Matthews (of counsel) on behalf of the respondent, the Western Australian Industrial Relations Commission (the Commission) pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, (the Act) hereby:

1. DECLARES that Application CR 32 of 2014 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority is part dismissed on public interest grounds pursuant to s 27(1)(a) of the Act with the exception of those matters relating to:
   a. whether there were reasonable grounds for the respondent to hold the belief that the applicant's member was guilty of the misconduct alleged, having regard for the principles reflected in the Full Bench decision ***The Minister for Health v Drake-Brockman*** (2012) 92 WAIG 203;
   b. procedural fairness; and
   c. penalty.
2. ORDERS THAT the application, other than those aspects listed in the Declaration, be and is hereby dismissed.
3. ORDERS THAT the application be re-listed at the applicant's and respondent's convenience to hear submissions on the matters referred to in the Declaration.

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

2015 WAIRC 00202

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	TUESDAY, 24 FEBRUARY 2015
FILE NO/S	CR 34 OF 2014
CITATION NO.	2015 WAIRC 00202

Result	Application dismissed
Representation	
Applicant	Mr M Amati and later Mr D Scaife of counsel
Respondent	Mr D Anderson 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 2nd day of February 2015 the Commission issued Reasons for Decision ([2015] WAIRC 00054) in respect of one of the grounds; and

WHEREAS on the 11th day of February 2015 the applicant filed a Notice of Discontinuance in respect of the matter;

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

THAT the matter be, and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Nursing Federation, Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 1/2013	4/12/2014	Dispute re changes to roster	Discontinued
The Civil Service Association of Western Australia Incorporated	Commissioner for Corrections, Department of Corrective Services	Kenner C	PSAC 7/2014	10/04/2014	Dispute re transfer	Discontinued
The Civil Service Association of Western Australia Incorporated	Commissioner of Police, WA Police Service	Kenner C	PSAC 4/2015	29/01/2015	Dispute re alleged breach of discipline	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00301

DISPUTE RE TRANSFER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER FOR CORRECTIONS, DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 14 APRIL 2014
FILE NO.	PSAC 7 OF 2014
CITATION NO.	2014 WAIRC 00301

Result	Recommendation issued
Representation	
Applicant	Mr M Shipman
Respondent	Ms I Rizmanoska and with her Mr N Cinquina

Recommendation

WHEREAS the Union has made an application under s 80E(1) of the Industrial Relations Act 1979 for a compulsory conference under s 44 of the Act in relation to a dispute between the Union and the Department concerning a member of the applicant, Mr Feehan. Mr Feehan is an Aboriginal Team Advisor Level 6 employed by the Department in the Community and Youth Justice Division;

AND WHEREAS the Arbitrator convened a compulsory conference on 10 April 2014. At the conference, the Arbitrator was informed that Mr Feehan was advised by letter dated 5 December 2013 that allegations had been made against him concerning his conduct and behaviour in the workplace, which complaints included intimidation and threatening conduct. The letter also advised Mr Feehan that in the interim, pending the investigation of the allegations, he would, without prejudice, be temporarily relocated to the Divisional Head Office. The Arbitrator was further informed that in response, the Union on 10 January 2014, acting on behalf of Mr Feehan, requested the Department to provide further and better particulars of the allegations against him in order that a response to them could be formulated in a timely fashion. As no response was received from the Department, the Union commenced this application in order to require the Department to furnish the particulars requested. Furthermore, the Arbitrator was informed that an investigator had been appointed by the Department, to conduct an investigation into the allegations involving Mr Feehan;

AND WHEREAS at the conference, the Arbitrator was provided with a copy of a letter by the Department dated 17 March 2014, from Corporate Psychology and Consulting Services, the investigator appointed by the Department to deal with the matters involving Mr Feehan. The letter sets out a number of allegations concerning Mr Feehan's conduct, that CPCS had been requested to outline to Mr Feehan. Those allegations appear to be numerous, and generally relate to various aspects of conduct and behaviour ranging over stated periods between late October 2013 and mid February 2014. Furthermore, the letter from CPCS to Mr Feehan also requests he attend a formal interview, which Mr Feehan is yet to do;

AND WHEREAS the Union informed the Arbitrator, that it has concerns that the issues involving Mr Feehan have been escalated to a formal investigation process, despite no formal disciplinary proceedings having been commenced, in accordance with the Public Sector Management Act 1994. The Department confirmed that no such formal disciplinary process has commenced. The Union further said that there has been a lengthy history of interpersonal conflict between Mr Feehan and another officer of the Department involved in the allegations. Accordingly, the Union maintained that it is premature, and potentially inflammatory, to proceed to a formal investigation at this particular time. The Union does not object to the temporary relocation of Mr Feehan, in all of the circumstances;

AND WHEREAS for the Department, it was put to the Arbitrator that the purpose of the appointment of CPCS to investigate the allegations against Mr Feehan, was to enable the facts concerning the issues to be established. The Department was not in a position to indicate to the Arbitrator what further steps may then be taken, as this will depend on the outcome of the initial investigation;

AND WHEREAS the Arbitrator informed the parties that consideration would be given as to whether recommendations would be made as to the future conduct of the matter. In doing so, the Arbitrator notes the importance and sensitivity of issues involving alleged bullying behaviour in the workplace. Additionally, it is observed that wherever practicable, attempts to resolve such matters should be undertaken at the workplace level;

AND WHEREAS having considered the matters arising in the application and the compulsory conference, the Arbitrator has determined that it will make a recommendation to the parties;

NOW THEREFORE the Arbitrator, having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to the powers vested in it by the Act, hereby recommends –

(1) THAT the allegations arising in relation to the alleged conduct of Mr Feehan in the workplace be the subject of either informal or formal mediation involving Mr Feehan and any other relevant persons in the workplace to whom the allegations refer.

(2) THAT the Investigation not be proceeded with at this stage, pending the outcome of any mediation conducted in accordance with par (1) above.

(3) THAT this conference be adjourned to a date and time to be fixed by the Arbitrator.

(Sgd.) S J KENNER,
[L.S.] Public Service Arbitrator.

2015 WAIRC 00210

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALEXIS NOAKES
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 3 MARCH 2015
FILE NO.	U 252 OF 2014
CITATION NO.	2015 WAIRC 00210

Result	Direction issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr D Anderson of counsel

Direction

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

WHEREAS the application was set down for a Directions hearing on the 3rd day of March 2015; and

WHEREAS the applicant provided a Minute of Proposed Directions to be issued for the preparation of the hearing of the matter and the Commission heard from the parties; and

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

1. THAT the hearing be set down for 4 days at a date to be determined by the Commission.
2. THAT the applicant file and serve a revised Statement of Claim within 14 days.
3. THAT the respondent file and serve a revised Answer within 14 days thereafter.
4. THAT the parties engage in informal discovery.
5. THAT the parties file a Statement of Agreed Facts no later than 7 days prior to the date of the hearing.
6. THAT the applicant file and serve any signed witness statements of the witnesses she intends to rely upon no later than 14 days prior to the date of the hearing.
7. THAT the respondent file and serve any signed witness statements of the witnesses it intends to rely upon no later than 7 days prior to the date of the hearing.
8. THAT the applicant file and serve a written Outline of Submissions no later than 5 working days prior to the date of the hearing.
9. THAT the respondent file and serve a written Outline of Submissions no later than 3 working days prior to the date of the hearing.
10. THAT the parties have liberty to apply.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
St Mary's Anglican Girls' School (Inc) (Enterprise Bargaining) Agreement 2015 AG 1/2015	5/03/2015	The Independent Education Union of Western Australia, Union of Employees and St Mary's Anglican Girls' School	(Not applicable)	Commissioner J L Harrison	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2014 WAIRC 00950

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 10 JANUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES NEVILLE HAGUE

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF PARKS AND WILDLIFE

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G RICHARDS - BOARD MEMBER
MS V TOMLIN - BOARD MEMBER

DATE THURSDAY, 14 AUGUST 2014

FILE NO PSAB 3 OF 2014

CITATION NO. 2014 WAIRC 00950

Result Directions issued

Representation

Appellant Mr D Stojanoski of counsel

Respondent Mr G Edwards and with him Ms L Oversby

Directions

HAVING heard Mr D Stojanoski of counsel on behalf of the appellant and Mr G Edwards and with him Ms L Oversby on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant file and serve any signed witness statements upon which the appellant intends to rely no later than 14 days prior to the date of the hearing of the appeal.

(2) THAT the respondent file and serve any signed witness statements upon which the respondent intends to rely no later than 7 days prior to the date of the hearing of the appeal.

(3) THAT the appellant and the respondent file and serve an outline of written submissions no later than 3 working days prior to the date of the appeal.

(4) THAT the appeal be listed for 4 days commencing on 14 October 2014.

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

(Sgd.) S J KENNER,
Commissioner.

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

2015 WAIRC 00041

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 10 JANUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEVILLE HAGUE
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF PARKS AND WILDLIFE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	Mr G RICHARDS - BOARD MEMBER
	Ms V TOMLIN - BOARD MEMBER
DATE	WEDNESDAY, 28 JANUARY 2015
FILE NO	PSAB 3 OF 2014
CITATION NO.	2015 WAIRC 00041

Result	Appeal discontinued by leave
Representation	
Appellant	Mr D Stojanoski of counsel
Respondent	Mr D Anderson of counsel

Order

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

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

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

2014 WAIRC 01025

APPEAL AGAINST THE DECISION OF THE RESPONDENT TO TAKE DISCIPLINARY ACTION TO IMPOSE A REPRIMAND GIVEN ON 8 JULY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR PAUL HOGG
	APPELLANT
	-v-
	MR BRIAN BRADLEY, DIRECTOR GENERAL, DEPARTMENT OF COMMERCE, MS ANNE DRISCOLL, COMMISSIONER FOR CONSUMER PROTECTION, DEPARTMENT OF COMMERCE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS M CONROY - BOARD MEMBER
DATE	TUESDAY, 16 SEPTEMBER 2014
FILE NO	PSAB 9 OF 2014
CITATION NO.	2014 WAIRC 01025

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr J M Carroll of counsel

Directions

HAVING heard the appellant in person and Mr J M Carroll of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT each party shall give informal discovery.

(2) THAT the appellant and respondent file an agreed statement of facts (if any) no later than 7 days prior to the date of hearing.

(3) THAT the appellant file and serve an outline of submissions no later than 7 business days prior to the date of hearing.

(4) THAT the respondent file and serve an outline of submissions no later than 5 business days prior to the date of hearing.

(5) THAT the appellant file and serve an outline of submissions in reply no later than 3 business days prior to the date of hearing.

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

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

(Sgd.) S J KENNER,
Commissioner.

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

2015 WAIRC 00166

APPEAL AGAINST THE DECISION OF THE RESPONDENT TO TAKE DISCIPLINARY ACTION TO IMPOSE A REPRIMAND GIVEN ON 8 JULY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR PAUL HOGG
	APPELLANT
	-v-
	MR BRIAN BRADLEY, DIRECTOR GENERAL, DEPARTMENT OF COMMERCE, MS ANNE DRISCOLL, COMMISSIONER FOR CONSUMER PROTECTION, DEPARTMENT OF COMMERCE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G LEE - BOARD MEMBER
	MS M CONROY - BOARD MEMBER
DATE	WEDNESDAY, 11 FEBRUARY 2015
FILE NO	PSAB 9 OF 2014
CITATION NO.	2015 WAIRC 00166

Result	Discontinued by leave
Representation	
Appellant	In person
Respondent	Mr JM Carroll of counsel

Order

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

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

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

2015 WAIRC 00188

APPEAL AGAINST THE DECISION GIVEN ON 23 DECEMBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TERRI VINCENT
	APPELLANT
	-v-
	COMMISSIONER OF STATE REVENUE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS E HIDES - BOARD MEMBER
	MR G BROWN - BOARD MEMBER
DATE	THURSDAY, 19 FEBRUARY 2015
FILE NO	PSAB 1 OF 2015
CITATION NO.	2015 WAIRC 00188

Result	Appeal dismissed
Representation	
Appellant	Ms T Vincent on her own behalf
Respondent	Mr D Anderson of counsel

Order

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

WHEREAS on the 13th day of February 2015 the Board convened a Directions hearing for the purpose of preparing for the hearing of the substantive appeal; and

WHEREAS on the 16th day of February 2015 the appellant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

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

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008.

Application Number	Award, order or industrial agreement varied	Parties		Commissioner	Matter	Dates	Result
APPL 25/2014	N/A	Penelope Harris	Belmont City Physiotherapy	Beech CC	Request for mediation re alleged bullying and victimisation conflict	N/A	Did not proceed
APPL 30/2014	N/A	Ralph Fitzpatrick	Classic Information Systems	Beech CC	Dispute re bonus payments	23/10/2014	Consent

RECLASSIFICATION APPEALS—

2015 WAIRC 00167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMUEL DINNISON
	APPELLANT
	-v-
	WORKPLACE RELATIONS BRANCH WA POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
DATE	WEDNESDAY, 11 FEBRUARY 2015
FILE NO	PSA 20 OF 2014
CITATION NO.	2015 WAIRC 00167

Result	Order issued
Representation	
Appellant	Mr S Dinnison
Respondent	Ms A Greenland

Order

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

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Public Service Arbitrator.

2015 WAIRC 00196

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HALA GRAHAM
	APPLICANT
	-v-
	PARLIAMENTARY COUNSEL'S OFFICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 23 FEBRUARY 2015
FILE NO	PSA 18 OF 2014
CITATION NO.	2015 WAIRC 00196

Result	Application dismissed
Representation	
Applicant	Ms J Moore of counsel
Respondent	Mr O Wood

Order

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

WHEREAS on the 9th day of February 2015 the Public Service Arbitrator convened a hearing for mention; and

WHEREAS at that hearing the applicant sought time to consider her position; and

WHEREAS on the 18th day of February 2015 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,
[L.S.] Public Service Arbitrator.

2015 WAIRC 00236

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VRENELI GARE
	APPLICANT
	-v-
	MS ANNE DONALDSON (DIRECTOR)
	HEALTH AND DISABILITY SERVICES COMPLAINTS OFFICE (HADSCO)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 13 MARCH 2015
FILE NO	PSA 22 OF 2014
CITATION NO.	2015 WAIRC 00236

Result	Application dismissed

Order

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

WHEREAS by email on the 12th day of March 2015 the applicant requested that the file be closed;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00198

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARMAINE MISQUITTA
	APPLICANT
	-v-
	PARLIAMENTARY COUNSEL'S OFFICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 23 FEBRUARY 2015
FILE NO	PSA 19 OF 2014
CITATION NO.	2015 WAIRC 00198

Result	Application dismissed
Representation	
Applicant	Ms J Moore of counsel
Respondent	Mr O Wood

Order

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

WHEREAS on the 9th day of February 2015 the Public Service Arbitrator convened a hearing for mention; and

WHEREAS at that hearing the applicant sought time to consider her position; and

WHEREAS on the 18th day of February 2015 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,
[L.S.] Public Service Arbitrator.

2015 WAIRC 00235

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER ROSENBERG
	APPLICANT
	-v-
	MS ANNE DONALDSON (DIRECTOR)
	HEALTH AND DISABILITY SERVICES COMPLAINTS OFFICE (HADSCO)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 13 MARCH 2015
FILE NO	PSA 23 OF 2014
CITATION NO.	2015 WAIRC 00235

Result Application dismissed

Order

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

WHEREAS by email on the 12th day of March 2015 the applicant requested that the file be closed;

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

THAT this application be, and is hereby dismissed.

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

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2015 WAIRC 00181

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	FEWSTONE PTY LTD T/A CITY BEACH
	APPLICANT
	-v-
	COMMISSIONER LEX MCCULLOCH WORKSAFE WA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 17 FEBRUARY 2015
FILE NO/S	OSHT 1 OF 2015
CITATION NO.	2015 WAIRC 00181

Result	Order issued
Representation	
Applicant	Ms J Hart (of counsel)
Respondent	Ms S Duce (of counsel)

Order

The Occupational Safety and Health Tribunal of its own motion pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* hereby orders –

THAT the witness summonses filed on 4 and 9 February 2015 in OSHT 1 of 2015 be and are hereby set aside.

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

2015 WAIRC 00183

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	FEWSTONE PTY LTD T/A CITY BEACH
	APPLICANT
	-v-
	COMMISSIONER LEX MCCULLOCH WORKSAFE WA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 17 FEBRUARY 2015
FILE NO/S	OSHT 1 OF 2015
CITATION NO.	2015 WAIRC 00183

Result	Order issued
Representation	
Applicant	Ms M Saraceni and with her Ms J Hart (of counsel)
Respondent	Ms S Duce (of counsel)

Order

WHEREAS this matter was listed as a for mention hearing before the Occupational Safety and Health Tribunal (the Tribunal) on 13 February 2015;

AND WHEREAS having considered it necessary to adjourn the for mention hearing;

AND WHEREAS it is the view of the Tribunal, having careful regard for the provisions of s 51A(5)(c) of the *Occupational Safety and Health Act 1984* (the Act), that the provisions of that section can only be accessed when the Tribunal has concluded an inquiry into the matter as referred;

AND WHEREAS the Tribunal is in receipt of a Form 1 – Notice of Application from the respondent to OSHT 1 of 2015 supported by the applicant to the referral;

AND WHEREAS the Tribunal having held an inquiry into the circumstances relating to the s 51 review of the Improvement Notice 64000646 issued by the Commissioner for WorkSafe on 15 January 2015; and

HAVING HEARD Ms M Saraceni and Ms J Hart (both of counsel) on behalf of the applicant and Ms S Duce (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the Act and the *Industrial Relations Act 1979* hereby orders –

1. In accordance with s 51A(5)(c) of the Act the Tribunal hereby revokes the decision of Lex McCulloch, Commissioner for WorkSafe dated 15 January 2015 to uphold Improvement Notice 64000646.
2. In accordance with s 51A(5)(c) of the Act Improvement Notice 64000646 issued on Fewstone Pty Ltd t/a City Beach is hereby cancelled.
3. The programming order (2015 WAIRC 00124) issued by Commissioner Mayman in this matter on Wednesday, 4 February 2015 is hereby renumbered; by deleting orders 1 to 9 inclusive and inserting in lieu thereof:

1. THAT this matter is to be relisted to deal with the applicant's application for costs submitted to the Tribunal on Friday, 13 February 2015.

4. The programming order (2015 WAIRC 00124) issued by Commissioner Mayman in this matter on Wednesday, 4 February 2015 is hereby renumbered:

2. THAT order 10 becomes order 2.

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

2015 WAIRC 00238

REVIEW OF IMPROVEMENT NOTICES

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	REECE PTY LTD
	APPLICANT
	-v-
	THE WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 13 MARCH 2015
FILE NO.	OSHT 3 OF 2014
CITATION NO.	2015 WAIRC 00238

Result	Directions issued
Representation	
Applicant	Ms M Saraceni (of counsel)
Respondent	Ms A Crichton-Browne (of counsel)

Directions

HAVING heard Ms Saraceni (of counsel) on behalf of the applicant and Ms Crichton-Browne (of counsel) on behalf of the respondent the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* and *Industrial Relations Act 1979*, hereby directs -

1. THAT the hearing be set down for 18 May 2015 commencing at 10.00am;
2. THAT the applicant be provided with the ability to view and be provided with copies of the respondent's discovered documents;
3. THAT the respondent provide to the applicant, with a copy to the Tribunal, witness statements for all witnesses with the exception of the WorkSafe Western Australia Commissioner by close of business on 20 April 2015;
4. THAT the respondent provide to the applicant, with a copy to the Tribunal, a witness statement for the WorkSafe Western Australia Commissioner by close of business on 13 May 2015;
5. THAT the applicant identify the witnesses it wishes to cross-examine with the exception of the WorkSafe Western Australia Commissioner by close of business on 11 May 2015;
6. THAT the applicant advise the respondent whether it wishes to cross-examine the WorkSafe Western Australia Commissioner by close of business on 15 May 2015;
7. THAT the parties have liberty to apply at short notice.

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

2015 WAIRC 00239

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	TYRE & AUTO PTY LTD (KTAS)
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 13 MARCH 2015
FILE NO/S	OSHT 2 OF 2015, OSHT 3 OF 2015
CITATION NO.	2015 WAIRC 00239

Result	Applications dismissed
Representation	
Applicant	Mr G McCann (of counsel)
Respondent	Ms S Duce (of counsel)

Order

WHEREAS these are applications pursuant to s 51A of the *Occupational Safety and Health Act 1984* (the Act);

AND WHEREAS these matters were listed for a directions hearing before the Occupational Safety and Health Tribunal on 11 March 2015;

AND WHEREAS these applications were filed on 28 January 2015;

AND WHEREAS these applications pursuant to section 51(2) were required to be filed by close of business 27 January 2015;

AND WHEREAS these applications failed for want of meeting the requirements of section 51A(2);

HAVING HEARD Mr G McCann (of counsel) on behalf of the applicant and Ms S Duce (of counsel) on behalf of the respondent, the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the Act and *Industrial Relations Act 1979* hereby orders –

THAT the applications be, and are hereby dismissed.

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

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2014 WAIRC 01236

APPEAL AGAINST THE REFUSAL TO TERMINATE A TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN COLLEGE OF TRAINING
	APPELLANT
	-v-
	MS LOUISE-MARIE SOBEY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 30 OCTOBER 2014
FILE NO.	APA 2 OF 2014
CITATION NO.	2014 WAIRC 01236

Result	Directions issued
Representation	
Appellant	Mr S Farrell and Ms R Catalano as agents and Mr T Richards
Respondent	In person

Directions

HAVING heard Mr S Farrell and Ms R Catalano as agents and Mr T Richards on behalf of the appellant and the respondent on her own behalf the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant and respondent file and serve an outline of submissions by 6 November 2014 on the issue of the proper named respondent to this appeal.

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

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

2015 WAIRC 00040

APPEAL AGAINST THE REFUSAL TO TERMINATE A TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN COLLEGE OF TRAINING
	APPLICANT
	-v-
	MS LOUISE-MARIE SOBEY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 28 JANUARY 2015
FILE NO/S	APA 2 OF 2014
CITATION NO.	2015 WAIRC 00040

Result	Application discontinued by leave
Representation	
Applicant	Mr S Farrell as agent
Respondent	In person

Order

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

THAT the application be and is hereby discontinued by leave.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2013 WAIRC 00827

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	BITUMEN TRANSPORT PTY LTD
	APPLICANT
	-v-
	LOGI WEST EXPRESS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 27 SEPTEMBER 2013
FILE NO/S	RFT 6 OF 2013
CITATION NO.	2013 WAIRC 00827

Result	Direction issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr B Lynch of counsel

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr B Lynch of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

THAT leave be and is hereby granted for the respondent to file and serve an amended notice of answer within 14 days of service of the applicant's answers to the respondent's request for further and better particulars.

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

2013 WAIRC 01086

REFERRAL OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BITUMEN TRANSPORT PTY LTD
	APPLICANT
	-v-
	LOGI WEST EXPRESS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 23 DECEMBER 2013
FILE NO.	RFT 6 OF 2013
CITATION NO.	2013 WAIRC 01086

Result	Direction issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr B Lynch of counsel

Direction

HAVING heard Mr Dzieciol of counsel by correspondence on behalf of the applicant and Mr Lynch of counsel by correspondence on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

THAT leave be and is hereby granted for the respondent to file and serve an amended notice of answer within 14 days of finalising the respondent's request for discovery and request for further and better particulars.

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

2014 WAIRC 00365

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2014 WAIRC 00365
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 1 MAY 2014
DELIVERED	**:**	MONDAY, 5 MAY 2014
FILE NO.	**:**	RFT 6 OF 2013
BETWEEN	**:**	BITUMEN TRANSPORT PTY LTD Applicant AND LOGI WEST EXPRESS Respondent

Catchwords	**:**	Owner-driver contract – Referral of dispute regarding payment of claim – Discovery – Direction made
Legislation	**:**	*Owner-Drivers (Contracts and Disputes) Act 2007* (WA)
Result	**:**	Direction made
Representation:		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	:	Ms S Radovanovic of counsel

Reasons for Decision

1 The Tribunal listed this matter for mention on 1 May 2014. The substantive claim was filed on 14 June 2013. In it, Bitumen Transport Pty Ltd claimed unspecified losses, arising from the construction of a float at a cost of $180,000. A notice of answer and counter-proposal was filed on 5 July 2013. A compulsory conference was held on 15 August 2013. Substituted particulars of claim were filed on 20 September 2013, in which Bitumen Transport claims damages for losses in the sum of $171,400.

2 As a consequence of discussions between the parties, and by consent, the Tribunal made a direction on 23 December 2013, that Logi West Express be granted leave to file an amended notice of answer within 14 days of the parties finalising requests for discovery and further and better particulars. That process has become elongated. The Tribunal, as with the Commission, is obliged under the Owner-Drivers (Contracts and Disputes) Act 2007, to deal with matters referred to it with all due expedition.

3 Accordingly, the Tribunal took steps to list the matter for mention. At the hearing, the Tribunal was informed by counsel that a number of matters concerning particulars and discovery remain in dispute. These are set out in a letter of 30 April 2014 from Logi West's solicitors to the Transport Workers' Union, on behalf of Bitumen Transport. To the extent that the matters are in issue, I deal with them as follows.

Requests for further and better particulars

4 Counsel for Bitumen Transport agrees that Logi West's requests at pars 1, 2 and 4 of request A of its letter as to particulars, are appropriate. It disputes par 3 of request A, dealing with par 6(f)(A) of Bitumen Transport's further and better particulars of claim. That particular relates to steps taken by Bitumen Transport to mitigate its claimed losses. Sub-particular (A) refers to steps taken by Bitumen Transport in negotiating a release from its contract with Logi West to undertake other work. Also, reference is made, in general terms, to discussions between Bitumen Transport and Linfox concerning other possible work. It is that aspect in relation to which further particularity is sought. In my view the request of Logi West is reasonable.

Further discovery

5 There is an issue in relation to Logi West's request for financial records over various periods. The substituted particulars of claim filed by Bitumen Transport on 20 September 2013, at par 11, allege Logi West was in breach of the relevant owner-driver contract between the period 14 December 2012 and 18 April 2013. Losses claimed by Bitumen Transport are claimed for the period 1 January 2013 to 18 April 2013. Logi West seeks financial records, comprising business records, invoices and payslips for Bitumen Transport in the period August 2012 to April 2013. Logi West says that financial documents requested for the period August 2012 to November 2012 are relevant in relation to a claim by Bitumen Transport that, in accordance with the owner-driver contract, Bitumen Transport was prevented from seeking work from other hirers. As to financial documents for December 2012 to April 2013, Logi West says that they are relevant to the issue of Bitumen Transport's loss of profit and earnings and steps taken by it in mitigation. It is asserted that bank statements are insufficient.

6 I do not consider that financial records in the period August 2012 to November 2012 are relevant. Those dates pre-date the alleged breach of contract set out in Bitumen Transport's substituted particulars of claim at par 11, and the period over which Bitumen Transport alleges it was not able to obtain work from other hirers, set out in par 15. As to the period December 2012

to April 2013, as intended by Bitumen Transport, financial documents in the form of invoices payslips or other payment advices are relevant, and they should be discovered. In my view, that is the extent to which such documents are relevant.

7 As to taxation records, I do not consider that they should be discovered. The relevant documents as to the claim and/or issues of mitigation are income records for Bitumen Transport. Bank statements have already been provided or will be provided by Bitumen Transport. In conjunction with invoices and/or pay advices to be provided, in my view, that is sufficient for the purposes of these issues.

Quotes/applications for work

8 In relation to Logi West's requests for confirmation by Bitumen Transport that it has no electronic or hard copies of any documents in relation to quotes or applications for work for the period December 2012 to April 2013, this issue was dealt with adequately in Bitumen Transport's further and better particulars of claim. Discovery on oath has not been ordered in this matter.

9 As to other matters, as raised with the parties in the hearing, the substantive claim will now be listed for hearing on dates to be fixed by the Tribunal. Logi West will be required to file its amended notice of answer within 14 days. Additionally, the parties have agreed that witness statements would assist in the efficient disposition of the proceedings by the Tribunal. The parties will also be directed to file and serve an outline of submissions. The Tribunal will issue directions accordingly.

2014 WAIRC 00366

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	BITUMEN TRANSPORT PTY LTD
	APPLICANT
	-v-
	LOGI WEST EXPRESS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 5 MAY 2014
FILE NO.	RFT 6 OF 2013
CITATION NO.	2014 WAIRC 00366

Result	Direction issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Ms S Radovanovic of counsel

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms S Radovanovic of counsel on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby directs –

(1) THAT Logi West file an amended notice of answer by 19 May 2014.

(2) THAT as to request A in Logi West's solicitor's letter of 30 April 2014 Bitumen Transport respond to requests 1, 2, 3 and 4 by 12 May 2014.

(3) THAT discovery and inspection is to be given by Bitumen Transport of the following documents or classes of documents by 12 May 2014:

(i) Bank statements for the period December 2012 to April 2013; and

(ii) Invoices, payment advices or pay slips for the period December 2012 to April 2013.

(4) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Tribunal.

(5) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than seven days prior to the date of hearing.

(6) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than three days prior to the date of hearing.

(7) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of the hearing.

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

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

2014 WAIRC 01369

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2014 WAIRC 01369
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 1 MAY 2014, WEDNESDAY, 1 OCTOBER 2014
DELIVERED	**:**	FRIDAY, 19 DECEMBER 2014
FILE NO.	**:**	RFT 6 OF 2013
BETWEEN	**:**	BITUMEN TRANSPORT PTY LTD Applicant AND LOGI WEST EXPRESS Respondent

Catchwords	**:**	Owner-driver contract – Referral of dispute – Alleged variation of the contract regarding work for a float – Alleged breach – Claim for loss and damage – Respondent claimed no guarantee of a minimum amount of work – Principles applied – Expression of future intention – Promissory estoppel – Tribunal can have regard to equitable principles – Evidence considered – Contract was not varied – Mere expectation – Implied term – Application dismissed – Order issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 26(1)(a) *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) ss 37(1), 43(1), 47(4)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	**:**	Mr M Mony De Kerloy of counsel
Solicitors:		
Applicant	**:**	Transport Workers' Union of Australia Industrial Union of Workers (WA Branch)
Respondent	**:**	Mony De Kerloy Barristers & Solicitors

Case(s) referred to in reasons:

BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266

Franklin v Manufacturers Mutual Insurance Ltd (1935) 36 SR (NSW) 76

GB Energy Ltd v Protean Power Pty Ltd [2009] WASC 333

Hawkins v Clayton (1988) 164 CLR 539

Moratic Pty Ltd v Lawrence James Gordon & Anor [2007] NSWSC 5

Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited (1979) 144 CLR 596

The Commonwealth of Australia v Verwayen (1990) 170 CLR 394

Waltons Stores (Interstate) Limited v Maher (1988) 164 CLR 387

Ware v Amaral Pastoral Pty Ltd (No 5) [2012] NSWSC 1550

Case(s) also cited:

Australian Woollen Mills Proprietary Limited v The Commonwealth (1954) 92 CLR 424

Coghlan v Pyoanee P/L [2003] QCA 146

Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) ALJR 1094

Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd (1981) 36 ALR 567

Gibson Motor Sport Merchandise Pty Ltd & Ors v Robert James Forbes & Ors [2005] FCA 749

Global Network Services Pty Ltd v Legion Telecall Pty Ltd [1999] NSWSC 1090

Tekmat Pty Ltd v Dosto Pty Ltd (1990) 102 FLR 240

Reasons for Decision

1 In August 2012 the applicant Bitumen Transport Pty Ltd and the respondent Logi West Express entered into an owner-driver contract under the Owner-Drivers (Contracts and Disputes) Act 2007 under which Bitumen Transport would provide transport services to Logi West. It was not in dispute that the contract was an owner-driver contract for the purposes of the OD Act, and that Bitumen Transport provided services in accordance with its terms. I am so satisfied on the evidence.

2 What is in dispute in the present case, is a claim by Bitumen Transport that effective in about November 2012, the owner-driver contract was varied to include a term to the effect that if Bitumen Transport acquired a 50 tonne float, then Logi West would hire the float at the rate of approximately $40,000 per month. Bitumen Transport says that on the strength of the variation, it contracted to purchase a 50 tonne float and dolly, at a cost of some $235,400.

3 However, on taking delivery of the float in December 2012, Bitumen Transport contended that in breach of the owner-driver contract, as varied, Logi West did not provide it with work in accordance with the agreement. Accordingly, Bitumen Transport says that it has suffered loss and damage as a result of the breach of contract by Logi West and claims damages in the sum of $136,500.

4 Logi West disputes Bitumen Transport's claim in its entirety. It contended that there was never any variation to the owner-driver contract as claimed by Bitumen Transport. Whilst admitting there was some discussion between the principal of Bitumen Transport Mr English and a director of Logi West, Ms Kelly (nee Kelly to which reference will be made in these reasons) in about early November 2012, no agreement was reached in the terms alleged by Bitumen Transport. In any event, Logi West contended that the nature of its business operations was and is such that work is only provided by it to owner-drivers as and when such work becomes available. This is reflected in the written terms of the contract, which does not oblige Logi West to provide any minimum level of work to any contractor, including Bitumen Transport.

5 Furthermore, in defence of the claim, Logi West contended that the contract expressly provided that any variations to it were required to be in writing and signed by the parties. This did not occur. Furthermore in any event, Logi West was unable to provide sufficient float work to Bitumen Transport, because Linfox, from whom Logi West obtained any such work, awarded all of its float work to another operator by tender, effective from late December 2012 or early January 2013. Thus, any failure to provide substantial float work to Bitumen Transport was a matter beyond Logi West's control.

The evidence

6 The only evidence on behalf of Bitumen Transport was from Mr English, who is the sole shareholder of the company. The business owns and operates a single truck, which is a 2007 Kenworth prime mover with a maximum carrying capacity of 130 tonnes. Mr English is the only driver of the truck and it was used in services provided to Logi West. He is an experienced owner-driver, and has been in the transport industry for some 26 years. Mr English gave evidence as to events leading up to his engagement by Logi West. This resulted in a written owner-driver contract being entered into on 15 August 2012. Whilst he could not locate a signed copy of it, Mr English testified, and it was common ground, that the terms of the written contract were as set out in exhibit A2.

7 Principally, the work performed by Logi West at that time was in connection with transporting goods to and from the Gorgon Project in the North West of the State, from the Gorgon supply base in Henderson, Perth. Mr English described the method by which he obtained work generally as being receiving a call from Ms Kelly on an evening, making work available to him for the following day. If Mr English was available, then he would drive his truck to the supply base at Henderson for work to be allocated to him. Sometimes, if Linfox needed trailers to be transported to the supply base, then Mr English said he would drive to the Linfox yard, which was close to his home, pick up trailers and deliver them to Henderson. It would appear on the evidence, that after a short period of time Bitumen Transport came to receive a significant amount of work from Logi West on a relatively continuous basis.

8 In about late September or early October 2012, at a regular toolbox meeting, Mr English testified that Ms Kelly, who normally conducted the meetings, asked the group of drivers present, whether anyone was aware of availability of a 50 tonne float that was in very good condition which could be used by Logi West. According to Mr English, the work involved would be mainly quarantine work, based in the metropolitan area. Sometime later, after making some enquiries, Mr English said that he located a 50 tonne float that was in the process of being built in Victoria. Mr English made some enquiries and was informed by the manufacturer that the float would be ready for use in about a month, with a total cost, including a new dolly, of $235,400.

9 Given what he understood from Ms Kelly, as to the work that a float might be used for by Logi West, Mr English testified that he spoke again with Ms Kelly in early October 2012. This was at the Logi West premises in Welshpool. Mr English said that he put a number of issues to Ms Kelly about the float work. He said he asked her whether she was serious about her previous comment concerning a further 50 tonne float and according to Mr English, Ms Kelly said that she was "absolutely … deadly serious". According to Mr English, Ms Kelly further assured him that if he could obtain a float, then Logi West would provide as much work as he could handle, and that it was likely that such a workload would continue for at least two years. According to Mr English, Ms Kelly made it clear that Logi West wanted a further float as soon as possible. At the end of the

conversation, Mr English informed her that he would "make some phone calls". Mr English testified that in the meantime, he made some further enquiries about obtaining a float locally in Western Australia. As this was not possible, he again spoke with the manufacturer in Victoria, and was told that if he wished to secure the float that was then under construction, he would be required to pay a ten per cent deposit.

10 A little later, according to Mr English, in about late October or early November, he had a further conversation with Ms Kelly about the float work, after a toolbox meeting. According to Mr English, he said words to the effect to Ms Kelly "decision time for you and me" and informed her about the float under construction in Victoria that would be available about five weeks from then, at a cost of $235,400. Mr English testified that on questioning Ms Kelly, he was assured that there was work immediately available for the float and he would be given as much as he could handle. Ms Kelly was said to have informed him that the float would be hired out at a rate of $200 per hour for seven days a week up to twelve hours per day. Additionally, Mr English testified that when the float was in the quarantine yard, Bitumen Transport would be allocated the usual pickup and delivery work, meaning that the company could obtain two sources of income.

11 Overall, Mr English said that from this conversation with Ms Kelly, she appeared very confident about the amount of float work available to Bitumen Transport, should it proceed to acquire a float. On the strength of this and the previous conversations, Mr English testified that he estimated that approximately $40,000 a month income would be generated from float work. This was calculated on a more conservative estimate of ten hours' working time per day, five days per week.

12 Based on these assurances, and his calculations of probable income, Mr English said that he then proceeded to contact the manufacturer in Victoria in early November 2012, confirming his interest in buying the float under construction. He paid a deposit of $23,540 to secure it. In about mid-November 2012, Mr English travelled to Melbourne to inspect the float under construction. From that inspection, he confirmed that it would be suitable for the work which he understood would be made available by Logi West.

13 In terms of financing the purchase, finance was arranged through a finance broker. As a part of this process, the finance broker informed Mr English that he would need to obtain from Logi West a letter, setting out the expected earnings from float work for Bitumen Transport. Mr English testified that he was aware that Ms Kelly in fact provided two letters to his finance broker. As the first letter was not specific enough, a second letter was provided, dated 6 November 2012. This second letter, which was annexure JAT-6 to Ms Kelly's witness statement, formal parts omitted, relevantly said:

> This letter is to advise that Mr Peter English has been working as a Sub Contractor for LogiWest Express since 6/8/12. He has been engaged to work on Linehaul to Karratha and operate within our Local PUD fleet.
>
> We have found Peter to be of exceptional character, willing to work and extremely reliable. Based on this we have offered him a position on our fleet utilising a float.
>
> The float will be carrying Quarantine Items and based on current work volumes we anticipate it working 12 hours a day at $200.00 per hour – depending on the pickup requirement of the customer, in most cases will be hired 7 days a week (float Only). In addition while the float is on hire, Peter will be engaged on our local PUD fleet as a Haulier and will be utilised approximately 50 – 60 hours a week at $80.00 per hour.
>
> Please feel free to contact me should you have any questions or if I can be of any further assistance.

14 To finance the purchase, Mr English testified that a loan was obtained from a bank in the sum of $211,860 over a five year term. This required repayments of $3,873.77 per month. Mr English testified that based upon the assurances given to him by Ms Kelly, Bitumen Transport was confident that the level of work to be made available for his float would generate sufficient income to comfortably service these loan commitments.

15 From time to time, Mr English testified that he mentioned the progress in the construction of his float in Victoria and informed her when it was ready for delivery. In mid-December, Mr English travelled to Melbourne to collect the float and drove it back to Perth. He arrived back in Perth on 18 December. Mr English spoke with Ms Kelly and she told him to contact a Mr Withers, the Linfox representative. Mr Withers informed Mr English to be on "stand-by" and that he would see him in early January 2013. On 2 January Mr English said that he drove to Linfox's Gorgon Project office at Henderson. He spoke with Mr Withers who told Mr English that he had some "bad news". This was that Linfox could not provide Bitumen Transport with any float work, as it had shortly before, apparently due to a decision taken in the Eastern States by Linfox management, been put out to tender and awarded to another company, Gavin Transport. On hearing this, Mr English then telephoned Mr Watkins, the Managing Director of Logi West. When Mr English informed Mr Watkins of the situation with the float work, Mr English said that Mr Watkins appeared surprised and would get back to him. The next day, Mr Watkins did speak again with Mr English, who confirmed with Mr English what Mr Withers had told him. However, Mr Watkins assured Mr English that he would try and get whatever other work for the float that was available.

16 The situation Mr English described was that he had just paid $235,400 for a float, and it had no work. Furthermore, to make matters worse, it seems that according to Mr English, in the month of December 2012 to January 2013, the availability of floats went from a severe undersupply, to a severe oversupply, which meant it was going to be very difficult for Bitumen Transport to obtain work for its new float. During the course of January to April 2013, Mr English testified that he took a number of steps to secure work for his float. The upshot of this activity was that over this period, float work that Bitumen Transport could obtain generated income of $3,480. In the period up to 18 April 2013, when Bitumen Transport terminated its contract with Logi West and entered into a further contract directly with Linfox, Mr English said that he had expected total earnings, based on the assurances from Ms Kelly, of about $140,000 from float hire to Logi West. Accounting for the income that he did receive in this period, his direct loss was the claimed amount of $136,500. Furthermore, despite endeavours to do so, up to the date of the hearing of this matter, Bitumen Transport had been unsuccessful in selling the float.

17 Ms Kelly has also had many years of experience in the transport industry. In November 2010 along with Mr Watkins, she purchased the Logi West business. Both she and Mr Watkins were appointed directors. Up until mid-2014, Ms Kelly was the Operations Director of the company, which involved managing the procurement and engagement of Logi West's contractors,

handling training and compliance and invoicing of work. Ms Kelly outlined the main part of Logi West's business which is principally engaged in pickup and delivery services, of general freight, in Perth, Geraldton and the South West of the State.

18 The overall modus operandi of the business was outlined by Ms Kelly. She said Logi West provides its services through contractors, with whom standard subcontract agreements are entered into. This was the case with Bitumen Transport. Owner-drivers provide their own trucks and are paid on a fixed hourly rate for the work provided. Ms Kelly was at pains to emphasise that the business does not, and never has, provided any guaranteed minimum level of work. The process for job allocation generally is that customers will contact Logi West shortly before work is allocated. It could be the prior day or within only a few hours' notice. The job is then dispatched to a subcontracted driver to complete. More recently, Ms Kelly testified that Logi West had been providing pickup and delivery work and long haul transport services for Linfox.

19 The method of engagement was generally that a telephone call would come in from Linfox, informing her of the job requirements for the following day. Ms Kelly would then in turn, offer the work to Logi West's contractors. The same method of operation applied to long haul services to the North West region of the State. The difference being that long haul work was normally paid on a per kilometre basis, depending on load size. As with other general freight work, Ms Kelly testified that the work from Linfox, whether general pickup, or long haul services, was solely dependent on the needs of Linfox. No minimum level of work was ever expected by Logi West and never guaranteed by Linfox. Accordingly, no such commitments could be given by Logi West to any of its contractors.

20 In relation to Bitumen Transport, Ms Kelly said that as referred to by Mr English in his evidence, Bitumen Transport initially commenced providing contract services on long haul work from Linfox on the Gorgon Project. Ms Kelly said that in about mid-October 2012, Mr English approached her and said that Bitumen Transport was looking for more general cartage work as the long haul work was becoming more intermittent. In about late October, Bitumen Transport started receiving more pickup and delivery work from Linfox, increasing Bitumen Transport's revenue accordingly.

21 In relation to float work, Ms Kelly said that she became aware from Mr Watkins, that he had approached Linfox to see whether more general float work could be provided to Logi West, if subcontractors with their own floats could be sourced. As the float work is relatively specialised, Ms Kelly said she made some enquiries amongst the existing drivers as to whether more floats could be obtained. Of those, only one agreed to do so. Logi West contracted with the driver to undertake float work, when requested by Linfox. According to Ms Kelly, the arrangement for float work was on the same basis as general cartage. That is, there was no fixed volume of work committed to, and all of Linfox's float work given to Logi West was on an as needed basis. According to Ms Kelly, the only float work obtained by Logi West at about this time, which was late 2012 to early 2013, was from Linfox.

22 It was common ground that Mr English did approach Ms Kelly at a toolbox meeting in early November 2012. Ms Kelly said that Mr English said to her words to the effect "I'm thinking about getting a float". Ms Kelly testified that she replied with words to the effect "Pete, if you have a float, we'll use it". According to Ms Kelly, that was the sum total of her conversation with Mr English about float work for Bitumen Transport. Ms Kelly testified that she never guaranteed any minimum amount of work to Bitumen Transport, whether that was for float work or any other type of work. According to Ms Kelly, she also did not discuss with Mr English, any particular rates that would be used for float hire. Ms Kelly said that she would never have provided any guarantee of a minimum level of work, as this was not the way that Logi West conducts its business.

23 Shortly after her discussion with Mr English, Ms Kelly said she received a telephone call from Mr English's wife requesting a letter to be given to Bitumen Transport's finance broker, in order to obtain finance for a float. Ms Kelly said she would. A copy of her initial letter dated 6 November 2012, was annexure JAT-4 to Ms Kelly's witness statement. She received a telephone call from the finance broker, asking for more detail to be incorporated into her letter. For example, the broker requested information in relation to the expected hours and level of use for the float. Accordingly, Ms Kelly rewrote her letter, the terms of which are set out above. In doing so, Ms Kelly testified that she bore in mind when writing it, that Logi West's workload is solely dependent on the requirements of its customers. Ms Kelly said that in the letter, she provided an estimate only, of what the workload of Bitumen Transport could be, subject to the requirements of its customers. She testified that the work volumes and hire-rates were not discussed with Mr English.

24 From time to time, Ms Kelly confirmed that Mr English would mention to her progress being made on his acquisition of a float for use by Bitumen Transport. Ms Kelly said that on one occasion when speaking with Mr English, he asked about the current workload for floats. She testified that she told him that "(Darren) Magan was being kept busy so, so far so good, fingers crossed it keeps going, but who knows with Linfox". Mr Magan was then the only driver undertaking float work for Logi West. At the end of 2012, Ms Kelly said she took some leave over the Christmas period. She testified that Mr Watkins told her that in early January 2013, Linfox had put all of its float work out to tender and had awarded the work to another company, Gavin Transport. The effect of this was that Logi West would no longer receive any float work from Linfox. Ms Kelly said she was surprised and disappointed about this and that Logi West had no inkling that Linfox was putting out its work to tender. Logi West was not invited to bid for the work.

25 On returning from holidays, Ms Kelly spoke with Mr English who expressed his anger to her about the Linfox situation. According to Mr Watkins, Mr English was of the view that Linfox's local management must have been aware of the tender process, however, did not say anything to him when he was negotiating the purchase of his float from Victoria. Because of the situation that Bitumen Transport had found itself in, Ms Kelly said she attempted to locate other work that might use the float. Two contracts were found for work in January 2013. Ms Kelly said she also told Mr English that Logi West would let him contract directly with some of Logi West's customers, but the rates were not sufficiently attractive to Bitumen Transport for this work.

26 The nature of the Logi West business was also outlined in evidence from Mr Watkins. He also referred to the Linfox general pickup and delivery work and the long haul line work on the Gorgon Project. Mr Watkins emphasised that at no time was Logi West guaranteed any minimum level of work from Linfox, irrespective of the type of work. In relation to float work generally, Mr Watkins said that in about late 2012, he met with a representative of Linfox. At the meeting, Mr Watkins was asked

whether Logi West could provide float services to Linfox. Mr Watkins said that he would make enquiries. Only one contractor, Mr Magan, sourced a float and undertook float work for Logi West on Linfox work from early October 2012.

27 In relation to Bitumen Transport specifically, Mr Watkins testified that he was not directly involved in discussions with Mr English and Ms Kelly, other than Ms Kelly informing him that Bitumen Transport was considering acquiring a float.

28 Mr Watkins was contacted on 2 January 2013 by a Linfox employee, responsible for float work dispatch. Mr Watkins was informed that Linfox had contracted out its work to another provider, Gavin Transport, and as a result, Linfox were aware that Mr English was very upset by the decision. Mr Watkins testified that at no time was Logi West invited to tender for the float work, and they were not aware that Linfox was putting the work out to tender.

29 As a result of the situation that had developed, Logi West formally released Bitumen Transport from its contract in May 2013, in order that Bitumen Transport could contract directly for work with Linfox and others.

Consideration

30 In this case, the Tribunal is concerned with the contractual rights of the parties and not whether what occurred was fair or unfair.

Variation of contract

31 In relation to the variation of an existing contract, in *GB Energy Ltd v Protean Power Pty Ltd* [2009] WASC 333 Le Miere J set out relevant legal principles concerning the variation of a contract. Whilst the quotation is lengthy, it helpfully encapsulates principles applicable to the present matter before the Tribunal. Commencing at par 69 Le Miere J said:

> **7.3 Legal principles concerning variation of contract**
>
> 69 In complex or long-term contracts, changes will often be made to the contract, either informally or formally. When the parties to an existing contract enter into a further contract by which they vary the original contract then they have made two contracts. Whether the parties terminate their existing contract and replace it with a new contract, or alter the contract without affecting its existence, depends upon the intention of the parties as disclosed by the later agreement: ***Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd*** [2000] HCA 35; (2000) 201 CLR 520 (Gleeson CJ, Gaudron, McHugh and Hayne JJ) [22] - [24].
>
> 70 The rules of contract formation apply equally to a variation as they do to the initial contract. Sometimes, an issue arises whether there is consideration for the variation. That is not an issue in this case. The issue in this case is whether or not the parties agreed to vary their contract constituted by the Deed in the manner asserted by GBX.
>
> 71 Clause 14.4 of the Deed provides that no variation, modification or waiver of any provision of the Deed shall be of any force or effect unless confirmed in writing and signed by the parties. An informal contract variation may occur notwithstanding a clause such as cl 14.4 of the Deed. This is because the very clause governing contract changes may itself be changed expressly or tacitly by the conduct of the parties: Seddon N C, Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (9th Aust ed, 2008) [4.32].
>
> 72 The defendants accept that cl 14.4 lacks legal effect but submit that it has significant evidentiary effect. In ***GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*** [2003] FCA 50; (2003) 128 FCR 1, Finn J discussed the effect of a contractual clause that required any contractual variation to be in writing. Finn J said that 'though lacking legal effect in the face of a subsequent oral or implied agreement, it seems to be accepted that a no oral modification clause can have significant evidentiary effect' [221]. The clause is a fact to be taken into account in interpreting the subsequent conduct of the parties.
>
> 73 In ***GEC Marconi Systems Pty Ltd*** Finn J noted the following propositions, which I respectfully adopt:
>
> (1) Parties to an existing agreement may vary or extinguish some of its terms by a subsequent agreement: ***Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd***. In so doing the parties will have made 'two contracts': ***Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household & Body Care (Australia) Pty Ltd*** (2000) 201 CLR 520 at 533; with the latter, no less than the former being subject to the ordinary rules governing contract formation: eg ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266 at 286; ***Tekmat Pty Ltd v Dosto Pty Ltd*** (1990) 102 FLR 240 at 248.
>
> (2) Conduct engaged in for the purposes of ongoing commercial arrangements is not always readily susceptible to the traditional forms of analysis employed by common lawyers for the purposes of determining whether a contract has been formed: ***Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*** (1988) 5 BPR 11,110 at 11,117. This can be particularly the case when dealings are analysed on an offer and acceptance basis. So in ***Vroon BV v Foster's Brewing Group Ltd*** [1994] 2 VR 32 at 81, Ormiston J was prepared to accept:
>
> > … that agreement and thus a contract can be extracted from circumstances where no acceptance of an offer can be established or inferred and where the most that can be said is that a manifestation of mutual assent must be implied from the circumstances.
>
> Likewise in ***Integrated Computer Services Pty Ltd*** at 11,118 McHugh JA observed that:
>
> > … in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.

(3) 'In determining whether the communications between the parties constitute a contract the court is not confined to a consideration of the terms or manner in which the communications were made: they must be interpreted by reference to the subject matter and the surrounding circumstances including, inter alia, the nature of, and the relationship between, the parties, and previous communications between them, as well as to standards of reasonable conduct in the known circumstances': ***Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd*** (1979) 1 BPR 9251 at 9255. See also ***Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd*** (1988) 18 NSWLR 540 at 550.

(4) Post-contractual conduct is admissible on the question whether a contract was formed though it is not admissible on the question of what that contract, if formed, means: ***Brambles Holdings Ltd v Bathurst City Council*** at 163 - 164; Lord Steyn, 'The Intractable Problem of the Interpretation of Legal Texts', 9ff, The John Lehane Memorial Lecture (2002).

(5) The need frequently arises in relational contracts of significant duration to adjust terms to accommodate changed or unforeseen circumstances. For that reason it is common for such contracts to make express provision for variation. Nonetheless, and notwithstanding their contract, parties in an ongoing business relationship equally commonly 'regulate their relationships in accordance with what they consider is fair and reasonable or commercially necessary at particular points in time rather than by reference to a priori rights and duties arising under a contract': ***Integrated Computer Services Pty Ltd*** at 11,117 [226] - [230].

Finn J used the term 'relational contract' to describe 'a contract that involves not merely an exchange, but also a relationship, between the contracting parties' [224]. That description applies to the contract in this case.

74 As Finn J observed, evidence of post-contractual conduct is admissible on the question of whether a contract was formed: ***Brambles Holdings Ltd v Bathurst City Council*** [2001] NSWCA 61; (2001) 53 NSWLR 153 [25] (Heydon JA); ***Suncorp Metway Insurance Ltd v Owners Corporation Strata Plan 64487*** [2009] NSWCA 223, [55] (Sackville AJA, Campbell and MacFarlan JJ agreeing); ***Sagacious Procurement Pty Ltd v Symbion Health Ltd*** [2008] NSWCA 149, [117] (Giles JA, Hodgson and Campbell JA agreeing).

75 In ***County Securities Pty Ltd v Challenger Group Holdings Pty Ltd*** [2008] NSWCA 193 Spigelman CJ said that in that case the terms of the contract must be inferred from a combination of surrounding circumstances including conversations, documents and conduct none of which provided a definitive form of words. The Chief Justice said that the issue was not one of interpretation because there were no words to interpret. The issue was one of fact: what did the parties agree? In the absence of a written document or a conversation constituting the agreement it was necessary for the court to consider the full range of relevant surrounding circumstances when determining the subject matter and terms of the contract. Principles of law based on the parol evidence rule are not applicable: [7] - [8]. Spigelman CJ referred to the observations of Lord Hoffmann in ***Carmichael v National Power Plc*** [1999] 1 WLR 2042, 2049:

> The rule that the construction of documents is a question of law … applies in cases in which the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact.

Spigelman CJ explained:

> In ***Carmichael v National Power Plc***, supra, the House of Lords had to determine whether a person performed work under a contract of employment, within the meaning of a statute. The House of Lords overruled a Court of Appeal decision that, on the proper interpretation of documents pursuant to which the casual work arrangement had been made, there was such a contract. When rejecting a submission that reliance on post contractual conduct was inconsistent with the objective approach to identifying and interpreting a contract and that the subjective belief of the parties was irrelevant, Lord Hoffmann said at 2050:
>
> > This austere rule would be orthodox doctrine in a case in which the terms of the contract had been reduced to writing. But I do not think that it applies to a case like the present. In a case in which the terms of the contract are based upon conduct and conversations as well as letters, most people would find it very hard to understand why the tribunal should have to disregard the fact that Mr Lovatt and Mrs Carmichael both agreed that the CEGB were under no obligation to provide work and the applicants under no obligation to perform it. It is, I think, pedantic to describe such evidence as mere subjective belief. In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief … But the terms of the engagement must have been discussed and these conversations must have played a part in forming the views of the parties about what their respective obligations were.
> >
> > The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see ***Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd*** [1970] AC 583)

may be relevant on similar grounds, namely that it shows what the parties thought they had agreed [22].

76 In determining what are the terms of a contract that is partly written and partly oral, surrounding circumstances may be used as an aid to finding what the terms of the contract are. If it is not possible to make a finding about the particular words that were used, as sometimes happens when a contract is partly written, partly oral and partly inferred from conduct, the surrounding circumstances can be looked at to find what in substance the parties agreed: ***County Securities Pty Ltd v Challenger Group Holdings*** [7] - [8] (Spigelman CJ); ***Masterton Homes Pty Ltd v Palm Assets Pty Ltd*** [2009] NSWCA 234, [90] (Campbell JA, Allsop P and Basten JA agreeing).

77 As I have said, a contract may come into existence through conduct. The conduct is to be viewed in light of the surrounding circumstances and in the commercial context in which the dispute arose: ***Australian Broadcasting Commission v XIVth Commonwealth Games Ltd*** (1988) 18 NSWLR 540, 548. The conduct must be of such a character as necessarily to lead to an inference that an agreement has been made and its terms: ***Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*** (1988) 14 NSWLR 523, 535; ***Brambles Holdings Ltd v Bathurst City Council***, 195. It cannot be assumed that merely because something has been done there is a contract in existence which has thereby been partly performed: ***Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*** (1988) 5 BPR 11,110, (11,117). Business people not uncommonly act on an anticipated contractual relationship prior to the contract being formed: ***Sagacious Procurement Pty Ltd v Symbion Health Ltd*** [117].

Estoppel

32 A further contention of Bitumen Transport was that the conduct of Logi West, through Ms Kelly, in promising to provide float work to Bitumen Transport, constituted an estoppel, as it would be unconscionable for Logi West to now be allowed to ignore the promise alleged to have been made to Bitumen Transport. The scope of the doctrine of promissory estoppel was set out by the High Court in *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387 where at 428-9, Brennan J said:

> In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

33 Logi West submitted that the Tribunal cannot deal with a claim based on estoppel as such a claim does not involve a dispute between a hirer and an owner-driver in relation to an owner-driver contract. Alternatively, it was contended by Logi West that on the evidence, there could be no basis to conclude that an estoppel arises in this case, as the conversations between Ms Kelly and Mr English amounted to no more than an expression of intention that Logi West could put a float to good use, as its major client Linfox, was looking for that sort of service to be provided by Logi West. It was contended by Logi West that an expression of future intention is no basis for an estoppel to arise: *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR (NSW) 76 at 82; *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 409.

34 As was said by Brereton J in *Moratic Pty Ltd v Lawrence James Gordon & Anor* [2007] NSWSC 5 at par 29:

> In promissory estoppel, as with equitable estoppel generally, equity comes to the relief of a plaintiff who has acted to its detriment on the basis of a fundamental assumption in the adoption of which the defendant has played such a part that it would be unfair or unjust if it were left free to ignore it, on the footing that it would be unconscionable for the defendant to deny the assumption [*Grundt v Great Boulder Gold Mines Limited* (1937) 59 CLR 641, 675; *Thompson v Palmer* (1933) 49 CLR 507, 547; *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J)]. The unconscionability which attracts the intervention of equity is the defendant's failure, having induced or acquiesced in the adoption of the assumption or expectation, with knowledge that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion [*Waltons v Maher*, 423 (Brennan J)].

35 And further, Brereton J said at par 34:

> In the case of promissory estoppel where the defendant has not positively encouraged the plaintiff to adopt the relevant assumption, a plaintiff must show that the defendant at least failed to deny the assumption with knowledge that the plaintiff was relying on it to the plaintiff's potential detriment, and that the assumption could be fulfilled only by a diminution or suspension of the defendant's contractual rights [see generally *Waltons v Maher*, 428-429 (Brennan J); Meagher, Gummow & Leeming, [17-050]]. It is essential to an equitable estoppel that the defendant knows or intends that the party who adopts the assumption will act or abstain from acting in reliance on it [see *Crabb v Arun District Council* [1976] Ch 179, 188; *Waltons v Maher*, 423 (Brennan J)]. Such knowledge or intention may easily be inferred where the adoption of the assumption is induced by the making of a promise, but it may also be found where the defendant encourages a plaintiff to adhere to an assumption already formed, or acquiesces in an assumption when in conscience objection ought to be stated [*Waltons v Maher*, 423 (Brennan J)]. The cases emphasise that a party who seeks to set up an equitable estoppel of this type must show that the other has made, whether by words or conduct, an unequivocal representation that it did not intend to enforce its strict legal rights [*Allied Marine Transport Ltd v Vale Do Rio Doce Navegacao SA (The Leonidas)* [1985] 1 WLR 925, 941 (Robert Goff LJ); *Legione v Hateley*, 435-7; *Foran v Wright*, 410-11, 435-6].

36 I am not persuaded by Logi West's submission that the Tribunal cannot have regard to equitable principles when determining a contractual dispute between a hirer and an owner-driver. In my view, in hearing and determining a dispute, as defined in s 37(1) of the OD Act, the Tribunal has jurisdiction and power in its determination, in relation to a number of remedies, as set out in s 47(4) of the OD Act. The powers of the Tribunal in making a determination are broad. They include not only orders in the nature of payments for sums of money, by way of debts due and owing or for damages, but also orders in the nature of restitution. Further orders, such as declarations and orders for specific performance, may also be made, including an order declaring void any unjust term of an owner-driver contract. Orders of this kind are within the armoury of equitable remedies.

37 I see nothing in the OD Act, to preclude the Tribunal, in hearing and determining a dispute, having regard to relevant equitable principles, in making a determination for the purposes of s 47(4) of the OD Act. This is particularly so, when regard is had to s 43(1), by which the relevant provisions of the Industrial Relations Act 1979 that apply to and in relation to the exercise of the jurisdiction of the Commission, apply to the exercise of jurisdiction conferred on the Tribunal. This includes s 26(1)(a) in relation to "equity, good conscience, and the substantial merits of the case".

38 I turn now to consider the evidence, in light of the above legal principles.

Was there a variation of the contract?

39 Consistent with the above principles, the context in which the parties' dealings took place is important. It was contended by Logi West, and it appears to be accepted by Bitumen Transport, and as reflected in the terms of the contract itself, that the workflow provided by Logi West to its owner-drivers, including Bitumen Transport, was solely dependent on requests from customers. Whilst the contract between Bitumen Transport and Logi West was for a term from 15 August 2012 to 30 June 2013, it is clear from its terms, and the evidence before the Tribunal, that the provision of services by Bitumen Transport to Logi West, could never be guaranteed at a certain level. Thus, the level of work for both Logi West, and in turn Bitumen Transport, was entirely driven by market demand.

40 It is in this context, that the evidence, and the claims made by Bitumen Transport, must be assessed. Mr English accepted in cross-examination, that there was never any guarantee of any minimum level of work. Whilst he expressed himself in various ways on this issue, the upshot of his testimony was that from his discussions with Ms Kelly, he understood that there would be work for the float from Logi West. Mr English also accepted that in relation to Linfox, who was clearly a major customer of Logi West, that the level of work available to owner-drivers was, consistent with the general operating principle adopted by the business, entirely dependent on the work that Linfox gave to Logi West. As set out in the evidence of both Ms Kelly and Mr Watkins, earlier in these reasons, this was the manner in which Logi West had run its business consistently in the past.

41 I accept on the evidence that Logi West was asked by Linfox to see if it could service float work. There was a suggestion from Linfox, that if Logi West was able to identify an owner-driver(s) with access to a float(s), such work would be forthcoming. Accordingly, this led Ms Kelly, to enquire of the owner-drivers as to their accessing a float for this type of work. At that time, only one owner-driver, Mr Magan, responded to the initial approach, and obtained a float on hire and was given some work which was referred to Logi West by Linfox. Such work was provided on an "as required basis".

42 There was a conflict on the evidence as to what next occurred. According to Mr English, there were further discussions between himself and Ms Kelly at the respondent's premises in Welshpool, where Mr English alleges that Ms Kelly assured him of as much float work as he could handle for "at least two years". Mr English referred to a further discussion after a toolbox meeting shortly after, where Ms Kelly referred to the rate of $200 per hour for such work. On Ms Kelly's version of the events, only one discussion with Mr English took place and that was after a toolbox meeting in early November 2012. Mr English informed Ms Kelly that he was considering obtaining a float and she responded to the effect that if so, then Logi West would use it.

43 On balance, and considering the context of the operation of the Logi West business, as outlined in the evidence, I prefer Ms Kelly's version of events. The suggestion by Mr English that Ms Kelly committed to float work for at least two years, would be entirely inconsistent with the way that the Logi West business had operated. It certainly would be inconsistent with the method by which Linfox gave Logi West work, which, as was common ground, was on an as needed basis. Also, Ms Kelly's version is more consistent with the testimony of Mr Watkins, to the effect that Linfox requested Logi West to explore providing float work services. In response, only one owner-driver at that point, Mr Magan, was engaged to do so, based on a float which he had hired for the work.

44 It is also to be noted that on the evidence, Mr English testified that he may also have had some discussions directly with a Linfox representative, a Mr Withers, about the possibility of float work from them. I therefore do not discount the possibility, and consider it quite likely, that Mr English may have been given a level of comfort by Linfox from any such discussions, about the amount and duration of float work that Linfox may make available. Such an approach by Mr English would be understandable, and perhaps to be expected, in the context of him approaching a manufacturer in Victoria, about the possibility of purchasing the float then under construction. In considering such a step, it would stand to reason that Mr English may seek some assurance from the source of the float work, Linfox, as to their future requirements.

45 I am not satisfied however, that any such assurance was given by Ms Kelly on behalf of Logi West. As was submitted by Logi West, and correctly so in my view, in light of all the evidence, why would Logi West, a reasonably small business itself, commit to an arrangement, effectively locking itself into a guaranteed obligation to pay Bitumen Transport some $40,000 per month, on an indefinite basis? In my opinion, this is particularly unlikely, when Logi West had no assurance at any time, of any minimum level of float work being required by Linfox, its major customer. The proposition advanced by Bitumen Transport is entirely inconsistent with the accepted business model adopted by Logi West.

46 For reasons which Mr English considered to be in his interests, he decided, after no doubt seeing the work being done by Mr Magan for Logi West, and perhaps also supplemented by information provided by Linfox directly, that it may be commercially attractive to him to go ahead and purchase the float under construction. It would then be available for use on Linfox work offered to Logi West. There was also the evidence of Mr English, that around this time, floats were hard to obtain locally and work was available.

47 This then brings me to the letter that Ms Kelly wrote for Bitumen Transport, at the request of the finance broker. As noted earlier in these reasons, Ms Kelly in fact wrote two letters. The request for a letter came soon after Ms Kelly's conversation with Mr English, when he told her that he was considering acquiring a float. The letters themselves are revealing, in particular the first one, which is at JAT-4 to Ms Kelly's witness statement. In my view, the first letter of 6 November 2012 reveals Ms Kelly's state of mind at the time, following her quite recent discussion with Mr English. In it, Ms Kelly only refers to Mr English having been offered a position "on our fleet utilising a float". Reference is then made to the rate of $200 per hour and other PUD work when the float is on hire. There is certainly no reference to any commitment to a minimum level of engagement or any term over which such an arrangement would continue.

48 What next followed was a request from the finance broker for more detail. This is set out in an email from the broker to Ms Kelly which is at JAT-5 to her witness statement. The request from the broker makes no reference to any agreement between Bitumen Transport and Logi West for float work, as contended by Bitumen Transport. As pointed out by Logi West in its submissions, the request only makes reference to "expected" hours to be worked. Accordingly, Ms Kelly, at the broker's request rewrote the letter as it is set out at par 13 above. Ms Kelly's evidence was, which I accept, she added the extra information as requested by the finance broker, based on the then work being given by Linfox to Mr Magan. Thus, the reference in the letter to "current work volumes" and that Logi West "anticipate" a certain level of work, "depending on the pickup requirement of the customer", was included in the letter. This latter statement is entirely consistent with the evidence as a whole, as to Logi West's business model. This documentary evidence is quite at odds with the stance adopted by Bitumen Transport in this case.

49 Further, if, as Bitumen Transport maintained, the alleged agreement with Logi West was as certain as it contended, then one would imagine that Mr English would inform the finance broker of this, and he would seek some reference to be made to it in the letter from Logi West. Such an inclusion, one would imagine, would significantly enhance the prospect of a successful finance application.

50 Also as part of considering the context in this case, is the conduct of the parties subsequent to the alleged variation to the contract. As Logi West points out in its submissions, the evidence was that Mr English spoke directly with Linfox on his return to Perth from Melbourne, with the new float. Mr English responded to Linfox's request to "stand-by", until early January 2013. Mr English clearly understood that it was Linfox, and not Logi West, who was in control of the float work that he may be provided with.

51 Regardless of the issue of a written variation being required as contended by Logi West, on all of the evidence, taken in context, I am not able to conclude that the contract was varied as alleged by Bitumen Transport. At best, Bitumen Transport had an expectation that it would receive float work sufficient to generate a return on its investment. Unfortunately, this was not to be the case.

52 In the alternative, even if there was a variation to the contract, which I consider there was not, then any such contract as varied, would, in my view, contain an implied term consistent with the main contract, and all of the evidence, that Logi West would provide float work to Bitumen Transport, for only as long as it was provided requests for such work from Linfox. There could be no guarantee of a minimum level of work and certainly not for any fixed period of time. The tests as to the implication of a term in fact, in a contract are well settled. As was said by the Privy Council in *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 at 282-283:

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

53 This approach has been affirmed by the High Court of Australia: *Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited* (1979) 144 CLR 596; *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1982) 149 CLR 337. Additionally, in the case where the contract in question is oral or partly oral and partly in writing, as in the present matter, a less strict approach to the application of these factors may be appropriate: *Hawkins v Clayton* (1988) 164 CLR 539 per Deane J; *Ware v Amaral Pastoral Pty Ltd (No 5)* [2012] NSWSC 1550. On the facts of this case, such a term, in the context of the operation of the main contract, would be consistent with it and thus would be reasonable and equitable. On the same footing, it would be necessary to give business efficacy to the contract, and it would be obvious to the parties because that is how they had operated under the main contract for a considerable period of time. It could be clearly expressed and would be entirely consistent with the express terms of the main contract.

Was there an estoppel?

54 Similarly for the same reasons, I am not persuaded that an equitable estoppel arises in this case. At its highest, on the findings that I have made, based on the dialogue between Ms Kelly and Mr English, and as evidenced by the letters for the finance broker, there could only be a representation of future intention by Logi West, which, without more, cannot found an estoppel: *Verwayen* per Mason CJ at 409-410.

Conclusion

55 The circumstances of this case are most unfortunate. The Tribunal has considerable sympathy for the circumstances which Mr English found himself in. However, that does not give rise to any alteration in the contractual rights between the parties, which is the only issue with which the Tribunal can be concerned. Accordingly, the application must be dismissed.

2014 WAIRC 01370

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	BITUMEN TRANSPORT PTY LTD
	APPLICANT
	-v-
	LOGI WEST EXPRESS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 19 DECEMBER 2014
FILE NO/S	RFT 6 OF 2013
CITATION NO.	2014 WAIRC 01370

Result	Application dismissed
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr M Mony De Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr M Mony De Kerloy of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the application be and is hereby dismissed.

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

2014 WAIRC 00524

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	GC AND GE LIDDICOAT
	APPLICANT
	-v-
	CONSOLIDATED SITE SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 20 JUNE 2014
FILE NO/S	RFT 13 OF 2014
CITATION NO.	2014 WAIRC 00524

Result	Consent order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr R Foley

Consent Order

WHEREAS this matter has been referred to the Tribunal alleging that the respondent, Consolidated Site Services Pty Ltd, has failed to pay GC and GE Liddicoat amounts due and owing under an owner-driver contract made under the Owner-Drivers (Contracts and Disputes) Act 2007;

AND WHEREAS a conference before the Tribunal under s 44 of the OD Act was held on 20 June 2014. At the conference Consolidated did not dispute that it was indebted to Liddicoat and agreed to paying the applicant the total sum of $28,571 in relation to work performed by Liddicoat as an owner-driver. Due to the financial circumstances of Consolidated, it has agreed to pay Liddicoat by instalments, in the sum of $5000 paid today, Friday 20 June 2014, and then the sum of $5,892.75 thereafter every three weeks over 4 payments;

AND WHEREAS as a result of discussions at the conciliation conference, it was agreed by the parties that the Tribunal would issue consent orders recording the parties' agreed payment plan and that this application will remain on foot until the monies outstanding have been repaid. Both parties have liberty to apply to relist the application on short notice.

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, and hereby orders by consent –

(1) THAT the respondent pay to the applicant the sum of $5000 today, Friday 20 June 2014, and thereafter four further payments in the sum of $5,892.75 every three weeks, they being on 4 July, 25 July, 15 August and 5 September 2014.

(2) THAT if the respondent fails to make a payment as and when it falls due under par 1 of this order, then the whole amount then due and owing to the applicant will be payable forthwith.

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

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

2014 WAIRC 01004

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	GC AND GE LIDDICOAT
	APPLICANT
	-v-
	CONSOLIDATED SITE SERVICES (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 16 SEPTEMBER 2014
FILE NO/S	RFT 13 OF 2014
CITATION NO.	2014 WAIRC 01004

Result	Correcting order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	No appearance required

Correcting Order

WHEREAS on 6 June 2014 the applicant filed a notice of referral to the Tribunal and stated that the name of the respondent was "Consolidated Site Services Pty Ltd";

AND WHEREAS on 6 June 2014 the Commission made a direction that the time for the respondent to file an answering statement be abridged;

AND WHEREAS on 20 June 2014 a conciliation conference was convened by the Tribunal and orders were made by consent that same day regarding the payment by the respondent to the applicant monies owed in instalments, and that the parties have liberty to apply on short notice;

AND WHEREAS by letter dated 9 September 2014 the applicant informed the Tribunal that there was a typographical error in the notice of referral and the correct name of the respondent is "Consolidated Site Services (WA) Pty Ltd" and not "Consolidated Site Services Pty Ltd";

AND WHEREAS the applicant in its letter made an application to the Tribunal to make a correcting order to correct name of the respondent;

NOW THEREFORE having heard Mr A Dzieciol of counsel on behalf of the applicant, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders –

(1) THAT the name of the respondent on the notice of referral be amended by deleting the name "Consolidated Site Services Pty Ltd" and inserting in lieu thereof the name "Consolidated Site Services (WA) Pty Ltd".

(2) THAT the consent order made by the Tribunal on 20 June 2014 and the direction made by the Commission on 6 June 2014 be and are hereby amended by deleting the name of the respondent as "Consolidated Site Services Pty Ltd" and inserting in lieu thereof the name "Consolidated Site Services (WA) Pty Ltd".

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

2015 WAIRC 00178

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2015 WAIRC 00178
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 23 OCTOBER 2014
DELIVERED	**:**	TUESDAY, 17 FEBRUARY 2015
FILE NO.	**:**	RFT 15 OF 2014
BETWEEN	**:**	LOUISVILLE HOLDINGS PTY LTD Applicant AND SIMS GROUP AUSTRALIA HOLDINGS LTD T/AS SIMS METAL MANAGEMENT Respondent

Catchwords	**:**	Owner-driver contract – Referral of dispute – Whether there was an ongoing contractual relationship – Whether the contract contained an implied term as to termination on notice – Introduction of sub-contract agreements – Whether an agreement was inferred by conduct – Principles applied – No mutual obligation – Engagement on an as required basis – Stand-alone contracts – No contractual obligation to give notice of termination – Application dismissed – Order made
Legislation	**:**	*Owner-Drivers (Contracts and Disputes) Act 2007* (WA)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr A Dzieciol
Respondent	**:**	Mr N Mony de Kerloy
Solicitors:		
Applicant	:	Transport Workers Union
Respondent	**:**	Mony de Kerloy Barristers & Solicitors

Case(s) referred to in reasons:

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

Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110

Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165

Vroon BV v Foster's Brewing Group Ltd [1994] 2 VR 32

Reasons for Decision

1 Mr Cox is the director of Louisville Holdings Pty Ltd, which owns and operates a prime mover and trailers, and which entered into owner-driver contract(s) with Sims Metal Management under the Owner-Drivers (Contracts and Disputes) Act 2007.

Louisville Holdings was engaged by Sims since 2001 until May 2014 to load and cart scrap metal which was loaded for export onto ships in various ports in Western Australia, which included Fremantle, Port Hedland, Dampier and Bunbury.

2 Since about 2010 Sims introduced individual "sub-contract agreements" and on each occasion that a ship arrived for loading, Mr Cox would sign an agreement which stipulated the duration of the work for the particular vessel, the tonnage rates and the conditions of the contract. Sims does not dispute that these individual contracts were owner-driver contracts for the purposes of the OD Act. I find accordingly.

3 Louisville Holdings says that over the period of more than thirteen years it was contacted on a regular basis, as one of Sims' preferred contractors, to cart scrap metal using its own truck and trailers. Louisville Holdings contends that the vast majority of its income was derived from the Sims work and it was, for the most part, always available to do the work when called upon by Sims.

4 Sims denies that there was an ongoing contract since 2001. Rather, Louisville Holdings terminated the contract when its truck was sold. Sims contends that since 2010, Louisville Holdings was one of many contractors engaged on an ad hoc basis with no guarantee of future work. It says Louisville Holdings was free to work for whomever it chose, and no owner-driver contract was in place at the time Sims decided to no longer offer Louisville Holdings any further work.

5 In about May 2014 Louisville Holdings ceased providing work for Sims in circumstances which are controversial in these proceedings. The Operations Manager was instructed by senior management not to offer Louisville Holdings any more work, following allegations of bullying. Louisville Holdings denies the bullying allegations, and contends that it did not breach the contract. By not offering any further work, Louisville Holdings says that Sims terminated the contract, and claims damages for a period of reasonable notice of termination, being the amount it expected to earn from one ship's work.

6 The issues in this case are:

a) Was there an ongoing contractual arrangement between the parties or a series of separate contracts?

b) Was there an implied term that Sims was required to give Louisville Holdings reasonable notice to terminate the contract?

c) If so, what would be a reasonable period of notice in the circumstances?

d) Further, if Sims was required to give reasonable notice, did Louisville Holdings breach the contract in such a manner as to allow Sims to terminate the contract without notice?

7 I outline the evidence as follows.

The evidence

8 Mr Cox gave evidence that he has driven his truck for Sims since 2001. The situation Mr Cox described was that he did not work for Sims on a daily or weekly basis, rather, the supervisor of bulk shipments, Mr Goldie, would telephone him when a ship was arriving into port, ask whether he was available to do the job and Mr Cox would make himself available. There was no set period of notice, which would range from five days' notice to as little as two days' notice, depending on the size of the ship or the ship's location. Mr Cox's evidence was that this arrangement had been ongoing for thirteen and a half years.

9 Mr Cox said that in recent times when a ship would arrive there would be generally 18 contractors working on the job. The work involved picking up specially designed shipping bins at a certain time, loading them with scrap metal in Spearwood, Malaga and other yards depending on the amount of steel available. Then, usually the day before, Mr Cox would travel to the wharf, and then follow instructions to unload, in order for the ship to be loaded as quickly as possible. The process would take anywhere from six and a half to seven days to complete. Mr Cox said that he would do about 12 ships per year, and sometimes more. Mr Cox was not paid hourly, but by the tonne.

10 According to Mr Cox, the work he performed was specialised and he was required have the correct trailers, accreditation, MSIC card to get access to the wharf, permits, insurance and the ability to travel with large loads. Mr Cox said that an inexperienced driver could not do the work, and using a replacement driver to fill in was not allowed. In the thirteen years he worked for Sims, Mr Cox said that he only used a replacement driver twice after seeking permission. Mr Cox recalled that this occurred ten years ago, but he was fortunate because the replacement driver had an MSIC card. He said with the exception of those two occasions, he had always personally driven for Sims. According to Mr Cox, Mr Goldie did not want drivers who did not know the work, and nowadays drivers have to be inducted by Sims.

11 In his evidence, Mr Cox said that initially the job arrangements with Sims were verbal but in the last four or five years Sims introduced the sub-contract agreements which were signed at the wharf by Mr Cox and others at the start of each job. Mr Cox said he was then paid within seven days of completion. According to Mr Cox, there was virtually no change to the way the work was organised, but drivers had to agree to a list of conditions.

12 Exhibit R1 was a standard sub-contract agreement and on the front page it includes details of the parties to the agreement, the name of the ship, the approximate tonnage, and the duration of the job with the start and finishing dates. The clause in question states:

> The following agreement between the above parties covers the cartage of scrap metal from Sims Metal Management Limited yards to the Fremantle wharf and is effective for "***M.V.(Insert Ships Name***) loading approximately (**Insert Tonnes**) tonnes from (**Insert Date**) through to (**Insert Date**).

13 The second page lists the shipping rates per tonne, and the third page sets out 21 "Conditions of Contract". I outline some of the conditions as follows:

Conditions of Contract:

…

8. Any dispute will be discussed upon completion of the ship without any lost loading time during the ship.

9. Any driver creating a nuisance on Sims Metal Management premises or at the wharf may be excluded from working the balance of that and future ships.

10. Refusal to accept directions as listed above means instant dismissal from the contract.

14 Tendered as exhibit R2 was a bundle of the front pages of sub-contract agreements entered into by Louisville Holdings and Sims on various dates.

15 According to Mr Cox the written contracts were introduced by the previous Operations Manager, Mr Mayne, following a stop work meeting on the wharf about four years ago about tonnage rates. Mr Cox said that these written contracts were a change to the way things had been done previously. He said Sims told the drivers that, in the future, any grievances or problems, concerning tonnage rates, would be dealt with after the ship had been completed, as Sims did not want any stop work meetings beforehand. According to Mr Cox, this was the reason he thought the change was made and referred to clause 8 in the contract. According to Mr Cox, he was not given any other reason as to why the contracts were introduced.

16 Mr Cox also said that it was his understanding that he and Sims had an ongoing relationship, because he was "on the list and inducted". Mr Cox described it as, if Sims needed a truck, he would provide the service. Mr Cox acknowledged that there was no written correspondence guaranteeing him ongoing work, it was just the arrangement he understood he had with the past and current Operations Managers.

17 Exhibit A1 was Mr Cox's handwritten tax invoice book which he would submit to Sims for the amount charged for the tonnage carted after each ship. Louisville Holdings provided a summary sheet of calculations for the last 12 months, which I set out as follows:

21-04-13	$21,945.00
27-05-13	$7,304.09
27-05-13	$13,168.72
01-07-13	$21,822.35
01-07-13	$495.00
26-08-13	$21,862.26
25-09-13	$7,742.59
01-10-13	$12,046.46
14-10-13	$10,055.24
16-10-13	$5,070.84
30-10-13	$14,951.19
05-12-13	$9,922.41
16-12-13	$15,209.76
23-12-13	$6,877.95
03-02-14	$7,200.56
10-02-14	$13,917.18
04-03-14	$8,259.62
24-03-14	$10,681.31
22-04-14	$12,973.85
	$221,506.38

18 When it was put to Mr Cox that there was no problem with him doing work for companies other than Sims during the times ships were coming in, Mr Cox said that was correct. Mr Cox also said that in the first five years of working for Sims, he also worked for another company doing a Perth to Melbourne run. According to Mr Cox, finding other work was fine, but Louisville Holdings' main business model was based on obtaining work from Sims. Mr Cox said that he earned over $200,000 from Sims in the last 12 months, and did not understand it to be some ad hoc arrangement.

19 Mr Cox said that a ship would come in about every four weeks so in between ships he would look around to see if other jobs come up, depending on how much they would pay. Mr Cox described it as "like a semi-retirement job" which was going to top up his superannuation, and in about five years he was going to retire. Mr Cox said he never knocked back work from Sims. The situation Mr Cox described was that he and Sims, as with all of the 18 contractors, always had a relationship, whereby Sims had the work and he provided the truck and trailers.

20 During cross-examination, Mr Cox acknowledged that there were invoices in his book for work completed that was not Sims' work. For instance, invoice 22 dated 9 September 2013 and invoice 23 dated 19 September 2013 were for "R.M. Ebbett" which involved container cartage from Perth to Geraldton which was about one days' work each. Another example was invoice 33 dated 30 January 2014 which was a one-off trip moving a salt excavator to Onslow for Mark Overall Transport.

21 Mr Cox said there was a period of about two or three months where he left work after his trailers were sold. This occurred in 2007 where he missed about two or three ships because he had his truck refurbished. Mr Cox said that he told Mr Mayne, the Operations Manager at the time about the refurbishment and that someone wanted to buy the trailers. According to Mr Cox, he understood Mr Mayne had no issue with it. When the work to the truck was completed, Mr Cox rang Mr Goldie and said that he was available to work again, and he worked for Sims ever since. Mr Mayne was not called to give evidence in these proceedings.

22 Mr Goldie also gave evidence as to Sims' operations. As the Senior Shipping Coordinator, Mr Goldie is responsible for coordinating the collection and transportation of scrap metal. This is coordinated by using subcontracted drivers in a pool of drivers, which Sims can choose from. The situation Mr Goldie described was that when he is notified that a ship is coming in, he would telephone the drivers to see who is available, and he would normally give the drivers a week's notice of the arrival of a ship. He said that he tries to give the drivers a week's notice in case they have other work which they need to plan around and organise. Mr Goldie said that the jobs would last anywhere from five days to ten days, depending on the tonnage and how much needs to be loaded. Mr Goldie estimated that on average, Sims normally loads one ship every six to seven weeks.

23 In his evidence, Mr Goldie confirmed that Sims uses the standard sub-contract agreement for every ship. Mr Goldie said that he was told by senior management to implement the written agreements in 2010, but he was not sure as to the reason, and thought that it may have had something to do with a previous case involving one of the subcontractors. Mr Goldie testified that since the agreements were introduced, "basically nothing changed". For instance, Mr Goldie used the same notification procedure on a ship by ship basis. The only change was that, at the commencement of each ship, the agreement was given to each driver.

24 Mr Goldie said that drivers could do other work between ships and it is the driver's decision whether they wish to accept work from Sims when they are telephoned. Mr Goldie said that it is fine if the drivers are unavailable if they have something else on, as he will ring the next driver in the pool of about 23. Then next time, when a ship comes in, Mr Goldie, will again ring the drivers to see if they are available and so on.

25 There was some initial suggestion by Mr Goldie, that Mr Cox had a break from the transport industry for some 12 months when his truck was sold. However in his evidence, Mr Goldie said that he could not give a definitive answer as to the length of Mr Cox's break, and accepted that the break could have been for a two or three month period.

26 Mr Goldie also gave evidence in relation to Mr Cox's alleged conduct and behaviour in the workplace. Mr Goldie testified that a complaint was made in May 2013 about Mr Cox allegedly engaging in antisocial behaviour over the two way radio. I set out as follows, with formal parts omitted, exhibit R3 which is an unsigned letter of complaint dated 30 May 2013:

> Dear Mr Matthers,
>
> **Reference - Complaint Against Mr David Cox**
>
> I am writing this letter as a formal complaint about another contractor Mr David Cox. For the past 12 months I have suffered constant verbal abuse and intimidation in the workplace. I raised a recent example with both yourself and Mr Dave Goldie and you advised me to put my complaint in writing.
>
> This most recent example relates to my contract at the Bunbury Port two weeks ago. On the first day damage to a gate on the Bunbury Port occurred. UHF radio discussion led to me making the comment -"I only know one person who hits weighbridges and gates" - I did not name that person. Mr Cox responded immediately telling me to "shut my mouth and go get fucked, you fat fuck and I will sort you out later". A day after this incident I heard Mr Cox speaking with Mr Murray Waite and referring to me as a "fat fuck". Mr Waite also approached me that evening to say that Mr Cox asked him to tell me that "if that fat fuck puts in a letter of complaint against him, he will sue me for slander.
>
> I have been verbally threatened by Mr Cox before even though it was about something I was not involved in at all. Another specific example relates to an incident approximately 12 months earlier when I was working at the Fremantle Port and when Mr David Goldie was present. This related to discussions about the legalities of road train routes and different views - Mr Cox became very agitated and again was verbally abusive and intimidating to me. He asked me to meet him after working hours to fight him at the North Mole which of course I did not do.
>
> The majority of contract drivers on the wharf have all experienced ongoing verbal abuse and intimidation by Mr Cox. For example, Mr Bill Ninnis has told me that Mr Cox has tailgated him and blocked lanes of traffic so he could not pass for no apparent reason - just to be difficult. Mr Brian Draper has told me that he was in the Bunbury Port and was threatened to be bashed if he didn't reveal the rates of pay that he was being paid by his primary contractor Mr Lindsay Della. Mr Cox I believe approached Mr Lindsay Della to find out what percentage he was taking. This resulted in Mr Cox and Mr Della having a fist fight at the North Mole.
>
> Most of the contractors get on very well in their work environment but we have all experienced Mr Cox's abusive and intimidating behaviour and have had enough. This recent incident in my view is the straw that broke the camel's back and I am no longer prepared to put up with his behaviour or bullying tactics.

27 Mr Goldie said that he did not recall who made the complaint. Mr Goldie did not know what the outcome of any investigation was because complaints get acted upon by senior management. Mr Cox continued to work for Sims until May 2014.

28 Mr Smith was another subcontractor Sims used for the scrap metal work, and the author of the above complaint of 30 May 2013. Mr Smith testified that he was abused, threatened and called names by Mr Cox, for example, Mr Cox said he wanted to "kick the shit out of him" and the like. Mr Smith said that he had raised his concerns previously, but nothing had been done about it. Mr Smith said he had enough and so decided to speak with Mr Goldie and Mr Matthers, the Operations Manager, and was told that if he wanted to take it any further, he could make a written complaint. According to Mr Smith, he was not sure how it all started.

29 According to Mr Cox, in about May 2013 Mr Cox was told by the Operations Manager that there had been a complaint by a driver. Mr Cox did not understand what the grievance was about, the issue was addressed by the union and Mr Cox was of the view that the issue had been resolved, and he carried on with work. Mr Cox said that there was confusion about who the complainant was as he thought it was someone named "Stan".

30 Mr Cox said that he only used the radio when he went to the yard for the purposes of getting instructions from the operators, the loader drivers or the yard foreman, as to which road he was to use or which machine to use. Mr Cox said the purpose of calling out on the radio is to avoid trucks coming in and going out at the same time. Mr Cox said that as soon as he gets on the road, he would turn off the radio to avoid general "chitchat". Mr Cox also denied that he challenged another driver to a fight.

31 Mr Cox said that in the past he had raised issues with Mr Goldie about the behaviours of some of the other drivers on the road, as he would always try to do the right thing but he never confronted those drivers personally because that is management's job, and not his job. If someone had done the wrong thing Mr Cox said he thought it appropriate to confront Mr Goldie about it as he is the person responsible for what happens on and off the wharf. According to Mr Goldie, as far as he could recall, there had been no complaints raised about owner-drivers not using designated routes for restricted access vehicles.

32 A further complaint was received in April 2014 from Mr Ninnis, which was tendered as exhibit R4, and which I set out below:

> **Re: Harassment Complaint Mr David Cox**
>
> I would like to bring to your attention a situation regarding harassment by another subcontractor Mr David Cox.
>
> Mr Cox will see me talking to other contractors, then ring them on their mobile phone and ask "why the fuck are you talking to him" – he is a back stabling (sic) asshole.... ". Over the past 6 months he has repeatedly done this and uses other filthy and derogatory remarks to them about me. I have tried to take the approach to ignore him but his onslaught never stops, so I feel a written complaint is the only way to have some action taken.
>
> If I am amongst a group of other contractors I always say hello to Mr Cox but always at best get a grunt in return. The last incident was on the ship Orient Singapore. While waiting to be loaded at the Spearwood yard, I was in line of about 6-7 trucks. Mr George Kelly was behind me and Mr Murray Waite in front. Mr Waite was inspecting tyres on his truck and walked back to my truck to say hello. Mr Cox could see us talking and I told Murray that his mobile phone would probably ring soon and it would be Mr Cox. Suddenly Murray's phone rang - it was Mr Cox and Murray said he was complaining about me. George Kelly came over to say hello and have a chat and I said that his phone would probably ring soon - it did, it was Mr Cox who again spoke badly about me.
>
> On this occasion Mr Cox rang both Mr Kelly and Mr Waite again and harassed them both about talking to me. I believe the discussion in both cases was Mr Cox using bad language and making derogatory remarks about me and questioning why they were talking to me. This all took place within 10 minutes.
>
> At an out of work BBQ I met Mr Lindsay Della. Without prompting Mr Della, another SIMS subcontractor, said that he had been told by Mr Remo Pasalli (another contractor) that Mr Cox was threatening to assault me in the future. On a previous bulk metal ship job, Mr Cox had personally threatened and physically pushed me at the wharf but I didn't retaliate.
>
> There are 18 different subcontractors working together and we are all different personalities but get on pretty well, and also work well together. Mr Cox is a bully and constantly causing trouble with his harassment and bullying tactics and many of us have had enough with his antics. I feel it is time that this matter is formally registered and action taken under your Bullying Policy.

33 Mr Goldie said that this complaint was raised with Sims' senior management and the decision was made to remove Mr Cox from the employable drivers' pool. Mr Goldie said that there had been complaints made, and from his point of view there was nothing that he could do apart from inform management and if the drivers wanted action to be taken, the complaints had to be made in writing. Mr Goldie said that he had never received any complaints from Sims' direct employees, anyone involved in loading the trucks in the yard or the stevedores.

34 The complainant, Mr Ninnis, also gave evidence in the proceedings. Mr Ninnis testified that he decided to complain in writing about Mr Cox's "continuous slander". Prior to making the written complaint, he had approach Sims about his concerns and was told to put it in writing if he wanted further action to be taken. The situation Mr Cox described was that he never had any complaints from any of the workers at Sims or people on the wharf in the thirteen and a half years he has worked there. Mr Cox got along with the other drivers, and had no problems with them. Mr Cox said that he, and everyone else was there to get on with the job and make a living.

35 In relation to the written complaint by Mr Ninnis of 26 April 2014, tendered as exhibit R4, Mr Cox refuted the allegations. Mr Cox said that he did not use his mobile telephone to talk to other drivers, as that was not allowed in the yard. Mr Cox said that he did not instruct people to talk to anyone. Mr Cox denied that he used filthy and derogatory remarks to other drivers, said that he greeted everyone in the morning and did not harass, threaten or assault anyone. He said that he had no problem working with Mr Ninnis.

36 On or about 20 May 2014 Mr Cox said that he learned that he was no longer doing work for Sims when he was not telephoned to do the scrap metal work in Bunbury. Mr Cox then telephoned Mr Goldie and he was told that Mr Goldie had been instructed not to use him on any more ships and to talk to the Operations Manager, Mr Matthers, to find out further details. Mr Cox said that that same day he spoke to Mr Matthers who said there had been an anonymous telephone complaint to the New York office that he had engaged in bullying behaviour, and so Mr Cox's services had to be "terminated". Mr Cox said that he did not have an opportunity to reply. Mr Cox described the situation as particularly bad because he planned his business model around a certain amount of income being derived from Sims and then it disappeared "without the common courtesy of a phone call or a discussion".

37 During the period from May to August 2014, Mr Cox said that he has not had any work for his truck, with the exception of two days. He also did a "wages job" in September and October 2014.

Nature of the contractual arrangement

38 I have carefully considered the oral and documentary evidence in this matter. The first question to determine is whether there was an ongoing contractual arrangement between Louisville Holdings and Sims, and what the effect was of the introduction of the sub-contract agreements in 2010.

39 Sims contends that the Tribunal does not have jurisdiction to deal with the claim because there was no owner-driver contract in existence when Sims decided not to offer Louisville Holdings any further work. Accordingly, Sims submits that it was not necessary to provide Louisville Holdings with notice of termination or provide notification that work would no longer be offered. Sims asserts that the contracts were on a ship by ship basis and when the contracts ended so did the obligation to provide notice of termination or offer further work. It says there was no guarantee of ongoing work.

40 Louisville Holdings submits that the fact that a contract was signed each time did not change the nature of the relationship, as they were merely a formality. It says the work was being performed on a regular, cyclical and ongoing basis since 2001, whereby Mr Cox expected that sometime during the relevant month he would receive a telephone call to do work for Sims. The only difference was that after 2010, a document was signed by Mr Cox each time a ship was loaded, and handed back to Sims. As against the long standing practice established on the evidence, the contract document should be given little weight by the Tribunal.

41 It is important to consider whether the conduct of the parties, objectively considered, shows an intention that the parties intended to be contractually bound: *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110. An agreement may be inferred from conduct, irrespective of whether an identifiable offer and acceptance may be present: *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523; *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32. The approach to determining the nature of the contractual relationship of the parties is to objectively assess, from all of the surrounding circumstances, what a reasonable person, in the position of the other, would believe, not what the parties themselves may have subjectively intended: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at 179.

42 It was common ground that the same procedure for the engagement of drivers, including Mr Cox, was adopted, prior to and after the written contracts were introduced. Sims would make contact with drivers, trying to give some notice, of the arrival of a ship. If drivers were available, they were given the work. The loading of a ship would take between five and ten days. A ship is required to be loaded, on average, each six to seven weeks. In between ships, drivers are able to perform whatever other work they were able to source. The process would then repeat itself for the next and successive ship arrivals. Mr Cox testified that except for the period in 2007 when he refurbished his truck, he was continuously available to and did work for Sims between 2001 and May 2014. The performance of the work was regular and systematic. It was not intermittent or sporadic.

43 To answer the question in this case, first requires consideration of the oral contractual arrangement prior to the introduction of the contract document in 2010. If the outcome of that inquiry is that the arrangement was in fact and law an ongoing one, then the next question to be answered is did Louisville Holdings' break from service in 2007, and the introduction in 2010 of the contract document, change the contractual position?

44 Turning to the first issue, there was evidence that could support the conclusion that each engagement constituted a separate contract. Each of the shipping jobs was a discrete task, and they had clearly defined periods. As and when required, Sims would make contact with the drivers and offer jobs to those who were available. There was a pool of up to 23 drivers on Mr Goldie's list and he would work through the list, to get the number of trucks he needed. If a driver was not available, he would go to the next one and so on. The evidence of both Mr Cox and Mr Goldie was that between ships coming into port, there was nothing stopping the drivers from doing other work. Mr Cox confirmed that he worked on other jobs. Thus, there was no expectation, or requirement by Sims, that Mr Cox would be available for each ship. Whilst Mr Cox said that he modelled his business around this type of work, this appeared to be his choice because he considered the job "semi-retirement".

45 Further, Mr Goldie's evidence that he gave drivers as much notice of a ship as possible, to enable them to plan around other work, is more consistent with each engagement being on a stand-alone basis. The length of each shipping job was also variable, depending on the tonnage of scrap to be transported and loaded. The drivers were paid, on a per tonne basis, on the completion of each ship. There was no suggestion on the evidence of any roster arrangement, whereby drivers were required to commit to be available in advance. I am not persuaded that Louisville Holdings remained in any contractual sense, on "standby" from ship to ship. As to the break in the performance of services, whilst there was some dispute on the evidence as to how long this was for, I am not persuaded that it is a factor of real significance either way.

46 Having regard to the above, there was no mutuality of obligation in existence, between Louisville Holdings and Sims, in relation to the performance of the work.

47 On the other hand, there are some factors indicating an ongoing arrangement.

48 The first and most significant was that Louisville Holdings performed services for Sims for more than thirteen years. The ships did arrive on a regular basis, around each six to seven weeks. Mr Cox also testified that it was rare to use a replacement driver, and he had to get permission from Sims to do this. Mr Cox characterised the relationship as Sims having the work and him providing the truck and trailers. Whilst Louisville Holdings said that specialised knowledge was required for the job, I am not convinced this is a strong factor supporting an ongoing arrangement. There was a pool of drivers who all knew the job. I regard this factor as relatively neutral.

49 Having regard to all of the evidence, it is not without some oscillation, that I have come to the conclusion that the arrangement between Louisville Holdings and Sims, up to 2010, was for the cartage of scrap metal on an as required basis. Each engagement stood alone, and a separate owner-driver contract came into existence on each engagement, on terms that the parties were accustomed to dealing with each other by.

50 The terms of the subcontract agreement, as exhibit R1, formalised in writing largely what had been occurring up to that time. This seemed to be common ground. The reason for Sims introducing it was not entirely clear on the evidence. The third page of the document refers to "Conditions of Contract" which set out some 21 points. Many of them appear to be instructions in relation to loading procedures, some concern safety procedures, and others deal with driver behaviour. In the absence of evidence on the point, it can only be speculation as to what extent these conditions confirmed then current unwritten practices and protocols.

Conclusion

51 Having concluded that the owner-driver contracts were stand-alone contracts, for each ship to be loaded, the final contract between Louisville Holdings and Sims, for the "M.V. Nord Copenhagen", from 19 to 23 March 2014, came to an end by effluxion of time, on completion of the ship on the appointed date. There was in my opinion, no contractual requirement for Sims to give notice of termination of the contract, by reasonable notice or otherwise. Having said that however, given that the parties had dealt with each other over a number of years, I consider that Sims should have, as a courtesy, made contact with Mr Cox, to explain its decision to no longer offer any further contracts for ship loading. To that extent, Sims did not handle the matter particularly well. Furthermore, given that there were complaints made about Mr Cox, he should have at least been made aware of them and given the opportunity to respond.

52 For the foregoing reasons, it is unnecessary for me to deal with the remaining issues of reasonable notice and breach of contract alleged by Sims. I must say however, the evidence led by Sims in relation to the allegations against Mr Cox, involved considerable hearsay evidence of doubtful probative value, should the Tribunal have been required to determine that issue.

53 The application is dismissed.

2015 WAIRC 00176

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	LOUISVILLE HOLDINGS PTY LTD
	APPLICANT
	-v-
	SIMS GROUP AUSTRALIA HOLDINGS LTD T/AS SIMS METAL MANAGEMENT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 17 FEBRUARY 2015
FILE NO/S	RFT 15 OF 2014
CITATION NO.	2015 WAIRC 00176

Result	Application dismissed
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr N Mony De Kerloy of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr N Mony De Kerloy of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00522

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	NINO MERENDA TRADING AS THUNDER
	APPLICANT
	-v-
	CONSOLIDATED SITE SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 20 JUNE 2014
FILE NO/S	RFT 12 OF 2014
CITATION NO.	2014 WAIRC 00522

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr R Foley

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr R Foley on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the name of the applicant on the notice of referral be amended by deleting the name "Nino Merenda trading as Thunder" and inserting in lieu thereof the name "Thunder Contracting Pty Ltd."

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

2014 WAIRC 00523

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	THUNDER CONTRACTING PTY LTD
	APPLICANT
	-v-
	CONSOLIDATED SITE SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 20 JUNE 2014
FILE NO/S	RFT 12 OF 2014
CITATION NO.	2014 WAIRC 00523

Result	Consent order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr R Foley

Consent Order

WHEREAS this matter has been referred to the Tribunal alleging that the respondent, Consolidated Site Services Pty Ltd, has failed to pay Thunder Contracting Pty Ltd amounts due and owing under an owner-driver contract made under the Owner-Drivers (Contracts and Disputes) Act 2007;

AND WHEREAS a conference before the Tribunal under s 44 of the OD Act was held on 20 June 2014. At the conference Consolidated did not dispute that it was indebted to Thunder Contracting and agreed to paying the applicant the total sum of $21,534 in relation to work performed by the applicant as an owner-driver. Due to the financial circumstances of Consolidated, it has agreed to pay Thunder Contracting by instalments, in the sum of $5000 paid today, Friday 20 June 2014, and then the sum of $5,511.33 thereafter every three weeks over 3 payments;

AND WHEREAS as a result of discussions at the conciliation conference, it was agreed by the parties that the Tribunal would issue consent orders recording the parties' agreed payment plan and that this application will remain on foot until the monies outstanding have been repaid. Both parties have liberty to apply to relist the application on short notice.

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, and hereby orders by consent –

(1) THAT the respondent pay to the applicant the sum of $5000 today, Friday 20 June 2014, and thereafter three further payments in the sum of $5,511.33 every three weeks, they being on 4 July, 25 July and 15 August 2014.

(2) THAT if the respondent fails to make a payment as and when it falls due under par 1 of this order, then the whole amount then due and owing to the applicant will be payable forthwith.

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

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

2014 WAIRC 01003

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	THUNDER CONTRACTING PTY LTD
	APPLICANT
	-v-
	CONSOLIDATED SITE SERVICES (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 16 SEPTEMBER 2014
FILE NO/S	RFT 12 OF 2014
CITATION NO.	2014 WAIRC 01003

Result	Correcting order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	No appearance required

Correcting Order

WHEREAS on 6 June 2014 the applicant filed a notice of referral to the Tribunal and stated that the name of the respondent was "Consolidated Site Services Pty Ltd";

AND WHEREAS on 6 June 2014 the Commission made a direction that the time for the respondent to file an answering statement be abridged;

AND WHEREAS on 20 June 2014 a conciliation conference was convened by the Tribunal and orders were made by consent that same day regarding the payment by the respondent to the applicant monies owed in instalments, and that the parties have liberty to apply on short notice;

AND WHEREAS on 20 June 2014 the Tribunal made an order changing the name of the applicant on the notice of referral;

AND WHEREAS by letter dated 9 September 2014 the applicant informed the Tribunal that there was a typographical error in the notice of referral and the correct name of the respondent is "Consolidated Site Services (WA) Pty Ltd" and not "Consolidated Site Services Pty Ltd";

AND WHEREAS the applicant in its letter made an application to the Tribunal to make a correcting order to correct name of the respondent;

NOW THEREFORE having heard Mr A Dzieciol of counsel on behalf of the applicant, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders –

(1) THAT the name of the respondent on the notice of referral be amended by deleting the name "Consolidated Site Services Pty Ltd" and inserting in lieu thereof the name "Consolidated Site Services (WA) Pty Ltd".

(2) THAT the consent order and the order made by the Tribunal on 20 June 2014 and the direction made by the Commission on 6 June 2014 be and are hereby amended by deleting the name of the respondent as "Consolidated Site Services Pty Ltd" and inserting in lieu thereof the name "Consolidated Site Services (WA) Pty Ltd".

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

2014 WAIRC 00820

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2014 WAIRC 00820
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 29 JULY 2014
DELIVERED	**:**	TUESDAY, 29 JULY 2014
FILE NO.	**:**	RFT 10 OF 2014
BETWEEN	**:**	TROY ROGERS / TROJEN TRANSPORT PTY LTD
		Applicant
		AND
		SEA TO SUMMIT TRANSPORT
		Respondent

Catchwords	**:**	Owner-driver contract – Failure to comply with summons to attend compulsory conference – Respondent duly notified – Enforcement proceedings – Respondent could demonstrate good cause for failure to appear – Proceedings to enforce the summons dismissed
Legislation**:**		*Owner-Drivers (Contracts and Disputes) Act 2007* (WA)
Result	**:**	Enforcement proceedings dismissed
Representation:		
Applicant	**:**	No appearance required
Respondent	**:**	Mr S Melia

Reasons for Decision

Ex Tempore

1 The Tribunal has before it in application RFT 10 of 2014, the affidavit of Lauren Blanche Hillbrick sworn 25 July 2014, in connection with the enforcement of a summons by the Tribunal arising from proceedings held before it on 11 July 2014.

2 The enforcement that the summons is directed to is the respondent in the substantive claim, Sea to Summit Transport, in particular Mr Melia, who is a director of that company. The Tribunal has listed the application for enforcement this afternoon in accordance with the terms of the legislation.

3 The Tribunal has heard from Mr Melia this afternoon to the effect that due to circumstances of a family and personal nature, he was required to assist his wife to attend medical attention urgently on the morning of 11 July 2014. Mr Melia attempted to communicate, and directed an employee to communicate his inability to appear before the Tribunal in accordance with the summons. However, the employee concerned failed to act in accordance with her instructions.

4 Furthermore, the Tribunal notes that by email received at 10.11am on 11 July 2014 from Mr Melia of the respondent, the nature of the respondent's predicament was set out. It is regrettable that later in the morning of 11 July 2014, my Associate

was not informed directly by Mr Melia or any other person acting on his behalf, of the specific circumstances of the failure to appear.

5 Nonetheless on the basis of the submissions of Mr Melia this afternoon, the Tribunal is satisfied that there is good reason why the respondent failed to appear in accordance with the summons on 11 July 2014. Therefore the Tribunal will take no further steps in relation to the enforcement action, and the enforcement proceedings will be dismissed.

2014 WAIRC 00821

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TROY ROGERS / TROJEN TRANSPORT PTY LTD
	APPLICANT
	-v-
	SEA TO SUMMIT TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 31 JULY 2014
FILE NO/S	RFT 10 OF 2014
CITATION NO.	2014 WAIRC 00821

Result	Enforcement proceedings dismissed
Representation	
Applicant	No appearance required
Respondent	Mr S Melia

Order

HAVING HEARD Mr S Melia on behalf of the respondent and there being no appearance required by the applicant, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the application to enforce the summons issued to the respondent under s 45 of the Owner-Drivers (Contracts and Disputes) Act 2007 be and is hereby dismissed.

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

2014 WAIRC 01109

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TROY ROGERS / TROJEN TRANSPORT PTY LTD
	APPLICANT
	-v-
	SEA TO SUMMIT TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 7 OCTOBER 2014
FILE NO/S	RFT 10 OF 2014
CITATION NO.	2014 WAIRC 01109

Result	Consent order issued
Representation	
Applicant	Mr T Rogers
Respondent	Mr S Melia and with him Ms T Melia

Consent Order

WHEREAS on 22 May 2014 this matter was referred to the Tribunal alleging that the respondent, Sea to Summit Transport, failed to pay Mr Rogers of Trojen Transport Pty Ltd amounts due and owing for work completed and failed to pass on a portion of a fuel levy;

AND WHEREAS the notice of referral noted that the failure to pay Mr Rogers of Trojen Transport Pty Ltd the amount allegedly owed by Sea to Summit Transport was not in dispute;

AND WHEREAS a conference before the Tribunal under s 44 of the Owner-Drivers (Contracts and Disputes) Act 2007 was listed on 11 July 2014 and the respondent failed to appear;

AND WHEREAS the enforcement of the summons was listed on 29 July 2014 and the enforcement proceedings were dismissed on the basis that the Tribunal was satisfied that there was good reason why Sea to Summit Transport failed to appear at the conference on 11 July 2014;

AND WHEREAS the hearing of the substantive matter was listed, and proceeded on 26 September 2014;

AND WHEREAS during the course of the proceedings it became apparent that the parties could reach an agreement, and it was agreed by the parties that Sea to Summit Transport would pay to Mr Rogers of Trojen Transport Pty Ltd the sum of $5,000 in full and final settlement of any and all matters relating and arising from the contractual relationship between the parties;

AND WHEREAS it was agreed by the parties that the Tribunal would issue consent orders recording the parties' agreement as described in the paragraph above;

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, and hereby orders by consent –

(1) THAT the respondent pay to the applicant the sum of $5,000 by 31 October 2014.

(2) THAT on receipt by the applicant of the sum in order (1) above this application be and is hereby dismissed.

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

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

2014 WAIRC 01353

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TROY ROGERS / TROJEN TRANSPORT PTY LTD
	APPLICANT
	-v-
	SEA TO SUMMIT TRANSPORT
	RESPONDENT
CORAM	
DATE	FRIDAY, 12 DECEMBER 2014
FILE NO/S	
CITATION NO.	2014 WAIRC 01353

Result	Application discontinued by leave
Representation	
Applicant	Mr T Rogers
Respondent	Mr S Melia

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

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

Parties		Commissioner	Application Number	Dates	Matter	Result
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Toll Transport Pty Ltd	Kenner C	RFT 18/2014	N/A	Referral of dispute	Discontinued