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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2015] WASCA 66

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	BRETT -v- SHARYN O'NEILL, DIRECTOR GENERAL, DEPARTMENT OF EDUCATION [2015] WASCA 66
CORAM	:	BUSS J LE MIERE J MURPHY J
HEARD	:	1 DECEMBER 2014
DELIVERED	:	7 APRIL 2015
FILE NO/S	:	IAC 3 of 2014
BETWEEN	:	CHARLES BRETT Appellant AND SHARYN O'NEILL, DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	J H SMITH (ACTING PRESIDENT) A R BEECH (CHIEF COMMISSIONER) J L HARRISON (COMMISSIONER)
Citation	:	[2014] WAIRC 352
File No	:	FBA 19 of 2013

Catchwords:

Industrial relations - *Working with Children (Criminal Record Checking) Act 2004* (WA) - Principle of legality - Statutory construction - Restricting rights under the *Industrial Relations Act 1979* (WA) - Defining 'reason'

Legislation:

Education Act 1928 (WA)

Fair Work Act 2009 (Cth)

Industrial Relations Act 1979 (WA)

Public Sector Management Act 1994 (WA)

Safety, Rehabilitation and Compensation Act 1988 (Cth)

School Education Act 1999 (WA)

Working with Children (Criminal Record Checking) Act 2004 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr J R Birman
Respondent : Mr G T W Tannin SC & Ms R Young

Solicitors:

Appellant : Birman & Ride
Respondent : State Solicitor for Western Australia

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

Al-Ketab v Godwin (2004) 219 CLR 562

Australian Postal Corporation v Sinnaiah (2013) 213 FCR 449

Barclay v The Board of Bendigo Regional Institute of Technical and Further Education (2011) 191 FCR 212

Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500

Buck v Comcare (1966) 66 FCR 359

Coco v The Queen (1994) 179 CLR 427

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2014] HCA 41; (2014) 88 ALJR 980

Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd (1993) 46 FCR 301

Lacey v Attorney General for Queensland (2011) 242 CLR 573

Lee v New South Wales Crime Commission (2013) 251 CLR 196

Macabenta v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 202

March v M H Stramare Pty Ltd (1991) 171 CLR 506

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Raymond v Honey [1983] 1 AC 1

1 **JUDGMENT OF THE COURT:** The appellant, Mr Brett, was employed by the respondent, the Director General of the Department of Education, as a teacher in child-related employment as that phrase is defined in the *Working With Children (Criminal Record Checking) Act 2004 (WA)* (WWC Act). In May 2012 Mr Brett was charged with two offences under the *Criminal Code (WA)*. The charges related to Mr Brett's former de facto partner. On 16 May, as a result of the charges being made, the chief executive officer of the Department for Child Protection (CEO) issued an interim negative notice to Mr Brett pursuant to the WWC Act. Section 22(3) of the WWC Act provides that an employer must not employ a person in child-related employment if the employer is aware that an interim negative notice has been issued to the person. The respondent terminated Mr Brett's employment by a letter dated 22 May 2012 in which the respondent stated that Mr Brett's employment was at an end as he had repudiated his contract by reason of the interim negative notice and his inability to fulfil his duties as a teacher.

2 On 24 January 2013 Mr Brett was acquitted of the charges by the District Court of Western Australia. On 3 April 2013 the CEO cancelled the interim negative notice and reissued Mr Brett with an assessment notice. Mr Brett notified the respondent that the interim negative notice had been cancelled and that his assessment notice had been reissued. The appellant subsequently applied for employment and was re-employed by the respondent.

Application to Commission

3 On 20 June 2012, that is prior to being acquitted of the charges, Mr Brett applied to the West Australian Industrial Relations Commission for an order for reinstatement or compensation in respect of a harsh, oppressive or unfair dismissal. The grounds of his application were that the decision by the respondent to terminate his employment in reliance on the interim negative notice was premature, that the respondent had abdicated her responsibility and that the decision to terminate his employment was harsh, unjust and unreasonable in all the circumstances. In her notice of answer and counterproposal the respondent relied on s 41(2) and (3) of the WWC Act. Section 41(1) provides that if it would be a contravention of a provision of the Act for an employer to employ another person in child related employment, the employer must comply with the provision despite another Act or law or any industrial award, order or agreement. Section 41(2) provides protection from liability for employers by providing that the employer does not incur any liability because, in complying with the provision, the employer does not continue to employ the person in child related employment. Section 41(3) is a saving provision; it provides that nothing in s 41 operates to affect a person's right

to seek or obtain a remedy under the *Industrial Relations Act 1979* (WA) unless the remedy is for the dismissal of the person by the employer, the reason the employer dismissed the person was to comply with the Act, and the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason.

- 4 Mr Brett's application was heard by the acting Senior Commissioner in August 2013. By that time Mr Brett had been acquitted of the charges, the CEO had cancelled the interim negative notice and Mr Brett had been re-employed by the respondent. Mr Brett's application continued as an application for compensation for wages and benefits lost during the period he had been unemployed. The acting Senior Commissioner found that the provisions of WWC s 41(3) had been met and therefore Mr Brett's application must be dismissed.

Appeal to Full Bench

- 5 Mr Brett appealed to the Full Bench of the Western Australian Industrial Relations Commission. The Full Bench dismissed the appeal by majority. The majority, consisting of the acting President and Commissioner Harrison, found that WWC Act s 41(3) operated to preclude Mr Brett seeking a remedy for unfair dismissal under the *Industrial Relations Act 1979* (WA). The Chief Commissioner, in dissent, found that the respondent did not dismiss Mr Brett in order to comply with the WWC Act and hence he was not precluded by WWC Act s 41(3) from seeking relief.

This appeal

- 6 Mr Brett now appeals to this court. There were initially three grounds of appeal but Mr Brett abandoned grounds 2 and 3. The remaining sole ground of appeal is:

1. The majority of the Full Bench ... erred in its interpretation of s 41(3) of the [WWC Act]. Specifically, the Full Bench held:
 - 1.1 *'to determine the reason of a dismissal referred to in s 41(3) of the WWC Act requires an assessment of the acts and the state of mind of the employer'* [52];
 - 1.2 *'in an assessment of the real purpose of the dismissal what was in truth in the mind of the employer must be ascertained'* [59];
 - 1.3 *'the objective approach to the construction of s 41(3)(b) of the WWC Act ... must be rejected ...'* [55];
 - 1.4 if the employer was genuinely of the view that Mr Brett's dismissal was necessary so as to comply with the WWC Act then *'whether Mr Brett should have been offered alternatives to dismissal to remove him from child-related work is not a matter that can operate to characterise the reason for the dismissal as a reason of a different character'* [63]; and
 - 1.5 whether a dismissal was reasonable or *'the only course of action open [by which the employer could comply with the WWC Act] ... is immaterial'* [66].
2. On a correct interpretation of s 41(3), the word 'reason' in s 41(3)(b) is not concerned solely with the subjective state of mind of the employer. Rather; it also requires an objective consideration of whether the Respondent could practicably have complied with the WWC Act by means other than the dismissal of the Appellant. If the Respondent could practicably have complied with the WWC Act by means other than dismissal then compliance with the WWC Act cannot be the 'reason' for dismissal for the purpose of s 41(3).

- 7 There are two aspects to this ground of appeal. The first aspect concerns the interpretation of the phrase 'the reason ... was to comply with this Act' in s 41(3)(b). The appellant says that an employer only dismisses a person to comply with the Act if the employer was required to dismiss the person to ensure compliance with the Act. The appellant further says that the WWC Act did not require the respondent to dismiss Mr Brett when he was issued with the interim negative notice and hence the reason the respondent dismissed Mr Brett was not to comply with the Act. The second aspect of the appeal concerns the proper interpretation of the word 'reason' in WWC Act s 41(3)(b). The appellant says that the Full Bench wrongly interpreted 'reason' to refer to the subjective reason the employer dismissed the person whereas it should have considered the objective reason for the dismissal as well. Before considering those matters it is convenient to outline some relevant provisions of the WWC Act.

Working With Children Act

- 8 The long title of the Act is that it is an Act, amongst other things, to prohibit people who have been charged with or convicted of certain offences from carrying out child-related work. Section 3 provides that in performing a function under the Act, the CEO or the State Administrative Tribunal is to regard the best interests of children as the paramount consideration. Part 2 of the Act provides for assessment notices and negative notices. The CEO may issue an assessment notice to a person which allows the person to engage in child-related work. A negative notice or interim negative notice prohibits a person from engaging in child-related work. Section 22 prohibits employers employing certain people in child-related employment. In particular, s 22(3) provides that an employer must not employ a person in child-related employment if the employer is aware that a negative notice or an interim negative notice has been issued to the person and is current.

- 9 Section 41(1) provides that an employer must comply with a provision of the Act prohibiting the employer from employing another person in child-related employment despite another Act or law, industrial award, order or agreement. Section 41(2) provides that the employer does not incur any liability because in complying with the provision the employer does not continue to employ the person in child-related employment. Section 41(3), as we have said, is a saving provision. It narrows the effect of s 41(2) so as to preserve a person's right to seek or obtain a remedy under the

Industrial Relations Act 1979 (WA) from the operation of s 41(2). However, s 41(3) contains an exception. The saving provision does not apply if the elements of pars (a), (b) and (c) of s 41(3) are met. Those elements are:

- (a) the remedy is for the dismissal of the person by the employer; and
- (b) the reason the employer dismissed the person was to comply with the Act; and
- (c) the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason.

If those elements are met then the employer does not incur any liability because in complying with the relevant provision of the Act the employer does not continue to employ the person in child-related employment.

- 10 In this case it was common ground before the Full Bench that s 41(3)(a) and (c) were met. The issue before the Full Bench was whether s 41(3)(b) was met. The respondent asserted, and the appellant denied, that the reason the respondent dismissed the appellant was to comply with the WWC Act.

Reason was to comply with the Act

- 11 The first step of the appellant's argument on appeal is the contention that s 41(3)(b) can only be satisfied if a provision of the Act required the employer to dismiss the person. Mr Brett argues that the respondent could practicably have complied with the WWC Act by means other than dismissing him. Mr Brett argues that if the respondent could practicably have complied with the WWC Act by means other than dismissing him then compliance with the WWC Act cannot be the reason for dismissal. In framing his ground of appeal in that way the appellant states the result of the construction for which he contends, rather than what he says is the proper interpretation of s 41(3). In effect, the meaning of s 41(3)(b) advanced by the appellant is: 'the reason the employer dismissed the person was to comply with a requirement of the Act that the employer dismiss the person' or 'the employer was required to dismiss the person to ensure compliance with the Act' or words to that effect.

- 12 The appellant's argument misconstrues WWC Act s 41(3). The test whether the reason the employer dismissed the person was to comply with the Act is not whether the employer was required to dismiss the person to ensure compliance with the Act. The test is whether, as a matter of fact, the reason the employer dismissed the person was to comply with the Act. That is so for the following reasons.

The proper test

- 13 The objective of statutory construction is to give to the words of a statutory provision the meaning which the legislature is taken to have intended them to have: *Lacey v Attorney General for Queensland* (2011) 242 CLR 573 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ). Ordinarily the meaning which the legislature is taken to have intended the language of legislation to have will correspond with the grammatical meaning, but that is not always the case. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [78].

- 14 The ordinary grammatical meaning of 'to comply' with a statutory provision is to act in accordance with the provision. What a person must do, or refrain from doing, to comply with a statutory provision depends upon the nature and content of the provision. The respondent's case is that she dismissed Mr Brett to comply with WWC Act s 22(3), which provides that an employer must not employ a person in child-related employment if the employer is aware that a negative notice or an interim negative notice has been issued to the person and is current. Where an employer is aware that an interim negative notice has been issued to an employee employed to carry out child-related work, there may be more than one way the employer may comply with the statutory provision. The employer may dismiss the employee or the employer may continue to employ the person to carry out duties that do not involve child-related work. There may be other ways in which the employer may comply with the statutory provision.

- 15 The ordinary grammatical meaning of 'the reason the employer dismissed the person' is the cause, ground or motive for the employer dismissing the person. It has a similar meaning to 'by reason of', 'because of' and similar phrases. To determine whether the reason an employer dismissed a person was to comply with the Act requires a practical application of ordinary causation principles. In *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202, 213 the Full Federal Court held that the words 'by reason of' require the practical application of the causation principles explained in *March v M H Stramare Pty Ltd* (1991) 171 CLR 506. In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 Lockhart J at 321, in discussing the meaning of the words 'by reason of' in the definition of discrimination in the *Sex Discrimination Act 1984* (Cth), said the phrase implies a relationship of cause and effect.

- 16 There is nothing in the context of s 41 that requires s 41(3)(b) be given a meaning other than its ordinary grammatical meaning. The relevant purposes of the WWC Act appear from its long title and from s 3 of the Act, to which we have already referred. Those purposes are not such that the construction of s 41(3)(b) advanced by the appellant would promote a purpose or object underlying the WWC Act in preference to the ordinary grammatical meaning of that provision.

- 17 Mr Brett submitted that access to the Commission is a fundamental right that should only be denied to Mr Brett if that abrogation is justified by irresistibly clear language. Mr Brett relied upon the statement of Lord Bridge in *Raymond v Honey* [1983] 1 AC 1 at 14 where his Lordship said that in considering whether any contempt had been committed by the appellant in that case one of the basic principles from which to start is that a citizen's right to unimpeded access to the courts can only be taken away by express enactment. Mr Brett relied upon the approval of that statement by Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen* (1994) 179 CLR 427 at 436. In *Coco v The Queen* the right in question was the right of a person in possession of property to exclude others from those premises which the court

described as a fundamental common law right. The approach of the courts to the interpretation of statutes which abrogate or curtail fundamental rights has been referred to as the principle of legality: see *Al-Ketab v Godwin* (2004) 219 CLR 562 at [19] (Gleeson CJ). The principle of legality applied to the construction of statutes is that the courts will not, in the absence of clear statutory words, impute to the legislature an intention to abrogate fundamental common law rights.

- 18 The right to bring a claim for unfair dismissal in the Industrial Relations Commission is a statutory right not a common law right. It is not clear that the court should apply the same approach to limitations on statutory rights as to limitations on common law rights. In *Buck v Comcare* (1966) 66 FCR 359, Finn J dealt with the interpretation of s 57(2) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) under which an employee's rights to compensation and to institute or continue proceedings are suspended if he or she refuses or fails, without reasonable excuse, to undergo a medical examination by a legally qualified medical practitioner nominated by the relevant authority. Finn J said:

... [Section] 57(2) operates on a significant, albeit statutory, right of an employee in Mrs Buck's position. That right does not fall into the category of 'common law' rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous statutory language: cf JJ Doyle QC, 'Common Law Rights and Democratic Rights', P D Finn (ed), *Essays on Law and Government*, vol 1, pp 158ff. Yet it is a right of sufficient significance to the individual in my view, that, where there may be doubt as to parliament's intention, the courts should favour an interpretation which safeguards the individual. To confine our interpretative safeguards to the protection of 'fundamental common law rights' is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society (364 - 365).

The approach of Finn J was approved by the Full Federal Court in *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449 at [34].

- 19 The assumptions underlying the principle of legality are subject to the basic rule that parliament may override them. However, it must be apparent that the legislature has directed its attention to the question of the abrogation or curtailment of such rights and has determined upon abrogation or curtailment of them: *Coco v The Queen* [418] - [419]. In *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 Gageler and Keane JJ said:

The principle [of legality] ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration of rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.

The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'.

...

The interpretive strictures of the legality principle should not be applied so rigidly as to have a sclerotic effect on legitimate innovation by the legislature to meet new challenges to the integrity of the justice system [313] - [317].

- 20 The principle of legality does not lead to a construction of WWC Act s 41 different from that which we have set out above. This case is not concerned with whether general words are sufficient to abrogate the right of access to the Industrial Relations Commission for an unfair dismissal claim. The legislature has directly addressed the issue. WWC Act s 41(2) clearly abrogates any rights which an employee may otherwise have where the employer dismisses the employee in complying with a provision of the Act which prohibits the employer from employing the employee in child-related employment. Section 41(3) is a saving provision and the excluded remedy is an exception to the saving provision and hence falls within the remedies which are excluded by s 41(2). The principle of legality does not assist in the interpretation of those provisions even if access to the Industrial Relations Commission to claim a remedy for unfair dismissal is a right which attracts the legality principle.

- 21 Mr Brett submitted that in circumstances where the WWC Act did not require his dismissal, it cannot be said that the reason for the dismissal was compliance with the WWC Act. We do not agree. An employer may be found to have dismissed a person to comply with the WWC Act notwithstanding that the employer could have complied with the WWC Act by taking some other course of action. The enquiry is whether the reason the respondent dismissed Mr Brett was to comply with the Act, not whether the respondent could have complied with the Act by taking some other course of action.

Subjective and objective reasons

- 22 The second aspect of the appellant's argument on appeal concerns subjective and objective reasons. Mr Brett says that the word 'reason' in s 41(3)(b) is not concerned solely with the subjective state of mind of the employer; it also requires an objective consideration of the respondent's reason or reasons for dismissing the employee. The appellant says that the Full Bench erred by failing to give an objective consideration to the reason the respondent dismissed Mr Brett.

23 The supposed distinction between objective and subjective reasons has been recently addressed by the High Court in relation to *Fair Work Act 2009 (Cth) s 346* which prohibits the taking of adverse action by an employer against an employee for a proscribed reason. In *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 the majority of the Full Court of the Federal Court found that *Fair Work Act s 346* required an objective assessment of the intention of the alleged wrongdoer to establish the real reasons. The court found that the motive or what the person genuinely believes (subjective intention), while relevant to determine the question of whether an adverse action was taken because of a proscribed reason, was not determinative: Gray and Bromberg JJ at [28]. The decision was appealed to the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500. The High Court held that the test to establish the real reasons for the employer's decision was not an objective test but a test of what motivated the decision-maker at the time of making the decision: French CJ and Crennan J [44] - [45], Gummow and Hayne JJ [119], [127]; Heydon J [146] - [149]. Gummow and Hayne JJ said at [120] that questions of subjectivity as opposed to objectivity serve only to misdirect the correct interpretation of s 346. Their Honours explained:

... to engage upon an inquiry contrasting 'objective' and 'subjective' reasons is to adopt an illusory frame of reference. Such an inquiry into the 'objective' reasons risks the substitution by the court of its view of the matter for the finding it must make upon an issue of fact ... [121].

24 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* was applied by the High Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; (2014) 88 ALJR 980. French CJ and Kiefel J said at [7] that the focus of the inquiry as to whether *Fair Work Act s 346(b)* has been contravened is upon the reasons for the decision-maker taking the adverse action; the inquiry involves a search for the reasoning actually employed by the decision-maker. Their Honours stated that the determination to be made by the court is one of fact, taking account of all the facts and circumstances of the case and available inferences. Gageler J said at [85] that the word 'because' in *Fair Work Act s 346* connotes the existence of a particular reason as an operative and immediate reason for taking adverse action and the existence or non-existence of a particular reason as an operative and immediate reason for taking that adverse action turns on an inquiry into the mental processes of that individual. His Honour explained that in a case where the totality of the operative and immediate reasons for one person having taken adverse action against another person are proved, the question presented by *Fair Work Act s 346(b)* is whether any one or more of those reasons answers the description of the other person having engaged in any one or more of the industrial activities listed in s 347(a) or (b). His Honour observed at [93] that an employer could not escape the proscription in s 346(b) merely by proving that the employer applied its own characterisation to an act or omission having the character of a protected industrial activity.

25 The word 'reason' in *WWC Act s 41(3)(b)* should be interpreted in a similar way. The reason is the operative and immediate reason for the employer dismissing the person. The focus of the inquiry as to the employer's reason is upon the reasons for the decision-maker dismissing the person. The inquiry involves a search for the reasoning actually employed by the decision-maker. Direct evidence of the reason why the decision-maker dismissed the person may be accepted by the court or may be found to be unreliable because other objective facts are proven which contradict the decision-maker's evidence. The determination is one of fact, taking account of all the facts and circumstances of the case and available inferences.

26 This conclusion is consistent with the reference in s 41(3)(c) to 'the fact' that the person was dismissed for 'that reason'.

Full Bench made no error

27 In construing or interpreting s 41(3)(b) the acting President, with whom Commissioner Harrison agreed, made no error in her Honour's approach to determining the reason the respondent dismissed Mr Brett. In her reasons for decision the acting President stated at [47] that the expression 'the reason' in *WWC Act s 41(3)(b)* should be interpreted as the factual cause of the dismissal. At [52] the acting President said that to determine the reason of a dismissal referred to in *WWC Act s 41(3)(b)* requires an assessment of the acts and the state of mind of the employer. The acting President was directing attention to the fact that the decision-maker was the Director General herself and that the focus of the inquiry should be the reasoning actually employed by the decision-maker. At [55] the acting President said that the objective approach to the construction of *WWC Act s 41(3)(b)* must be rejected. Her Honour was right to say that the 'reason' in s 41(3)(b) is not to be determined objectively; it is to be determined taking account of all the facts and circumstances of the case and available inferences and in particular the reasoning actually employed by the decision-maker. At [59] the acting President said that the question for determination was a determination of the actual reason for the dismissal of Mr Brett and in an assessment of the real purpose of the dismissal what was in truth in the mind of the employer must be ascertained. Again, her Honour was correct in saying that the Commission must ascertain the reasons for the decision-maker dismissing Mr Brett and that inquiry involves a search for the reasoning actually employed by the decision-maker.

Practical alternatives

28 The appeal must be dismissed because the appellant's construction of *WWC Act s 41(3)* is wrong. It is therefore unnecessary to consider whether there were practical alternatives for the respondent to comply with the Act other than dismissing Mr Brett. Nevertheless, as the matter was argued we will briefly set out our findings on that issue.

29 It is an agreed fact that Mr Brett was a science teacher at North Lake Senior Campus and he was employed in child-related employment as defined in the *WWC Act*. The respondent would have contravened *WWC Act s 22(3)* if she had continued Mr Brett's employment after he was issued with the interim negative notice. That is because he was employed as a teacher in child-related employment. However, Mr Brett says that the respondent could have complied with *WWC Act s 22(3)* without dismissing him by transferring him to a position not involving contact with children or by

ordering him to leave the school premises and remain away or by suspending him. We will consider each of those propositions, starting with the assertion that the respondent could have transferred Mr Brett to a position not involving contact with children.

Transfer

30 It is an agreed fact that Mr Brett was appointed as a teacher under the *Education Act 1928* (WA) and after that Act was replaced with the *School Education Act 1999* (WA) his appointment continued under the *School Education Act 1999* (WA). Mr Brett's employment was subject to the provisions of *School Education Act* s 235 - s 238 and s 240. Section 235(1) provides that persons are to be employed in the Education Department in one of the following categories:

- (a) as public service officers appointed or made available under pt 3 of the *Public Sector Management Act 1994* (WA) (PSMA); or
- (b) as members of the teaching staff; or
- (c) as other officers; or
- (d) as wages staff.

Section 238(1) provides that the chief executive officer, the respondent, may, if she considers that it is in the interests of the department to do so, determine that a person who is a member of the teaching staff is to become an officer of the class mentioned in s 235(1)(a) or (c).

31 Therefore, the respondent had the power to transfer Mr Brett to become a public service officer if she considered that it was in the interests of the department to do so. It was submitted on behalf of Mr Brett that the respondent could have transferred him to the position of public service officer at head office. The respondent gave evidence that there was no opportunity to redeploy or transfer Mr Brett to a regional office or head office. The respondent further said that there was no capacity to find other work for Mr Brett and she did not need other work to be undertaken. That evidence was accepted by the acting Senior Commissioner who found that the respondent did not place Mr Brett in another role because there was no other work which was required to be performed. The Full Bench did not interfere with those findings on appeal. Under *School Education Act* s 238 the respondent could only transfer Mr Brett if she considered that it was in the interests of the Department to do so. Although the acting Senior Commissioner made no express finding that the respondent did not consider that it was in the interests of the Department to transfer Mr Brett, that is an inevitable consequence of the respondent's evidence and the acting Senior Commissioner's findings. It follows that transferring Mr Brett to another category of employee was not a practicable alternative.

Order to remain away from school premises

32 Secondly, Mr Brett says that the respondent could have ordered him to leave the school premises and remain away pursuant to *School Education Act* s 240. *School Education Act* s 240 empowers the respondent to order an employee to leave school premises and remain away if the chief executive officer suspects that the teacher may have committed a breach of discipline as referred to in PSMA s 80 and that the continued presence of the teacher on the school premises constitutes a risk to the safety or welfare of students on the premises. PSMA s 80 provides that an employee who does any of the things set out in s 80(a) to (e) commits a breach of discipline. The parties did not make any submissions whether the respondent had grounds for suspecting that Mr Brett had done any of the things set out in s 80(a) to (e). However, on 10 May 2012 the respondent ordered Mr Brett to remain away from the school premises. It may be inferred that the respondent suspected that Mr Brett may have committed a breach of discipline as referred to in PSMA s 80 and hence had the power to order Mr Brett to remain away from the school premises.

33 *School Education Act* s 240 provides that in the circumstances specified the chief executive officer may require a teacher to leave the school premises and remain away until the suspected breach of discipline has been dealt with under pt 5 of the PSMA or until the order is sooner revoked. The respondent did not deal with the charges against Mr Brett, or the issue of the interim negative notice, as a disciplinary matter under PSMA pt 5. However, the respondent did not submit that the chief executive officer may not make an order requiring a teacher to leave the school premises and remain away and not revoke the order in circumstances where the suspected breach of discipline is not dealt with under pt 5 of the PSMA. It is therefore unnecessary to address that matter.

34 The respondent submitted that the power to order a teacher to stay away is limited by the WWC Act which prohibits the employment of an employee who has an interim negative notice in child-related work. We will consider that submission later in these reasons when considering the power of the respondent to suspend Mr Brett.

Suspension

35 The third alternative proposed by Mr Brett is that the respondent could have suspended him. *School Education Act* s 239 provides that PSMA pt 5 has effect as if in that part references to 'employee' included a member of the teaching staff. PSMA pt 5 div 3, which includes s 80A to s 82, deals with disciplinary matters. Section 82 provides that if an employee is charged with having committed a serious offence, which is defined in s 80A to include an indictable offence against Western Australian law, the employer may, in accordance with the Commissioner's instructions, suspend the employee on full pay, partial pay or without pay. A suspension arising from a criminal charge has effect until the charge has been finalised: s 82(2)(b). On the face of the legislation, the respondent had power to suspend Mr Brett on full or partial pay or without pay.

36 The respondent submits that the power to suspend and the power to order the teacher to stay away are each limited by the WWC Act which prohibits the employment of an employee who has an interim negative notice or a negative notice in child-related work. The respondent submitted that a teacher who is suspended or ordered to stay away under a s 240 of

the *School Education Act* remains employed in child-related employment because the mere fact that the teacher is suspended or ordered to stay away does not alter his usual duties which habitually require contact with children.

37 The word 'suspended' in its ordinary signification includes to 'debar ... for a time, from the exercise of an office or function' (*Macquarie Dictionary*, 2nd ed). In the context of the phrase 'suspend the employee' (s 82 PSA), the word 'suspend' denotes the suspension of the functions of the employee, even though the contract itself subsists and continues in its operation subject to the effect of the suspension order. A teacher who is suspended or ordered to stay away from school premises cannot carry out functions which involve contact with a child in connection with an educational institution for children and hence cannot carry out child-related work.

38 The employment under the contract continues throughout the period a teacher is suspended or ordered to stay away under *School Education Act* s 240. However, whether or not the respondent would have contravened WWC Act s 22(3) by suspending Mr Brett or ordering him to stay away from school premises but not dismissing him involves a question of construction.

39 WWC Act s 22(3) provides that an employer must not employ a person in child related employment if the employer is aware that a negative notice or an interim negative notice has been issued to the person and is current. 'Child-related employment' is defined to mean child-related work carried out by a person under a contract of employment or in other specified circumstances. It is apparent from the definition, and confirmed by the Explanatory Memorandum, that the definition of 'child-related employment' captures child-related work carried out by individuals who are in an employment-like relationship, including where the work is carried out on an unpaid or voluntary basis. 'Child-related work' is defined as work where the usual duties of the work involve, or are likely to involve, contact with a child in connection with the places or services specified in s 6(1)(a)(i) - (xix).

40 The WWC Act s 23 provides that if a person holds a current interim negative notice the person must not be 'employed' in child-related employment. The purpose of s 23 is to prevent a person who holds a current interim negative notice from carrying out child-related work by prohibiting people who have been charged with or convicted of relevant offences from carrying out child-related work whilst in an employment-like relationship. The WWC Act is concerned with a person holding a current interim negative notice carrying out child-related work, not regulating the contract of employment between an employer and an employee or requiring contracts of employment to be terminated. If an employer suspends an employee from carrying out child-related work, or all work, or orders the employee to stay away from the premises on which child-related work is carried out then the employer would not be contravening WWC Act s 22(3) notwithstanding that the contract of employment continued to subsist. The terms 'employ' in s 22(3) and 'employed' in s 23(a) relate to the work performed or to be performed by the person in question, as distinct from the contractual or other relationship between the person and the employer.

Conclusion

41 The appeal should be dismissed.

2015 WAIRC 00287

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 19 OF 2013 GIVEN ON 29 APRIL 2014

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES CHARLES BRETT **APPELLANT**

-v-

SHARYN O'NEILL, DIRECTOR GENERAL, DEPARTMENT OF EDUCATION **RESPONDENT**

CORAM BUSS J
MURPHY J
LE MIERE J

DATE TUESDAY, 7 APRIL 2015

FILE NO/S IAC 3 OF 2014

CITATION NO. 2015 WAIRC 00287

Result Appeal dismissed

Representation

Appellant Mr J R Birman, Counsel

Respondent Mr G T W Tannin, SC

Order

It is hereby Ordered that:

1. The appeal be dismissed.
2. There be no Order as to costs.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of Court.

FULL BENCH—Appeals against decision of Commission—

2015 WAIRC 00244

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 166 OF 2013 GIVEN ON 22 SEPTEMBER
2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2015 WAIRC 00244
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON
HEARD	:	THURSDAY, 22 JANUARY 2015; WRITTEN SUBMISSIONS FRIDAY, 6 MARCH 2015
DELIVERED	:	FRIDAY, 20 MARCH 2015
FILE NO	:	FBA 12 OF 2014
BETWEEN	:	ALFRESCO CONCEPTS PTY LTD Appellant AND TROY PATRICK FRANSE Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner S M Mayman
Citation	:	[2014] WAIRC 01035; (2014) 94 WAIG 1594
File No	:	B 166 of 2013

CatchWords	:	Industrial Law (WA) - Appeal against decision of the Commission - Industrial matter - Claim of contractual benefits by an employee - Appeal conceded - Commissioner erred in finding an implied term about a motor vehicle allowance - Commissioner erred in failing to apply correct principles of law - Commissioner erred in the assessment of the evidence - Commission's power to make an award of compensation in the form of damages for breach of a term of contract considered - New point raised on appeal - New point cannot be raised when evidence could be called to meet the point - Decision suspended - Matter remitted for further hearing and determination
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 7(1), s 23, s 23(1), s 23A, s 26(2), s 29(1)(b)(ii), s 35(1), s 49, s 49(5)(c) <i>Taxation Administration Act 1953</i> (Cth) s 12-35 of sch 1, s 16-5 of sch 1
Result	:	Appeal allowed
Representation:		
Appellant	:	Mr G McCorry, as agent
Respondent	:	Mr P E Mullally, as agent

Case(s) referred to in reasons:

Agricultural and Rural Finance Pty Ltd v Gardiner [2008] HCA 57; (2008) 238 CLR 570

Australian Goldfields NL (In liq) v North Australian Diamonds NL [2009] WASCA 98; (2009) 40 WAR 191

Barnes v Forty Two International Pty Ltd [2014] FCAFC 152
Bennett & Dix (a firm) v Higgins [2005] WASCA 197; (2005) 85 WAIG 3653
Bogunovich v Bayside Western Australia Pty Ltd (1998) 79 WAIG 8
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; (1977) 52 ALJR 20
Brown v Churchill [2006] WASCA 17
Browne v Dunn (1894) 6 R 67 (HL)
Calandra v Civil Aviation Safety Authority [2015] WASCA 31
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337
Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 88 ALJR 814; (2014) 312 ALR 356
County Securities Pty Ltd v Challenger Group Holdings Pty Ltd [2008] NSWCA 193
Deane v The City Bank of Sydney (1904) 2 CLR 198
Dyers v The Queen [2002] HCA 45; (2002) 210 CLR 285
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] HCA 55; (2004) 218 CLR 471
Hoyt's Pty Ltd v Spencer [1919] HCA 64; (1919) 27 CLR 133
Hughes v St Barbara Ltd [2011] WASCA 234
Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298
Kingstyle Investments Pty Ltd v Lawson [2013] WAIRC 00355; (2013) 93 WAIG 493
Landsheer v Morris Corporation (WA) Pty Ltd [2014] WAIRC 00034; (2014) 94 WAIG 37
Major v Bretherton [1928] HCA 11; (1928) 41 CLR 62
Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 84 WAIG 2152; (2004) 136 IR 156
Miller v Wheatbelt Individual & Family Support Association Inc [2014] WAIC 00028; (2014) 94 WAIG 179
Nominal Defendant v Hook [1962] HCA 50; (1962) 113 CLR 641
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451
Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd [2014] WASCA 28
Saldanha v Fujitsu Australia Pty Ltd [2008] WAIRC 01732; (2008) 89 WAIG 76
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd [1979] HCA 51; (1979) 144 CLR 596
Shacam Transport Pty Ltd v Damien Cole Pty Ltd [No 2] [2014] WAIRC 01294; (2014) 94 WAIG 1835
Skinner v Broadbent [2006] WASCA 2
The Administration of the Territory of Papua and New Guinea v Daera Guba (1973) 130 CLR 353
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Triantopoulos v Shell Company of Australia Ltd [2011] WAIRC 00004; (2011) 91 WAIG 67
University of Wollongong v Metwally (No 2) [1985] HCA 28; (1985) 59 ALJR 481; (1985) 60 ALR 68
Whisprun Pty Ltd v Dixon [2003] HCA 48; (2003) 77 ALJR 1598

Reasons for Decision

SMITH AP:

The appeal

- 1 This appeal is instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision made by the Commission on 22 September 2014 in B 166 of 2013. Application B 166 of 2013 is an industrial matter referred to the Commission by Troy Patrick Franse (the respondent) under s 29(1)(b)(ii) of the Act. The respondent claimed in his application that he was owed by Alfresco Concepts Pty Ltd (the appellant) a car allowance to the value of \$23,750 and a bonus in the amount of \$17,339 (being a total of \$41,089).
- 2 The respondent's claim was substantially successful. The appeal is instituted against the decision which is in the form of a declaration and order in which it is declared that the appellant had denied the respondent benefits under his contract of employment and ordered the appellant to pay the respondent \$34,536 (less applicable taxation) within 21 days of the date of the order.

The material written terms of the contract of employment

- 3 The respondent was employed between 4 July 2011 and 11 February 2013 by the appellant as the appellant's manager. The respondent was paid a base salary of \$80,000. It was an agreed fact in the proceedings at first instance that a letter of offer of employment dated 11 June 2011 was provided to the respondent prior to commencing employment. It was not in dispute that the letter dated 11 June 2011 proposed a three-month trial period of employment. The offer also contained a number of benefits totalling a package of approximately \$120,000 which included that after a three-month trial period the respondent was to be provided with a fully maintained company vehicle, including fuel (value approx \$15,000) and a bonus of 1% of the appellant's turnover paid on a quarterly basis (exhibit Franse 1).

- 4 It was also an agreed fact that the appellant and the respondent signed a formal contract of employment dated 4 July 2011. However, the employment contract did not contain any conditions in respect of remuneration other than superannuation. It provided for a period of three months' probation, the respondent's duties, hours of work, conditions relating to annual leave, personal(sick)/carer's leave and other leave. The contract also contained a confidentiality clause, a clause relating to policies and procedures, a restraint of trade clause and a clause setting out the conditions by which the contract of employment could be terminated.
- 5 At the hearing at first instance, the appellant claimed the respondent signed the contract of employment on 4 July 2011 which was the first day he commenced work (exhibit Franse 2). On behalf of the appellant, evidence was adduced that at the end of the probationary period Mr Henry Kowalewski, one of the appellant's directors, met with the respondent on 7 October 2011 and provided him with a letter dated 7 October 2011 containing an offer for a full-time position as manager which included a salary of \$80,000, superannuation of 9% and a fully maintained Mazda ute which was not to be used for the respondent's private business (exhibit Alfresco 2). The offer did not contain a bonus of any amount. Mr Kowalewski's evidence was that this offer was accepted by the respondent.
- 6 The respondent gave evidence that he had never seen the letter of 7 October 2011. He also testified that he had a meeting with Mr Kowalewski on 28 September 2011 and at that meeting he signed the employment contract dated 4 July 2011 (exhibit Franse 2).
- 7 The Commissioner in her reasons for decision found the purported letter of 7 October 2011 (exhibit Alfresco 2) did not form part of the respondent's contract of employment and that the terms and conditions of employment of the respondent were set out in the letter of offer dated 11 June 2011 (exhibit Franse 1) and the employment agreement dated 4 July 2011 (exhibit Franse 2) ([64], [72], AB 40, AB 41). At the hearing of the appeal it was accepted by the appellant that the contractual terms of employment were those contained in exhibits Franse 1 and Franse 2.

Motor vehicle allowance

- 8 When the agent for the respondent made an opening submission in the hearing at first instance he stated that the claim for the motor vehicle allowance raised an issue between the parties as to what was agreed. He also said that the respondent relied primarily on the letter of 11 June 2011 to say that a motor vehicle would be provided throughout the respondent's employment for the use in the respondent's employment, including fuel, but that the respondent would testify about a conversation with the appellant in which he the respondent said he had his own Ford Falcon ute and was happy to use that to do his job as the manager if the appellant paid him the value of the vehicle that had been described in the letter of 11 June 2011. The appellant's agent then put a submission that:
- (a) the respondent's claim for the motor vehicle allowance was made on grounds that there was a conversation that if the respondent used his own vehicle, the appellant was happy to pay him \$15,000 per annum; and
 - (b) secondly, and in the alternative, the claim for the motor vehicle allowance was made on the basis that it could be implied into the contract of employment that if the appellant, having promised to provide a vehicle, did not do so, it would be fair and reasonable for the respondent to expect to be paid \$15,000 per annum in lieu of the provision of a fully maintained motor vehicle (ts 26).
- 9 When the respondent gave evidence he stated that he had the following discussion with Mr Kowalewski about the payment of a motor vehicle allowance (ts 33):
- Henry and I were actually driving I - I think we went to have a look at some outdoor furniture. We drove past a red dual cab Holden ute which was for sale; it's on the corner of Bannister Road and I don't recall the street name that we turn off which then leads onto Vinnicombe where the - Alfresco's premises was at the time. Henry mentioned to me that he had - have to start looking for a new vehicle. At that point I said to him, 'Well, I have a perfectly good ute. I don't believe we need to - you need to go to the expense of buying another vehicle, I'm happy to drive my vehicle to and from work and use it as necessary at work,' which our - and I did say, however, 'You know, I would like - that way you could put the vehicle component as part of my bonus.' And this was - this was still during the probation period.
- And what did he say with respect to that proposition?---He agreed.
- 10 When asked about this conversation in cross-examination, the respondent did not depart from his version of events.
- 11 When Mr Kowalewski gave evidence he denied that he had ever had any discussion with the respondent about the payment of the motor vehicle allowance. His testimony was that a fully maintained 10-year-old Mazda ute was available to the respondent for his exclusive use (ts 82).
- 12 In closing submissions the respondent's agent, after referring to the evidence given by the respondent about the payment of the motor vehicle allowance, made a submission that the contract of employment had been orally varied. No submission was put on behalf of the respondent in closing that a finding should be made that it was an implied term of the respondent's contract of employment that he be paid a motor vehicle allowance calculated at \$15,000 per annum (ts 163).

Evidence relevant to the assessment of the quantum of the bonus

- 13 When the respondent gave evidence he testified that whilst he was employed by the appellant he received a total amount of \$24,000 in cash bonus payments from Mr Kowalewski and he kept 'track' of the bonus payments made to him against two documents containing a register of sales that he had in his possession. In support of his evidence, these documents were tendered into evidence as exhibit Franse 4. One document is titled 'Sales Register [All Sales]' from July 2011 to June 2012 and the other is titled 'Sales Register [All Sales]' from 1 July 2012 to 12 December 2012 (AB 64 - 71). The documents record dates and numbers of invoices issued, customer names and the amount of each invoice and the status of each payment as closed, quote or open. The sales register from July 2011 to June 2012 records a total amount of sales including quotes and open invoices of \$2,233,439.18 with an amount due of \$572,081.29 (AB 69). The sales register from 1 July 2012 through to

12 December 2012 records invoices up to 21 November 2012 and a total amount of sales including quotes and open invoices of \$1,500,498.53 with an amount due of \$527,268.17. The respondent explained when giving evidence that the amounts recorded as 'open' in exhibit Franse 4 indicate that final payments had not been made. When cross-examined, the respondent conceded that he could not say whether all of the jobs recorded in exhibit Franse 4 had been performed or not. He also said there was at least one sale which was recorded to be a quote but it in fact had been incorrectly entered as it was a sale. It was invoice #00002628 for an amount of \$45,876.40.

- 14 Also tendered into evidence in support of the respondent's claim for a bonus were two exhibits setting out goods service tax (GST) details for the value of sales during the period the respondent was employed by the appellant (exhibits Franse 5 and Franse 7).
- 15 Exhibit Franse 5 was tendered into evidence when the respondent gave his evidence in chief. That document records the details of the sale value for GST purposes of 10% from 1 July 2012 until 11 February 2013. The document also records that the total value of sales in that period was an amount of \$1,233,159.58. When the document was tendered into evidence, the respondent was not asked to comment on the document. However, when he was cross-examined he was asked whether there was much of a difference between the value of the sales set out in exhibit Franse 5 and exhibit Franse 4. In response the respondent said he had not had an opportunity to check that and it was at that point of the evidence that he conceded that he could not say whether many of the jobs set out in exhibit Franse 4 were performed or not. Mr Kowalewski was not questioned by his counsel or the agent for the respondent about the sales figures in exhibit Franse 5.
- 16 Exhibit Franse 7 was tendered into evidence during the cross-examination of Ms Amanda Kowalewski. Ms Kowalewski is the office manager of the appellant. Ms Kowalewski identified exhibit Franse 7 as a record of the sales value of items sold by the appellant's business from 4 October 2011 until 28 June 2012. Exhibit Franse 7 records a total value of sales for that period in the amount of \$1,506,577.11. Ms Kowalewski, however, was not cross-examined about the contents of that document. She gave evidence after her father, Mr Kowalewski.
- 17 Mr Kowalewski produced in his evidence exhibit Alfresco 5, a document that he said he had prepared, from notes in his diary, about a week prior to the commencement of the hearing at first instance. Mr Kowalewski gave evidence that the exhibit Alfresco 5 records 15 cash payments he made to the respondent which he said totalled an amount of \$32,000. He also said his daughter, Ms Kowalewski, helped him create the document. His testimony was that the document sets out the payments he made to the respondent and the monthly turnover of the appellant during the relevant period of the respondent's employment. Whilst exhibit Alfresco 5 sets out amounts of turnover on a monthly basis, it is not clear from the document itself which month the figures relate to. Mr Kowalewski explained this was because when he created the document on the computer he was unable to input the months in the Excel program.
- 18 Whilst exhibit Alfresco 5 does not contain a total of the monthly sale figures, when each of the figures are added they total \$2,726,000. Mr Kowalewski said that this figure was verifiable against the GST sales records discovered by the appellant to the respondent prior to the hearing (exhibits Franse 5 and Franse 7), but not from the sales register produced by the respondent (exhibit Franse 4). The Commissioner said to the respondent's agent when Mr Kowalewski was being cross-examined (ts 110):
- The assertion that - that Mr Kowalewski makes is the documents that you provided are in fact early documents and do not ring true with the documents that are later provided because in fact orders either fell by the wayside or were not fully paid.
- 19 The agent for the respondent then asked Mr Kowalewski, 'Right. Is that your case?' and Mr Kowalewski said, 'Yes' (ts 110).
- 20 Mr Kowalewski said in his evidence that he paid the respondent in cash as his company receives a lot of payments in cash. He then testified that he had processed the cash he gave the respondent in the books of his account out of the company's funds and that he had paid tax on each cash payment he made to the respondent as 'his drawings' (ts 110). He, however, agreed that he had not recorded the cash payments in the respondent's PAYG summaries.
- 21 When Ms Kowalewski gave evidence she said she had not seen exhibit Alfresco 5 before it was tendered into evidence (ts 137). When asked whether she assisted in its preparation, she said she did not (ts 137). She was also asked questions about the contents of exhibit Alfresco 5 when compared with exhibit Franse 7. She said she was not able to comment on the contents of exhibit Alfresco 5 (ts 138).

The Commissioner's reasons for decision

- 22 After summarising much of the evidence given by each of the parties and the submissions made on their behalf, the Commissioner made the following findings:
- (a) It was her view that the outcome of the proceedings rested primarily on the credibility of the evidence given by the witnesses for the applicant and the employer and the documentation associated with that evidence.
 - (b) In assessing the credibility of the applicant there was nothing in particular about that evidence which would lead to a conclusion that the applicant tried to deliberately mislead the Commission. From time to time it became apparent that he had a different story to the employer, but there was nothing which suggested that the Commission ought to consider what he said as other than a truthful version of the events.
 - (c) The evidence given by Mr Kowalewski in respect of the letter dated 7 October 2011 together with a meeting of the same date should be treated with some caution and that Mr Kowalewski's credibility on this issue could not be accepted.
 - (d) The letter dated 7 October 2011 did not form part of the applicant's contract of employment.

- (e) With respect to the evidence given in relation to the bonus, the parties were at variance with respect to the amounts received in that the applicant claims to have received \$24,000 and the employer claims to have paid \$32,000 in incentives.
- (f) Considering the terms relied upon by the employer in the letter dated 7 October 2011, the bonus payments continued on a monthly basis with the exception of the final month of the applicant's employment.
- (g) There was a substantial variation between the monthly GST sales figures in exhibits Franse 5 and Franse 7 and the amounts in the monthly turnover figures in exhibit Alfresco 5 as analysed in exhibit Franse 8 which suggests the credibility of the employer on this matter is somewhat in doubt.
- (h) Counsel for the employer neglected to ask the applicant whether he had received \$32,000 or \$24,000 in bonus payments when the applicant was in the witness box. Having regard to the reasoning in *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285 in the High Court where their Honours restricted the application of *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 it is the case now that the Commission can only act on the basis of the evidence called.
- (i) The applicant's evidence that he received \$24,000 in bonus payments from the employer is accepted, rather than \$32,000 suggested by the employer. There is \$14,536 outstanding in bonus payments owed by the employer in accordance with the letter dated 11 June 2011 (exhibit Franse 1).
- (j) At no stage did the applicant access the entitlement to a fully maintained company motor vehicle including fuel valued at approximately \$15,000.
- (k) The applicant's evidence is that he was driving his own vehicle to and from work and a company vehicle was not available for his own purposes as other employees were using it. He discussed and reached agreement with the employer to use his own vehicle in return for the motor vehicle allowance to save the employer the purchase cost of a new vehicle.
- (l) The applicant had no access to any motor vehicle allowance throughout his employment.
- (m) The employer's evidence was that a Mazda utility vehicle was available for use by the applicant and the applicant at no stage throughout his employment requested his motor vehicle allowance.
- (n) If it appears from the written contract that a term is to be implied, there are conditions which any proposed term must satisfy. In the decision of the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 their Honours referred to the majority judgment in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; (1977) 52 ALJR 20 adopted by Mason J with the concurrence of the other members of the court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596. These conditions are:
 - (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.
- (o) From the applicant's written contract (exhibit Franse 1) it is an implied term of the applicant's contract that after the three month probation period, in the absence of a motor vehicle, a \$15,000 motor vehicle allowance would apply. The applicant was denied that contractual benefit. Accordingly, the applicant is owed \$20,000 by the employer.
- (p) The conclusion reached about Mr Kowalewski's evidence is that with the exception of those matters already referred to, it is accepted that Mr Kowalewski presented a true version of the events. The evidence of Ms Kowalewski is evidence that can be regarded as satisfactory. In all other regards it is clear on the assessment of credibility that the weight of evidence should lay with the applicant.
- (q) The applicant has been denied contractual benefits. Accordingly, an order will issue in a minute form requiring the respondent to pay to the applicant the sum of \$34,536 (less applicable taxation) within 21 days of the final order issuing.

The appellant's submissions and grounds of appeal

- 23 The grounds of appeal set out 14 grounds of appeal. The appellant concedes that the grounds of appeal as filed are unnecessarily prolix and could be combined into two broad grounds:
 - (a) the Commissioner failed to properly exercise jurisdiction; and
 - (b) the Commissioner made errors of fact and law.
- 24 The appellant in its submissions focussed on two errors which it says are appealable; the finding of an implied term about the motor vehicle allowance and the implicit conclusion about the credibility of the appellant's evidence.
- 25 The appellant informed the Full Bench it should take at its highest the evidence of the respondent as to what were the terms of the contract of employment and the amount that he was paid as bonuses during the period of employment. Thus, it is said that the Full Bench can determine a large part of this appeal on the basis of the respondent's evidence alone. The respondent's evidence was that:
 - (a) the contractual terms were those contained in the letter dated 11 June 2011 and the formal employment agreement dated 4 July 2011 and signed by the respondent on 28 September 2011;
 - (b) he was paid \$24,000 by way of bonuses by the appellant; and

- (c) after a three-month trial period the respondent's package would include a fully maintained company vehicle, including fuel (value approximately \$15,000).
- 26 Whilst there is nothing in the reasons for decision to indicate whether the \$24,000 in payments were net or gross, it appears to be that the payments were net (evidence of Mr Kowalewski, ts 110).
- 27 The appellant contends that even if the respondent was entitled to the \$38,536 in total that he claims to be the bonuses payable to him, those bonuses would be subject to taxation at the marginal rate of 37%, giving him a net entitlement of \$24,277, which is not significantly different from what he admits receiving.
- 28 The appellant says that putting the highest and most favourable to the respondent complexion on all this evidence, the contractual benefits claim must fail for two reasons. Firstly, the Commissioner's error of law in relation to the existence of an implied term as to the motor vehicle allowance and the Commissioner's failure to make necessary finding of facts, in respect of the turnover of the appellant during the relevant period, and to provide reasons for doing so.
- 29 The appellant points out that much of the evidence given by the parties was in conflict and the resolution of that conflict required the Commissioner to determine which evidence was to be accepted and the reasons for accepting one piece of evidence over another. However, the Commissioner made only 12 findings. Those in contest were that:
- (a) there was no extension of the respondent's probationary period;
 - (b) the respondent received \$24,000 rather than \$32,000 in bonus payments;
 - (c) the respondent did not access the entitlement to the fully maintained company vehicle;
 - (d) the contract contained an implied term that in the absence of provision of the vehicle a motor vehicle allowance of \$15,000 per annum and the respondent was denied a contractual benefit of \$20,000 thereby; and
 - (e) on an assessment of the credibility of witnesses the weight of evidence should lie with the respondent.
- 30 The appellant argues that the Commissioner gave no reasons for not making findings of fact in any contested matter and failed to provide any sufficient reasons for preferring the credibility of one witness over another. In particular, the Commissioner made no finding of what the turnover of the appellant was. Thus, it says the failure to make necessary findings of fact and provide reasons for doing so is a failure to properly exercise jurisdiction.
- 31 The appellant points out that after citing the gravamen of the decision in *Codelfa* the Commissioner not only failed to consider how the conditions which must be satisfied for a term to be implied might apply in the instant case, but proceeded to ignore the clear evidence that an implied term must not contradict any express term of the contract.
- 32 As the provision of a company vehicle is an express term of the contract, to posit an implied term for payment of a motor vehicle allowance as an alternative, constitutes a contradiction between the express and implied term which *Codelfa* says cannot be allowed.
- 33 The appellant also argues that:
- (a) It is not obvious that a motor vehicle allowance would be payable if the vehicle was not supplied. There is nothing in any of the documentation or evidence before the Commissioner at first instance that showed any requirement for the respondent to do any travel in the performance of his duties or that he would be put to any expense or inconvenience if a motor vehicle was not supplied.
 - (b) It is not necessary to give business efficacy to the entirety of the contract to imply such a term. The contract was for the personal services of the respondent in the business of the appellant and in no way conditional or essentially dependent on the use by the respondent of a motor vehicle.
 - (c) The implied term is not capable of clear expression without also implying other terms such as for what purposes the motor vehicle allowance was payable.
- 34 Thus, the appellant says the Commissioner at first instance erred in law in finding the existence of the implied term and in addition she erred in failing to give reasons for so doing. Thus, it says the order for payment to the respondent in relation to the motor vehicle allowance must be set aside.
- 35 The alternative basis for the claim, again not considered by the Commissioner at first instance, was that there was an oral variation to the contract following a discussion between the appellant and the respondent while out driving. The appellant denied there was such a conversation or such an agreement reached, but in any case, again putting the respondent's claim at its highest, the claim for an oral variation to the contract must fail as the respondent's evidence was that the conversation in which an agreement was reached occurred early during the respondent's trial period and as he signed the contract at the end of his trial period and it makes no reference to a motor vehicle allowance, it must be taken that the written documents (exhibits Franse 1 and Franse 2) contain the entirety of the contractually binding terms: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165.
- 36 In the application, the respondent initially claimed that he had not been paid a bonus of \$17,339 (Form 1 particulars of claim, AB 10). The turnover of the appellant's business in the relevant period was later said to be \$3,853,601.34 and the total bonus payable was then said to be \$38,536 (respondent's further and better particulars of claim, AB 18). It was alleged that \$24,000 had been paid and the outstanding amount was thus \$14,536 (AB 18). The appellant points out there was no evidence of whether the bonus percentage or the turnover was to be calculated on a GST inclusive or exclusive basis.
- 37 The appellant also points out that the respondent initially relied upon exhibits Franse 4, Franse 5 and Franse 7 for the calculation of the appellant's turnover. Yet, the Commissioner in her findings in her reasons for decision made no reference to exhibit Franse 4, despite the respondent admitting when giving evidence that some of the figures may not be correct because some orders had not been finalised (evidence of the respondent, ts 52). Further, the Commissioner only referred to exhibits

Franse 5 and Franse 7 when setting out the respondent's submissions on the comparison between the monthly turnover figures allegedly derived by the respondent and those in the appellant's exhibit Alfresco 5 and an obscure reference to cross-examination of one of the appellant's witnesses indicating a GST turnover of \$190,000 in exhibits Alfresco 5 and Franse 7 (reasons for decision [54], AB 38).

- 38 The appellant says the Commissioner at first instance made no findings about what the appellant's turnover was during the respondent's employment and based her decision on the credibility of the witnesses in light of an alleged significant variance between the figures in exhibit Alfresco 5 and the summary document exhibit Franse 8 prepared by the respondent's representative.
- 39 The appellant also argues that the issue whether the turnover of the appellant's business during the period of the respondent's employment was \$3,853,601.34 was not a live issue in the proceedings before the Commission. It points out that the case that the respondent put to the Commissioner at first instance in closing submissions was that the turnover of the business in the relevant period was as set out in exhibits Franse 5 and Franse 7 and compiled in exhibit Franse 8. Thus, the appellant says that the respondent must be bound by its case that it put to the Commissioner at first instance and it is not open to the respondent to now put a different case to the Commission in this appeal: *University of Wollongong v Metwally (No 2)* [1985] HCA 28; (1985) 59 ALJR 481; (1985) 60 ALR 68.
- 40 The appellant argues that for the variance between the two sets of figures in exhibits Franse 5 and Franse 7 when compared to exhibit Alfresco 5 to be so significant as to affect the credibility of the parties, they would need to be large and biased so as to show the appellant's claimed turnover was less than what the respondent alleged was the case.
- 41 The appellant in its written submissions provided a table which is a reproduction of exhibit Franse 8 with an additional column added showing the percentage variance of calculated turnover each month. This table is as follows:

Month	Year	Alfresco 5 stated turnover total for each month	Calculated turnover total from Alfresco GST Sales figures	Turnover Variance	Variance as percentage of Calculated Turnover
October	2011	\$190,000.00	\$181,206.86	-\$8,793.14	-4.85%
November	2011	\$247,000.00	\$259,094.39	\$12,094.39	4.67%
December	2011	\$181,000.00	\$183,834.70	\$2,834.70	1.54%
January	2012	\$151,000.00	\$140,444.09	-\$10,555.91	-7.52%
February	2012	\$159,000.00	\$184,755.22	\$25,755.22	13.94%
March	2012	\$170,000.00	\$132,853.27	-\$37,146.73	-27.96%
April	2012	\$128,000.00	\$134,609.17	\$6,609.17	4.91%
May	2012	\$142,000.00	\$163,245.39	\$21,245.39	13.01%
June	2012	\$180,000.00	\$136,992.12	-\$43,007.88	-31.39%
July	2012	\$185,000.00	\$217,350.44	\$32,350.44	14.88%
August	2012	\$154,000.00	\$156,834.40	\$2,834.40	1.81%
September	2012	\$110,000.00	\$104,525.63	-\$5,474.37	-5.24%
October	2012	\$181,000.00	\$156,906.42	-\$24,093.58	-15.36%
November	2012	\$250,000.00	\$256,196.81	\$6,196.81	2.42%
December	2012	\$201,000.00	\$206,520.76	\$5,520.76	2.67%
January	2013	\$97,000.00	\$95,513.56	-\$1,486.44	-1.56%

- 42 The appellant points out that it is significant that when the percentage of calculated turnover figures are examined that in seven of the 16 months, the turnover asserted by the appellant is greater than that alleged by the respondent, considerably so in March, June and October 2012, which is inconsistent with the appellant seeking to mislead the Commissioner at first instance.
- 43 The appellant also points out that where the variance between what the respondent alleges was the calculated turnover and what the appellant asserted it was, the percentage variation is insignificant (less than 5% for six of the nine months and less than 3% for four of them).
- 44 It is also pointed out that the difference between the two sets of figures over the entire period in question is \$15,116.77. The appellant reaches this figure by totalling the stated turnover for each month in exhibit Alfresco 5 which amounts to \$2,726,000.00 and the calculated turnover from GST sales in exhibits Franse 5 and Franse 7 (as reflected in exhibit Franse 8) is \$2,710,883.23 which is a variance of 0.56% and what is more, the variance is in favour of the exhibit Alfresco 5 figures. That is, the appellant's total figures for turnover are greater than what the respondent alleges.
- 45 Thus, the appellant says the Commissioner erred in finding that the variance between the respective figures had any relevance to the credibility of the witnesses.
- 46 The appellant also points out that in the absence of any findings about what was the turnover of the appellant's business in the relevant period and on the basis that there was a contractual entitlement to the bonuses, the Commissioner erred in finding that the respondent has been denied any contractual benefit.
- 47 The appellant then says in the alternative, and considering the most favourable position possible for the respondent, if the total turnover was as asserted by the appellant in exhibit Alfresco 5 such that the respondent was entitled to bonuses of 1% of that turnover, then he was entitled to be paid a total of \$27,260.00 gross by way of bonuses. From that amount tax at 37% or \$10,086.20 would be required to be withheld leaving \$17,173.80 due to be paid to the respondent in cash. The respondent says he received \$24,000 in cash payments which is more than he was entitled to receive. The appellant says tax was paid by it in respect of the cash payments the respondent received. Thus, the appellant says that the respondent has not been denied any contractual benefit.

48 For these reasons, the appellant seeks an order that the appeal be upheld and the decision at first instance quashed.

The respondent's submissions

49 Prior to the hearing of the appeal the respondent filed written submissions which contained a concession that the Commissioner fell into error both as to determining the essential and relevant facts and determining questions of credibility. The written submissions also concede that the Commissioner failed to provide adequate reasons for decision and therefore made appealable errors of both fact and law.

50 At the hearing of the appeal the respondent put a submission before the Full Bench that the decision of the Commissioner should be suspended and the matter be remitted for further hearing and determination. The basis of the respondent's submission is as follows:

- (a) By letter dated 11 June 2011, the appellant offered to employ the respondent as its manager on a base salary of \$80,000 and otherwise on the terms and conditions set forth in the letter (exhibit Franse 1). The respondent's case is that the parties signed a formal contract of employment which incorporated the letter. On the appellant's evidence this was on 28 September 2011 and the respondent's case was that it was on 4 July 2011.
- (b) The dispute between the parties concerned two aspects of the terms and conditions of the letter. These were:
 - (i) that the appellant would pay to the respondent a bonus of 1% of the appellant's turnover on a quarterly basis; and that at the conclusion of the employment the appellant had not paid all of the bonus to which the respondent claimed he was entitled;
 - (ii) that the appellant would provide during the term of employment to the respondent a fully maintained company vehicle including fuel at a value of approximately \$15,000 or if not so provided pay to the respondent a motor vehicle allowance of \$15,000 per annum.
- (c) There were a number of live issues between the parties which were not resolved by the Commissioner in her reasons for decision. The first is that the turnover claimed by the respondent during the period of his employment was \$3,853,601.34. In support of his case, the respondent relied upon exhibits Franse 4, Franse 5 and Franse 7 to establish that amount. The appellant relied upon a substantially different amount of turnover, which is set out in exhibit Alfresco 5. Whilst the respondent agrees with the submission made by the appellant that the Commissioner made no proper findings as to what was the turnover during the relevant period of the respondent's employment, the respondent does not concede that he relied only upon exhibits Franse 5 and Franse 7 to establish the quantum of his entitlement to a bonus of 1% of turnover.
- (d) The second live issue between the parties is the issue raised by the appellant in respect of taxation. Whilst it is not in dispute that the respondent was paid bonus payments in cash, nor is it in dispute that these payments were not recorded in the PAYG system, the respondent's case is that it was agreed that he would be paid a bonus as a gross amount and that he would have to pay his own tax on that amount. This issue the respondent says turns upon whether Mr Kowalewski's evidence that he paid tax on the bonus payments should be accepted.
- (e) The respondent does not concede that it was not open to the Commissioner to find that it was an implied term that he should be paid a motor vehicle allowance calculated at \$15,000 per annum in the absence of the provision of a fully maintained company vehicle including fuel during his employment. However, the respondent says it would have been open on the evidence for the Commissioner to make a finding that the contract of employment had been varied in that the appellant entered into an agreement to vary the contract of employment to provide to the respondent a motor vehicle allowance.

51 When regard is had to all of these matters, the respondent says the appealable errors made by the Commissioner are that there was a failure to:

- (a) make findings in respect to the turnover of the appellant's business;
- (b) make findings in respect to the taxation issue;
- (c) make findings in respect of the implied term argument;
- (d) make findings of fact to establish whether there was a variation of the contract of employment which established the respondent's entitlement to a motor vehicle allowance of \$15,000 per annum;
- (e) give adequate reasons for decision which created an injustice; and
- (f) make proper findings of credibility.

52 In these circumstances, the respondent says the decision should be suspended and the matter remitted to the Commissioner at first instance to enable the parties to make further submissions as to the findings of fact and law that should be made.

Additional submissions made by the parties

53 Following the hearing of the appeal, the Full Bench sought written submissions from the parties in respect of the following questions:

- (a) Is it conceded in this appeal on behalf of the appellant that a fully maintained company vehicle including fuel with a value of approximately \$15,000 per annum had not been provided to the respondent?
- (b) If the answer to (a) is yes and the terms of the contract of the respondent are solely to be found in exhibits Franse 1 and Franse 2 without variation by any oral agreement, would it be open to the Full Bench to vary the decision by making an award of compensation in the nature of damages assessed as \$15,000 per annum,

for a breach of the term that required the appellant to provide to the respondent, post the trial period, a fully maintained company vehicle including fuel?

Any submission about this question should address the reasoning of the Industrial Appeal Court in *Mathews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 84 WAIG 2152; (2004) 136 IR 156 [20] - [27], [48] - [49] and [73]; *Saldanha v Fujitsu Australia Pty Ltd* [2008] WAIRC 01732; (2008) 89 WAIG 76 [122] and *Kingstyle Investments Pty Ltd v Lawson* [2013] WAIRC 00355; (2013) 93 WAIG 493 [50] - [54].

- (c) Is it open to scale up the bonus payments totalling \$24,000 by 37% paid to the respondent to take account of taxation that should have been withheld from those payments as PAYG tax paid to the Commissioner of Taxation on behalf of the respondent, in light of the reasoning of the Industrial Appeal Court in *Bennett & Dix (a firm) v Higgins* [2005] WASCA 197; (2005) 85 WAIG 3653 [36] - [42]?

54 In response to the request made by the Full Bench the parties filed written submissions on 6 March 2015.

(a) **The appellant's further submissions**

55 In answer to question (a), the appellant states its answer is, 'No'.

56 The appellant points out that its evidence was that a vehicle was provided and the respondent chose not to use it (ts 81 - 82, 87, 105 - 106). The appellant also relies upon the evidence given by the respondent that there was an oral agreement that he would receive a motor vehicle allowance rather than have the use of the appellant's vehicle (ts 33, 45, 48, 73, reasons for decision [15], AB 30); that he never received the use of the vehicle apart from an eight-week period (ts 71) or received the allowance or made any representations or complaint about not receiving either during the period of his employment or for six months afterwards (ts 34, 48, 70). The appellant also points out that Mr Kowalewski was not cross-examined on whether a vehicle was provided because it was the respondent's case that by oral agreement the contractual entitlement to the vehicle had been exchanged for a vehicle allowance and he was entitled only to the vehicle allowance (ts 48).

57 The appellant also relies upon the principle in *Metwally (No 2)* that it is elementary that a party is bound by the conduct of his case. It says that the respondent's claim for the motor vehicle allowance was never maintainable at law given the long established principles relating to written contracts that was endorsed by the High Court in *Toll* [42] - [48]. It also contends that in light of the respondent's own evidence that during the entire period of his employment and for six months afterwards he made no complaint about not receiving the motor vehicle allowance or not being given the vehicle the Full Bench should find that the vehicle was provided.

58 In these circumstances, the appellant says that question (b) is not required to be answered.

59 The appellant contends it is unable to answer question (c) as *Bennett & Dix (a firm) v Higgins* [2005] WASCA 197; (2005) 85 WAIG 3653 involved a question of whether the employer was obliged by Commonwealth law to withhold tax from an order of compensation ordered by the Commission to be paid to an unfairly dismissed employee rather than pay the entire amount to the employee.

60 The appellant says the gravamen of the decision in *Bennett & Dix (a firm) v Higgins* is contained in [40] in which it was found that an employer is discharged from all liability to pay to an employee or account for monies properly withheld under s 12-85 of sch 1 [sic] of the *Taxation Administration Act 1953* (Cth), provided the amount withheld is the amount required to be withheld. On the facts of that matter, the employer was discharged from all liability to pay to the former employee, Mr Higgins, the \$973.10 in tax that was the amount required to be withheld and was properly withheld and remitted to the Australian Taxation Office and thus the proceedings in the Industrial Magistrate's Court for failing to do so were not sustainable.

61 The question as framed by the Full Bench in this matter, with the expression 'taxation that should have been withheld', assumes that tax was not withheld, but the question is it open to scale up by 37% is mathematically incorrect to reflect the proper process of deriving the gross amount from the net amount with a marginal tax rate of 37%. The correct formula is net sum divided by (1-0.37). The question framed by the Full Bench suggests that taxation was withheld and the question may be whether it should be taken into account. If the former is the case, *Bennett & Dix (a firm) v Higgins* is not relevant to this appeal. If the latter then the decision is relevant.

62 The evidence established that the respondent received at least \$24,000 in cash, in monthly payments rather than quarterly as the contract stipulated, but Mr Kowalewski said that he paid the tax in respect of those payments (ts 110).

63 Whether this amounts to not withholding the tax appears to be a matter of semantics: it is scarcely modern day accounting practice to physically divide an amount into two and give one part to the employee and the other to the taxman, which is what to withhold implies. Bookkeeping entries achieve the same outcome. The payment of the tax by the appellant, howsoever carried out, discharged any obligation to make payment of that amount to the respondent. There was no direct evidence of what that amount was.

64 The respondent's gross salary was \$80,000 and any payments above that figure attracted a 37% tax withholding obligation. If the cash payments received by the respondent were \$24,000, the amount of tax the appellant was required to remit to the Australian Taxation Office was \$14,095, being $\$24,000/(1-0.37) = \$38,095$. There was no evidence it was not remitted. If it was not remitted the appellant itself would be liable for taxation on the entire amount as it would be income to the company rather than an expense.

65 The respondent asserted that he was owed \$38,536 by way of bonuses. The cash payments and the tax paid by the appellant amount to \$38,095, a difference of \$441 from what the respondent says was due. In these circumstances, the appellant says there has been no denial of the contractual benefit claimed.

(b) The respondent's further submissions

- 66 In answer to the question whether it is conceded in this appeal on behalf of the appellant that a fully maintained company vehicle including fuel with a value of approximately \$15,000 per annum had not been provided to the respondent, the respondent points out although this question is primarily directed to the appellant, the respondent's case was that this condition of employment was denied. Further, that the respondent asserted that the term of the employment contract with respect to the motor vehicle contained in exhibit Franse 1 was varied orally to a term that the appellant would pay an annual motor vehicle allowance of \$15,000 and the respondent would use his own car (ts 33, 44). The respondent also points out the oral variation was denied by the appellant (ts 87).
- 67 The respondent's answer to question (b) is, 'Yes'. The respondent says if the Full Bench found on the evidence that the oral variation to the motor vehicle term was not established given the conflict of evidence about the oral variation, it is open to find that the term in exhibit Franse 1 with respect to the motor vehicle was operative. He says that despite the attempts by the appellant to show that a Mazda ute was available to the respondent, he did not use it.
- 68 It is said that it is open for the Full Bench to vary the decision at first instance to find that the respondent was not provided with a benefit or entitlement under his contract of employment and to award compensation in the nature of damages based on the agreed value of the motor vehicle to the respondent of \$15,000 per annum post the trial period.
- 69 The respondent says it should be open to raise this new point of law although it was not argued for at the hearing below. In support of the respondent's submission it relies upon the principles set out in *Kingstyle Investments Pty Ltd v Lawson* [2013] WAIRC 00355; (2013) 93 WAIG 493 [52] - [53] (Smith AP).
- 70 The respondent says that when regard is had to those principles that it would be taking a very technical view of the proceedings below for the Full Bench in this matter to exclude reliance upon the motor vehicle term in exhibit Franse 1 given that the respondent opened his case on the basis that exhibit Franse 1 provided 'the backbone of this application' (ts 24). The respondent points out that the raising of this point does not require the introduction of new evidence and to do so does not prejudice the appellant. In addition, the new point clearly has substantial merit and in the interests of justice ought to be allowed.
- 71 The respondent also argues it is open on the authorities for the Full Bench to award compensation for the failure of the appellant to provide the motor vehicle as agreed. The respondent submits that the decision of the Industrial Appeal Court in *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 84 WAIG 2152; (2004) 136 IR 156 makes this abundantly clear. The contractual benefit which is denied by the employer is that which is contained in the contract itself. The award of compensation or damages is the means by which the Commission deals with the industrial matter referred to it under s 29(1)(b)(ii) of the Act utilising the broad power given to it under s 23(1) and s 26(2) of the Act: *Cool or Cosy* [24] (Steytler P). The rationale of *Cool or Cosy* was confirmed in *Saldanha v Fujitsu Australia Pty Ltd* [2008] WAIRC 01732; (2008) 89 WAIG 76 [317] (Ritter AP).
- 72 In respect of question (c), the respondent submits there is no basis for scaling up the \$24,000 already paid, as the time for withholding tax is when the payment is made.
- 73 The rationale of the Full Bench decision in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8 is that compensation is not compensation as defined if it does not as much as possible put the person who suffered the loss or damage back in the position in which but for the loss or damage, the person would have been. This was a case of unfair dismissal and the measure of compensation for such. However, the respondent submits that the same principles should be applied to compensation to be awarded under s 29(1)(b)(ii) in this case for the denial of the appellant to pay the appropriate or the full bonus on sales turnover.
- 74 The award will be made more than 12 months after the employment has ended. The payment to the respondent by force of the *Taxation Administration Act* (sch 32 [sic]) is that the appellant will be required to withhold tax at the rate of 31.5% on the basis that this will be an employment termination payment: *Bennett & Dix (a firm) v Higgins*. This decision is authority for the proposition that tax must be withheld at the time of payment or the employer could face a penalty.
- 75 The respondent submits only the balance of the sum owing to the respondent is capable of being scaled up by the termination rate of 31.5% so that the respondent will receive full compensation for the denied contractual benefit.

Conclusion

(a) What were the terms of the contract?

- 76 The parties do not take issue with the findings made by the Commissioner that the express terms of the contract of employment were initially set out in exhibits Franse 1 and Franse 2 which were the letter dated 11 June 2011 and the employment agreement signed by the respondent on 28 September 2011.
- 77 The terms of the contract material to the resolution of the issues in this appeal are as follows (exhibit Franse 1):

SALARY \$80,000 pa

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

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

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

78 Of importance in this appeal is the fact that the respondent was offered and accepted terms that were to provide him with a package of salary and contractual benefits including bonuses and a fully maintained vehicle to the value of approximately \$120,000 per annum.

(i) **Was there scope to imply a term?**

79 From the promissory statement in the letter of 11 June 2011 that was accepted, it was a term of the contract of employment that the appellant would be provided with a fully maintained vehicle including fuel (value approximately \$15,000). From that term, the first question that arises in this appeal is whether it is open to imply a term into the contract that if a fully maintained vehicle and fuel were not provided to the respondent he would be paid \$15,000 per annum.

80 There are five conditions that must be satisfied for a term to be implied on grounds of fact to give business efficacy to a contract. In *BP Refinery (Westernport) Pty Ltd* and in *Codelfa* (347), the conditions were stated that the term sought to be implied must:

- (a) be reasonable and equitable;
- (b) be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (c) be so obvious that it goes without saying;
- (d) be capable of clear expression; and
- (e) not be contradictory of any express term of the contract.

81 The determination of whether a term should be implied is dependent upon the ascertained subjective intention of the parties at the time of the agreement. Courts (and tribunals) should be slow to imply a term into an agreement: *Codelfa* (346) (Mason J).

82 The Commissioner referred to the conditions in *Codelfa* but did not even attempt to address whether each of the five conditions were satisfied before finding that it was an implied term that, in the absence of a motor vehicle, a \$15,000 per annum motor vehicle allowance would apply. In failing to do so the Commissioner erred in law by failing to provide any reasons in support of this finding. Such an error of law by a Commissioner who has a statutory duty to provide reasons for decision by operation of s 35(1) of the Act is a clear failure to provide good adjudication.

83 In my opinion, if the Commissioner had directly addressed each of the conditions it would have been clear to her that all of the five conditions could not in this matter be satisfied and thus it would have been clearly apparent to her that the term in question could not be implied.

84 When each of the five conditions for implying a term are addressed, the following findings must follow:

- (a) In light of the promissory statement in the letter of 11 June 2011 that the respondent's remuneration was a package of approximately \$120,000, as the provision of a motor vehicle was to constitute approximately \$15,000 of the approximate annual remuneration package, it could be said that in the absence of the provision of the motor vehicle that it would be reasonable and equitable that the respondent be paid an approximate annual sum in lieu.
- (b) However, it could not be found that the contract would not have been effective without such a term or that such a term was so obvious that it went without saying. In *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 88 ALJR 814; (2014) 312 ALR 356 French CJ, Bell and Keane JJ observed [22]:

Implication of a term in fact in a contract, by reference to what is necessary to give it business efficacy, was described in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* as raising issues 'as to the meaning and effect of the contract' ([1982] HCA 24; (1982) 149 CLR 337 at 345 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392). Implication is not 'an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision.' ([1982] HCA 24; (1982) 149 CLR 337 at 345 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392) It is nevertheless an 'exercise in interpretation, though not an orthodox instance.' ([1982] HCA 24; (1982) 149 CLR 337 at 345 per Mason J, Stephen J agreeing at 344, Wilson J agreeing at 392) The implication of terms in fact was also characterised in *Attorney General of Belize v Belize Telecom Ltd* ([2009] UKPC 11; [2009] 1 WLR 1988; [2009] 2 All ER 1127) as an exercise in construction. Lord Hoffmann, delivering the judgment of the Privy Council, said ([2009] UKPC 11; [2009] 1 WLR 1988 at 1994 [22]; [2009] UKPC 11; [2009] 2 All ER 1127 at 1134):

'it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.'

The distinction thus drawn is appropriate even though the scope of the constructional approach adopted by Lord Hoffmann has been debated (Hooley, 'Implied Terms After *Belize Telecom*', (2014) 73 *Cambridge Law Journal* 315; Courtney and Carter, 'Implied Terms: What *Is* the Role of Construction?', (2014) 31 *Journal of Contract Law* 151 at 160–163).

- (c) The condition of necessity is not easily met. The following passage in the judgment of Beach J in *Barnes v Forty Two International Pty Ltd* [2014] FCAFC 152 (with whom Siopis J agreed) makes this point clear. At [140] his Honour said:

In terms of the necessity to give business efficacy, as Bowen LJ in *The Moorcock* (1889) 14 PD 64 at 68 made clear, one is seeking to identify 'an implication from the presumed intention of the parties with the

object of giving to the transaction such efficacy as both parties must have intended that at all events it should have'. It must be 'clearly necessary' in the context of the terms and circumstances of the particular contract and the particular relationship between the specific parties to the contract (*Heimann v Commonwealth of Australia* [1938] NSWStRp 47; (1938) 38 SR (NSW) 691 at 695 per Jordan CJ); a broader context of necessity is applied when dealing with terms implied in or by law (see *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356; [2014] HCA 32 at [28]- [29] per French CJ, Bell and Keane JJ, [86] per Kiefel J and [113]-[114] per Gageler J). Moreover, this 'business efficacy' condition overlaps with the 'so obvious' condition. In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605, Scrutton LJ said:

A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'

- (d) There was nothing missing or left incomplete in the obligation resting on the appellant to provide a company motor vehicle including fuel to the appellant. The terms of the contract could not be said to be ineffective, futile or necessary to give efficacy without the implication of a motor vehicle allowance in lieu of the provision of a motor vehicle allowance. Nor could such a condition be said to be objectively obvious when the parties entered into the agreement.
- (e) The implied term would be contradictory of the express term to provide a company motor vehicle. Although such an implied term would only have effect if a vehicle is not provided, such an implied term would change the meaning of the term of the contract that expressly only created an obligation on the appellant to provide a motor vehicle and fuel to the respondent to the approximate value of \$15,000 per annum. The implied term would if applied widen that obligation in circumstances not contemplated in the express terms of the contract.

85 If the Commissioner had properly considered each of these principles she would have found that there was no scope to imply such a term. She then should have turned her mind to the question raised directly by the evidence of the respondent whether the terms of contract in respect of the provision of a motor vehicle and fuel set out in exhibit Franse 1 had been varied by agreement.

(ii) Should findings have been made as to whether the contract had been varied by oral agreement?

86 At first instance, in opening submissions and in closing the respondent's agent put a submission that the terms of the contract were varied by an oral agreement to pay a car allowance of \$15,000 per annum. The appellant disputes that the matter was ever the subject of a discussion or agreement. In any event, it says that:

- (a) if an oral agreement was reached it was prior to the execution of exhibit Franse 2 on 28 September 2011; and
- (b) the terms of an oral agreement cannot contradict the terms of the written documents that set out the terms of the agreement.

87 The resolution of this issue turns on whether the terms of the contract, post the probation period, were wholly in writing or partly oral. Although this issue also turns upon whether the evidence of the respondent should be preferred to the evidence given by Mr Kowalewski, the argument put forward in this appeal on behalf of the appellant may not require the Full Bench to consider or resolve any issue going to the credibility of any witness.

88 The starting point in a consideration of this issue is that a party who alleges that a written agreement does not represent the entire contract must counter a presumption that it does: *Major v Bretherton* [1928] HCA 11; (1928) 41 CLR 62, 67 (Isaacs J).

89 In *Landsheer v Morris Corporation (WA) Pty Ltd* [2014] WAIRC 00034; (2014) 94 WAIG 37, I set out the well-established principles that apply when determining whether a contract is partly in writing and partly oral and are relevant to the issues raised in this appeal. At [22] - [29] I made the following points that are relevant to the issues raised in this appeal:

- (a) If a contract is partly in writing and partly oral, the oral terms cannot contradict the terms of the written agreement: *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471 [36]. Nor can the terms of a collateral contract impinge upon the terms of the main contract: *Hoyt's Pty Ltd v Spencer* [1919] HCA 64; (1919) 27 CLR 133, 147. If earlier agreed oral terms contradict written agreement the terms of the oral agreement can be said to be discharged by the written agreement: *Equuscorp* [36].
- (b) Courts are reluctant to find that the parties' contract is partly in writing and partly oral when the written document appears to be a complete contract. In *Equuscorp*, the High Court in a joint judgment of five judges made the following points why generally a party having executed a written agreement will be bound by it. These are:
 - (i) The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions [34].
 - (ii) Oral agreements will sometimes be disputable and resolving such disputes is commonly difficult, time-consuming, expensive and problematic [35].
- (c) Whether the parties intended the contract to be wholly in writing is a question of fact. In *Deane v The City Bank of Sydney* (1904) 2 CLR 198 Griffith CJ said:

In the present case the first question is, what is the agreement? Is it the writing, or the verbal conversation, or is it to be gathered from the conversation and the letter with all the other circumstances? Possibly it was open to the jury to find that the agreement was contained in the writing, but whether it was or not was a preliminary question of fact for the jury to determine on the evidence (209).

- (d) Whilst the principle may have been controversial, it is now accepted that a court or tribunal cannot look at subsequent conduct to interpret a written agreement: *Hughes v St Barbara Ltd* [2011] WASCA 234 [106] (Pullin JA); *The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353, 446 (Gibbs J); *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 [35] (Gummow, Hayne and Kiefel JJ).
- (e) However, regard may be had to subsequent conduct of the parties for the purposes of determining what were the entire terms of the contract: *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 [21] - [27] (Spigelman CJ).
- (f) To determine the terms of agreement, consideration must be given not only to what the parties by their words and conduct said and surrounding circumstances, but not their substantive beliefs or understanding: *Toll* [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].
- 90 *Toll* is authority for the point that once a party signs a contractual document, knowing it is a legal document relating to his or her rights and obligations, he or she is bound by the document: *Toll* (177 - 179); *Equuscorp* [33] - [35] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ). *Equuscorp* is also authority for the point that the execution of a later agreement will discharge an earlier oral consensus where there is conflict between the oral agreement and the written agreement [36] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).
- 91 These points arising from *Toll* and *Equuscorp* do not apply as the facts of this matter are that the later document executed by the respondent on 28 September 2011 did not comprehensively or exhaustively contain all terms of the contract. In particular, the written agreement signed on that day was incomplete in respect of the remuneration the respondent was to receive (exhibit Franse 2). Relevantly, the written agreement:
- (a) provides in cl 6.1 (AB 59):
- During the period that the Employee serves the Company under this Agreement, the Company must pay to the Employee the gross salary amount set out in Item 2 in the Schedule to this agreement payable weekly to the Employee's nominated local bank account.
- (b) has no schedule attached; and
- (c) provides in cl 7.1 conditions that attached to the appellant's obligation to pay superannuation to the respondent's nominated superannuation fund but this clause does not specify an amount of superannuation to be paid.
- 92 In these circumstances, no inconsistency could arise between the terms of the 'purported oral agreement' and the written agreement. If it were to be found that an agreement to vary the terms of the 11 June 2011 agreement (exhibit Franse 1) was made, the remaining terms of exhibit Franse 1, the oral variation and the written agreement signed on 28 September 2011 (exhibit Franse 2) could stand together.
- 93 For these reasons, I am of the opinion that the appellant's argument that no oral agreement could be effective at law fails as the written contract (exhibit Franse 2) was incomplete in that it did not contain the respondent's conditions of remuneration.
- 94 It is clear that the Commissioner erred in failing to consider whether the term relating to the provision of a motor vehicle in exhibit Franse 1 was varied by an oral agreement to provide a motor vehicle allowance in lieu of a motor vehicle. However, the members of this Full Bench are not in a position to assess the evidence on this issue and make findings of credibility as the Commissioner made insufficient findings about the credit of the witnesses.
- 95 When making findings of fact dependent upon findings of credibility, when a tribunal or court has before it competing versions, Steytler P in *Skinner v Broadbent* [2006] WASCA 2 [37] explained:
- [I]t is necessary for a trial judge to explain why one version has been preferred over another. In doing so, the trial judge should refer to relevant evidence and, when one set of evidence is accepted over a conflicting set of significant evidence, set out his or her findings as to how he or she has come to accept the one over the other: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280; *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 at 443; *Waterways Authority* at 1830. It is a judge's duty to consider all of the evidence in a case and, where important or critical evidence is not referred to, an appellate court may infer that it has been overlooked or that the trial judge failed to give consideration to it: *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435 at 442 and *Beale*, at 443. As Samuels JA pointed out in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728, for a judge to ignore evidence critical to an issue of fact found against a party may promote a sense of grievance and create a litigant who is both disappointed and disturbed, because it tends to deny both the fact and the appearance of justice having been done.
- 96 In the Commissioner's conclusions she recited some relevant evidence and submissions but then failed to make findings about which parts of the evidence and submissions she accepted. In addition, the specific findings the Commissioner made about the evidence of Mr Kowalewski are confusing. Although, she made a clear finding that she rejected the evidence given by Mr Kowalewski about a purported meeting on 7 October 2011 (exhibit Alfresco 2) and evidence that he had extended the respondent's probationary period ([63] - [64], AB 40) she made no other relevant specific findings of fact relating to his credibility. The Commissioner went on to refer to the respondent's submission that the figures reflected in exhibit Alfresco 5 were unreliable on grounds that exhibit Franse 8 showed a significant variance from the monthly GST sales figures. However, she did not state whether she accepted this submission. She then found that she rejected the evidence given by Mr Kowalewski that he had paid the respondent \$32,000 in bonus payments, but did not reject this evidence on grounds of credibility, but on grounds that counsel for the appellant had neglected to ask the respondent whether he had received \$32,000 or \$24,000 in bonus payments ([66], AB 40).

- 97 The Commissioner excluded this evidence because counsel for the appellant had failed to cross-examine the respondent about this issue. In these circumstances, it was indeed open to the Commissioner to reject the evidence given by Mr Kowalewski that an amount of \$32,000 was paid to the respondent by application of the rule in *Browne v Dunn* (1894) 6 R 67 (HL), as this evidence was about a matter that was a critical issue in dispute and Mr Kowalewski's evidence on this issue was not put to the respondent. The Commissioner did not, however, rely upon the rule in *Browne v Dunn* to reject this evidence but instead relied upon the rule in *Jones v Dunkel*. However, the rule in *Jones v Dunkel* could have no application, as it is a rule that it may be sometimes appropriate to apply in proceedings before this Commission when a party fails to give relevant evidence, to call particular witnesses or tender documents. Consequently, the application of *Jones v Dunkel* by the Commissioner in this matter was clearly an error of law. However, the error is not material to the disposition of this appeal as it is accepted in this appeal that the respondent was paid \$24,000 in bonus payments.
- 98 After finding that it was an implied term of the respondent's contract of employment in the absence of a motor vehicle a \$15,000 motor vehicle allowance would apply, the Commissioner found:
- [W]ith the exception of those matters already referred to the Commission accepts that Mr Kowalewski presented a true version of the events ... In all other regards it is clear on the assessment of credibility that the weight of evidence should lay with the applicant.
- 99 This finding is at best confusing as the Commissioner made no findings about what aspects of Mr Kowalewski's evidence that she accepted. In particular, she made no findings about whether she preferred the evidence of the respondent or Mr Kowalewski in respect of whether or not an oral consensus was reached to pay a motor vehicle allowance of \$15,000 per annum.
- 100 If in a case credibility is a critical factor, and if evidence wrongly excluded may bear upon the critical witness credibility, a retrial may generally be had: *Nominal Defendant v Hook* [1962] HCA 50; (1962) 113 CLR 641, 661 (Windeyer J), applied in *Brown v Churchill* [2006] WASCA 17 [40] (Pullin JA with whom Steytler P agreed). In this matter, as this issue turns solely on an assessment of the credit of the respondent and Mr Kowalewski, it is clear that the Full Bench not having seen and heard the witnesses is not in a position to legitimately make the necessary findings of fact.
- 101 Whether the term in exhibit Franse 1 was varied turns on an assessment of the credibility of the evidence in respect of this issue. Such an assessment would necessarily include an assessment of all relevant logically probative evidence which would include a consideration and assessment of exhibit Franse 3 which is an acknowledgment signed by the respondent on 15 March 2013 that he had received payment of all financial entitlements owed to him and the circumstances of the making and execution of that document. This assessment should have been made in light of the principle that the onus is on the respondent to counter a presumption that the terms of the contract were set out in writing. The Commissioner made no assessment of the effect of the contents of this letter. The respondent gave evidence that he signed the letter after he had received payment of pay in lieu of notice and holiday pay (ts 35). His evidence about this was not substantially challenged in cross-examination. Nor was any submission made about the effect of the acknowledgement in closing submissions. In these circumstances it would have been open to accept the respondent's evidence about why he signed the acknowledgement and what the acknowledgement of payment related to, however, the Commissioner neglected to make any finding about the veracity of this document. An assessment should have also included an assessment of the veracity of evidence relating to whether a motor vehicle and fuel were made available to the respondent.
- 102 In the event that a finding is made that there was an oral agreement reached between the parties which had the effect of varying the terms of the contract so as to entitle the respondent to a motor vehicle allowance of \$15,000 per annum to be added to the entitlement of the bonus calculated on turnover, in lieu of the provision of a company vehicle and fuel, a finding that the respondent was entitled to an amount of \$20,000 in lieu of the provision of a company motor vehicle would be open as the respondent was employed for 16 months post the three month trial period.
- (iii) **If a finding is made that the contract had not been varied by oral agreement, would it be open to make an award of compensation for a breach of the term relating to the provision of a motor vehicle?**
- 103 In the event a finding is made that there was not an oral agreement, can it be inferred from the fact that the Commissioner granted the respondent's claim for a motor vehicle allowance that she must have rejected Mr Kowalewski's evidence that a fully maintained vehicle had been made available to the respondent for his use? On the one hand, the answer to that question could be said to be, 'Yes', as the Commissioner found that it was an implied term of the respondent's contract that after the three-month probation period, in the absence of a motor vehicle, a \$15,000 motor vehicle allowance would apply and the respondent was denied that benefit. However, leaving aside the finding in respect of the implied term which has already been considered in these reasons, the difficulty with this finding is that the Commissioner failed to make any findings of fact or reasons to support this finding. She simply recited the evidence given on behalf of each party in respect of this issue. In the absence of any findings of fact in support of this finding and reasons for making that finding, the finding that there was an absence of a provision of a motor vehicle to the respondent cannot stand.
- 104 Findings of fact should have been made by the Commissioner as to which version of events relating to this issue is preferred.
- 105 As this issue also turns solely on an assessment of the credibility of the evidence, the Full Bench not having seen and heard the witnesses is not in a position to legitimately make findings of fact in respect of this issue.
- 106 If the decision is suspended and the matter remitted for further hearing and determination by the Commissioner and a finding was subsequently made that the terms of the contract were not varied, would it be open to the Commissioner to make an award of compensation in the nature of damages for loss caused by the breach of the term of the contract to provide a company vehicle and fuel to the respondent? The appellant says that the answer to this question is, 'No'. It says the Commission has no jurisdiction to award damages for breach of a term of contract to provide to the respondent a fully maintained vehicle.

107 I do not agree that this submission is correct. Under s 23 of the Act, the Commission is empowered to make a monetary award in the nature of damages to resolve a claim of a breach of a right or entitlement to a 'benefit' made under s 29(1)(b)(ii) in relation to an industrial matter. In *Cool or Cosy*, a finding had been made by a Full Bench that it was an implied term of Mr Matthews' contract of employment that he was entitled to reasonable notice. President Sharkey with the concurrence of the other members of the Full Bench found the term of reasonable notice amounted to a period of 12 months. It had also been found that Mr Matthews had been harshly, oppressively and unfairly dismissed. The Full Bench capped Mr Matthews' loss of remuneration at six months' remuneration under s 23A of the Act and did not make an award for the breach of contractual benefit of 12 months' notice to terminate the contract of employment.

108 On appeal to the Industrial Appeal Court, the Court found s 23A had no application to the contractual benefits claim referred under s 29(1)(b)(ii) of the Act and each member of the Court made the point that the Commission in determining a claim brought under s 29(1)(b)(ii) of the Act can, in the exercise of its power under s 23(1) of the Act to inquire into and deal with an industrial matter, award damages in lieu of a denied contractual benefit. Justice Steytler explained [20]:

The Full Bench having found that it was an implied term of the appellant's contract of employment that he should be given reasonable notice, that a reasonable period of notice was one of 12 months and that the appellant had been denied that benefit (and, in my opinion, it plainly was a 'benefit' for the purpose of s 29(b)(ii) [sic], having been for the advantage or good of the appellant: cf *Slee and Stockden Pty Ltd v Blewitt*, above, and *Wardell v Donnybrook Stone Company* (1992) 72 WAIG 2250), the only remaining question was that of whether it was empowered to award to the appellant compensation in lieu of that benefit, it obviously having been impracticable to require the employer to let the appellant work out that period of notice.

109 In [22] his Honour then said:

Some of the cases to which we were referred by counsel for the respondent were cited in support of the proposition that damages in lieu of a denied contractual entitlement could not be a 'benefit ... to which ... [an employee] is entitled under his contract of employment' for the purposes of s 29(1)(b)(ii) as the 'benefit' there referred to is the contractual entitlement itself and damages 'is a common law remedy which is not based on any doctrine relating to implied contractual terms or their enforcement': *HotCopper*, above, per Anderson J at [22]. However, the 'benefit' which was denied in this case is, as I have said, the entitlement to reasonable notice itself and the question is not whether damages in lieu can be regarded as a benefit for the purposes of s 29(1)(b)(ii), but whether the Commission can, in the exercise of its power under s 23(1) to inquire into and 'deal with' a matter referred to it under s 29(1)(b)(ii), award compensation in lieu of the denied contractual benefit.

110 Justice Steytler then went on to consider a number of cases in which the distinction to award compensation in the form of damages in lieu was discussed. He then said at [24] and [27]:

[24] In my respectful opinion, the better analysis in each of those cases should have been that the contractual benefit which was denied by the employer was that which was provided for by the contract of employment itself (respectively the full term of employment provided for by the contract, the right to a defined period of notice and the right to reasonable notice) and that the award of compensation was the means by which the Commission dealt with the industrial matter referred to it under s 29(1)(b)(ii), utilising the broad power given it under s 23(1) of the Act read, if necessary, with s 26(2) thereof.

[27] The approach which I have favoured is that which was favoured, also, by Anderson J in *HotCopper*, above, at [24], where, without intending to express a concluded view, his Honour said (with the concurrence of the other two members of the Court) in the context of a claim referred under s 29(1)(b)(ii) that he was inclined to think that the Commission was empowered to make 'a monetary order for compensation - that is, a damages award - in an appropriate case, as long as its purpose is to do no more than is necessary to "redress the matter by resolving the conflict in relation to the industrial matter" - *Welsh v Hills* (1982) 62 WAIG 2708 - and as long as its effect is so limited'.

111 Justice Pullin also made the same point. At [48] - [49] he said:

The appellant argues that the 'benefit' he was not allowed was the contractual right to receive written notice. The word 'benefit' is a word of wide meaning: see *Balfour v Travelstrength Ltd* (1980) 60 WAIG 1015. A benefit is in ordinary meaning 'anything that is for the good of a person or thing'; 'Macquarie Dictionary'. A contractual promise by an employer to give an employee 12 months' notice before employment is terminated, confers a right on the employee to be given such notice. Such a contractual right is a benefit with real and measurable value. If a contract containing a term requiring notice to be given, is terminated by an employer without cause and without notice, and therefore in breach of such a term, then the employee is entitled to an award of damages: see *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 465.

In the language of s 29(1)(b)(ii), an employee dismissed without notice in breach of contract, may refer to the Commission a claim 'that he [had] not been allowed by his employer a benefit ... to which he [was] entitled under his contract of service'. Once the claim has been referred, the authority or jurisdiction of the Commission to grant remedies, is to be found in s 23. The section is extraordinary in its brevity. As I have already said, it simply confers jurisdiction on the Commission to enquire into and 'deal with' the claim. In my opinion, this provision confers jurisdiction on the Commission to order damages for the non-allowance of a benefit if the non-allowance amounts to a breach of contract. The principal objects of the Act are set out in s 6, and they include a statement that the objects of the Act are to provide a means for conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes, and to provide means for 'settling industrial disputes not resolved by amicable agreement'. If there were no power to award damages, then the Commission would not be able to settle this type of dispute.

- 112 Justice EM Heenan agreed with the conclusions of Steytler and Pullin JJ and said that he did not 'wish to be understood as suggesting that this is a special exception or qualification upon limits of the Commission, otherwise, to give effect to common law entitlements on an application by an employee under s 29(1)(b)(ii)' [73]. His Honour also observed that entitlements that can be claimed under s 29(1)(b)(ii) are 'entitlements which the employee has arising out of his contract of employment with the employer. They are contractual and, therefore, common law claims which exist independently of the provisions of the Act and which could, if necessary, be pursued in any court of appropriate general civil jurisdiction [60].
- 113 In *Saldanha*, Ritter AP pointed out that the determination of a denial of contractual benefits claim by the Commission involves the enforcement of legal rights and the exercise of judicial power [122]. He also said that *Cool or Cosy* made it clear that the way in which the Commission deals with a claim of a contractual benefit that has not been 'allowed' is in accordance with the common law [122]; see also the discussion of these principles by Scott ASC in *Triantopoulos v Shell Company of Australia Ltd* [2011] WAIRC 00004; (2011) 91 WAIG 67. Thus, it is clear that the Commission does have jurisdiction to make an award of compensation in the form of damages for a breach of a term of contract where the term creates an entitlement to a contractual benefit that is an 'industrial matter' within the meaning of the definition of industrial matter in s 7(1) of the Act.
- 114 In this matter, however, no submission was put at first instance on behalf of the respondent that an award of compensation in the form of damages could be awarded for breach of the term of contract set out in exhibit Franse I which required after a three-month trial period the appellant to provide to the respondent a company motor vehicle and fuel valued at approximately \$15,000 per annum. In my opinion, this omission may not be fatal. In *Kingstyle Investments*, the principles that apply when a new point is sought to be raised on an appeal were considered. At [50] - [54] I observed:

Appeals brought under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) are not by way of rehearing, but are appeals in the strict sense: *Hammersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch* (1984) 64 WAIG 852; see the discussion in *The Minister for Health v Drake-Brockman* [2012] WAIRC 00150; (2012) 92 WAIG 203 [73] (Smith AP and Beech CC). Fresh evidence can, however, be admitted by a Full Bench where special or exceptional circumstances are raised: *Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Ltd* (1990) 70 WAIG 3040. This does not allow a matter to be heard without regard to the manner in which a matter was conducted at first instance. In *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2012] WASCA 50, Martin CJ set out the circumstances when a new point may be raised on appeal to an appellate body at [49] - [52]:

- 49 [I]n *University of Wollongong v Metwally (No 2)* [1985] HCA 28; (1985) 60 ALR 68, the High Court observed:

It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so (71).

- 50 Similar observations were made by the Court of Appeal of New South Wales in the case under appeal in *Coulton v Holcombe*. Their Honours observations as to:

... the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court

were endorsed by the plurality in *Coulton v Holcombe* (8) as important principles underpinning the public interest in the finality of litigation: see also *Liftronic Pty Ltd v Unver* [2001] HCA 24; (2001) 179 ALR 321, 330 - 331 (Gummow and Callinan JJ).

- 51 However, this is not to say that a new point can never be raised on appeal. In *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491, the plurality (Mason CJ, Wilson, Brennan and Dawson JJ) observed:

It is true that in *Maloney v Commissioner for Railways* (1978) 18 ALR 147, 152 it was recognised that in 'very exceptional cases' a plaintiff's omission to put at trial a case formulated on appeal may not be conclusive against him. But it was pointed out that the opportunity to assert the new case at another trial should only be granted where the interests of justice require it and such a course can be taken without prejudice to the defendant. No exceptional circumstances arise in this case where the parties adopted the course which they took of their own choice (498).

- 52 It is significant to note that the High Court has twice described the circumstances in which a party will be allowed to raise a new point on appeal as 'very exceptional'. Such a course will only be permitted if two requirements are met. First, the interests of justice must require determination of the new point. Second, there must be no prejudice to the party against whom the new point is taken.

In *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760, the Full Bench found it was the duty of the Full Bench to entertain a plea as to jurisdiction irrespective whether the point had been taken at first instance. It is clear that this principle applies where the jurisdictional issue sought to be raised for the first time on appeal is a bare legal point. However, in circumstances where additional or different evidence may have been led if the point had been raised at first instance, it is open to the Full Bench to refuse to permit an appellant to raise the issue for the first time. In recent times courts and tribunals have applied this rule strictly.

In *Minister for Education v Liquor Hospitality and Miscellaneous Union, Western Australian Branch* [2011] WAIRC 00818; (2011) 91 WAIG 1839 [23] - [24], I had regard to the principles set out in *Water Board v Moustakas* (1988) 180 CLR 491, 497 - 498 and then had regard to the observations of Branson and Katz JJ in *H v Minister for Immigration and Multicultural Affairs* [2000] FCA 1348 [7] - [8] where their Honours said:

In our view, the readiness with which appeal courts have in the past been satisfied that it is expedient in the interests of justice to allow a fresh point to be argued and determined on appeal is unlikely to continue into the future. The volume and complexity of the cases presently required to be heard and determined by the intermediate appellate courts of Australia is such that it is increasingly important that such courts are able to devote their time to the genuine review of first instance decisions. It is becoming increasingly difficult, in our view, to establish that it is expedient in the interests of justice that the time of three or more judges should be spent giving original consideration to issues that ought to have been raised before the primary judge. The interests of justice in this sense extend beyond the interests of the parties to the appeal to encompass the interests of other litigants whose appeals require hearing and determination, and the broad public interest in efficient judicial administration.

I then observed at [25] - [26]:

- 25 When assessing whether it would be expedient in the interests of justice to allow a new point to be raised Branson and Katz JJ also had regard to whether the point had any merit [9].
- 26 From these passages the following principles guide when a finding could be made that it is expedient and in the interests of justice to entertain a point:
- (a) The point must be one of construction or of law and not be met by calling evidence.
 - (b) In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance.
 - (c) In very exceptional cases an omission to put a case formulated on appeal may not be conclusive. The opportunity to assert the new case should be granted only where the interests of justice require it and such a course can be taken without prejudice to the defendant.
 - (d) Consideration of the interests of justice should extend to a consideration of relevant matters beyond the interests of the parties to the interests of other litigants and efficient case management.
 - (e) When assessing the interests of justice, the merit of the new point sought to be raised is a relevant consideration.

Where the point sought to be raised for the first time is an issue that goes to jurisdiction, the same rule applies. This was made clear by the Industrial Appeal Court in *Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch* (1996) 76 WAIG 4417. In that matter the appellant had applied to register an agreement which had the effect of varying and renewing a current registered industrial agreement. On appeal by the union against the decision to register the agreement the appellant sought to be heard on an issue that was said to be jurisdictional. The appellant sought to advance an argument that the Full Bench had no jurisdiction to hear the appeal because the union's officers had not been duly elected and were not authorised to bring the appeal. The Full Bench refused to entertain the argument and heard and determined the appeal. On appeal to the Industrial Appeal Court the Court held the Full Bench had not erred. Justice Anderson, with whom Rowland and Franklyn JJ agreed, held (4419):

The Full Bench took the view that this question of authorisation should have been argued below and that all the relevant evidence should have been canvassed below. I am not persuaded this was wrong. An appeal tribunal is entitled to refuse to allow matters which ought to have been agitated below to be raised for the first time before it at least where the matters involve disputed factual issues. This is a rule of broad application, applied in the interests of expedition and the finality of legal proceedings. *Coulton v Holcombe* (1986) 162 CLR 1 at 7; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *The Water Board v Mustakis* (1988) 68 ALJR 209; *Paltara Pty Ltd v Dempster* (1991) 6 WAR 85 at 99.

Although in one sense the issue of authority to bring the appeal did not arise until the appeal stage, that would be taking too technical a view of the principle. The appeal proceeding was part of the intervenor proceedings and the issue whether the intervenor proceedings generally were properly authorised and whether the people purporting to file appropriate documents were authorised to do so raised substantial factual issues which could have been settled at first instance. I am not persuaded the Full Bench was wrong to decide the present appellant should be held to the conduct of its case below. There was plainly an opportunity before the Commissioner to challenge the authority of those purporting to represent the first respondent in the intervenor proceedings and the failure to take advantage of that opportunity, whether it was deliberate or inadvertent, entitled the Full Bench to say that should be the end of the matter.

As the appellant's argument was developed before us it seemed to me to be firmly based on the proposition that because this issue of due authorisation went to the jurisdiction of the Full Bench to hear the appeal the Full Bench had no discretion to decline to entertain argument on the point and its refusal to do so therefore constituted fatal error. I am unable to accept this proposition. In the first place I am not sure the rule that an appeal tribunal may refuse to allow a point to be raised for the first time in the appeal where contested issues of fact are involved does not apply even where questions of jurisdiction arise. See the comments of Deane J in *Squire v Rogers* (1979) 27 ALR 330 at 337

115 The principles that govern the circumstances in which a party would be allowed to raise on appeal an argument which had not been raised in proceedings below were recently applied by the Court of Appeal in *Primewest (Mandurah) Pty Ltd v Ryom Pty*

Ltd [2014] WASCA 28. When summarising the well-established principles Martin CJ (Pullin and Murphy JJA agreeing) [85] said in relation to the prejudice which a party may suffer as a result of the other party being able to raise a new argument on appeal that the following comments of Gleeson CJ, McHugh and Gummow JJ in *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 77 ALJR 1598 [51] are of direct relevance. In *Whisprun*, their Honours said:

It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at the trial unless it could not possibly have been met by further evidence at the trial (*University of Wollongong v Metwally* [No 2] (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 875 [44]; *Water Board v Moustakas* (1988) 180 CLR 491 at 496-497; cf *R v Birks* (1990) 19 NSWLR 677 at 683-685). Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination. Even when no question of further evidence is admissible, it may not be in the interests of justice to allow a new point to be raised on appeal, particularly if it will require a further trial of the action (*Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645-646). Not only is the successful party put to expense that may not be recoverable on a party and party taxation but a new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs.

116 Recently applied by Martin CJ (Mazza JA and Hall J agreeing) in *Calandra v Civil Aviation Safety Authority* [2015] WASCA 31 [19].

117 The question is whether to now allow the point to be raised before the Commissioner in the event that the decision is suspended and the matter remitted to the Commissioner for further hearing and determination would prejudice the appellant.

118 In this matter, as the finding that the terms of the contract are those in exhibits Franse 1 and Franse 2 whether a motor vehicle and fuel to the approximate value of \$15,000 was provided is a matter that should be decided at first instance having regard to the evidence before the Commission. The issue is not solely one of law, the raising of the issue of damages is an issue that could in part be met by further evidence, which could reduce the quantum of the loss occasioned by the breach.

119 If the point was taken at first instance, the Commissioner would be required to turn her attention to the assessment of the loss occasioned by the breach of contract. I do not agree that the principles in *Bogunovich* have any application. In *Shacam Transport Pty Ltd v Damien Cole Pty Ltd (No 2)* [2014] WAIRC 01294; (2014) 94 WAIG 1835 [22], the Full Bench referred to principles for assessing damages for a breach of contract that were summarised by Buss JA in *Australian Goldfields NL (In liq) v North Australian Diamonds NL* [2009] WASCA 98; (2009) 40 WAR 191, in which his Honour observed [276]:

The general contractual principle governing the measure of damages is that the innocent party suing for breach of contract is to be placed in the same position, so far as money can do it, as if the contract had been performed: see *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] per French CJ, Gummow, Heydon, Crennan and Kiefel JJ; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 per Mason CJ and Dawson J; *L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225 at 237 per Gibbs CJ; *Wenham v Ella* (1972) 127 CLR 454 at 471 per Gibbs J. The innocent party is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss): see *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11 - 12 per Mason, Wilson and Dawson JJ. The innocent party should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss suffered by reason of the breach of contract. Ordinarily, this involves a comparison between the position in which the innocent party would have been if the breach of contract had not occurred and what, relevantly, represents the position in which the innocent party is in after the occurrence of the breach: see *Amann Aviation* (at 116) per Deane J.

120 The Full Bench in *Shacam Transport Pty Ltd (No 2)* also observed [29(a)]:

An assessment of a head of damage need not be calculated in a way that is precise. In *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 Toohey J observed (138):

[T]he quantification of damages is 'in many cases no more than an approximation lacking in mathematical or economic accuracy or sufficiency' (*Pennant Hills Restaurants* (1981), 145 C.L.R., at p. 636) or even that the assessment of damages 'does sometimes, of necessity, involve what is guess work rather than estimation' (*Jones v. Schiffmann* (1971), 124 C.L.R. 303, at p. 308). It is now almost a century since Bowen L.J. said in *Ratcliffe v. Evans* ([1892] 2 Q.B. 524, at pp. 532-533):

'As much certainty and particularity must be insisted on ... in ... proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'

121 In this matter, if it were found that the conditions of employment set out in exhibit Franse 1 were not varied and no fully maintained motor vehicle including fuel with an approximate value of \$15,000 per annum was provided to the respondent at the expiration of the three-month trial period, it follows that if no vehicle at all was provided the loss occasioned by the breach of the term could be said to be expressly quantified in the terms of the contract, that is a sum approximately \$15,000 per annum. In these circumstances it would be open to the Commissioner to make an award of compensation by way of damages for the loss assessed at \$20,000.

122 However, if the Commissioner was to find that a vehicle was provided to the respondent for his use that had a lesser value than \$15,000 per annum, would it be open to the Commissioner to assess the loss taking account of the approximate value of the vehicle and fuel that was provided? In my opinion, such an assessment could not be made as even if Mr Kowalewski's evidence about the availability of a 10-year-old Mazda ute is accepted, there is no evidence before the Commissioner as to the value of the 'use' to the respondent.

- 123 Assessment of the loss occasioned by the breach of the condition if it could be made, could turn on:
- (a) whether the evidence given by Mr Kowalewski that a 10-year-old Mazda ute was made available for the personal use of the respondent, should be accepted;
 - (b) a consideration of the respondent's evidence that for a period of eight weeks he sought to use one of the appellant's vehicles for his personal use, including whether that occurred after the expiration of the three-month trial period; and
 - (c) if it is accepted that the respondent had available to him for his personal use a fully maintained company vehicle including fuel for any period of time, even if that period was only for eight weeks, an assessment of the value of that use to the respondent.
- 124 The issues raised in the preceding paragraph would be clearly relevant to an assessment of loss occasioned by the breach of the term requiring the provision of a fully maintained company vehicle to the approximate value of \$15,000 post the three-month trial period. However, the respondent's case at first instance was not put to the Commission on the basis that this condition had been breached. As the appellant points out in its submissions filed on 6 March 2015, it was the respondent's case that by oral agreement the contractual entitlement to the vehicle had been exchanged for a vehicle allowance. The appellant would suffer prejudice if the respondent is now allowed to take this point that he did not take at the hearing at first instance. If the point had been taken, the appellant would have had an opportunity to adduce evidence of the value of the use of the vehicle to the respondent that Mr Kowalewski says he made available to the respondent for his personal use and if relevant, the value of the use of the vehicle to the respondent that may have been available to him for his personal use in the eight-week period.
- 125 In these circumstances, the respondent should not now be allowed to raise the point before the Commissioner at first instance, that an award of compensation in the form of damages could be made for breach of the term of contract that required the appellant to provide to the respondent a fully maintained motor vehicle including fuel valued at approximately \$15,000 per annum.
- (b) Quantum of turnover of the appellant's business**
- 126 It is patently clear that the Commissioner erred in law in finding that the appellant had denied the respondent a contractual benefit of \$14,536 in bonus payments.
- 127 The Commissioner made no findings of fact as to how that amount was calculated.
- 128 Although the respondent pleaded in his further and better particulars that the amount of \$14,536 has been calculated as 1% of a turnover of \$3,853,601.34 less \$24,000 that had been paid, the Commissioner made no findings of fact that the turnover of the appellant's business from the end of the respondent's three-month trial period until the termination of employment was the amount claimed in the particulars.
- 129 At the hearing of the appeal the respondent's agent informed the Full Bench that the evidence relied upon to prove the turnover of the appellant's business was the addition of the figures in exhibits Franse 4, Franse 5 and Franse 7 with allowance made for the commencement of the entitlement period for the bonus on 4 October 2011 or thereabouts. The appellant says that this contention was not a live issue in the proceedings at first instance. I do not agree.
- 130 In the hearing at first instance, the quantum of the turnover of the appellant's business during the material period of the respondent's business was squarely in issue. The respondent's agent tendered into evidence documents in support of the respondent's case which were a sales register (exhibit Franse 4) and GST [Detail - Cash] (exhibits Franse 5 and Franse 7).
- 131 The Commissioner made no findings in her reasons for decision about the reliability of exhibit Franse 4. Nor did she refer to exhibit Franse 4 in her reasons for decision. The appellant's counsel and the respondent's agent made no submission about exhibit Franse 4 in closing submissions. The respondent's agent in his closing address spent some time putting a submission that the monthly figures in exhibit Alfresco 5 could not be relied upon because there was a substantial variance between the monthly GST figures in exhibits Franse 5 and Franse 7 and exhibit Alfresco 5 and that the figures in those exhibits had been analysed in a document in the nature of an aide memoire and is tendered into evidence as exhibit Franse 8. Exhibit Franse 8 is not a source of documentary evidence in itself but simply a summary of the figures set out in exhibits Franse 5, Franse 7 and Alfresco 5.
- 132 However, the fact that no submissions were made about exhibit Franse 4 did not absolve the Commissioner from the duty cast upon her to reveal her reasons for finding that the claim of \$14,536 in outstanding bonus payments had been made out. As the only basis for that finding must have in some sense entailed some analysis of exhibit Franse 4 the Commissioner was bound to make findings about exhibit Franse 4.
- 133 The respondent properly concedes that the Commissioner erred in failing to make findings about this issue. The respondent says the decision should be suspended and the matter remitted to the Commissioner to enable a submission to be made that the figures in exhibit Franse 4 should be accepted, together with exhibits Franse 5 and Franse 7 in an assessment of the turnover during the relevant period of the respondent's employment.
- 134 The respondent's agent attempted to make a submission to the Full Bench that the respondent had believed that the figures in exhibit Franse 4 were accepted, except for some of the challenges with respect to sales that had fallen through. The difficulty with this submission is that the effect of the evidence given by both the respondent and Mr Kowalewski was that exhibit Franse 4 could not be relied upon to determine the turnover of the appellant's business during the material time. The respondent said that he could not say whether many of the jobs listed in exhibit Franse 4 were performed and that the jobs listed as open were not finalised in payment (ts 51 - 52). If proper regard is had to this evidence it would be difficult to sustain a submission that the sales figures in exhibit Franse 4 can be regarded as reliable. Thus if exhibit Franse 4 is not relied upon the consequence is that the turnover figures in exhibits Franse 5 and Franse 7 would have to be accepted to calculate turnover during the material period. This would lead to a finding that the turnover of the appellant's business during the period of the

respondent's employment post the trial period was \$2,710,883.23 entitling the respondent to a gross bonus of \$27,108.83. Alternatively, in light of the fact that exhibit Alfresco 5 records a higher turnover figure of \$2,726,000.00, if that figure is accepted, the respondent would have had an entitlement of a gross bonus of \$27,260.

135 It is notable that the Commissioner in her reasons for decision did not make a finding the figures in exhibit Alfresco 5 to be unreliable. She simply recited the submissions made on behalf of the respondent that:

- (a) the figures were not produced from Mr Kowalewski's diary until a week before the hearing and were not provided to the respondent; and
- (b) the monthly sales figures in exhibit Alfresco 5 significantly varied from GST sales receipts in exhibits Franse 5 and Franse 7.

136 The submission made on behalf of the appellant in this appeal is that the overall difference in the figures between exhibits Franse 5 and Franse 7 and exhibit Alfresco 5 is not significant. The evidence of Mr Kowalewski was that the source of the monthly figures came from his diary and verifiable by the sales register of figures provided in discovery by the appellant (exhibits Franse 5 and Franse 7). From this evidence and the fact that it appears from the reproduction of the figures in exhibit Franse 8, that the figures in exhibit Alfresco 5 are rounded, whereas the figures in exhibits Franse 5 and Franse 7 are not, a finding would be open that the best evidence to ascertain the turnover of the appellant's business during the period in question is exhibits Franse 5 and Franse 7.

137 If this finding is accepted, it is clear that the Commissioner erred in failing to find that the quantum of turnover of the appellant's business in the material period was \$2,710,883.23 and that the respondent had a contractual entitlement to gross monthly payments of a bonus assessed at 1% of the turnover which is an amount of \$27,108.83.

138 Turning to the issue of taxation, the appellant's agent points out that an employer is subject to a mandatory obligation to withhold taxation from remuneration payments made to an employee and pay that amount to the Commissioner of Taxation. Pursuant to s 12-35 of sch 1 to the *Taxation Administration Act* an entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee. Pursuant to s 16-5 of sch 1 to the *Taxation Administration Act* the entity must withhold an amount of taxation from a payment, when making the payment. In *Bennett & Dix (a firm) v Higgins*, the respondent in that appeal worked for the appellants as a painter. When his employment was terminated he made an application to the Commission claiming he had been unfairly dismissed from his employment. In defence the appellants claimed he had been contracted to them under a contract for services and was an independent contractor. The Commission found the respondent was an employee and that he had been unfairly dismissed. The Commission ordered the appellants to pay the respondent two weeks' pay which totalled an amount of \$2,006.40. After the order was made, the appellants' agent wrote to the respondent's solicitors stating that:

In addition to the obligation to deduct as an eligible termination payment 47.5 percent of the compensation ordered, a total of \$950.00, our client is also obliged to deduct the PAYG instalments due in respect of your client's earnings of \$2,588.80 in July 2003. That tax liability amounts to \$1,229.68.

139 The Attorney General for the Commonwealth of Australia intervened in the appeal and made submissions about the effect of the obligation on an employer to withhold taxation. In the judgment of Le Miere J he set out a submission made by the Commonwealth Solicitor General that is relevant to the disposition of this appeal. At [36] his Honour said:

The Solicitor-General submitted, and it was not disputed by either of the parties, that the words of s 16-5 in Sch 1 require the withholding to occur when making a payment. These laws do not require and do not permit a payer to withhold from a later payment a PAYG amount that should have been withheld from an earlier payment. The opportunity to withhold is lost once the full amount of the payment is made to the employee.

140 His Honour (with whom Wheeler and Pullin JJ agreed) then found [37] - [42]:

As discussed above, the compensation of \$2,006.40 required by the WAIRC order to be paid by the appellants to the respondent is properly characterised as an eligible termination payment. The appellants were obliged to withhold from that payment an amount worked out under the holdings schedules. It is common ground that the amount so calculated is \$973.10.

The appellants withheld a further amount on the basis that they were obliged by the Commonwealth taxation legislation to deduct that further amount on account of the wages and salary payments made by them to the respondent in the course of his employment prior to the termination of his employment.

The definition of salary and wages in s 221A of Div 2 of Pt VI of the ITA Act to include an eligible termination payment is not relevant to Sch 1. Division 2 of Pt VI applied to the PAYE deduction system. The PAYE deduction system ceased to operate in respect of salary and wage payments made after 30 June 2000. Consequently the Solicitor-General submitted that the appellant had no obligation to make a deduction under s 221C(1a) from the payment and remit it to the Commissioner of Taxation. The obligation under s 221C(1a) only applies to payments to an employee of salary and wages before 1 July 2000. That submission was not contested by the appellants and I accept it.

In respect of its obligation to pay \$2,006.40 to the respondent, the appellants may rely upon s 16-20 of Sch 1 to the TA Act to say that it is discharged from all liability to pay or account for an amount properly withheld under s 12-85 provided it is the amount required by s 15-10 of Sch 1 to be withheld.

The appellants may not rely upon s 16-20 of Sch 1 in respect of the amount they withheld from the \$2,006.40 in respect of the PAYG amounts that they did not withhold under s 12-35 at the time payments of salary and wages were made to the respondent in July 2003.

Thus, the appellants were required under Commonwealth tax law to withhold the amount of \$973.10 from the payment of \$2,006.40 to the respondent under the WAIRC order. Further, having remitted that amount to the Commissioner of

Taxation the appellants were discharged from all liability to pay or account for that amount to the respondent. However, the appellants were not required under Commonwealth tax law to withhold any further amount from the payment of \$2,006.40 to the respondent under the WAIRC order and were not discharged from their liability to pay the balance of that sum to the respondent.

- 141 Thus the obligation to withhold taxation from amounts paid to an employee as remuneration arises at the time the payment is made, but no amount can be withheld from any future payment of remuneration in respect of a past payment.
- 142 The facts of this matter in this appeal are that:
- (a) the respondent was paid a total amount of \$24,000 as bonus payments; and
 - (b) no amount of taxation was withheld from any bonus payment and paid to the Commissioner of Taxation as tax withheld from a bonus payment paid to the respondent.
- 143 Although it is argued on behalf of the appellant that tax on the amount of \$24,000 was paid to the Commissioner of Taxation, it is apparent from the evidence given by Mr Kowalewski that the respondent paid tax on that amount as taxation paid on behalf of the appellant or Mr Kowalewski and not the respondent.
- 144 The respondent's agent urged the Full Bench not to accept Mr Kowalewski's evidence that he had paid the bonus payments from the company and he had paid taxation on the amounts paid. Whilst this raises an issue going to the credibility of the evidence given by Mr Kowalewski, it is not necessary to consider whether this is an issue that should be determined by the Commissioner following the remittal of this matter by the Full Bench pursuant to s 49(5)(c) of the Act.
- 145 The respondent's agent made a submission in this appeal that the respondent treated the payment of \$24,000 as a gross figure upon which he would have to pay his own tax. The difficulty with that submission is the respondent did not give any evidence to that effect. He simply said that he had received a total of \$24,000 in bonus payments and that the payments had been paid randomly but on a quarterly basis to cover specific timeframes (ts 34). He made no comment about whether he understood the payments had been made to him on a net or gross basis.
- 146 The reasoning of *Le Miere J* makes it clear that at the time each of the bonus payments were made the appellant was required to withhold the rate specified by the Commissioner of Taxation. It is obvious that the amount withheld must be remitted to the Commissioner of Taxation as an amount withheld from a payment made to the respondent. Thus, the tax paid must be paid as tax to be credited and accounted for by the Commissioner of Taxation as part of the respondent's assessable income. It is clear from Mr Kowalewski's evidence (even if accepted) this did not occur. In these circumstances, the appellant is not discharged from its liability to pay to the respondent the balance of the amount between \$27,108.83 and the amount of \$24,000. Thus, \$3,108.83 remains owing to the respondent. From that amount the appellant would be required to withhold the applicable rate of taxation. It is not open to the Commission to scale this amount up to take account of the rate of tax that must be paid when making an eligible termination payment, as all amounts of compensation paid in compliance with an order made by the Commission form part of an employee's assessable income in the financial year the payment is made. If an amount withheld as taxation results in an overpayment of tax, the Commissioner of Taxation will deal with that overpayment as part of an assessment of the employee's assessable income for that financial year: *Miller v Wheatbelt Individual & Family Support Association Inc* [2014] WAIC 00028; (2014) 94 WAIG 179.
- 147 As the decision should be suspended and the matter remitted to the Commissioner to further hear and determine the respondent's claim in relation to the company vehicle, the Full Bench is unable to make an order to vary the decision to order the appellant to pay this sum to the respondent. This is a matter that can be rectified by the Commissioner when she determines the claim relating to the motor vehicle.

Determination of the appeal

- 148 For these reasons, I am of the opinion that an order should be made by the Full Bench to uphold the appeal, suspend the operation of the decision and remit the matter for further hearing and determination.
- 149 The issues the Commissioner is required to determine after hearing submissions by the parties are in my opinion as follows:
- (a) Whether the condition in the contract of employment and set out in exhibit Franse 1 relating to the provision of a motor vehicle was varied by oral agreement?
 - (b) If the condition referred to in (a) was varied, what were the terms of the variation and were the terms of the variation breached by the respondent?
- 150 If the condition in the contract of employment relating to the provision of the motor vehicle was not varied this part of the claim of denied contractual benefits should be dismissed.
- 151 After hearing and determining the respondent's claim in respect of the motor vehicle, the Commissioner should then deal with the respondent's claim to the balance of money's owing from the bonus payments calculated on the appellant's turnover, being a gross amount of \$3,108.83.

BEECH CC:

- 152 I have had the advantage of reading in draft form the reasons for decision of the Acting President. I agree with those reasons and have nothing to add. I agree with the order to issue.

HARRISON C

- 153 I have had the benefit of reading the reasons for decision of her Honour, the Acting President. I agree with those reasons and have nothing to add.
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2015 WAIRC 00248

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ALFRESCO CONCEPTS PTY LTD	APPELLANT
	-and- TROY PATRICK FRANSE	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON	
DATE	TUESDAY, 24 MARCH 2015	
FILE NO	FBA 12 OF 2014	
CITATION NO	2015 WAIRC 00248	

Result	Appeal allowed
Appearances	
Appellant	Mr G McCorry, as agent
Respondent	Mr P E Mullally, as agent

Order

This appeal having come on for hearing before the Full Bench on Thursday, 22 January 2015, and having heard Mr McCorry, as agent, on behalf of the appellant, and Mr Mullally, as agent, on behalf of the respondent, and reasons for decision having been delivered on Friday, 20 March 2015, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is allowed.
2. The decision made by the Commission on 22 September 2014 ([2014] WAIRC 01035; (2014) 94 WAIG 1594) is suspended.
3. The matter is remitted to the Commission for further hearing and determination.

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

[L.S.]

NOTICES—Application for General Order—

2015 WAIRC 00289

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
111 St Georges Terrace, Perth
**Submissions for the 2015
WA Minimum Wage**

The WAIRC is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee of \$665.90 per week was set in June 2014 to apply from 1 July 2014.

The WAIRC invites interested persons or organisations to make a submission to the Commission on what minimum wage should be set in 2015. The Commission will hear oral submissions on Tuesday, 2 June 2015. The proceedings are open to the public and will be webcast. Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Tuesday, 12 May 2015.

Written submissions are welcomed. Any person or organisation who wishes to make a written submission should do so in writing or by email by Tuesday, 12 May 2015. Please note that copies of written submissions may be made available to other persons appearing and may be displayed on the Commission's website.

Further particulars may be obtained from the Registry of the WAIRC and from the Commission's website at www.wairc.wa.gov.au.

All correspondence should be addressed to the Registrar at the above address or by email to registrar@wairc.wa.gov.au quoting Matter number 1 of 2015.

DATED at Perth this 7th day of April 2015.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00279

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2015 WAIRC 00279
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : ON THE PAPERS
DELIVERED : WEDNESDAY, 1 APRIL 2015
FILE NO. : M 186 OF 2013
BETWEEN : KYRA PHILLIPS
 Applicant
 AND
 MVJ ENTERPRISES PTY LTD
 Respondent

CatchWords : Respondent employer's application for costs pursuant to section 570 of the Fair Work Act 2009; Claimant successful at Trial on liability but largely unsuccessful as to quantum; whether proceedings instituted without reasonable cause; whether Claimant's unreasonable act or omission caused the Respondent to incur costs; whether proper cause for the award of costs.

Legislation : *Fair Work Act 2009*, section 570
 Industrial Magistrates Courts (General Jurisdiction) Regulations 2005

Instruments : Educational Services (Post-Secondary Education) Award 2010 (MA000075)

Case(s) referred to in reasons:

Kyra Phillips v MVJ Enterprises Pty Ltd (2015 WAIRC 00204)
Suda Ltd v Sims (No. 2) [2014] FCCA 190
Chileshe v E & M Business Trust [2014] FCCA 1381
Reeve v Ramsay Health Care Australia Pty Ltd (No. 2) [2012] FCA 1322
Melbourne Stadiums Ltd v Sautner [2015] FCAFC 20
Construction, Forestry, Mining and Energy Union v Clarke (2008) 170 FCR 574

Result : Costs application is refused

Representation:

Claimant : Mr N Marouchak of MKI Legal appeared for the Claimant.
Respondent : Mr G Douglas of Douglas Cheveralls Lawyers appeared for the Respondent.

REASONS FOR DECISION**Introduction**

- 1 Ms Kyra Phillips resigned from her employment with MVJ Enterprises Pty Ltd (the Respondent) in September 2013.
- 2 At that time she was in dispute with her employer about her pay. Ms Phillips believed, based on information received from Fair Work Australia (as it was then known) and the Fair Work Ombudsman, that her employer had failed to comply with the Educational Services (Post-Secondary Education) Award 2010 (MA000075) (the Award) and had thereby underpaid her.
- 3 Following her resignation Ms Phillips was offered an amount of \$5,904.79, in full and final satisfaction of any claim that she might have with respect to underpayment. She rejected that offer, believing that she was entitled to much more.
- 4 On 19 December 2013 Ms Phillips, unrepresented, instituted these proceedings claiming \$49,000.00. On 16 January 2014 the Respondent defended the claim.
- 5 The dispute between the parties had become bitter very early on. Such is discernible from correspondence passing between them. The bitterness has continued throughout the course of these proceedings and still continues. Such is apparent from the annexures attached to the submissions on costs received from Ms Phillips. I can have regard to those materials (see Regulation 35(4) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (IMC) Regulations)).
- 6 Given the degree of hostility between the parties it is unsurprising that the unrepresented parties failed, pre-trial, to resolve the issues between them. The parties were so entrenched in their respective positions that settlement was never likely and it was clear that the proceedings would be hard fought.
- 7 On 21 May 2014 the Respondent appointed lawyers to act for it.

- 8 On 11 June 2014 the claim was listed for a two day hearing commencing on 22 October 2014 and continuing the next day. Ultimately the Trial lasted 4 days.
- 9 On 17 September 2014 Ms Phillips appointed lawyers to act for her. She was represented on a pro bono basis pursuant to the Western Australian Law Society Law Access Pro Bono Referral Scheme.
- 10 At 4.04pm on Friday 10 October 2014, the Respondent's lawyer sent to Ms Phillips' lawyer an email in which the Respondent offered to settle the claim. The Respondent offered \$3,000.00 in full and final satisfaction of the claim on the basis that each party bear their own costs. At 6:08pm the same day Ms Phillips' lawyer responded by email rejecting the offer.
- 11 When the Trial commenced Ms Phillips amended her claim. She asserted that she was owed either \$65,721.96 or \$32,823.59, depending on whether certain transitional provisions of the Award applied. In the end result Ms Phillips was only able to prove that she was entitled to recover \$375.82 (see *Kyra Phillips v MVJ Enterprises Pty Ltd* (2015 WAIRC 00204)).

Costs Application

- 12 The Respondent contends that Ms Phillips should pay its costs because:
1. she instituted the proceedings without reasonable cause; and/or
 2. her unreasonable act or omission caused the Respondent to incur costs.

Determination

- 13 Section 570(2) of the *Fair Work Act 2009* (FW Act) provides that a party may be ordered to pay the costs only if:
- a) the Court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
 - b) the Court is satisfied that the party's unreasonable act or omission caused the other party to incur costs.
- 14 Section 570(2) of the FW Act was enacted to ensure that litigants involved in proceedings under the FW Act are not exposed to costs being awarded against them save in limited circumstances (see *Suda Ltd v Sims (No. 2)* (Suda) [2014] FCCA 190 per Lucev J at 20).
- 15 The policy behind section 570(2) is that a Claimant who believes, in good faith that a set of facts exist that entitles him or her to a legal remedy, ought not to be penalised by a costs order if either:
- a) the evidence leads a Court to make a different finding as to the facts; or
 - b) the Claimant was mistaken about the application of the law to the facts (see *Chileshe v E & M Business Trust* [2014] FCCA 1381 at [39]).

Were the Proceedings Instituted Without Reasonable Cause (section 570(2)(a), FW Act)?

- 16 In *Reeve v Ramsay Health Care Australia Pty Ltd (No 2)* [2012] FCA 1322 Barker J said at paragraph 10:
- "It is now well accepted that one way of testing whether a proceeding is instituted 'without reasonable cause', for the purpose of a provision such as s 570, is to ask whether upon the facts apparent to the applicant at the time of instituting the proceeding, there were no substantial prospects of success. If success depends upon resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to say that the proceeding was instituted 'without reasonable cause'. But where on the applicant's own version of the facts it is clear the proceeding must fail, it may be said that it lacks a reasonable cause..."*
- 17 The Respondent suggests that at the time the proceedings were instituted Ms Phillips knew that she did not possess the minimum teaching qualification required by the Respondent and therefore there was no reasonable prospect that a Court would find that she ought to have been assessed as a Category D Level 9 teacher.
- 18 I reject that contention. It was always Ms Phillips' contention that she was a Level 9 teacher based on her teaching experience. Indeed, she had every reasonable prospect of success had the Court accepted her evidence about her teaching experience. On her own version of the facts she was a Category D Level 9 teacher notwithstanding that she was unable to prove it.
- 19 Despite her failure to prove that she was a Category D Level 9 teacher she was nevertheless successful in her claim. I have found that Ms Phillips was underpaid \$375.82. In those circumstances I cannot see how it can be argued that she initiated the proceedings without reasonable cause. The fact that she was not able to prove the quantum she says she was owed does not undermine her legitimate cause of action.
- 20 The Respondent submits that there is a second, independent basis on which the Claimant unreasonably commenced and continued the proceedings, that being by her failure to accept a reasonable offer of compromise (see *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20).
- 21 Ms Phillips was initially offered \$5,904.79 and then \$3,000.00 on 10 October 2014. If the second offer had been accepted prior to Trial the cost of the Trial would have been avoided. The Respondent contends that Ms Phillips' non-acceptance of the offers has resulted in her unreasonably proceeding with her claim, and that the unreasonableness of her actions is to be judged against the fact that she only recovered \$375.82.
- 22 I observe that the first offer was made prior to the commencement of proceedings. At that time, based on advice received, Ms Phillips genuinely believed she was entitled to a much higher sum. She believed she had a strong case. Without the benefit of legal representation Ms Phillips could not have envisaged anything but success. In those circumstances it was not unreasonable for her to have rejected the offer and to have commenced proceedings.

- 23 I now turn to consider the non-acceptance of the second offer. I observe that subsection 570(2)(a) of the FW Act relates only to the institution of proceedings. It appears that the Respondent's submissions concerning the continuation of proceedings must be considered in the context of section 570(2)(b) rather than subsection 570(2)(a) of the FW Act.
- 24 Either way, it was not unreasonable for Ms Phillips to have rejected the October 2014 offer because of the following reasons:
- a) the offer was made late, not long before the Trial, in circumstances where the dispute had been protracted and bitter. Given the history of the matter, it was unlikely that such a low offer made at such a late stage would have been accepted; and
 - b) had Ms Phillips' evidence about her prior teaching experience been accepted she would have recovered a vastly greater amount than that offered.
- 25 The Respondent contends that another reason why a finding should be made that the proceedings were conducted without reasonable cause is because the claim contained manifestly unreasonable and unsustainable grounds which were ultimately abandoned. They included the payment at 1.5 hours for each hour of teaching conducted, and further, a claim for a 20% global uplift in certain circumstances.
- 26 The unsustainable aspects of Ms Phillips' claim were abandoned after she became legally represented. The fact that her claim initially contained unsustainable aspects did not vitiate her claim as a whole or otherwise render its institution unreasonable. Indeed, much of her claim remained arguable at Trial.
- 27 The Respondent contends that because Ms Phillips was relying on her inherently suspect and uncorroborated account of her own experience, her evidence would not have been able to sustain her claims, particularly given that she had made false and misleading statements in writing as to her qualifications.
- 28 At the time Ms Phillips commenced the proceedings she would not have contemplated that the Court would have found her not to be credible. It would be entirely inappropriate for Ms Phillips to be penalised by an adverse discretionary costs order because she incorrectly pre-judged how her testimony would be received.
- 29 In any event, the Court did not make a positive finding that Ms Phillips had not accumulated the teaching experience required for a Category D Level 9 teacher, but rather, that she had not been able to prove the extent of teaching experience she asserted.
- 30 This Court was unprepared to accept her uncorroborated evidence as to experience. She simply did not come up to proof on that element. In those circumstances, I cannot see how it can be said that it was unreasonable for Ms Phillips to have instituted the proceedings.

Did the Claimant Commit an Unreasonable Act or Omission Causing Costs (section 570(2)(b), FW Act)?

- 31 The Respondent submits that if the Court is unwilling to award costs pursuant to section 570(2)(a), then in the alternative it should make a partial award of costs pursuant to section 570(2)(b) of the FW Act.
- 32 It submits that Ms Phillips unnecessarily engaged in conduct which caused the Respondent to incur costs.
- 33 The alleged acts are:
- a) the change to her claim made on the first day of Trial when she abandoned her claims for 1.5 hours' pay for each hour worked and her claim for 20% extra in certain circumstances; and
 - b) the introduction at Trial of Exhibits 30 and 31 (previously undiscovered), which revised her claim and particularised the quantum of her claim in the alternative, dependent upon whether the transitional Award provisions applied.
- 34 I observe that the introduction of Exhibits 30 and 31, together with the abandonment of part of Ms Phillips' claim did not materially affect the course of the Trial or its conduct. The issue of quantum played a somewhat secondary role to the issue of liability being her correct level.
- 35 The claim expressed in the alternative was easily addressed and disposed of at Trial. Further, the abandonment of part of the claim and the introduction of Exhibits 30 and 31 helped delineate and clarify the issues to be determined, including quantum. Ms Phillips' actions in abandoning the misguided parts of her claim truncated the issues to be determined.
- 36 The Respondent also argues that Ms Phillips' failure to respond to its Notice to Admit resulted in further cost. I observe that the notice was issued following the first 2 days of Trial and prior to its resumption on 4 February 2015. Ms Phillips was not required to respond to the notice because it had been issued without authority (see Regulation 32 of the IMC Regulations). In any event, any failure to admit even if it had been required did not materially affect the length of the Trial or unduly burden the Respondent. The issues raised by the Respondent were expeditiously dealt with under further cross-examination.
- 37 In *Suda* His Honour Lucev J, in dealing with subsection 570(2)(b) of the FW Act, adopted what was said by the Full Court of the Federal Court of Australia in *Construction, Forestry, Mining and Energy Union v Clarke* (2008) 170 FCR 574 at 382 per Tamberlin, Gyles and Gilmour JJ (*Clarke*). Their Honours observed that the exercise of the discretion is not necessarily engaged because:
- a) a party does not conduct litigation efficiently;
 - b) a concession is made late;
 - c) a party may have acted in a different or timelier fashion; or
 - d) a party adopted a genuine but misguided approach.
- 38 Those observations are apposite in this case. Ms Phillips' conduct was not such that it would enliven a costs order against her.

Discretion

39 Subsection 570(1) of the FW Act provides:

“A party to proceedings (including an appeal) in a court (including a Court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.”

40 I observe that sections 569 and 569A of the FW Act have no application in this instance.

41 Subsection 570(1) of the FW Act clearly indicates that whether or not costs are ordered is entirely discretionary. The discretion is, however, subject to the constraints imposed by subsection 570(2).

42 In *Suda* Lucev J repeated what was said in *Clarke*, that the Court ought not to exercise its discretion to award costs (under section 570(2) of the FW Act) *“with too much haste”*. That position is to be considered against the policy behind section 570(2) of the FW Act which is to ensure that workers are not dissuaded from taking legitimate action to recover entitlements because of the prospect of an adverse costs order being made.

43 The question to be asked in any event is whether this is a proper case for the award of costs.

44 This protracted and bitter dispute may well have been avoided if the Respondent had done what it was required to do, that is, to identify Ms Phillips’ salary level upon commencement of the Award. Its omission in that regard played a significant role in what has subsequently transpired. The uncertainty as to her salary level could and should have been avoided. If at the commencement of Award, the Respondent had identified Ms Phillips to be a Level 1 teacher, and she had disagreed with it, then she could have resigned, or alternatively the parties could have come to some agreement as to her level. As it was, her level was left undetermined and subject to disputation. The Respondent is not without fault in what occurred. Its omission significantly contributed to the existence of the dispute.

45 The Respondent’s own conduct militates against an award of costs. I would exercise my discretion against the award of costs irrespective of subsection 570(2) of the FW Act.

46 The application for costs is refused.

G CICCHINI

INDUSTRIAL MAGISTRATE

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

2015 WAIRC 00255

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 11 DECEMBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HYDRAMET PTY LTD

APPLICANT

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 27 MARCH 2015

FILE NO/S

APPL 49 OF 2014

CITATION NO.

2015 WAIRC 00255

Result

Application dismissed

Representation

Applicant

Ms E Jenkin of counsel

Respondent

Mr S Kemp of counsel

Order

WHEREAS this is an application for a review of a decision of the Construction Industry Long Service Leave Payments Board; and
WHEREAS on the 21st day of January 2015 the Commission convened a conference for the purpose of scheduling and directions;
and

WHEREAS at that conference the parties agreed to a further exchange of documents; and

WHEREAS on the 26th 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.

[L.S.]

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00156

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	STEPHAN CURR	APPLICANT
	-v-	
	TRU BLUE HIRE AUSTRALIA PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	THURSDAY, 5 FEBRUARY 2015	
FILE NO/S	B 214 OF 2014	
CITATION NO.	2015 WAIRC 00156	

Result	Name of respondent amended
Representation	
Applicant	Mr J Kitto, of counsel
Respondent	Mr JR Brooksby, of counsel and Mr N Keats, of counsel

Order

WHEREAS the parties to this matter agree that the correct name of the applicant's former employer is "Coates Hire Operations Pty Ltd" and the application should be corrected accordingly; and

AND WHEREAS the Commission considers that amending the application will result in Mr Curr's former employer being correctly identified; and

HAVING HEARD Mr J Kitto, of counsel, on behalf of the applicant and Mr JR Brooksby, of counsel and Mr N Keats, of counsel, on behalf of the respondent;

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

THAT the name of the respondent "Tru Blue Hire Australia Pty Ltd" be deleted and "Coates Hire Operations Pty Ltd" be inserted in lieu thereof.

[L.S.]

(Sgd.) A R BEECH,
 Chief Commissioner.

2015 WAIRC 00246

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
CITATION	:	2015 WAIRC 00246
CORAM	:	CHIEF COMMISSIONER A R BEECH
HEARD	:	TUESDAY, 3 FEBRUARY 2015
DELIVERED	:	MONDAY, 23 MARCH 2015
FILE NO.	:	B 214 OF 2014
BETWEEN	:	STEPHAN CURR
		Applicant
		AND
		COATES HIRE OPERATIONS PTY LTD
		Respondent

CatchWords	:	Industrial law (WA) – contractual benefits claim – employment pursuant to written employment agreement – provision for a housing allowance non-taxable - whether misrepresentation of taxability of the housing allowance - whether provision actionable - mistake on matter of law - whether provision of allowance non-taxable void for illegality - whether employee entitled to receive full amount of housing allowance - whether claim is an industrial matter
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 7(1), s 23(1), s 26(1)(a), (c), s 29(1)(b)(ii) <i>Taxation Administration Act 1953</i> (Cth) Schedule 1 s 12 - 35, s 16 - 25 <i>Property Law Act 1969</i> (WA) s 124
Result	:	Declaration issued and application adjourned
Representation:		
Counsel:		
Applicant	:	Mr J Kitto of counsel
Respondent	:	Mr J R Brooksby of counsel and Mr N Keats of counsel
Solicitors:		
Applicant	:	Kitto and Kitto
Respondent	:	W. G. McNally Jones Staff

Case(s) referred to in reasons:

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99
Barker v Midstyle Nominees Pty Ltd [2014] WASCA 75
Belo Fisheries v Dennis Terence Froggett (1983) 63 WAIG 2394
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353
Equuscorp Pty Ltd v Haxton [2012] HCA 7; (2012) 246 CLR 498
Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust [2004] NSWSC 214
Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd [2012] WASCA 216; (2012) 45 WAR 29
Hockey v WIN Corporation Pty Ltd [2013] FCA 772
Matthews v Cool or Cosy Ltd & Anor [2004] WASCA 114; (2004) 84 WAIG 2152
Miller v Miller [2011] HCA 9; (2011) 242 CLR 446
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451
Shacam Transport Pty Ltd v Damien Cole Pty Ltd [2013] WAIRC 00872; (2013) 93 WAIG 1628
Taylor v Johnson [1983] HCA 5; (1983) 151 CLR 422
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410

Reasons for Decision

1 Mr Curr's employment agreement states:

You will receive the following housing allowance, paid fortnightly:

Housing Allowance (non taxable)	\$1600 per fortnight
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2 He claims he should receive \$1,600 per fortnight from his employer without incurring a tax liability on that sum.

Evidence

- 3 Mr Curr gave evidence that he lives in Queensland and had previously worked as a bus driver in Karratha in 2010 - 2011 before he commenced working as a bus driver with the respondent. He was aware that living in Karratha is very expensive. He was in Queensland when he received an email from the respondent (at that time Tru Blu Hire Australia Pty Ltd which subsequently became the respondent named in this matter) stating they were looking for a driver in Karratha. He had a discussion with the respondent which led to the job being offered to him.
- 4 He accepted employment with them and on 13 February 2012, the day he started employment, signed an employment agreement (exhibit A). He was employed by the respondent between 13 February 2012 and 31 March 2014 under the employment agreement.

5 The employment agreement contains the following terms which are relevant to the issues raised in the hearing.

4 Remuneration

You will be paid a flat rate of **\$28.00** per hour.

The rate of pay referred to is paid in recognition of any and all entitlements that you may have pursuant to any Award or any other industrial instrument.

This rate of pay is intended to fully compensate you for all hours worked including, but not limited to, any entitlement to any periodic rate of pay, penalty rates, overtime penalty payments and allowances.

The Company reserves the right to offset the rate of pay that has been paid to you against all Award or any other industrial instrument entitlements of any nature.

The net cash salary (gross salary less PAYG tax) will be paid in fortnightly instalments directly into your nominated bank account.

Housing for Remote Location:

In conjunction with your employment the company will provide you with accommodation as part of the remote location you are residing in. You will receive the following housing allowance, paid fortnightly:

Housing Allowance (non taxable)	\$1600 per fortnight
---------------------------------	----------------------

...

4.1.1. Superannuation Guarantee Contributions

Superannuation Guarantee Contributions (SGC) shall be calculated at the statutory rate of 9% of your annual gross salary up to the Maximum Benefits Limit, which is indexed annually by the Australian Taxation Office, and adjusted at the commencement of each financial year.

SGC will be paid into a superannuation fund of your choice. It is your responsibility to ensure that the chosen superannuation fund is a complying fund to which the Company can contribute funds under the superannuation guarantee legislation.

...

12 Amendments and Variations

The Company reserves the right to make alterations, amendments and additions to the terms and conditions set out in this Agreement from time to time in consultation with you.

The terms and conditions set forth in this Agreement supersede all contrary oral understanding or impressions you may have obtained in conversations with the Company representatives prior to the signing hereof.

You and the company agree that any Implied Term of Mutual Trust and Confidence is expressly excluded from this contract of employment.

6 Mr Curr's evidence is that he had understood that he would be paid \$1,600 clear, and he would not be paying any tax on that sum. He says he would not have accepted the position in Karratha otherwise, because it is too expensive to live there without having a housing allowance.

7 His evidence is from the date he started work until a date in mid-2013 he received the housing allowance of \$1,600 without any deduction being made for tax. In mid-2013, he was called to a meeting with some other employees and addressed by Mr Durey, the new general manager, and handed a letter (exhibit B). Mr Durey said, in essence, that Mr Curr had to pay back-taxes on the housing allowance and that the pay section in Perth had made a mistake. From the first pay period in the 2013/2014 financial year, he no longer received \$1,600; he received a lesser sum after tax had been deducted from the \$1,600.

8 In cross examination, Mr Curr was asked about his tax returns. He has an accountant to do his tax returns but said that 'because of the situation I didn't do any tax returns until I got those people to do that because I knew we were having problems with this whole affair. So I thought best to keep it until I straightened it out a bit' (ts 16). Tax was not deducted in the first financial year 2011/2012 which was consistent with his expectation arising from the employment agreement that the housing allowance was non-taxable.

9 Mr Curr was asked the following:

Mr Brooksby: And I think your actual words were, "I did not think I would pay tax on the \$1,600," that was your understanding?---That's correct.

And subsequent to that understanding being changed, have you taken the matter up with the taxation authorities - - -?---No.

- - - as to whether it is taxable?---No. Because of the situation with myself and the other, I think the majority of us haven't done a tax return until this is resolved through this - these hearings and this Commission.

So do you know whether it's taxable?---The housing allowance?

Yes?---Well, I would presume it would be taxable.

Right.

And have you paid tax on the housing allowance?---I have been taxed - - -

At source?---I think from - I'm - from July 2013 up until I had left on 31 March 2014, my housing allowance was taxed.
(ts 16/17)

- 10 Mr Curr does not know how much, if any, tax will be levied on the housing allowance he has received. He said that his understanding had been that he would be paid \$1,600 clear:

Mr Brooksby: That that sum was non-taxable? --- That that was non-taxable by – by – not by me. Maybe by Tru Blue, or Coates, or whoever it may be, but I wasn't to pay tax on it. That was what my impression was and that's what I was told.
(ts 18)

- 11 No other witnesses gave evidence.

- 12 The letter received by Mr Curr (exhibit B) is dated 23 July 2013 and is headed 'Payment Summary Correction' and states, relevantly:

It has been brought to our attention that your PAYG Payment Summary – Individual non business for Year Ending 2012-2013 has been printed incorrectly.

Please see below the correct figures plus the breakdown.

- 13 The letter also states 'The Australian Tax Office has been notified of this amendment to your Payment Summary. We apologise for any inconvenience this may have caused'. The letter is signed by the respondent's payroll manager.

Submissions on behalf of Mr Curr

- 14 Mr Kitto submitted that the written agreement distinguished the housing allowance as 'non-taxable' from the taxable \$28 per hour wage which is expressed as a 'net cash salary (gross salary less PAYG tax)'. A contractual agreement between the parties is to be interpreted using the ordinary words of the contract unless there is an ambiguity. Nevertheless, the respondent has withheld PAYG tax from the housing allowance and thereby paid Mr Curr less than the agreed amount. He has therefore been underpaid by the respondent.

- 15 Mr Curr is seeking payment of his contractual benefits from the respondent. He is not seeking a reimbursement from the Australian Taxation Office. The monies paid to the Australian Taxation Office have been paid correctly, but these monies should have come from the respondent's resources and the respondent was not entitled to reduce its agreed payment to Mr Curr in order to pay the Australian Taxation Office. Mr Curr acknowledges that the respondent says it was initially mistaken as to the tax liability attaching to the housing allowance when it entered into the contract and when it was partly performed.

- 16 Nevertheless, when the mistake was discovered and the respondent made aware that it was lawfully obliged to remit the tax on the housing allowance, it unilaterally paid Mr Curr less than the agreed sum by remitting some of the allowance to the Australian Taxation Office. However, the respondent's contractual obligation to Mr Curr to pay him the amount of \$1,600 non-taxable simply obliges the respondent to pay the Australian Tax Office sufficient monies to cover Mr Curr's tax liabilities so he receives \$1,600 net of tax as promised by the respondent.

- 17 Further, the payment of \$1,600 per fortnight goes to the very heart of the employer-employee relationship and is a fundamental express term of remuneration. It would be legally impossible to characterise it as a mere representation. On behalf of Mr Curr, it is submitted the respondent cannot seek to avoid liability for its mistake by characterising it as a mere misstatement of the law. There is no statement of law at all, and even if there was, the representation would still expose the respondent to damages if it was made in trade or commerce. Mr Curr is not seeking damages for negligent representation, rather he seeks payment of the stated consideration.

- 18 The term 'non-taxable' does not mean that tax is not payable by anyone. It merely states, unambiguously and simply, that the applicant gets the allowance without paying tax on it. The employment contract does not compel the respondent unlawfully to make a payment free of any tax deduction.

Submissions on behalf of Coates Hire Operations Pty Ltd

- 19 Mr Brooksby, for the respondent, submitted that the claim, properly construed, is that Mr Curr seeks reimbursement of the additional tax that he has paid and the claim therefore does not relate to an industrial matter. The taxation authorities will, when an appropriate tax return is submitted, adjust the incidence of taxation in accordance with the governing law. It is an allowance to the employee and must therefore be dealt with in his hands.

- 20 Further, the respondent has complied with the terms of the contract. The respondent did not withhold any amount in relation to the taxation of the housing allowance. The statement in the contract is, and can be, no more than a representation as to the state of the law and is not actionable. There has been an innocent misrepresentation on a matter of law in respect of which Mr Curr is not entitled to relief. The contract cannot bind the Australian Taxation Office and is void and unenforceable as a matter of public policy. The fact that there were subsequent taxation consequences to the payments made by the respondent does not alter the fact that the respondent has discharged its obligations under the contract.

- 21 Furthermore, the provision of the contract that provides for the housing allowance to be non-taxable must be void because it required the doing of something expressly prohibited by s 12-35 of Schedule 1 of the *Taxation Administration Act 1953* (Cth). The section of the employment agreement which Mr Curr is seeking to enforce would compel the respondent unlawfully to make a payment free of any tax deduction. The illegal part of the contract can be severed so that the non-illegal parts of the contract are capable of performance. In the absence of that term therefore the contract is valid and enforceable.

- 22 Mr Brooksby also submitted cl 12 of the employment agreement gave the respondent the right to make alterations, amendments and additions to the terms and conditions set out in the agreement from time to time in consultation with Mr Curr. It was submitted that as a result of the meeting in mid-2013, the respondent varied the terms of the contract and accordingly there has not been a breach of it.

Consideration of the issues

23 Mr Curr is entitled to refer to the Commission a claim that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment: *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii) (the Act). There is no dispute that he was at the time an employee and employed by the respondent. There is a dispute, however, over the following issues.

- **Whether the claim is an industrial matter**

24 The Commission is only able to enquire into and deal with an industrial matter: s 23(1). The Act in s 7(1) defines an industrial matter as meaning 'any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —

(a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment'.

25 The respondent's submission is that properly characterised, the claim is seeking reimbursement of the additional tax that he has paid and it therefore does not relate to an industrial matter. The submission is that Mr Curr's dispute is with the taxation authorities, not with the respondent, and to that extent the dispute is a matter of tax law and not a matter of industrial law.

26 I do not find this argument persuasive. His claim that it is a benefit under his contract of employment that he would receive a housing allowance of \$1,600 per fortnight from which he would not have to pay the tax is a claim affecting or relating or pertaining to the amount of an allowance to be paid in respect of Mr Curr's employment. The claim directly arises as a result of the words 'non-taxable' which are used in the employment agreement to describe the housing allowance. Mr Curr's dispute is with the respondent because he claims it did not pay him a housing allowance of \$1,600 per fortnight non-taxable because it caused Mr Curr to have to pay tax on the housing allowance he received to July 2013 and it deducted tax from the housing allowance he received after July 2013. Mr Curr submits that his employment agreement means he would receive \$1,600 per fortnight from which he would not have to pay the tax.

27 The relief claimed in the particulars of claim attached to the Notice of application is an order that the respondent pay Mr Curr a sum in damages for the loss of the contractual benefit and the sum claimed is an amount which he says he has paid in tax which he should not have paid.

28 If his claim is successful, the Commission, using the broad power given it under s 23(1) of the Act, read if necessary with s 26(2), may award compensation as the means of dealing with the industrial matter referred to it (*Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 84 WAIG 2152 per Steytler J at [24]). The Commission may award compensation to Mr Curr as the means of dealing with the claim referred. To do so, the amount of the housing allowance he did not receive will need to be calculated. The remedy sought is no more than a valuation of the benefit he did not receive.

29 The amount of additional tax that he has paid may provide one measure of the amount of the housing allowance he did not receive; in turn, that amount may be the appropriate amount of any compensation to be ordered to be paid to him by the respondent if it would do no more than compensate him for the benefit which he will not have been allowed. But it is whether Mr Curr is entitled to the benefit which he claims which characterises the matter referred to the Commission, not the consequential relief sought if the claim is successful.

30 The claim Mr Curr has referred to the Commission is that he is entitled under his contract of employment to receive from his former employer a housing allowance of \$1,600 per fortnight from which he would not have to pay the tax. The claim arises from the wording in his employment agreement. I find that it is an industrial matter.

- **Whether Mr Curr is entitled to the benefit which he claims**

31 Whether Mr Curr is entitled to the benefit he claims turns upon the proper interpretation of the employment agreement. The ascertainment of the terms of a contract, whether oral or in writing, always turns on the words used by the parties, and the construction of the words used by the parties are to be judged objectively (*Shacam Transport Pty Ltd v Damien Cole Pty Ltd* [2013] WAIRC 00872; (2013) 93 WAIG 1628 per Smith AP at [43], referring to *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 where the Full Court of the High Court said at [40]:

This Court, in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* at 461-462 [22]).

32 The meaning of the terms of the employment agreement is to be determined by what a reasonable person would have understood them to mean. In relation to the words 'non-taxable', the word 'taxable' means 'liable to be taxed' (Onions CT, *Shorter Oxford English Dictionary* (3rd ed revised 1973) 2250). As the word 'non' implies the opposite, the words 'non-taxable' mean not liable to be taxed. Objectively, the words mean that the housing allowance was not liable to be taxed. In my view those words have a plain meaning and regard is not to be had to the surrounding circumstances: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 352; *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216; (2012) 45 WAR 29 at [9].

- 33 In relation to the purpose and object of their transaction, the housing allowance and its description as non-taxable occur in an employment agreement. Its purpose is to prescribe the terms and conditions agreed between Mr Curr and the respondent by which Mr Curr would render the services of a driver as an employee of the respondent and in return be remunerated in accordance with cl 4.
- 34 The whole of the employment agreement has to be considered since the meaning of one part of it may be revealed by other parts and the words of every clause must if possible be construed so as to render them harmonious: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99 per Gibbs J at 109. Both the rate of pay of \$28 per hour and the housing allowance form part of the remuneration. Provision of the rate of pay also contains information about the taxation of it by use of the words: 'The net cash salary (gross salary less PAYG tax) will be paid in fortnightly instalments directly into your nominated bank account'. Objectively, the remuneration in the contract is \$28 per hour which will be taxed and a housing allowance of \$1,600 per fortnight which would not be taxed because it was not liable to be taxed. To interpret the provision of the housing allowance in this way is harmonious with the provision of the rate of pay.
- 35 The only other remuneration mentioned within the employment agreement is superannuation in cl 4.1.1. Reference within that clause to the calculation of the superannuation guarantee contribution is that it is the said percentage of the 'annual gross salary'.
- 36 Within the employment agreement, each reference to remuneration (hourly rate, housing allowance and superannuation) carries information relevant to taxation. It sets out what payments Mr Curr will receive for providing his services to the respondent as a driver in Karratha. In relation to the housing allowance, the words 'non-taxable' direct attention to the allowance not being taxed. A reasonable person would understand the words 'non-taxable' next to the words 'housing allowance' in the remuneration clause of the employment agreement to mean that Mr Curr would receive a housing allowance of \$1,600 per fortnight net, not a lesser sum after tax was deducted from it.
- 37 Is this a 'benefit' to Mr Curr as that word is used in s 29(1)(b)(ii) of the Act? I find that it is. As Steytler J noted in *Matthews* (referred to above) at [18], the word 'benefit' as it is used in s 29(1)(b)(ii) of the Act has wide meaning. The word 'benefit' is defined by the *Macquarie Concise Dictionary*, (6th ed, 2013) as meaning 'anything that is for the good of a person or thing' and by the Shorter Oxford English Dictionary as meaning, in its ordinary sense, 'advantage, profit, good'.
- 38 Objectively, it was good for Mr Curr, or to his advantage, that he receive a housing allowance of \$1,600 per fortnight net, rather than a lesser sum if tax was to be deducted from it. Therefore it was a benefit to which he was entitled under his contract of employment.
- 39 I find that Mr Curr is entitled under his contract of employment with the respondent to receive a housing allowance of \$1,600 per fortnight net.
- **Whether the term of the employment agreement is actionable**
- 40 The respondent contends that the term of the employment agreement providing for the 'housing allowance (non-taxable) \$1,600 per fortnight' is no more than a representation as to the state of the law and is not actionable. The understanding of the parties that Mr Curr would be entitled to retain the full benefit of the payment was incorrect and cannot be characterised as a misrepresentation giving rise to any right of action. Rather, it is an innocent misrepresentation on a matter of law in respect of which Mr Curr is not entitled to relief.
- 41 Further, the respondent says that a mistake on a matter of law is non-actionable, despite some doubt in WA because of s 124 and s 125 of the *Property Law Act 1969* (WA).
- 42 In response, the submission on behalf of Mr Curr is that the payment of \$1,600 per fortnight is a fundamental express term of remuneration which goes to the very heart of the employer-employee relationship.
- 43 In relation to the submission of misrepresentation I find as follows. The general law relating to misrepresentation is usually concerned with the negotiations leading to the making of the contract in question. A finding that a person was induced to enter a contract by an actionable misrepresentation may lead to the remedy of rescinding the contract. It is sometimes said that a misrepresentation must be material to be actionable and an innocent misrepresentation, not calculated by the representor to induce the representee to enter the contract, may nevertheless induce the representee to do so: Seddon N, Bigwood R and Ellinghaus M, *Cheshire & Fifoot Law of Contract* (10th Aust ed, 2012) at [11.1], [11.8], [11.40] and [11.41].
- 44 Mr Curr is not claiming he was induced to enter the employment agreement by the housing allowance being non-taxable and therefore is seeking to have the employment agreement or one of its terms rescinded; nor is he seeking payment of damages arising from a misrepresentation having induced him to enter the contract. In any event, those are matters not within the jurisdiction of the Commission.
- 45 A misrepresentation of law traditionally has not given rise to any remedy or relief (above at 11.13)]. For those reasons I reject the respondent's submission that the term of the employment agreement providing for the 'housing allowance (non-taxable) \$1,600 per fortnight' is not actionable.
- 46 I turn to the submission that a mistake on a matter of law is non-actionable. The submission refers to a traditional rule that recovery of money paid under a mistake of law is not permitted; however this rule has been held not to form part of the law in Australia: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 376. In WA the rule has been abolished by legislation: *Property Law Act* s 124. I see no need to revisit the rule in this case. In any event, the matter referred to the Commission is not a claim to recover money paid by mistake.
- 47 Both the oral submissions on behalf of Mr Curr and the respondent's submissions addressed whether a mistake had been made and by whom it had been made. The respondent accepted in the hearing that it had made a mistake and submitted that it was a

mutual mistake because Mr Curr and the respondent both thought the housing allowance was non-taxable. On behalf of Mr Curr it was submitted that the evidence shows it was not a mutual mistake at all.

- 48 A distinction can be made between possible types of mistake: common mistake, mutual mistake and unilateral mistake. In common mistake, both parties to a contract make the same mistake; in mutual mistake the parties misunderstand each other; in unilateral mistake only one of the parties is mistaken.
- 49 On the evidence, the submission on behalf of Mr Curr that it was not a mutual mistake is correct. The evidence of Mr Curr is that he presumed the housing allowance would be taxable but the tax would not be payable by him. He presented as a truthful witness. He was cross examined on his evidence and it was not in any sense broken down. It was not put to him that his evidence on this point should not be accepted; neither was it put to the Commission that this part of his evidence should not be accepted. There is no evidence to the contrary. I accept Mr Curr's evidence that he presumed the housing allowance would be taxable but the tax would not be payable by him.
- 50 The respondent's offer in the employment agreement that the remuneration to Mr Curr included a housing allowance of \$1,600 per fortnight which was not liable to be taxed, which was accepted by Mr Curr, was a mistake by the respondent of the applicable law. Only the respondent believed that the housing allowance was not liable to be taxed: it therefore was a unilateral mistake.
- 51 This finding does not mean that the term of the employment agreement providing for the 'housing allowance (non-taxable) \$1,600 per fortnight' is not actionable, as the respondent submits. However the fact that a mistake was made by the respondent will be a relevant consideration because the Commission's task in this matter is to act according to equity, good conscience, and the substantial merits of the case (s 26(1)(a)) and to have regard for the interests of the persons immediately concerned (s 26(1)(c)). The fact that the respondent made a mistake about the taxability of the housing allowance will be taken into account later when considering whether an order should issue in Mr Curr's favour.

- **Whether the term of the employment agreement is void**

- 52 The respondent's further and alternative submission is that the provision of the employment agreement that the housing allowance is non-taxable is void because it required the doing of something expressly prohibited by s 12-35 and s 16-25 of Schedule 1 of the *Taxation Administration Act*. The respondent submits it is impliedly prohibited by statute, referring to *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410. To enter into a contract with a term of that character renders the term void on the grounds of public policy: *Hockey v WIN Corporation Pty Ltd* [2013] FCA 772. The submission is that the employment agreement itself is not void for illegality; rather, that part of it which is prohibited by statute should be severed leaving the non-prohibited parts of the employment agreement capable of performance.
- 53 The submission on behalf of Mr Curr rejects the respondent's further and alternative submission saying that the employment agreement does not compel the respondent to make a payment free of any tax deduction. It does not require either the respondent or Mr Curr to do anything illegal in the performance of the employment agreement. The employment agreement itself is not for an unlawful purpose and there is nothing illegal in it to sever.
- 54 I approach this issue as follows. Schedule 1 sub-div 12-B of the *Taxation Administration Act* deals with payments for work and services. Section 12-35 of that subdivision provides:

12-35 Payment to employee

An entity must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee (whether of that or another entity).

- 55 The respondent is an 'entity' and Mr Curr was an employee. Section 12-35 requires the respondent to withhold an amount from an allowance it pays to Mr Curr. There are exceptions to the requirement in s 12-35, however it is not disputed by Mr Curr that the applicable taxation legislation obliged the respondent to deduct tax from the housing allowance when it paid the housing allowance to Mr Curr. I therefore proceed on the basis that the exceptions do not apply and s 12-35 applied to the respondent on each occasion that it paid the housing allowance to Mr Curr. I also note that by s 16-25 it is an offence for the entity to fail to withhold an amount as required.
- 56 The relevant general principles when the making or performance of a contract is expressly or impliedly prohibited by statute are helpfully summarised by Buss JA in *Barker v Midstyle Nominees Pty Ltd* [2014] WASCA 75 at [37] as follows:

A contract may be unenforceable for statutory illegality where:

- (a) the statute expressly prohibits, absolutely or conditionally, the making of the contract or the doing of an act essential to its formation (first category);
- (b) the statute impliedly prohibits the making of the contract (for example, where the contract is to perform an act the performance of which is prohibited by the statute) (second category); or
- (c) the statute does not expressly or impliedly prohibit the contract, but the courts treat the contract as unenforceable because it is associated with or furthers illegal purposes (third category).

See *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ); *Equiscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498 [23] (French CJ, Crennan & Kiefel JJ).

- 57 The issue in the respondent's submission is whether the employment agreement is unenforceable for statutory illegality by reason of the *Taxation Administration Act*. The respondent does not argue, correctly in my view, that the *Taxation Administration Act* expressly or impliedly prohibits the making of the employment agreement or the doing of an act essential to its formation. The prohibition in s 12-35 is directed to an employer not deducting tax at the time it pays the allowance to an employee, not to the making or performance of an employment agreement. Therefore the first and second categories above do

not apply and it is only in relation to the third category, specifically the operation of s 12-35 on the provision in the employment agreement, that describes the housing allowance to be non-taxable, that the respondent's submission is made.

58 The taxation legislation requires the respondent to deduct tax from the housing allowance when it pays it to Mr Curr and makes it an offence not to do so. If the employment agreement requires the respondent not to deduct tax from the allowance when it pays it to Mr Curr then the employment agreement would be associated with, or would further, an illegal purpose. In such a case, the third category above will apply and the provision in the employment agreement would be unenforceable.

59 The provision is set out earlier in these reasons, nevertheless for convenience I repeat them:

You will receive the following housing allowance, paid fortnightly:

Housing Allowance (non taxable)	\$1600 per fortnight
---------------------------------	----------------------

60 The provision entitles Mr Curr to receive a housing allowance of \$1,600 per fortnight. The two words 'non-taxable' by themselves do not compel or direct or instruct the respondent not to deduct tax when it pays the housing allowance to Mr Curr. They identify, or provide information, that the housing allowance is not liable to be taxed but they do not themselves actually require the respondent not to deduct tax at the time it pays the allowance.

61 The absence of any obligation on the respondent by those two words stands in contrast to the provision of the rate of pay of \$28 which contains words which oblige the respondent to deduct PAYG tax from the gross salary: the respondent is to pay 'the net cash salary (gross salary less PAYG tax) directly into [Mr Curr's] nominated bank account'.

62 In my view, for a provision in a contract of employment to be found to be associated with, or to further, an illegal purpose, the provision would need to unambiguously require a party to do the thing which would be associated with, or would further, that illegal purpose. That is not the case here.

63 In *Hockey v WIN Corporation Pty Ltd* (referred to above) a term of Mr Hockey's contract relating to him resigning after a certain length of service provided that WIN will pay out the balance of the term 'as a redundancy'. WIN did not do so and the court was obliged to consider the proper interpretation of those words. The court held as follows at [51]:

51 The meaning of cl (a)(ii) is that after the initial period of six months expiring on 30 September 2011 Mr Hockey was entitled to terminate his employment at any time and, if he did so, he would be entitled to be paid out the balance of the term of his contract. In my opinion the words "as a redundancy" are no more than explanatory or descriptive of the payment for the lengthy balance of the term. He was to receive payment for that lengthy term notwithstanding that, under cl (a)(ii), he would be the initiator of the termination.

52 Further, those words imposed no obligation on WIN to withhold an amount from the payment on one basis or another.

53 I reach this conclusion more readily as I would not lightly construe the clause to mean, by implication, that either party had agreed to act in a way that was contrary to law.

54 This construction does not involve any reading in of words that are not part of the express terms of the contract such as "withholding from the payment an amount calculated on the basis that the payment was or included a 'genuine redundancy payment'". The words "as a redundancy" make no express reference to the income tax legislation of the Commonwealth and the words have a sufficient meaning in themselves.

64 As the court noted, the words 'as a redundancy' in the contract under consideration imposed no obligation on WIN to withhold an amount from the payment on one basis or another. In my view, in this case the words 'non-taxable' of themselves impose no obligation on the respondent not to deduct tax from the housing allowance when it pays it to Mr Curr.

65 I would not lightly construe the words to mean that, by implication, the respondent had agreed to act in a way that was contrary to law. I observe that there is no suggestion in the evidence that at the time it made the offer to employ Mr Curr the respondent knew that the housing allowance was taxable. I find that at the time it made the offer of employment and signed the employment agreement the respondent believed the housing allowance was not liable to be taxed. There was no intention on the part of the respondent to do anything unlawful; on the contrary, when it became aware that the housing allowance was liable to be taxed it immediately took steps to comply with the taxation laws.

66 I find that the provision of the employment agreement that describes the housing allowance as non-taxable does not require the respondent to do something expressly prohibited by s 12-35 and s 16-25 of Schedule 1 of the *Taxation Administration Act*. The provision therefore is not associated with, or does not further, an illegal purpose and is not void or unenforceable. The Commission is not being asked to enforce an illegal term because Mr Curr does not have to rely upon an unlawful transaction to establish his cause of action.

- **Clause 12 Amendments and Variations**

67 It is necessary to address the submission of the respondent that cl 12 Amendments and Variations reserved the right to the Company to make an amendment to the terms and conditions of the agreement from time to time in consultation with Mr Curr. This submission was not strongly pressed, and in my view with good reason.

68 The facts of the matter do not show that the respondent amended the terms and conditions set out in the employment agreement. The letter received by Mr Curr (exhibit B) did not purport to do so. Further, the respondent did not seek to exercise the right reserved to it in cl 12: the meeting which Mr Curr attended was not the consultation with Mr Curr which is a necessary precondition of the exercise of the right in cl 12. The meeting merely informed Mr Curr what the respondent was doing. The respondent merely reissued Mr Curr's payment summary and commenced deducting tax from the housing allowance. The employment agreement remained unchanged. I do not accept the respondent's submission on this point.

Conclusion

- 69 For the reasons given above, I find that it is a term of Mr Curr's employment agreement that he would receive a housing allowance of \$1,600 per fortnight net. The respondent says it has complied with the terms of the contract because in paying Mr Curr the respondent did not withhold any taxation of the housing allowance and that is all that the contract required the respondent to do. However, I do not accept the submission. On the evidence, I find that the respondent caused Mr Curr to pay, or be liable to pay, tax on the housing allowance it paid to him in two ways.
- 70 The first way was that in July 2013 the respondent reissued his payment summary for the year ending 2012/2013 in such a way that Mr Curr would be obliged to pay tax on the \$1,600 per fortnight it already had paid to him. The second way was that after July 2013 it deducted tax from the \$1,600 and paid Mr Curr the balance. The consequence of these is that Mr Curr did not receive a housing allowance of \$1,600 per fortnight. This means that the respondent did not comply with the employment agreement it had with Mr Curr that he would receive a housing allowance of \$1,600 per fortnight, not \$1,600 per fortnight from which he would have to pay the tax.
- 71 Mr Curr has established that he has been denied a benefit to which he is entitled under his contract of employment.
- 72 I take into account that the respondent made a mistake when it believed the housing allowance was not liable to be taxed and offered a housing allowance of \$1,600 per fortnight to Mr Curr on the basis that he would receive that amount, not \$1,600 less tax. There is no evidence from the respondent how the respondent came to make the mistake. The mistake was not caused by any misrepresentation to the respondent by Mr Curr.
- 73 The mistake was made in a remuneration provision in an employment agreement offered by an employer to a prospective employee and was accepted. It is important that when an employer expressly makes an offer, such as the housing allowance will be \$1,600 per fortnight, not \$1,600 per fortnight less tax, a prospective employee can rely on the offer. That is true of an offer made in any contractual situation: the person to whom the offer is made is entitled to think that the offer is genuine and, if accepted, will be complied with, particularly where the offer is part of the remuneration for the performance of the contract.
- 74 Sometimes parties to a contract make a mistake regarding one of its terms, however it is not open to the party who made the mistake to ignore the term; that would undermine the purpose of having a contract in the first place. In this case, the respondent became aware the housing allowance was taxable. It was legally obliged by the taxation legislation to deduct tax from the payment it made to Mr Curr. At the same time it was contractually obliged by its contract with him to pay him a housing allowance of \$1,600 per fortnight net. The discovery that the housing allowance was taxable provided grounds for the respondent to seek to vary or rescind the employment agreement; it did neither and the employment agreement remained unchanged. Therefore it was required to meet both obligations.
- 75 I also take into account that Mr Curr did not make a mistake: Mr Curr presumed the housing allowance would be taxable but the tax would not be paid by him. The amount of \$1,600 per fortnight net was of significance to Mr Curr because that amount addressed his concern at the expense of living in Karratha: his evidence is that he would not have accepted the position offered if he had known he would have to pay the tax on the housing allowance. He had been told he would not pay tax on it (ts 18).
- 76 I think there is some strength too in the submission that Mr Curr accepted the contract on that basis, he performed the contract and he is entitled to the payment allowed by the contract. He will have incurred the higher cost of living in Karratha for which the housing allowance of \$1,600 per fortnight was agreed to be paid to him.
- 77 The Commission should not readily exercise its discretion not to order compensation to an employee who has been denied a benefit to which they are entitled under their contract of employment unless in the circumstances of the case it would be fair not to do so (see *Belo Fisheries v Dennis Terence Froggett* (1983) 63 WAIG 2394). The general position is that special circumstances will ordinarily need to be shown before it would be unconscionable for one party to a written contract to enforce it against another party who was under a mistake as to its terms or its subject matter: *Taylor v Johnson* [1983] HCA 5 at 12; (1983) 151 CLR 422 per Mason ACJ, Murphy and Deane JJ at 431. Special circumstances include that the mistake was known to the other party who then unfairly took advantage of it (*Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust* [2004] NSWSC 214 at 24), but that is not the case here.
- 78 In this jurisdiction, the Commission is obliged to act according to equity, good conscience, and the substantial merits of the case and to have regard for the interests of the persons immediately concerned. In my view, the equity, good conscience, and substantial merits of the case lie with Mr Curr.
- 79 At the commencement of the hearing, it was agreed between the parties that depending upon the finding of the Commission, they were prepared to enter into discussions regarding any relief to be ordered. Accordingly, the hearing of this matter will be adjourned to a date to be fixed. Once the parties have completed their discussions, the Commission anticipates that the application will be relisted.
- 80 A minute now issues declaring that Mr Curr is entitled under his contract of employment to receive a housing allowance of \$1,600 per fortnight net and ordering that the application be adjourned to a date to be fixed once the parties have completed their discussions.
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2015 WAIRC 00280

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00280
CORAM : CHIEF COMMISSIONER A R BEECH
HEARD : MONDAY, 30 MARCH 2015
DELIVERED : WEDNESDAY, 1 APRIL 2015
FILE NO. : B 214 OF 2014
BETWEEN : STEPHAN CURR
 Applicant
 AND
 COATES HIRE OPERATIONS PTY LTD
 Respondent

Result : Declaration and order issued; Application adjourned

Representation:

Counsel:

Applicant : Mr J Kitto of counsel and later Mr C Hershowitz of counsel
 Respondent : Mr J R Brooksby of counsel and Mr N Keats of counsel and later Mr C Fogliani of counsel
 Solicitors:
 Applicant : Kitto & Kitto
 Respondent : W.G. McNally Jones Staff

Supplementary Reasons for Decision

- 1 Two matters were raised at the speaking to the minutes.
- 2 The minute provided for a declaration as follows:
 THAT it is a term of Mr Curr's employment agreement that he would receive a housing allowance of \$1,600 per fortnight net.
- 3 That is consistent with the finding made at [39], and repeated in [80], of the reasons for decision ([2015] WAIRC 00246). It was suggested by counsel for Mr Curr that the word 'net' on its own is unclear and that it should state clearly that Mr Curr should receive a housing allowance of \$1,600 per fortnight 'net of income tax'.
- 4 In [36] of the reasons for decision, I stated:
 A reasonable person would understand the words 'non-taxable' next to the words 'housing allowance' in the remuneration clause of the employment agreement to mean that Mr Curr would receive a housing allowance of \$1,600 per fortnight net, not a lesser sum after tax was deducted from it.
- 5 I therefore found that it is a term of Mr Curr's employment agreement that he would receive a housing allowance of \$1,600 per fortnight net of tax and in my view it is appropriate that the declaration and order to issue reflects that conclusion.
- 6 The second matter is that the minute does not expressly state that Mr Curr has been denied a contractual benefit. It is the applicant's position that such a declaration is necessary in order to facilitate the discussions between the parties regarding relief which were foreshadowed by them during the hearing, and which is reflected in the reasons for decision at [79] and proposed order 2. The applicant urges the Commission to include in the declaration and order to issue that the respondent has failed, or refused to pay, Mr Curr \$1,600 per fortnight net of income tax and thereby denied Mr Curr a contractual benefit under his contract of employment.
- 7 The respondent objects to any finding being made that the respondent has failed or refused to pay Mr Curr his entitlement, although the respondent recognises that the finding is made in the reasons for decision that Mr Curr has been denied a benefit under his contract of employment.
- 8 In the reasons for decision at [71], I found:
 Mr Curr has established that he has been denied a benefit to which he is entitled under his contract of employment.
- 9 At [69] I found that the respondent did not comply with the terms of the contract because it caused Mr Curr to pay, or be liable to pay, tax on the housing allowance it paid to him. It means that he did not receive \$1,600 per fortnight non-taxable. It is apparent from the evidence that the total amount by which he has received less than \$1,600 per fortnight non-taxable was not known at the time of the hearing; the total will be known once he completes the appropriate tax returns and that, in turn, is a task he has not completed because of the issue dealt with in this claim to the Commission: reasons at [8]-[10]. The amount which the respondent failed to pay Mr Curr is not a matter that was part of the hearing, with the parties being prepared to enter into discussions regarding relief.

- 10 Nevertheless, the respondent failed to allow Mr Curr a benefit under his contract of employment and he was therefore denied that benefit. I consider it is appropriate that a declaration issue reflecting the findings I have made at [69] and [71]. The language of s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act) does not use the word 'denied' and it is appropriate that the language of the Act be used in the declaration.
- 11 An order now issues in the terms of the minute, as amended in accordance with these supplementary reasons.

2015 WAIRC 00281

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	STEPHAN CURR	APPLICANT
	-v-	
	COATES HIRE OPERATIONS PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	WEDNESDAY, 1 APRIL 2015	
FILE NO/S	B 214 OF 2014	
CITATION NO.	2015 WAIRC 00281	

Result	Declaration and order issued; Application adjourned
Representation	
Applicant	Mr J Kitto of counsel and later Mr C Hershowitz of counsel
Respondent	Mr J R Brooksby of counsel and Mr N Keats of counsel and later Mr C Fogliani

Declaration and Order

HAVING HEARD Mr J Kitto of counsel and later Mr C Hershowitz of counsel for the applicant and Mr J R Brooksby of counsel and Mr N Keats of counsel and later Mr C Fogliani of counsel for the respondent, I the undersigned, having issued reasons for decision, and pursuant to the powers conferred under s 23(1) and s 27(1)(f) of the *Industrial Relations Act 1979*, hereby declare and order:

1. THAT Mr Curr has not been allowed by the respondent a benefit to which he is entitled under his contract of employment.
2. THAT it is a term of Mr Curr's employment agreement that he would receive a housing allowance of \$1,600 per fortnight net of tax.
3. THAT the further hearing of the application be adjourned to a date to be fixed once the parties have completed their discussions.
4. THAT the hearing may be relisted at the request of either party.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00243

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ERIN JULIA DEVEREUX	APPLICANT
	-v-	
	AFREYA HAIR BEAUTY AND TANNING	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	TUESDAY, 17 MARCH 2015	
FILE NO/S	U 14 OF 2015	
CITATION NO.	2015 WAIRC 00243	

Result Application dismissed

Order

WHEREAS this is an application referred to the Commission pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) by which the applicant claims that she was harshly, oppressively or unfairly dismissed by the respondent; and

WHEREAS on Monday, 16 February 2015, the Commission convened a conference pursuant to section 32 of the Act for the purpose of conciliating between the parties; and

WHEREAS following that conference, the parties reached agreement that the applicant's dismissal be withdrawn, that she resign, effective 17 February 2015, that the respondent provide an Employment Separation Certificate to reflect the applicant's resignation and that the parties not disparage each other following on the completion of these proceedings;

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

1. THAT the applicant's dismissal from her employment be withdrawn.
2. THAT the applicant resign her employment effective from 17 February 2015.
3. THAT the respondent provide to the applicant an Employment Separation Certificate to reflect the applicant's resignation effective 17 February 2015.
4. THAT the parties not disparage one another following the completion of these proceedings.
5. THAT the application be and is otherwise hereby dismissed.

[L.S.]

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

2015 WAIRC 00261

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	SANDRA PETRICH	APPLICANT
	-v-	
	GENTLEMENS HAIR LOUNGE	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	MONDAY, 30 MARCH 2015	
FILE NO/S	B 183 OF 2014	
CITATION NO.	2015 WAIRC 00261	

Result Application dismissed

Representation

Applicant No appearance

Respondent No appearance

Order

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

AND WHEREAS this matter was listed for conference on 24 November 2014;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached;

AND WHEREAS this matter was listed for hearing on 30 March 2015 for the applicant to show cause why the application should not be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT this application be, and is hereby, dismissed.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2015 WAIRC 00271

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SHONA TREADGOLD **APPLICANT**

-v-

AEG OGDEN (PERTH) PTY LTD **RESPONDENT**

CORAM COMMISSIONER J L HARRISON

DATE TUESDAY, 31 MARCH 2015

FILE NO/S B 12 OF 2015

CITATION NO. 2015 WAIRC 00271

Result Discontinued

Representation

Applicant In person

Respondent Mr L Moloney (as agent)

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 10 March 2015.

On 9 March 2015 the applicant advised the Commission that she did not wish to proceed with the matter and 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,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Eleanor Ruth Macpherson	The Perth Diocesan Trustees	U 253/2014	Commissioner S J Kenner	Discontinued
Kevin Quartermaine	Berty Button Pty Ltd	B 153/2014	Commissioner S J Kenner	Discontinued
Rodney Bekkers	The Trustee for CFC Employment Trust trading as CFC Employment Trust ABN: 28 015 164 975	B 24/2015	Commissioner S J Kenner	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	Department of Corrective Services	Scott A/SC	PSAC 29/2014	16/12/2014	Dispute re long service leave entitlements	Discontinued
Health Services Union of Western Australia (Union of Workers)	Minister for Health	Scott A/SC	PSAC 32/2013	N/A	Dispute re position titles	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as a delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 for the Metropolitan Health Services Board	Scott A/SC	PSAC 31/2010	15/01/2013 28/03/2013 8/07/2014 31/07/2014	Dispute re classification and re titling of positions of union members	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection and Family Support	Scott A/SC	PSAC 2/2015	28/01/2015	Dispute re leave entitlements	Discontinued
The Civil Service Association of Western Australia Incorporated	Commissioner for Corrections Department of Corrective Services	Kenner C	PSAC 22/2014	24/10/2014 28/11/2014	Dispute re Travelling Allowance	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Director General, The Department of Training and Workforce Development, Governing Council of Central Institute of Technology, Governing Council of Durack Institute of Technology	Scott A/SC	C 35/2014	2/12/2014 9/12/2014 10/12/2014	Dispute re negotiating impasse	Discontinued
United Voice WA	The Director General, Department of Education and Training	Scott A/SC	C 228/2013	28/10/2013 8/11/2013 25/11/2013 30/01/2014 4/04/2014	Dispute re fixed term contracts	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2015 WAIRC 00269

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 29 JANUARY 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER CORNELIUS

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN

MS C BARNARD - BOARD MEMBER

MR G LEE - BOARD MEMBER

DATE

TUESDAY, 31 MARCH 2015

FILE NO.

PSAB 3 OF 2015

CITATION NO.

2015 WAIRC 00269

Result

Directions issued

Directions

HAVING heard Ms J O'Keefe and with her Mr H McGregor on behalf of the appellant and Mr D Anderson of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT within seven days of these directions, the appellant is to advise in writing, to the Board and to the respondent, his position in relation to that part of the appeal said to be made under s 80I(1)(a) of the *Industrial Relations Act 1979*.
2. THAT within seven days of these directions, the respondent is to inform the Board and the appellant whether she consents to the appellant's application for an extension of time to file an appeal.
3. THAT within 14 days of the respondent receiving the appellant's written advice pursuant to Direction 1, the respondent is to file a Notice of Answer in relation to the appeal.
4. THAT the appeal be listed for two days' hearing, on dates to be advised.
5. THAT the parties engage in informal discovery.
6. THAT the appellant file and serve on the respondent a written outline of submissions seven business days before the hearing of the appeal.
7. THAT the respondent file and serve on the appellant a written outline of submissions three business days before the hearing of the appeal.
8. THAT there be liberty to apply.

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

[L.S.]

2015 WAIRC 00253

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00253
CORAM	:	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	THURSDAY, 19 MARCH 2015
DELIVERED	:	THURSDAY, 26 MARCH 2015
FILE NO.	:	U 247 OF 2014
BETWEEN	:	SANDRA BOULTER
		Applicant
		AND
		MENTAL HEALTH LAW CENTRE (WA) INC
		Respondent

CatchWords	:	Unfair dismissal – Application for discovery – Communications to and between Board members – Relevance – Volunteer board members – Confidentiality of Board members' communications – Fishing
Legislation	:	<i>Industrial Relations Act 1979</i> s 26(1)(a), s 27(1)(o)
Result	:	Application for discovery dismissed
Representation:		
Applicant	:	Mr T Lyons of counsel
Respondent	:	Mr M Cox of counsel

Reasons for Decision

- 1 The applicant claims that she was harshly, oppressively or unfairly dismissed by the respondent. The respondent filed a Notice of Answer in which it set out that there were concerns regarding the applicant's work performance. The respondent wrote to the applicant setting out those concerns and inviting her to respond. She did so and her responses were distributed to the Board of the respondent. Other communications from the applicant and her solicitor, as part of this process, were also distributed to the Board. The Board is said to have considered the performance concerns and the applicant's responses, and decided to terminate the applicant's employment.
- 2 The applicant seeks an order for discovery which, with the exception of some documents referred to in [1.1] to [1.3] of the discovery application are agreed. The matters in dispute are, in essence, that the applicant seeks and the respondent objects to discovery of communications to and between Board members. Those communications include any attachments to the documents distributed to the Board. The applicant says those communications may assist in identifying reasons for the

dismissal which may not be clear on the face of the formal minutes of meetings of the Board or in the advice to the applicant of the dismissal. The applicant also raised in reply that communications between Board members may be relevant in dealing with reinstatement.

- 3 The applicant also says that the Chairman of the Board resigned before the termination of employment and then subsequently became Chairman again, and therefore, this may have some relevance in determining the matter.
- 4 The respondent objects to providing discovery of communications between members of the Board on the following basis. The respondent says that the reason for dismissal is clear from the formal correspondence and the Board minutes, and that any communication between Board members other than Board meeting minutes is irrelevant. It is a decision of the Board, not the views of the individuals, which is relevant. Therefore, the individual communications are said to be not relevant. The respondent says in this context, the application for discovery of communications between Board members is 'fishing'.
- 5 Secondly, the respondent says that the members of the Board are volunteers who are entitled to have their communications treated as confidential. To require those communications to be disclosed would act as a disincentive to people to provide that voluntary service. Further, it is said to be onerous to require those volunteer Board members to go through all of their emails and other documents to identify those which are sought to be discovered.

Consideration

- 6 The *Industrial Relations Act 1979* (the Act) provides for the Commission to order discovery (s 27(1)(o)), however, no particular rules are set down. It is a matter to be considered as part of the equity of the Commission dealing with any matter before it in accordance with s 26(1)(a), to do justice between the parties (*Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel* (1995) 75 WAIG 1801).
- 7 As to the issue of relevance, discovery relates to what is in issue between the parties (*Mulley v Manifold* [1959] HCA 23; (1959) 103 CLR 341) and its purpose is to either advance a party's own case or to damage the opponents' case (*The Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55 at 63 per Brett LJ).
- 8 A document is relevant for discovery purposes if it helps to explain the controversy between the parties.
- 9 The respondent agrees to discovery of minutes of Board meetings and of formal documents which deal with the applicant's dismissal. There is nothing in the material before the Commission to indicate that there were any communications between Board members which may be relevant to whether the right to dismiss was exercised harshly, oppressively or unfairly as to amount to an abuse of that right (*The Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385).
- 10 It is the respondent which is responsible for the decision to dismiss, and whether it was an abuse of its lawful right, not the responsibility of individual Board members. Whether individual Board members have expressed views in informal communications is not relevant. It is the respondent's decision which is relevant.
- 11 As the obligation to provide discovery is ongoing, should discovery of the formal documents, including Board minutes, reveal matters which provide some basis for concluding that informal communications between the Board members is relevant, then the matter may be revisited. Otherwise, it has not been demonstrated that such communications were relevant to the fairness of the dismissal.
- 12 I also note that the reference in the Notice of Answer to the applicant's responses to the performance issues raised by the respondent being distributed to the respondent's Board, does not appear to be significant in the scheme of the Answer. That distribution appears to be merely incidental to the fact that they were provided to the Board for the Board's consideration in making a formal decision.
- 13 In that context, it would appear at this point that the application for discovery of those communications constitutes fishing (*John Palermo v Charles Rosenthal* [2011] 91 WAIG 129 per Smith AP and Beech CC at [61]-[62]).
- 14 Although these authorities deal with issuing of subpoenas, the principle applies equally to an application for discovery and whether the documents sought are relevant.
- 15 As to whether there ought to be different requirements on volunteers, I note that privacy or confidentiality attaches to the communications between board members, particularly in the interests of volunteer members. Privilege is not asserted here by the respondent. I think it is fair to say that members of boards generally expect that the communications between themselves will be private, and their discussions in board meetings will not be recorded in detail. Board meeting minutes generally record the tenor of debate and resolutions, but are not a transcript of the meeting. Members of boards would feel stifled in their expression of views as part of their deliberations were they to be individually accountable for them. To require discovery of the expression of those views may have the effect of stifling discussions between Board members in a way which is unhelpful to decision making.
- 16 If I am wrong and the communications between Board members are discoverable, I take account of the voluntary nature of the Board members' service. However, each of them has an obligation to undertake their duties diligently, even though they are volunteers. According to the Notice of Answer, the period of communications relating to the issues is relatively short, from 11 November 2014 to 10 December 2014. This should not place an onerous requirement on the members of the Board should discovery be necessary.
- 17 The application, in so far as it relates to communications between Board members in [1.1] to [1.3] of the Application, is dismissed. Otherwise, the Order for discovery will issue in the terms agreed by the parties.

2015 WAIRC 00277

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SANDRA BOULTER	APPLICANT
	-v-	
	MENTAL HEALTH LAW CENTRE (WA) INC	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 1 APRIL 2015	
FILE NO/S	U 247 OF 2014	
CITATION NO.	2015 WAIRC 00277	
Result	Order issued re discovery	

Order

HAVING heard from Mr T Lyons of counsel on behalf of the applicant and Mr M Cox of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT within seven days of the date of this order the respondent do provide discovery including discovery of the following categories of documents:

1. All documents including Board minutes and communications with third parties including stakeholders, relating to the performance of the applicant and relied upon by the respondent in terminating the applicant's employment;
2. All documents including Board minutes evidencing any decision to terminate the employment of the applicant;
3. All and any communication with 'Vital Conversations' and its employees and/or principals relating to its engagement for the purpose of carrying out a performance review of the applicant;
4. All and any communication with 'Vital Conversations' and its employees and/or principals relating to the provision of their report into the performance of the applicant;
5. Copies of any draft or preliminary reports produced by Vital Conversations relating to the performance review of the applicant; and
6. All documents evidencing and relating to the matters referred to in [6.3] of the Notice of Answer including the contract of the employee referred to therein.

[L.S.]

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Parks and Wildlife Rangers United Voice Fire Service Provisions Agreement 2014 AG 2/2015	31/03/2015	The Director General of the Department of Parks and Wildlife	United Voice	Acting Senior Commissioner P E Scott	Agreement registered

NOTICES—Appointments—

2015 WAIRC 00288

Designation of Officers

Section 93(1AC)

Industrial Relations Act 1979

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

Pursuant to section 93(1AC) of the *Industrial Relations Act 1979*, I DESIGNATE

the person nominated, being Sally Leeanne Anderson, AS A DEPUTY REGISTRAR to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 11 May – 3 July 2015 inclusive.



SUSAN BASTIAN

CHIEF EXECUTIVE OFFICER

REGISTRAR

DEPARTMENT OF THE REGISTRAR

1 April 2015

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 77/2013	N/A	N/A	Beech CC	Request for mediation re industrial action	26/03/2014 22/05/2014 11/06/2014 11/06/2014	Concluded
APPL 87/2015	N/A	N/A	Beech CC	Request for mediation re employment conditions	N/A	Did not proceed

RECLASSIFICATION APPEALS—

2014 WAIRC 00452

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MARIO VOLONNINO

APPELLANT

-v-

THE COMMISSIONER
DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE

THURSDAY, 5 JUNE 2014

FILE NO

PSA 2 OF 2014

CITATION NO.

2014 WAIRC 00452

Result	Order issued
Representation	
Appellant	Ms J Moore of counsel
Respondent	Ms N Sagar

Order

HAVING heard Ms J Moore of counsel on behalf of the appellant and Ms N Sagar on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent determine the reclassification application made by the appellant by 30 June 2014.

[L.S.]

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

2014 WAIRC 00453

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JACLYN STILLITANO	APPELLANT
	-v-	
	THE COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER	
DATE	THURSDAY, 5 JUNE 2014	
FILE NO	PSA 3 OF 2014	
CITATION NO.	2014 WAIRC 00453	

Result	Order issued
Representation	
Appellant	Ms J Moore of counsel
Respondent	Ms N Sagar

Order

HAVING heard Ms J Moore of counsel on behalf of the appellant and Ms N Sagar on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent determine the reclassification application made by the appellant by 30 June 2014.

[L.S.]

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

2014 WAIRC 00996

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MARIO VOLONNINO **APPELLANT**

-v-
THE COMMISSIONER
DEPARTMENT OF CORRECTIVE SERVICES **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE WEDNESDAY, 10 SEPTEMBER 2014

FILE NO PSA 2 OF 2014

CITATION NO. 2014 WAIRC 00996

Result Directions issued

Representation**Appellant** Ms J Moore of counsel**Respondent** Mr N Cinquina*Directions*

HAVING heard Ms J Moore of counsel on behalf of the appellant and Mr N Cinquina on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent file and serve upon the appellant any signed witness statements upon which it intends to rely no later than 7 days prior to the date of hearing.
- (2) THAT the respondent file and serve an outline of submissions upon which it intends to rely no later than 7 days prior to the date of hearing.
- (3) THAT the parties have liberty to apply on short notice.

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

[L.S.]

2014 WAIRC 00997

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JACLYN STILLITANO **APPELLANT**

-v-
THE COMMISSIONER
DEPARTMENT OF CORRECTIVE SERVICES **RESPONDENT**

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE WEDNESDAY, 10 SEPTEMBER 2014

FILE NO. PSA 3 OF 2014

CITATION NO. 2014 WAIRC 00997

Result	Directions issued
Representation	
Appellant	Ms J Moore of counsel
Respondent	Mr N Cinquina

Directions

HAVING heard Ms J Moore of counsel on behalf of the appellant and Mr N Cinquina on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent file and serve upon the appellant any signed witness statements upon which it intends to rely no later than 7 days prior to the date of hearing.
- (2) THAT the respondent file and serve an outline of submissions upon which it intends to rely no later than 7 days prior to the date of hearing.
- (3) THAT the parties have liberty to apply on short notice.

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

[L.S.]

2014 WAIRC 01026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 01026
CORAM	:	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
HEARD	:	WEDNESDAY, 3 SEPTEMBER 2014
DELIVERED	:	THURSDAY, 18 SEPTEMBER 2014
FILE NO.	:	PSA 2 OF 2014, PSA 3 OF 2014
BETWEEN	:	MARIO VOLONNINO; JACLYN STILLITANO
		Appellants
		AND
		THE COMMISSIONER
		DEPARTMENT OF CORRECTIVE SERVICES
		Respondent

Catchwords	:	Industrial law (WA) – Reclassification appeals – Representation by a legal practitioner – Questions of law raised – Procedural fairness – Leave granted for the appellants to be represented by a legal practitioner
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) ss 26(1)(b), 31, 31(1)(c)(iv) <i>Fair Work Act 2009</i> (Cth) s 596
Result	:	Leave granted for counsel to appear
Representation:		
Appellants	:	Ms J Moore of counsel and with her Ms K Hagan
Respondent	:	Ms N Sagar and with her Ms L Koloska

Case(s) referred to in reasons:

Mallet v Dept. of Consumer & Employment Protection (2009) 89 WAIG 405

Case(s) also cited:

Cunningham v Downer EDI Mining Pty Limited [2014] FWC 5449

R v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228

Reasons for Decision

- 1 The substantive claims in these matters are appeals by Mr Volonnino and Ms Stillitano from a decision of the Department of Corrective Services made on 30 June 2014 to not grant the officers a reclassification of their position. Prior to the hearing of

these substantive appeals, an issue has arisen for determination. That issue being an objection by the Department to the appellants being represented by counsel. Accordingly, the Arbitrator listed that issue for a preliminary hearing on 3 September 2014. At the conclusion of the submissions of the parties, the Arbitrator determined that for reasons to be published in due course, leave would be granted under s 31(1)(c)(iv) of the Industrial Relations Act 1979 for the appellants to be represented by counsel. These are my brief reasons for so deciding.

- 2 The appellants outlined the brief background to the appeals and their lengthy history. In short, whilst the appellants initially sought a reclassification of their Level 4 positions as Workers' Compensation Officers to Level 5 in February 2012, it was not until some 15 months later, that their request for reclassification was reviewed by the Classifications Unit of the Department of the Attorney General. The Review Report, dated 24 September 2013, recommended that the positions not be reclassified. A copy of the Reclassification Report was provided to the appellants in July 2014. The appellants contend that from the face of the report itself, serious issues arise as to whether the Reclassification Report should be admitted into evidence in the substantive proceedings, on the basis that the reviewing officer acknowledged, on p 2 of the Report, that:

Through discussions with a range of stakeholders it became evident that a number of other potential issues had, and were, impacting the progress, validation, and accurate assessment of the reclassification submission. These included potential issues relating to poor working relationships, work performance, and a proposal to change the business operations of the unit to a streamlined Injury Management Model of Service Delivery framework.

In this context the following assessment is provided.

- 3 By way of further background, an independent consultant's report obtained by the Department in June 2014 recommended, contrary to the Review Report, that the positions be reclassified as claimed.
- 4 The appellants submitted that there was a live issue to be determined in the appeal proceedings as to whether the Review Report should be admitted into evidence in the proceedings. This is so despite the terms of s 26(1)(b) of the Act providing that the Commission is not bound by the rules of evidence, but may inform itself on any matter in such a way as it thinks just. The appellants contended that there is an issue of law likely to arise in relation to the application of the statutory provisions in relation to reliance on evidence, in particular, the obligation on the Commission to ensure the appellants receive procedural fairness. The submission was that in the present case, a real issue arises as to the reliance of the Department on what is alleged to be a flawed Review Report. This will be a substantial argument put by the appellants at the hearing of the appeal. Accordingly, it was submitted that such a matter of law would be raised or argued, or would be likely to be raised or argued in the substantive proceedings, thus justifying leave being granted to counsel to appear.
- 5 For the Department, it was contended that leave should not be granted. In short, it was contended that there was no issue of law arising and in any event, it would be unfair if the appellants were granted leave to be represented by counsel in the substantive appeal. In relation to the fairness issue, the Department referred to a decision of the Fair Work Commission considering the application of s 596 of the Fair Work Act 2009 (Cth). I pause to observe however that that legislation is substantially different to s 31 of the Act. The federal legislation places primary emphasis on whether the proceedings before the Fair Work Commission would be dealt with more efficiently and fairly by the representation of a party by counsel. No such considerations arise under the Act.
- 6 Secondly, reference was also made to a decision of the Arbitrator in *Mallet v Dept. of Consumer & Employment Protection* (2009) 89 WAIG 405. In that case leave for counsel to appear for an applicant in a reclassification appeal was refused. However, again, in my view, that case is distinguishable. The issues arising in those proceedings were essentially straightforward questions of the application of established approaches to reclassification appeals and did not involve, nor were likely to involve, any substantive question of law.
- 7 In this case I am satisfied that whether, and if so to what extent, the Review Report can be tendered into evidence, and the extent to which it can be relied upon, involve issues of the application of s 26(1)(b) of the Act sufficient to grant leave for counsel to appear. In any event, even if fairness was a relevant consideration, which in my view it is not, then I note that as submitted by the appellant, the Department is a large and well-resourced organisation, with the ability to obtain its own independent legal advice through the State Solicitor's Office. In my view, given the issues arising in these appeals, it is difficult to see any material unfairness or disadvantage that may arise.
- 8 On a broader issue, whilst it is a matter for the Parliament of this State, the terms of s 31 of the Act, restricting the right of legal practitioners to appear in proceedings before the Commission, is somewhat archaic. It is difficult to see the rationale for precluding those persons legally trained and skilled in advocacy, from appearing in proceedings before the Commission and assisting the Commission in the determination of matters which come before it. Whilst in years past when it may have been less common for counsel to appear before the Commission, that is no longer so. Moreover, as Kelly SC in his report of 22 August 1978, when undertaking a review of the State's industrial legislation in 1978, prior to the introduction of the Act in 1979, observed at pp 36-37:

Those who support the exclusion of lawyers from the industrial jurisdiction frequently do so by reference to generalisations which are really little more than slogans such as "It is a layman's court" or "All lawyers do is introduce technicalities". No doubt such generalisations have some historical basis, but it is not to be found in the experience of the Commission in the fourteen years during which it has been operating. On the contrary, the appearance of legal practitioners has tended to keep proceedings short and to the point and has generally assisted the Commission and the parties. But even if it were otherwise that is not the real point. Decisions involving very large sums of money and decisions which affect in very important ways the rights and obligations of employers and employees and the community at large are made (and made frequently) in this jurisdiction, and parties to the proceedings in which those decisions are made are entitled to have the representation of their choice; and I confess to finding it somewhat ludicrous that the people who are generally excluded from that choice are those who are specially trained in the art of representation. The control and conduct of proceedings is in the hands of the

Commission and I am of the opinion that sufficient protection is reserved in subsection (4) of the proposed section (p.20). Apart from those considerations the freedom of lawyers to practise in the industrial jurisdiction should tend to produce better industrial lawyers and, ultimately, better (industrial) judges.

9 In my opinion, that view, and the particular draft provision of the then proposed legislation, has much to commend itself.

		2014 WAIRC 01030
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MARIO VOLONNINO; JACLYN STILLITANO	APPELLANTS
	-v-	
	THE COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 19 SEPTEMBER 2014	
FILE NO	PSA 2 OF 2014; PSA 3 OF 2014	
CITATION NO.	2014 WAIRC 01030	
Result	Order issued	
Representation		
Appellants	Ms J Moore of counsel and with her Ms K Hagan	
Respondent	Ms N Sagar and with her Ms L Koloska	

Order

HAVING heard Ms J Moore of counsel and with her Ms K Hagan on behalf of the appellants and Ms N Sagar and with her Ms L Koloska on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT applications PSA 2 and PSA 3 of 2014 be and are hereby joined and be heard and determined together.

[L.S.]

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

		2015 WAIRC 00216
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
CITATION	:	2015 WAIRC 00216
CORAM	:	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
HEARD	:	WEDNESDAY, 3 SEPTEMBER 2014, TUESDAY, 2 DECEMBER 2014
DELIVERED	:	FRIDAY, 6 MARCH 2015
FILE NO.	:	PSA 2 OF 2014, PSA 3 OF 2014
BETWEEN	:	MARIO VOLONNINO; JACLYN STILLITANO Appellants AND THE COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES Respondent

Catchwords	:	Industrial law (WA) – Reclassification appeals – Significant net addition to work value – Previous reclassification decision of the Arbitrator – Principles applied – No substantial increase in work value on the evidence – Workload issue – Appeals dismissed – Order made
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 80E(2)(a) <i>Public Sector Management Act 1994</i> (WA) <i>Prisons Act 1981</i> (WA) <i>Workers’ Compensation Code of Practice (Injury Management) 2005</i> (WA)
Result	:	Appeals dismissed
Representation:		
Appellants	:	Ms J Moore of counsel and with her Ms K Hagan of counsel
Respondent	:	Mr R Andretich of counsel and with him Ms N Sagar

Case(s) referred to in reasons:

Martelli v Department Corrective Services (2011) 91 WAIG 1143

Case(s) also cited:

Arnotts Limited v Trade Practices Commission (1990) 24 FCR 313

Australian Municipal, Administrative, Clerical and Services Union v Sydney Water Corporation T/A Sydney Water [2011] FWA 734

Civil Service Association of Western Australia Incorporated v Governing Council of the Challenger College of TAFE (2004) 84 WAIG 2582

Clark v Ryan (1960) 103 CLR 486

Daniel v Western Australia (2000) 178 ALR 542

Dasreef Pty Limited v Hawchar (2011) 243 CLR 588

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705

Pollock v Wellington (1996) 15 WAR 1

Quick v Stoland Pty Ltd (1998) 87 FCR 371

Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd (2002) 55 IPR 354

The Minister for Health in his Incorporated Capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board v The Health Services Union of Western Australia (Union of Workers) (2013) 93 WAIG 1565

Trade Practices Commission v Arnotts Limited (1990) 21 FCR 324

Reasons for Decision

- 1 Mr Volonnino and Ms Stillitano have been employed since March 2009 and December 2007 as level 4 Workers’ Compensation Officers within the People and Organisational Development division of the Department of Corrective Services. The appellants have brought their application pursuant to s 80E(2)(a) of the Industrial Relations Act 1979 and seek a decision by the Arbitrator that their positions be reclassified from level 4 to level 5.
- 2 The appellants’ reclassification application has a long history. Their original application for reclassification was submitted to the respondent on 23 February 2012. There was a delay of some 15 months in sending the application to the Classifications and Establishment Unit of the Department of the Attorney General. A brief background to the appeal was set out in my earlier reasons for decision dealing with the respondent’s objection to the appellants being represented by counsel: [2014] WAIRC 01026. The delay in the respondent dealing with the requests has been inordinate.
- 3 The appellants filed a notice of appeal to the Arbitrator on 14 March 2014, and following a conciliation conference held on 5 June 2014, the Arbitrator made an order that the respondent determine the appellants’ application for reclassification by 30 June 2014. On 30 June 2014 the appellants were informed of the Commissioner for Corrective Services’ decision that their positions were appropriately classified at level 4. The appellants now seek to overturn that decision.
- 4 The appellants contended that their salaries are no longer commensurate with the duties and responsibilities of a WCO and there has been a significant net addition to work value to warrant a reclassification from level 4 to level 5. The appellants claimed that there has been a permanent change in the nature of the work they have performed as compared to previous years. The respondent denied there has been a significant net increase in the work value of the role, and submitted that level 4 is the appropriate classification in all the circumstances.

The parties’ contentions

- 5 In summary, the appellants contended that there has been an increase in skills, knowledge and other expertise required to adequately undertake their duties. This is specifically in relation to managing “complex” workers’ compensation and

retirement on the grounds of ill health claims, and developing risk management strategies. The appellants submitted that there has been an increase in the level of responsibility required and an expectation that they work with less supervision combined with an increased workload. This has led to increased pressure, which results in vital decisions having to be made in shorter timeframes.

- 6 The appellants point out that managing “complex” workers’ compensation claims, retirement on the grounds of ill health claims and complex cases involving the Medical Board are not included in the job description form as the responsibilities of a level 4 WCO. Rather, such responsibilities appear in the JDF for the level 6 Coordinator Workers’ Compensation and Support Services. If there was an expectation for WCOs to manage complex cases involving retirement on the grounds of ill health or the Medical Board, then they say it would have been stated in their JDF as a responsibility of the position.
- 7 This raises the question as to what constitutes a “complex case”. The appellants submitted, and the respondent accepted, that a complex workers’ compensation case may involve:
 - a) Psychological injury with confirmed diagnosis;
 - b) Physical injury with psychological overlay;
 - c) Failure or lack of injury management by the employer;
 - d) Injury management - servicing the Department;
 - e) Multiple work injuries;
 - f) Industrial relations issues;
 - g) Undetermined medical diagnosis or conflict in medical opinion;
 - h) Employee related issues; and
 - i) Agency specific issues.
- 8 In 2003, the Workers’ Compensation and Rehabilitation Officer position was reclassified from level 3 to level 4 by a decision of the Arbitrator, where it was held that there had been a significant net addition to the work requirements of the position. The respondent contended that the arbitrated outcome in 2003 took into account the same classification factors which are currently being relied upon by the appellants in this appeal. It submitted that the increase in duties and skills were dealt with in 2003 when the roles were reclassified from level 3 to level 4. The respondent acknowledged that there have been minor increases in work value, but not enough to warrant a reclassification from level 4 to level 5. The WCOs’ responsibilities have been inherent in their role since 2003.
- 9 In relation to complexity, the respondent submitted that the RiskCover division of the Insurance Commission of Western Australia has the ultimate management, oversight and responsibility for complex claims. The respondent said that complex claims have always been made, and are not unique to the corrections environment.

Admissibility of the DoTAG Report

- 10 A preliminary issue raised in the appeal was whether the Reclassification Determination report prepared by the Department of the Attorney General (the DoTAG Report) on 24 September 2013, which recommended that the WCO position not be reclassified, should be admitted into evidence in the proceedings.
- 11 The DoTAG Report at page 2 states:

Background

...

The Classifications Unit met separately with the Coordinator Welfare & Counselling Service on 02 July 2013 and the Manager, Employee Welfare Services on 03 July 2013 for comment on the submission justifications and the proposed JDF, however minimal information was forthcoming. The Classifications Unit’s queries were ultimately responded to by the applicants themselves, received on 02 August 2013 via the then Acting Manager. Further additional information, sourced from RiskCover, was again provided on 12 and 17 September.

Through discussions with a range of stakeholders it became evident that a number of other potential issues had, and were, impacting the progress, validation, and accurate assessment of the reclassification submission. These included potential issues relating to poor working relationships, work performance, and a proposal to change the business operations of the unit to a streamlined Injury Management Model of Service Delivery framework.

In this context the following assessment is provided.

- 12 The appellants contended that the second paragraph set out above, means that the foundation of the Report is invalid and the Arbitrator should reject its tender. It was submitted that the Report was the main factor relied on by the respondent for rejecting the reclassification request, and as such, it would be unsafe to now rely on it in these proceedings.
- 13 For the respondent, it was submitted that if the process was as flawed as contended by the appellants, then the entire appeal process should be struck out and the parties should start over again. However, given the lapse of time and that all the materials are now before the Arbitrator, the Report should be considered along with all of the other evidence. Mr Veitch, the co-author of the Report, was called to give evidence and therefore, he could be questioned on any issues of concern.

- 14 Having adjourned briefly, I considered that the DoTAG Report should go into evidence. As with all such matters, the Report would be given appropriate weight by the Arbitrator, in the context of an assessment of all of the evidence.

The Workers' Compensation Officer position

- 15 Before the Arbitrator are JDFs for 2003 and 2007 (tab 9 exhibit R1) and for 2008, including for the level 6 Coordinator Workers' Compensation and Support Services position (tab F exhibit A1). I have taken the content of these documents into account, in the context of the following evidence and discussion.

The 2003 reclassification

- 16 In 2003, three appellants sought a reclassification of their level 3 Workers' Compensation and Rehabilitation Officer positions to level 4 or higher, on the basis that their duties had changed so significantly so as to justify a reclassification. One of the appellants, Mr Millard, filed a statement in the Commission on 5 March 2003. Mr Millard said that due to statutory change, his duties and responsibilities became more substantive in nature, and went beyond merely processing claims. In summary, at par 93 of his statement, Mr Millard said the additional duties he was responsible for included:

- a) Overseeing an injured worker's rehabilitation;
- b) Representing the former Ministry of Justice at conciliation and review hearings, and assisting with District Court procedures;
- c) Communicating the Ministry's policies to workplaces and other interested parties;
- d) Monitoring the medical discharge of public sector employees; and
- e) Advising workers of their rights and entitlements.

- 17 In those matters, Scott C found that there had been a significant net addition to the work requirements of the positions. The Arbitrator stated that changes to legislation meant that the Officers' duties and responsibilities changed as a consequence. The Arbitrator found that the Officers had "a real role in negotiations and appear to have some real authority". Scott C also noted the Officers' new role in medical retirements and non-work related rehabilitation were additional areas which required expanded skills and responsibilities. The Arbitrator was of the view that the Officers did not have a supervisory or specialist technical role, but the role required a level of skill and responsibility that went beyond a level 3 position. The Officers' duties had evolved since 1993, and Scott C considered that level 4 was a more appropriate classification than level 5, given the Officers' lack of supervisory responsibility: PSA 7, PSA 8 and PSA 9 of 2003.

- 18 I note at this juncture that the Public Service Commission's Classification Determination Manual – Guidelines for Assessment and Determination of Classifications states at p 23:

Where the classification level of an office has already been set by an arbitrated decision of the W.A. Industrial Relations Commission, **reclassification to a higher level should not be approved unless there have been significant changes to the duties of the office since the date of arbitration and these have substantially increased net work-value**

(Emphasis in original.)

The reports relied on

- 19 The respondent relied on various documents in reaching its decision not to support a reclassification, which were tendered into evidence in the appeal proceedings.
- 20 The DoTAG Report of September 2013, which did not support the reclassification, was submitted to the respondent's Classification Review Committee at its 15 January 2014 meeting. The Assistant Commissioner People and Organisational Development also provided a written report and made oral submissions at that Committee meeting. Subsequently, the respondent engaged The Nexus Network as an external consultant. The Nexus "Review of Reclassification Request for Workers Compensation Officers Level 4" report of May 2014 recommended that the WCO position be reclassified to level 5. Enquiries were also made of RiskCover's Injury Management Services division, and the respondent's policies and procedures were considered.
- 21 The respondent also relied on an internal memorandum of 30 June 2014 from the Executive Director Corporate Support to the Commissioner of Corrective Services that the WCOs' application for reclassification not be supported.
- 22 I summarise the DoTAG and Nexus Reports as follows.

The DoTAG Report

- 23 The DoTAG Report concluded that while there was some increase in work value, it was not sufficient to demonstrate a substantial net increase in overall work value or a significant change in the nature of the appellants' role. The Report found that the essential nature of the role has not changed.
- 24 The DoTAG Report includes an analysis of the "complex" cases allocated to WCOs over the past ten years as set out in the following table:

	2013 data						
	March 2003	Sept 2010	July 2013	Coord. Level 6	WC Officer Level 4 (007734)	WC Officer Level 4 (007735)	WC Officer Level 4 (007742)
Total active claims	289	382	423	20	122	131	145
Claims cost estimate	11.94m	\$24.27m	\$27.28m	\$2.16m	\$8.19m	\$8.71m	\$9.62m
Complex claims with psychiatric claims – Total stress claims	45	81	99	5	30	31	37
Total complex claims > \$50,000	70	154	184	15	60	63	77
Total complex claims	95	190	224	16	74	66	88
Total complex claims as a proportion of total active claims	32.9%	49.7%	52.9%	80%	60.6%	50.4%	60.7%
Prison Officer Headcount	Unknown*	2050	2032	n/a	n/a	n/a	n/a

- 25 This table shows that the total number of active claims has increased from 289 in March 2003 to 423 claims in July 2013. The total number of “complex” claims has risen from 95 in March 2003 to 224 in July 2013. The DoTAG Report concluded that an increase of four complex claims per year per WCO was insufficient to support a permanent increase in classification for all three positions, and the data indicated that it was primarily a workload issue.
- 26 Mr Veitch is the Classifications Coordinator in the Recruitment, Organisational Data and Classification Services division of the Department of the Attorney General. Mr Veitch was the primary author of the DoTAG Report. In his evidence, Mr Veitch said it was his understanding that the WCOs were expected, as required in the JDF, to take on some cases with a degree of complexity as they worked within a complex corrective services environment.
- 27 The DoTAG Report included a comparison between the JDFs for a level 4 and level 5 WCO and found that there were minor work value impact increases in the following areas, as set out in the following table:

LAST ASSESSED JDF 2007 Worker’s Compensation Officer Level 4	PROPOSED JDF 2013 Worker’s Compensation Officer Level 5	Comment	Work Value Impact (Increase Decrease or Neutral)
Injury Management	Worker’s Compensation and Injury Management		
Manages worker’s compensation claims to completion/finalisation.	Manage Workers’ Compensation and individual injury management / return to work programs to ensure successful completion or finalisation, including the management of complex matters.	Similar to previous duty but with the addition of “ <i>including the management of complex matters.</i> ” The previous work related requirements of the position state it is required to perform within “... <i>a complex and high risk environment</i> ” and work “... <i>cooperatively with other teams across the department to resolve complex employee welfare cases.</i> ” This indicates an existing expectation of some level of complex case management. This responsibility is also duplicated in the Level 6 Coordinator JDF.	Minor Increase

LAST ASSESSED JDF 2007 Worker's Compensation Officer Level 4	PROPOSED JDF 2013 Worker's Compensation Officer Level 5	Comment	Work Value Impact (Increase Decrease or Neutral)
Injury Management	Worker's Compensation and Injury Management		
Develops, implements and manages effective individual injury management/return to work programs.	Develops implements and manages effective individual injury management/return to work programs to enable injured employees to return to their full vocational competence	No change. Similar to previous duty however with revised/expanded wording.	Neutral
Manages and assists with cases requiring retirement on the grounds of ill health including arranging and facilitating medical board hearings	Manage complex cases requiring retirement on the grounds of ill health or Medical Boarding. Coordination of Medical Board Hearings and seeking the appropriate approvals from hierarchy through to finalisation of process.	Addition of managing <i>complex</i> medical boarding cases. As previously stated, the previous work related requirements of the position state it is required to perform within "... a complex and high risk environment." which indicates an existing expectation of involvement in complex case management.	Minor increase
Ensures the timely and accurate processing of worker's compensation related documentation.	Ensures the timely and accurate processing of Worker's Compensation and other relevant documentation.	No change. Identical to previous duty.	Neutral
Maintains and provides regular statistical information and reports	Maintains and provides regular statistical information and reports	No change. Identical to previous duty.	Neutral
Develops and implements effective rehabilitation programs to enable ill and injured employees to return to their full vocational competence	Develops and implements effective rehabilitation programs to enable ill and injured employees to return to their full vocational competence	No change. Identical to previous duty.	Neutral
Coordinates rehabilitation programs with a range of internal and external professionals and workplace supervisors.	Coordinates rehabilitation programs with a range of internal and external professionals and workplace supervisors.	No change. Identical to previous duty.	Neutral
Assesses ill and injured employees and assists in the development of rehabilitation programs.		Duty removed but is captured within the existing duty: <i>Develops and implements effective rehabilitation programs...</i>	Neutral
Assists in the development and delivery of department-wide training programs related to the prevention of injuries in the workplace and other rehabilitation issues.	Assists in the development and delivery of department- wide training programs related to an employees/employers rights and obligation/s with relation to the Worker's Compensation process and other rehabilitation issues.	No change. Similar to previous duty but with revised wording.	Neutral

LAST ASSESSED JDF 2007 Worker's Compensation Officer Level 4	PROPOSED JDF 2013 Worker's Compensation Officer Level 5	Comment	Work Value Impact (Increase Decrease or Neutral)
Injury Management	Worker's Compensation and Injury Management		
	Develops risk management strategies to minimise the Department's exposure to risk, both human and economic.	New duty, however based on the branch structure, it is evident the positions are not ultimately responsible for the development or implementation of risk management strategies. It is a reasonable expectation that the positions already provide input and contribute to the development of risk management strategies as they are already required to assist in "developing policies, standards and work practices" within a "complex and high risk environment." Responsibility for the development of risk management strategies is also duplicated in the following JDFs: Coordinator, Level 6; Coordinator, OSH and Risk Management, Level 5 at Casuarina and Hakea prisons; Senior Occupational Safety and Health Consultant, Level 5 (generic).	Minor Increase
Consultation and Advice	Stakeholder Management Consultation and Advice		
Liaises with insurers and other service providers on various matters including policy and claims management.	Liaises with insurer and other service providers and represents the Department at relevant legislative hearings, conferences, trials and Medical Boards.	No change. Similar wording to previous duty however with revised/expanded wording.	Neutral
Consults with stakeholders to provide timely advice in relation to worker's compensation and employee injury management/return to work programs.	Consults with stakeholders to identify issues associated with Worker's Compensation and employee welfare policies, practices, business processes and claims management.	No change. Similar to previous duty however with revised/expanded wording.	Neutral
Represents the Department at relevant legislative hearings, conferences, trials and medical boards.	Represent the best interests of the Department by participating in negotiations surrounding settlement of Worker's Compensation, Common Law and Medical Boarding procedures or voluntary termination of employment.	No change. Similar to previous duty however with revised/expanded wording.	Neutral
Provides recommendations related to the settlement of worker's compensation, common law and medical boarding procedures.	Provides advice in relation to the implementation of a variety of policies, Departmental initiatives and recommendations	No change. Similar wording to previous duty however with revised/expanded wording.	Neutral
	Providing timely advice in relation to Worker's Compensation and Injury Management enquiries	No change. This duty is captured in the previous JDF duty: "Consults with stakeholders to provide timely advice ..."	Neutral

LAST ASSESSED JDF 2007 Worker's Compensation Officer Level 4	PROPOSED JDF 2013 Worker's Compensation Officer Level 5	Comment	Work Value Impact (Increase Decrease or Neutral)
Policies and Procedures	Policies and Procedures		
Assists in developing policies, standards and work practices in relation to worker's compensation, employee welfare and other human resource related matters.	Develops and assists in the creation of policies, standards and work practices in relation to Worker's Compensation, employee welfare and human resource related matters.	Similar to previous duty however with the addition of "Develops..." As per the branch organisational and reporting structure, Level 6 Coordinator is ultimately responsible for developing relevant policies and standards, therefore the business area may consider rewording this duty to "Contributes to the development of..." Responsibility for developing policies etc is also duplicated in the Level 6 Coordinator JDF.	Minor Increase
Ensures up to date and accurate information is maintained and appropriately communicated on all process/procedural matters relating to worker's compensation and injury management programs.	Maintains and ensures the ongoing management of up-to-date and accurate information is maintained and appropriately communicated on all processes and procedures relating to Worker's Compensation and Injury Management programs and procedures.	No change. Similar to previous duty however with revised/expanded wording.	Neutral
	Identifies, analyses and explores opportunities that have the potential to improve the outcomes and performance of the section.	New duty, however the current JDF already indicates the positions are required to develop "...practical and innovative solutions to complex problems and resolving matters using available resources, information and reporting tools to analyse and report on emerging issues and trends." This indicates that the positions have always been required to perform a duty of this nature. This responsibility is also duplicated in the Level 6 Coordinator JDF.	Neutral
	Teamwork		
	To be able to work independently but also as a team within the section to maintain the good order and running of the section by providing and having good communication skills, innovative ideas and good interpersonal skills	This duty is captured in the current work related requirements under Teamwork.	Neutral
Ethical Behaviour	Ethical Behaviour		
Demonstrates ethical behaviour in accordance with relevant standards, values and policies	Demonstrates and manages ethical behaviour by working within the relevant policies, procedures and legislative requirements.	Similar to previous duty however with revised/expanded wording.	Neutral

LAST ASSESSED JDF 2007 Worker's Compensation Officer Level 4	PROPOSED JDF 2013 Worker's Compensation Officer Level 5	Comment	Work Value Impact (Increase Decrease or Neutral)
Equity, Diversity and Occupational Safety and Health	Equity, Diversity and Occupational Safety and Health		
Applies the principles of equity, diversity, occupational safety and health in the workplace and behaves in accordance with relevant standards, values and policies.	Applies the principles of equity, diversity, occupational safety and health in the workplace and behaves in accordance with relevant standards, values and policies.	Identical to previous duty.	Neutral
WORK RELATED REQUIREMENTS			
Knowledge and experience in a workers compensation environment	Knowledge and experience in injury management and workers' compensation.	Now includes <i>injury management</i> . Injury management has always been a component of the role and is specified in the current JDF duties.	Neutral
Communication, negotiation and interpersonal skills	Communication, negotiation and interpersonal and stakeholder management skills	Now includes <i>stakeholder management skills</i> , however the positions have always been required undertake stakeholder management in a complex and high risk environment. This includes establishing and maintaining proactive and effective workplace partnerships with internal clients, external agencies, and negotiating with senior management.	Neutral
Conceptual, analytical and problem solving skills	Conceptual, problem solving and analytical skills	No change. The positions are still required to have sufficient skills to undertake analysis of complex problems and develop innovative solutions.	Neutral
	Planning, organisational and policy development skills	New requirement however the positions have always been required to assist in developing policies, standards and operational work practices, as well as liaises with insurers and service providers on various matters including policy issues. This new requirement is duplicated in the Level 6 Coordinator JDF.	Minor Increase
Ability to work in a team	Ability to work independently and in a team	Now includes ability to work independently. The positions have always been required to work autonomously.	Neutral

- 28 The DoTAG Report also summarised the "BIPERS Assessment" tool, which found that the WCOs' rating of 312 placed the classification of the position at the upper point of the level 4 classification range. Comment was also made as to the outcome of the arbitrated decisions in 2003 whereby the level 3 position was reclassified to level 4 by order of the Arbitrator, as discussed earlier in these reasons. The DoTAG Report also included a comparative analysis of a number of internal and external positions, and found a strong alignment with positions at a level 4 classification. The Report considered that there were no internal flow-on implications, but there may potentially be implications across the public sector.
- 29 Mr Veitch acknowledged that understanding the workers' compensation unit was not straightforward due to the split of the Department of Justice in 2006 which resulted in the abolition and recreation of similar positions around this period. Mr Veitch said the Classifications and Establishment Unit were required to seek clarification and further information from the appellants' supervisor and branch manager. Although the appellants attempted to make something of this as part of the progress of the reclassifications in that this information was not initially prepared with the reclassification request, I am not persuaded that in the end, this is problematic. Mr Veitch did say that quite often he is required to follow up with appropriate persons, the

gathering of relevant information to complete the reclassification assessment. In the final analysis, he obtained the information he was seeking.

The independent consultant's report

- 30 The respondent also appointed an independent consultant to review the appellants' reclassification request, review the evidence provided to the Classification Review Committee and provide a work value recommendation. The Nexus Report dated May 2014 was compiled by Ms Sclanders and recommended that the WCO position should be reclassified from level 4 to level 5. The Report recommended that the WCOs receive back pay from the date of the lodgement of their reclassification request, being 23 February 2012.
- 31 The BIPERS assessment included in the Nexus Report placed the work value of the WCOs at the lower end of the range for level 5. The appellants submitted that the BIPERS assessment in the Nexus Report should be favoured over the assessment in the DoTAG Report, on the basis that the Nexus Report ranked interpersonal skills at level 6 and much of the WCOs' contact is outside of the respondent and is difficult and complex in nature.
- 32 The Nexus Report considered the comparative positions referred to in the DoTAG Report and also the Classification Review Committee assessment that supported a reclassification to level 5. Excluding the comparative positions from WA Police, the Nexus Report concluded that the Department of Treasury and Finance level 5 position provided a comparison supporting the WCOs' reclassification. Mention was made of the RiskCover level 2/4 position, as being similar, but it was located in a smaller agency. I note that whilst this may be so, RiskCover officers provide workers' compensation and risk management services across the whole of government. Therefore, the size of the organisation is not relative to the scope of activities of these officers.
- 33 Additionally, the Nexus Report states that the WCOs are given delegated responsibility "to process payment of claims of \$100k or less, requiring that only claims of more than this amount be referred to senior management in case the Department wishes to discuss the amount of the settlement with RiskCover". Whilst it is not stated in the Report, it needs to be borne in mind that in this regard, it is RiskCover's ultimate decision whether to settle a claim. The Report also states that WCOs "attend arbitration hearings by themselves where their responsibility is to ensure all necessary information relating to a claim is provided". It is not entirely clear whether this is intended to mean that WCOs attend without any other person from the respondent or that they conduct arbitration proceedings themselves. If the latter, this would not be correct.

The evidence

Complex claims

- 34 The appellants gave evidence that their role requires them to manage unique and complex claims which can involve a variety of issues. Such issues can be psychological and/or physical in nature, and can involve assaults, deaths in custody causing trauma, bullying and sexual harassment.
- 35 The appellants said there has been a significant net increase in the number of complex cases. Ms Stillitano said that her role requires her to deal with injured employees who often have pre-existing physical or psychological conditions. These conditions can be impacted by their grievances against the respondent or their colleagues. Such cases can be difficult to manage. In Ms Stillitano's opinion, the number of stress claims had also increased. The appellants' evidence in this regard is generally consistent with the DoTAG Report, which includes data over the past ten years showing the number of complex claims, set out at par 25 above.
- 36 In her evidence, Ms Stillitano provided a detailed example of a person who was declared unfit to work and the various complexities that arose in relation to that claim: see T21-23. Ms Stillitano agreed in cross-examination that she had been involved since she started employment with claims made by custodial officers in the corrections system. She had also been exposed to claims by public servants and administrators in the custodial services environment, and stress claims had never been peculiar to the custodial environment. It was about a year into employment that Ms Stillitano said she realised she was managing complex claims. Her evidence was that when she first started as a WCO she expected to do a certain role, and expected that the level 6 Coordinator would perform the complex duties. Ms Stillitano said that as time went on, she realised she was taking on all of the workers' compensation duties, including complex claims as well as creating policies and procedures.
- 37 Mr Volonnino gave similar evidence that, as time went on, he also realised that the cases the WCOs managed were complex, because they were managing every case. He said that when the WCOs raised questions, the level 6 Coordinator was given some cases. Mr Volonnino said that it would be possible to refer a complex case to the Coordinator if it was so complex that the WCOs did not want to handle it and if the Coordinator volunteered to take it.
- 38 According to the appellants, their duties require an increase in responsibility, with the expectation that they will work with less supervision.
- 39 Mr Stewart, the Executive Director Corporate Support who oversees the delivery of corporate support to the respondent, also gave evidence. Mr Stewart said that the nature of the respondent's claims appears to be changing, with an increasing number and proportion of stress and psychological claims, which are generally more complex claims to deal with. However, Mr Stewart was of the view that these claims did not add to the complexity of the work performed by the WCOs. Mr Stewart said the level 6 Coordinator has responsibility for complex claims.
- 40 RiskCover delivers a wide range of workers' compensation related services to agencies that includes claims management, injury management advice and training, provision of claims data and analysis and insurance advice. There are currently around 50 officers employed by RiskCover to manage workers' compensation claims for the State government. Ms Thompson has been employed by RiskCover for nine years and she is currently the Services Manager. From RiskCover's perspective, Ms Thompson said that there has been an increase in long duration claims, but stress claims have stabilised. Ms Thompson also gave evidence in relation to complex claims from RiskCover's perspective and she also commented on RiskCover's relationship with the respondent. At RiskCover, Ms Thompson said that level 2/4 Injury Services Officers are responsible for

managing claims with varying complexity from lodgement to finalisation. Ms Thompson testified that RiskCover and the respondent meet regularly to discuss the progress of complex claims and to update claims and injury management strategies.

- 41 In relation to RiskCover's processes regarding complex workers' compensation claims, Ms Thompson said that complex claims are managed by level 2/4 Injury Services Officers with advice from the Injury Services Coordinator, Dispute Resolution Officer, Injury Management Advisor or lawyer as required. Any level 2, 3 or 4 Injury Services Officer at RiskCover can manage complex claims on their own, but for the more complex claims they may seek out advice from the team leader, Injury Services Coordinator, the Dispute Resolution Officer or a lawyer.
- 42 RiskCover's officers' caseloads vary from 80 to 175 claims depending on the complexity and the officer's role. Ms Thompson said that RiskCover's level 2/4 Injury Services Officers manage approximately 110 to 130 claims, of which about 40 to 50 would be considered "long duration claims", which is a form of complex claim. RiskCover's officers would, at most, manage about 28 stress claims. Ms Thompson's evidence was that it was possible that 50% to 60% of RiskCover's officers' caseloads would be complex claims, but it was most likely around 40%. RiskCover allocates claims by regions, and it currently has three officers managing the respondent's claims.

Conciliation and arbitration processes

- 43 Ms Stillitano said that she attends conciliation conferences at WorkCover WA and represents the best interests of the respondent by ensuring that the respondent's position is presented and supported by evidence. She often attends conciliation conferences at WorkCover, along with RiskCover's solicitor. In Ms Stillitano's view, her role as a WCO allows her to influence RiskCover's settlement decisions. For instance, if Ms Stillitano does not agree with RiskCover's advice in relation to the plan to settle a claim, she will make her views known on the spot, on behalf of the respondent. She accepted that, ultimately, RiskCover makes the settlement decision, but her role allows her to influence the result on how to proceed, especially if she does not agree with RiskCover's approach. Ms Stillitano accepted that a RiskCover solicitor would normally be involved with complex claims, and the solicitor would present the case, and RiskCover would make the final decision in regards to the result it wants.
- 44 In terms of the conciliation and arbitration processes followed, Ms Stillitano testified that firstly, if a dispute is raised by the insurer or the worker about a workers' compensation claim, the dispute can be lodged at WorkCover. For instance, an insurer may raise a dispute about injury management and a worker failing to comply with their rehabilitation obligations, or a dispute could be raised if the insurer has a pending liability and the worker is seeking a quick resolution of their claim. When a dispute is raised by a party then the conciliation process will commence, prior to any arbitration. Ms Stillitano emphasised that the WCO's role at conciliation is to represent the respondent's best interests.
- 45 The appellants gave evidence that their role involves assisting RiskCover with the negotiation of settlement claims of up to \$100,000, without seeking management's approval. WCOs may notify management to seek approval for settlement of claims of over \$100,000, but Ms Stillitano said that she will still negotiate on behalf of and represent the respondent's position in relation to these claims.
- 46 Ms Stillitano said that she will make her views known to RiskCover at the conciliation stage, if the circumstances require her to. For example, if RiskCover decides to pay out a worker's claim where the worker is declared unfit to work, Ms Stillitano will make sure that RiskCover requires a voluntary termination of employment, to ensure that the respondent is not left with someone who is unfit to work. During cross-examination, Ms Stillitano agreed that since she commenced employment with the respondent in 2007 she has attended conciliation conferences and had always put the position of the respondent to the insurer. If conciliation fails and the dispute escalates to arbitration then RiskCover will start preparing its case with the assistance of RiskCover's own Dispute Resolution Officers or legal panel. At the preparatory stage, RiskCover will start establishing its witness list and gather the evidence.
- 47 Ms Stillitano said that while WCOs do not act as advocates at the arbitration, they will attend the arbitration and raise any issues they consider the advocate may have missed. According to Ms Stillitano, WCOs will assist with the preparations by finding witnesses' contact details and the like, and providing information to witnesses about the arbitration process. The appellants said that they are required to coordinate and assist RiskCover's lawyers by contacting witnesses and arranging meetings with witnesses to finalise witness statements in the lead up to arbitration.
- 48 Ms Thompson also gave evidence in the appeal as to the conciliation process, from RiskCover's perspective. It was Ms Thompson's evidence that it is ultimately RiskCover's decision as to what action should be taken in respect of a workers' compensation claim when deciding whether to accept liability or not, or to settle a claim and for how much. This is generally consistent with the appellants' evidence. She testified that RiskCover's level 5/6 Injury Services Dispute Resolution Officers manage applications for claims disputes that go to the conciliation and arbitration services at WorkCover and they provide technical advice to Injury Services Officers. RiskCover's Dispute Resolution Officers, as well as Injury Services Coordinators and Injury Services Officers, conduct claims settlement conferences.
- 49 Ms Thompson said that if the parties are of the view that a worker's return to work is unlikely due to permanent impairment, then the claim may be resolved by way of a larger settlement and which usually involves the resignation of the worker. Settlement documents are prepared by RiskCover, and settlement amounts are determined following consultation with the respondent. The respondent's officers attend conciliation and provide advice on matters relating to employment.
- 50 If a claim proceeds to arbitration, a lawyer usually represents RiskCover, but RiskCover's Dispute Resolution Officers may also conduct the arbitration. Often Dispute Resolution Officers will liaise with the lawyer as to how to approach the arbitration and give advice in relation to the claim or RiskCover's position. RiskCover officers oversee the process and keep the respondent informed.

Injury management processes

- 51 Ms Stillitano also described the injury management process the WCOs engage in. When a new claim is lodged, the WCO will process the claim and see whether the worker is less than fit for pre-injury duties by contacting the injured worker, the work site and the general practitioner to find out how to return the worker back to work. The WCO will make a recommendation on

the documentation that is sent to RiskCover to either “accept, pend or decline” along with reasons. Ms Stillitano said that a recommendation to decline a claim allows her some scope to influence the decision, but ultimately RiskCover holds the decision-making power, and so the WCO just assists with that process. The WCO will also find out further information if it will assist RiskCover in determining liability.

- 52 If a claim is pending, Ms Stillitano said there is an early intervention scheme which provides the worker with psychiatric treatment or vocational rehabilitation services to assist in the return to work. Ms Stillitano said this process is engaged in because sometimes a pending liability claim can take months to resolve, and action needs to be taken in the interim. The WCO will make contact with the doctor to receive advice about whether or not the worker can return to work. Following that, the WCO will contact the work site, ensure welfare is being paid to the worker, and establish medical duties with the general practitioner’s agreement to assist in the return to work process. The WCO role is to engage with the worker, general practitioner, work site and RiskCover to keep all parties informed of the worker’s progress. In the last year, Ms Stillitano has written about 12 individually tailored return to work programs.
- 53 Ms Stillitano said that, generally speaking, WCOs will contact the general practitioner directly if something goes wrong, for instance, if a worker is refusing to increase their hours or is medically stagnant. In these circumstances the WCO may ask questions about how long the program will continue. The WCO may ask RiskCover to arrange an independent review to determine the worker’s future fitness for work and the relevant timeframes.
- 54 If a worker is non-compliant with the injury management process, WCOs will gather evidence on behalf of RiskCover, which may be raised in a dispute at conciliation. Ms Stillitano said that a chronology of events will be drafted, and contact with the worker will be made to advise them of their obligations to try and resolve the situation. If the situation cannot be resolved, then the WCO may raise a dispute. Ms Stillitano testified that more injury management programs are being conducted in-house, rather than with a rehabilitation provider. This is because staff are now becoming more educated about the injury management process.
- 55 In November 2005 the Workers’ Compensation Code of Practice (Injury Management) 2005 commenced. Ms Stillitano said that at that time the respondent had not instigated any of the new injury management processes. Ms Stillitano was involved in establishing new policies and procedures to implement the changes, based on advice provided at meetings set up with rehabilitation providers. She said that she had not always performed the injury management functions because the respondent initially did not have any policies. However, prior to the implementation of policies and procedures, Ms Stillitano said she had always tried to assist in identifying the injury and the intervention required. Likewise, the same assistance would be applied to workers’ compensation claims.
- 56 Ms Thompson also gave evidence in relation to the injury management process. Ms Thompson described her relationship with the respondent as strategic and she is involved in providing advice on a range of matters relating to insurance, risk management and injury management. Ms Thompson testified that RiskCover is responsible for managing all aspects of workers’ compensation claims from lodgement with RiskCover to finalisation. Ms Thompson’s evidence was that all key decisions regarding a claim are made by RiskCover in consultation with the respondent.
- 57 In 2012 and 2013 a team of RiskCover officers reviewed the respondent’s workers’ compensation and injury management systems. Ms Thompson has also been involved in the delivery of workers’ compensation and injury management training to the respondent’s managers. On a day to day basis, Ms Thompson has very little contact with the WCOs.
- 58 Overall, Ms Thompson was of the view that RiskCover manages workers’ compensation claims, not the respondent, and RiskCover consults with the respondent’s WCOs before making decisions. In her evidence, Ms Thompson described the workers’ compensation claims process from RiskCover’s perspective. This includes:
- a) Following a claim being lodged by the worker with the respondent, the WCO reviews the information and attaches the employer’s report along with other information, such as their views on liability, then forwards it to RiskCover;
 - b) RiskCover allocates the claim to an Injury Services Officer who reviews the information and may take a number of actions such as seeking out additional information from the respondent or the treating doctor, refer to the worker to a medical specialist, engage an investigator or engage a RiskCover lawyer to assist in determining liability.
 - c) When all the information is obtained, the Injury Services Officer determines liability and communicates this to the worker and the respondent.
 - d) The Injury Services Officer estimates the value of the claim and determines the required services, treatment and weekly payments for the worker.
 - e) The claims and injury management strategies are developed in consultation with the respondent.
- 59 Ms Thompson described the “injury management” steps as involving incident reporting, first aid, medical treatment, liaison with key parties, engaging line manager support and return to work activities. According to Ms Thompson, it is the respondent’s role to monitor the progress of injury management and services provided by the rehabilitation provider, but RiskCover also does this. For as long as she has been employed, Ms Thompson testified that employers such as the respondent, have been held accountable for lodging workers’ compensation claims with RiskCover and implementing injury management processes and return to work programs. RiskCover holds the view that the respondent is best placed to manage the injury management process. She said that RiskCover is not responsible for injury management processes, return to work programs or retiring staff on the grounds of ill health.
- 60 According to Ms Thompson, the 2005 Code of Practice required employers to develop steps to assist an injured worker return to work, and the introduction of the Code, for the most part, has not changed the working relationship between RiskCover and employers. One change was that RiskCover now requires the respondent to provide copies of return to work programs for those workers on restricted hours and/or duties, which are often written by rehabilitation providers. Since the implementation of the Code of Practice, RiskCover has provided the respondent with more training and advice about injury management.

Retirement on the grounds of ill health

- 61 The appellants' roles require them to deal with claims that involve retirement on the grounds of ill health. The situation arises when an injured worker is no longer fit to return to the unrestricted duties of their role. Ms Stillitano accepted that this feature of her duties has been in existence since she started, and the function involves ascertaining whether the worker should be the subject of a recommendation as described earlier in these reasons. Ms Stillitano said she is required to prepare the documents and the briefing notes and then send them through the hierarchy, and ultimately it is a decision for the Commissioner as to whether or not the worker can be retired on the grounds of ill health.
- 62 Mr Volonnino also gave evidence in regards to his duties involving retirement on the grounds of ill health claims. When a specialist determines that the worker is permanently unfit, the WCO's role is to approach the work site to determine whether the site is satisfied for the claim to proceed, because ultimately it is a decision for the Commissioner. Mr Volonnino asks the work site to speak with the Commissioner. This is to save time in case the Commissioner has other plans for the employee or does not want the employee to attend the Medical Board.
- 63 If the decision is made for the worker to attend the Medical Board, Mr Volonnino will draft an internal memorandum to the Commissioner and include the various hierarchies of management. Permission from the WCOs' Coordinator is not required. When the Commissioner approves the internal memorandum, then the WCO writes to the Medical Panel which can be constituted by three specialists, and a decision will be made as to whether the worker is permanently unfit to perform his or her primary role. The WCO will approach the Commissioner for sign off on the decision, which is then sent to the ministerial branch which is forwarded to the Minister.
- 64 Mr Volonnino's evidence was that Officers had not always performed the retirement on the grounds of ill health claims, but started doing the claims because the WCOs had been doing all claims and there was a workload issue. Mr Volonnino emphasised that the WCOs started questioning their roles back in 2009, from the very start, and have been performing this function while their questions were being sorted out, as they do not want to interrupt the respondent's business.

Medial Board hearings

- 65 The appellants' evidence was that the role of a WCO involves organising Medial Board hearings for an employee to attend and have their future fitness for work with the respondent assessed. The coordination of the Medial Board process, from initiation to finalisation, can include performing the preparatory work by contacting the work site, then seeking approval to convene the Board from the Prison Superintendent or Commissioner, notifying the worker which includes providing information about their rights, and ensuring that counselling support is available for the employee. The WCO also writes to the Medical Board detailing the worker's history, and includes supporting medical documentation. In relation to the history of her role, Ms Stillitano accepted in cross-examination that her role had always involved the Medical Board process, and returning workers back to work.
- 66 Mr Volonnino accepted that the JDF for his role states "Manages and assists with cases requiring retirement on the grounds of ill health including arranging and facilitating medical board hearings", but noted that the form does not say "take complete conduct" of the process.

Educational requirements and workload

- 67 In terms of educational requirements involved in the injury management and return to work process, no formal qualifications are required.
- 68 Overall, the appellants said that their increased workload has led to greater pressure, and that has meant that decisions are being made in shorter timeframes.

Context and background

- 69 Mr Robinson also gave evidence in the appeal. Mr Robinson was employed by the respondent from 24 May 2010 to 19 September 2014 as the Acting Director of Human Resources and then the Assistant Commissioner, People and Organisational Development. In his roles, Mr Robinson had a portfolio that included employee welfare, which involved overseeing the management of the workers' compensation process, and in particular, the claims management process.
- 70 Mr Robinson provided some context to the WCOs' roles. When Mr Robinson joined the respondent as the Acting Director of Human Resources there were a number of workers' compensation cases which increased costs associated with the premium. Mr Robinson was tasked with addressing the workers' compensation "culture" at the respondent, the process, the premiums, and how the respondent worked with RiskCover. To address these issues, the WCOs reported directly to Mr Robinson for a period of time, and Mr Robinson had regular meetings with the WCOs and the Coordinators.
- 71 Mr Robinson's focus was on proper accountability of claims and the WCOs were to liaise directly with RiskCover. Mr Robinson said that the respondent had to ensure that claims were managed appropriately, and in doing so, injured workers had to be given sufficient information about the management of their claim. RiskCover also needed to be given additional information so that it could be fully abreast of the circumstances leading up to the incident.
- 72 Mr Robinson directed the WCOs to continue to send their summary of reports through to him, as their direct line manager at the time, so he could make decisions or provide guidance as to how the claims should be managed. To manage the claims, the WCOs were required to liaise and coordinate discussions with medical practitioners, the worker, the rehabilitation officer, their direct line manager and with the Commissioner for the area. The WCOs were required to liaise with these bodies to manage the claim with the aim of getting to the root cause of the issue to try and get the worker back to work as quickly and safely as possible.
- 73 Mr Robinson authorised the WCOs to approve financial settlements for workers' compensation claims up to \$100,000. This was because it was not physically possible for him or the Manager, Employee Welfare Services to attend every financial settlement, and the WCOs had the historical knowledge of their case and were best placed for negotiating settlements.
- 74 Mr Robinson said that the WCOs were responsible for negotiating significant financial settlements with assistance from RiskCover. As far as he was aware, no other level 4 or level 5 officers have such a high level of responsibility to negotiate and

be a party to a financial settlement. The history was that financial settlements were being made “with no rigorous outcome”, within a context of rising premiums which were costing the respondent significant amounts. Accordingly, the WCOs were tasked with finalising settlements that were suitable to the respondent in the circumstances, for example by requiring a resignation from a worker or bundling claims.

75 Mr Robinson noted that there was a movement towards the injury management model of service delivery, as previously there was no formal model in place within the respondent. I note that this was recognised in the Commission’s 2003 decision, especially in relation to the role of rehabilitation, as a result of legislative change.

76 Mr Robinson accepted in cross-examination that while settlement negotiations are a matter for RiskCover, the WCOs provide “significant input” on behalf of the respondent. Mr Robinson provided an example of RiskCover sending questions via the WCOs to himself while he was the WCOs’ line manager, to determine whether the settlement figure should be paid out or not. Mr Robinson gave evidence that the WCOs are responsible for the full management of complex workers’ compensation claims through to finalisation, and the roles require a high level of technical knowledge and specialised skills. Mr Robinson said a large percentage of claims are stress-related. Due to the nature and volume of the complex claims the Coordinator could not manage the complex claims as well as undertake all other aspects of the role.

77 In regards to arbitration, Mr Robinson said that Officers were required to represent the respondent’s best interests in determining whether to defend the matter, or assess the risks of ongoing litigation costs or accept liability.

Report to the Classification Review Committee

78 While the WCOs were reporting directly to Mr Robinson on a temporary basis, he presented a report to the Classification Review Committee on 15 January 2014 supporting the WCOs reclassification from level 4 to level 5. The majority of the Classification Review Committee decided to recommend that the position be reclassified, but there was an issue as to the effective date for the back payment of the reclassification. Mr Robinson’s report to the Committee was annexure G to his witness statement and it states:

2: Changes to legislation;

From 14 November 2005, the Workers' Compensation Code of Practice (Injury Management) 2005 came into effect which compels employers to ensure that emphasis is placed on injury management. This has resulted in additional compliance and resourcing into ensuring that the Department meets its legislative obligations. The WCO monitors and ensures compliance across the Department.

...

3: Complexities of job role

...

The position is assigned the responsibility for making recommendations and decisions with a high degree of authority and complexity which directly impacts upon the Department.

4: Payroll functions currently undertaken but not on JDF

The WCO is responsible for;

- quality assuring all payments of Workers' Compensation each fortnight
- liaising and negotiating with payroll on WC matters on behalf of the work locations and employees.

5: Additional duties absorbed since 2008 but not on JDF

Since the abolishment of the Level 2 Claims Processing Officer in 2008, the position undertakes full administrative duties, which includes but is not limited to;

- processing bulk mail on a daily basis,
- recouping compensation payments from RiskCover
- bulk amounts of data entry onto Alesco
- minimal/no relief during absence of colleagues
- processing new claims

6: Representation at a para-legal level with respect to 'Informal / Conciliation and

Arbitration on behalf of the Department

When there is a legal dispute lodged via WorkCover WA Conciliation Service, the WCO is required to attend and represent the Department on all matters. The WCO is required to present the Department's position with supporting evidence and other information, in collaboration with RiskCover.

If the matter is unable to be reasonably resolved at Conciliation, the matter is referred to WorkCover WA's Arbitration Service. The WCO is required to represent the Department’s best interests with a view to either defending a matter at Arbitration or assessing the potential risks of ongoing costs of litigation and acceptance of liability. Included in the assessment are the potential costs of any other concurrent employment issues such as, non-compensable, overpayments and any other action against the department. The WCO is responsible for determining whether a commercial settlement is the most cost effective outcome for the Department.

Arbitration is a complex, costly and time-consuming process. It is a requirement that the WCO possesses a high level of knowledge and negotiation skills in order to represent the best interests of the Department, to minimise financial costs incurred and to protect its reputation.

7: Original JEQ developed and assessed by external parties which does not represent actual work values.

It appears that the WCO position was not classified correctly in the first instance. A copy of the original Job Evaluation Questionnaire (**Attachment 2**) indicates that the Officer who originally assessed the position was not aware of the complexity and depth of WCO job role and subsequently the position was under classified. An updated JEQ is provided

(Attachment 3). The WCO classification should be classified by a current Bipers assessment as evidence of the actual work value of the position.

8: Alternate resources exhausted for complex claim management

Due to the specialised and technical nature required to undertake the WCO position, it is evident that the responsibilities are unable to be resourced/allocated to an alternate area or position of the Department. Due to the nature and volume of complex claims received, the Level 6 Coordinator Workers' Compensation would not be able to effectively manage all claims in conjunction with undertaking the inherent requirements of their job role.

9: Minimal flow on effects

As the position is unique and specialised in nature, I do not believe that the reclassification of the position will have a significant flow on effect to other positions within the Department.

...

10: Portfolio value

The WCO's are responsible for the management of a multi-million dollar claims portfolio. On average, each WCO is responsible for a portfolio in excess of \$8 million and responsible for negotiating claim settlements of up to \$150,000.00.

...

Executive Director Corporate Support's memorandum

- 79 Mr Stewart has been employed in the role of the Executive Director Corporate Support since 17 February 2014. He has had considerable experience in dealing with reclassification matters. Shortly after commencing with the respondent, the Commissioner sought Mr Stewart's advice regarding the reclassification of the WCO position. Mr Stewart had before him the DoTAG Report, the BIPERS assessments, the internal memorandum from the Classification Review Committee, advice from RiskCover and he also appointed the independent consultant from The Nexus Network. Mr Stewart wrote the internal memorandum of 30 June 2014 to the Commissioner which recommended that the WCO position be confirmed as appropriately classified at level 4.
- 80 Mr Stewart said that he formed the view that the DoTAG Report was the most comprehensive report available, which considered the change to work value and comparative positions. In his opinion, there was little to suggest that there had been a significant increase to work value. When considering the recommendation, Mr Stewart said that he did not talk to Mr Volonnino and Ms Stillitano specifically about their job. Nor did he talk to Mr Robinson specifically about the reclassification application or Mr Robinson's report to the Committee, but they discussed the function of the team, in a broad sense, as part of the handover process. Mr Stewart acknowledged the increase in the volume of the WCOs' work and engaged a level 2 administrative officer to relieve the WCOs from a large part of their administrative work.
- 81 I note at this juncture that cll 18 and 21 of the respondent's Classification Determination and Reclassification Policy state that:
18. The reclassification of an existing position shall only be progressed where all of the elements of the procedures have been met and where it has been clearly demonstrated that a manager has firstly considered other solutions such as:
- creating a temporary position; and
 - considering if the additional work (of a higher value) can be distributed amongst other positions.
- ...
21. The CRC must be satisfied that the changes to the work value have been significant enough to warrant a new classification level and that:
- this position will not result in a significant flow on effect to other areas in the department; and
 - the manager has clearly demonstrated that that they have firstly considered other options such as allocating additional work to another position.
- 82 (See also the respondent's Classification Determination and Reclassification Procedures.)
- 83 Mr Stewart was of the view that the BIPERS was one of a number of tools in determining the classification level. He thought that the Nexus Report's score of 322 in a band of 316-380 for a level 5 classification was not persuasive. Mr Stewart questioned the BIPERS assessment, and thought that the WCOs' external liaison was likely to be perfunctory in nature and involve seeking or exchanging information. In terms of the instructions received, Mr Stewart thought BIPERS should have considered the four tiers of management within the Corporate Support Division as well as the central role RiskCover plays.
- 84 In his evidence, Mr Stewart said that when assessing the classifications he placed significant weight on the relativity of similar positions across the public sector, and thought the assessments outlined in the DoTAG Report were thorough. Mr Stewart said that he was influenced by the structure and responsibilities of level 4 Claims Officer positions at RiskCover, in light of RiskCover having a whole of government function.

Consideration

Principles to be applied

85 In *Martelli v Department of Corrective Services* (2011) 91 WAIG 1143 at pars 40-42 I observed:

- 40 The relevant principles in relation to these matters are well settled. The issue for consideration in this appeal is whether the applicant's position has undergone a significant net addition to its work value. This requires a consideration of the Position itself and the work value attached to it.
- 41 In determining work value changes, regard is to be had to the nature of the work performed, the skills required, the responsibilities of the position and the circumstances in which the work is performed. An assessment of the work value of a position in a reclassification appeal is undertaken at the time the appeal is lodged: *Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the*

Metropolitan Health Service at PathWest Laboratory Medicine WA (2008) 88 WAIG 475; *Wall v Department of Fisheries* (2004) 84 WAIRC 3895.

- 42 Historically, work value was the fulcrum of wage and salary determination and later introduced under the system of wage indexation in the 1970's and adopted by industrial tribunals generally as a basis of measuring the worth of work in setting wages and salaries. See for example the *Metal Trades Award (re Work Value Inquiry)* (1967) 121 CAR 587.
- 86 It is only if the evidence establishes such a net addition to work requirements, as to warrant the creation of a new classification or upgrading to a higher classification, that a reclassification appeal should succeed. I have taken into consideration all of the evidence led in this matter, which I have set out in some detail above. For the following reasons I am not satisfied that the appellants have met the test necessary to obtain an order in their favour.
- 87 Having been the subject of a reclassification decision by the Commission in 2003, the respondent correctly submitted, that the 2003 decision is the proper datum point for any further assessment of work value changes in the WCO position. It is clear that to the extent that the appellants seek to rely on Medical Board processes under both the Prisons Act 1981 and the Public Sector Management Act 1994, these particular responsibilities of the position have been taken into account already by the Commission in its 2003 decision. I am not persuaded that the reference to "complex" Medical Board cases, as contended by the appellants, has materially changed the position. The functions referred to on the testimony of the appellants have always been a responsibility of the WCO. The Chief Executive Officer of the respondent holds the ultimate decision-making responsibility for Medical Board retirements.
- 88 It is accepted that the management of Medical Board cases is time consuming and may take some months to complete. However, the role of the WCO is largely to comply with established procedures and to gather information, including arranging an assessment by a Medical Panel, for consideration by the Chief Executive Officer. The requirement to "manage and assist" with Medical Board cases is specified in the 2007 and 2008 JDFs in evidence. The fact that a procedure has now been documented for these matters is of assistance no doubt. However, I am not persuaded of any increase in work value in relation to this aspect of the WCOs' work, since 2003.
- 89 A major focus of the appellants' case was based on the contention that WCOs are now required to manage complex cases, as a significant proportion of their work. It seemed to be common ground that a "complex case" has a number of elements, and for the purposes of classification, generally involves claims of a value of greater than \$50,000. The elements often present in such cases, as identified by RiskCover, and include those set out above at par 7 and at tab D in exhibit A1. Relying on the table on p 3 of the DoTAG Report, the appellants submitted that there had been an increase in the total number of complex claims from 70 in 2003 to 184 in 2013, an increase of 163%. From this, the appellants extrapolated that complex cases now account for between 50% and 60% of the caseloads of the WCOs.
- 90 As there has been no reference to "complex" workers' compensation cases in the JDFs, but there is such a reference in the JDF for the Coordinator level 6 position it was contended that the management of such cases is not contemplated in the WCO position. The appellants also contended that this issue is supported by the evidence and the report to the Classification Review Committee of Mr Robinson, who referred specifically to the increasing incidence of complex cases. Accordingly, having regard to all of these factors, their management of such complex claims, as a proportion of the overall workload of a WCO, was contended to represent, cumulatively, a significant increase in work value.
- 91 It is correct to say that the 2007 JDF for the WCO position does not specifically refer to "complex" workers' compensation cases. The level 6 Coordinator position does, and is solely focussed on these types of cases, because of the range of other responsibilities of the position. It is to be noted however, and significantly, that the JDFs for the WCO position, for 2003 and 2007, have, as a first responsibility of the position, the management of "all" workers' compensation cases. There is no apparent distinction drawn between the management of "non-complex" and "complex" cases. This has been unchanged since the 2003 reclassification decision of the Commission. Also, too, both the 2003 and 2007 JDFs refer to the requirement for WCOs to develop solutions to "complex problems" and to operate in "a complex and high risk environment" (2007 and 2008 JDFs). In my view, having regard to all of these matters, and all of the evidence, the management of complex cases has always been a requirement of the WCO position.
- 92 Consideration of this matter in the DoTAG Report, referred to the increase in complex claims, but, on a cumulative basis, did not assess an increase of approximately four complex cases per year, as significant enough to justify a reclassification, as it was considered to be more of a workload issue. This was confirmed in the testimony of Mr Veitch. Recognition of this issue also appears in the evidence of Mr Stewart. He acknowledged, as is self-evidently the case, that the overall number of workers' compensation cases handled by the respondent has increased, as has the respondent's workers' compensation premiums. The mix of cases, including an increase in more complex cases, was also acknowledged by Mr Stewart. Steps have been taken by the respondent to remove administrative responsibilities from the WCOs, by the appointment of an additional level 2 officer. The Nexus Report did not single out the growth in complex cases as a factor, but made general reference to this in assessing "Kind of problems" dealt with by WCOs (tab C exhibit A1 p 6).
- 93 The DoTAG Report considered and took into account that there had been an increase in the volume of complex cases handled by WCOs, in the period 2003 to 2013. In discussing the table set out on p 3 of the Report (see above), the Report said:
- In terms of the primary argument for reclassification - a permanent increase in complex cases that the Workers' Compensation Officers manage - the figures provided indicate that the total number of complex claims has increased by 129 since 2003. Using the current approximate ratio of complex case distribution between workers compensation team positions (Level 6 Coordinator: 10%, Level 4 Officer x 3: 30%), an increase of 129 complex cases over 10 years means an approximate increase of four complex cases per year per officer for 10 years. While the challenging nature of workers compensation in the corrective services environment and the trend in increasing numbers of complex claims is accepted, an increase of four complex cases per year per position is insufficient to support a permanent increase in classification for all three Workers' Compensation Officer positions, and points primarily to a workload issue. It is also noted that

directives have recently been issued for prison management to more effectively manage employee performance and grievances to minimise the number of workers compensation claims lodged.

- 94 It is to be accepted that in volume terms, the number of complex cases has increased. However, it is clear that the management of such claims has always been part of the responsibilities of the WCOs. The fundamental nature of the job in this regard has not changed. I consider that the conclusion of the DoTAG Report, noted above, was one reasonably open and not one that I disagree with. Steps have been taken to ease the administrative burden on the WCOs. Depending upon whether initiatives taken to reduce the overall number of workers' compensation cases generally are successful in the future, further steps may need to be taken by the respondent to address this issue, which is in essence, in my view, a matter of workload.
- 95 As to the submission that WCOs now have a substantial role to play in the development of risk management strategies, it was accepted in the DoTAG Report (pp 4-5) that this duty was new. However, in the context of the overall structure of the branch, and in particular having regard to the responsibilities of the level 6 position in these areas, it would be reasonable for the WCOs to make some contribution in this area. The overall responsibility however, remains with the level 6 officer. Along with some other minor changes in the WCO role, it was concluded in the DoTAG Report, that this contribution to risk management, was not sufficient to constitute a significant change in work value. Whilst the contribution of the WCOs in this area is to be acknowledged, the fact that they assist, with input into this area, is significant, as not being responsible for risk management strategies, means the overall contribution to work value is not major.
- 96 As to the remaining bases for the challenge to the refusal of reclassification, they being the BIPERS assessment, the use of comparative positions, and flow-on effects, I am not persuaded, having carefully considered all of the evidence led in these proceedings that the approach set out in the DoTAG Report was erroneous. In relation to the BIPERS assessment, it is to be noted that such assessments are only a tool, and are not of themselves, determinative. The differences between the DoTAG and Nexus Reports were at the margin, in dealing with the rating for "Interpersonal Skills". The DoTAG assessment was five and the Nexus assessment was six. The overall score for the DoTAG assessment was 312, which is at the top end of the level 4 range. The Nexus rating was 322, which is at the bottom end of the level 5 range.
- 97 It was noted that the WCOs, to the extent that they undertake negotiations with insurers and health professionals, do so in conjunction with officers from RiskCover, solicitors and also the level 6 position, where appropriate. The DoTAG Report concluded that the WCOs rated five which applies to "demanding negotiations or investigations where it is essential to influence or cooperate with people." In view of the evidence in these proceedings, I consider that the assessment made on this criterion in the DoTAG Report to be appropriate.
- 98 As to the comparative positions issue, from the comparative analysis undertaken in the DoTAG Report, it was concluded that the level 2/4 RiskCover Injury Services Officer position, had a "strong alignment" with the WCO position (at p 11). Comparisons were also undertaken with level 4 and level 5 workers' compensation positions in the Department of Treasury and Finance, the WA Police, and the Department of Education. The DoTAG Report concluded that the level 5 positions in these other departments, had additional levels of authority and coordination responsibility and that the respective level 4 positions, overall, were a better fit. In particular, when considering the level 2/4 RiskCover position, it was noted at p 11 that:
- An Injury Services Officer is classified at Level 2/4. Progression through increments and levels is dependent on the ability of the officer and is done via an assessment process conducted by the agency Training Unit. A sample of caseload numbers finds a Level 1 position carrying 80 simple claims; Level 2 with 130 active simple and some complex claims; Level 4 with 125 mostly complex active claims. On average, Level 4 Officers carry 100 – 130 claims.
- The proposed positions have a large number of similarities with the Injury Services Officer Level 4 positions as follows:
- Manages a portfolio of complex Workers' Compensation claims.
 - Provides proactive advice on injury and claims management strategies and issues.
 - Participates in dispute resolution and settlement conferences.
- Based on the similarities and compensating differences, overall the proposed positions have a strong alignment with the Level 4 comparative position.
- 99 Whilst accepting that the DoTAG Report in relation to comparative assessments was "comprehensive", reference is made to the differing view of the Classification Review Committee in the Nexus Report, which concluded that the level 5 positions were a more appropriate comparator. However, on a review of the Nexus Report, I am not persuaded by that analysis, which was, when compared to the DoTAG Report, relatively brief.
- 100 Having regard to the conclusions reached in the DoTAG Report, particularly in view of the evidence of Ms Thompson as to the role and responsibility of level 2/4 RiskCover officers, I consider that the assessment of a "strong alignment" with the WCO position to be sound. In saying that, I accept also that there are some responsibilities of the WCO position not performed by the level 2/4 RiskCover officers, for example, participation in the Medical Board process. However, overall, classification assessments necessarily involve a consideration of a broad range of factors. Also, as an overall assessment, it is my view based on all of the evidence that the principal responsibility for the management of workers' compensation claims, in terms of decision-making, rests with RiskCover. This includes the dispute resolution processes of conciliation and arbitration. No doubt, the WCOs provide support and are a valuable source of assistance to others involved in the process. I accept for example, in conciliation, that WCOs put the respondent's view and contribute to the decision-making process. I also note that WCOs now have authority to authorise RiskCover to settle claims up to \$100,000.
- 101 Finally, I am not of the view that there would be any significant flow-on effects if the WCO position were to be reclassified.

Conclusion

- 102 I accept that the WCOs work in a demanding and complex environment. They make a significant contribution to the resolution of workers' compensation claims. There has undoubtedly been a substantial increase in the volume of claims within the respondent's operations. However, ultimately, the core issue is one of workload and not a substantial increase in work value.

As I have already noted above, this workload issue is one that should be kept under review by the respondent, as to the need for further resourcing in the future.

103 For the foregoing reasons, the appeals should be dismissed.

		2015 WAIRC 00215
PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARIO VOLONNINO; JACLYN STILLITANO	APPELLANTS
	-v- THE COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER	
DATE	FRIDAY, 6 MARCH 2015	
FILE NO	PSA 2 OF 2014, PSA 3 OF 2014	
CITATION NO.	2015 WAIRC 00215	
Result	Appeals dismissed	
Representation		
Appellants	Ms J Moore of counsel and with her Ms K Hagan of counsel	
Respondent	Mr R Andretich of counsel and with him Ms N Sagar	

Order

HAVING heard Ms J Moore of counsel and with her Ms K Hagan of counsel on behalf of the appellants and Mr R Andretich of counsel and with him Ms N Sagar on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeals be and are hereby dismissed.

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

[L.S.]

CANCELLATION OF—Awards/Agreements/Respondents—Under Section 47

2015 WAIRC 00293

CEREAL PROCESSING, EXTRACTING AND MANUFACTURING AWARD NO. 26 OF 1970

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 8 APRIL 2015
FILE NO/S	APPL 84 OF 2015
CITATION NO.	2015 WAIRC 00293
Result	Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 25th day of February 2015 of an intention to make an order cancelling the award pursuant to s 47 of the *Industrial Relations Act 1979* (the Act);

AND WHEREAS the requirements of s 47(3) of the Act have been met;

AND WHEREAS at the 2nd day of April 2015 there were no objections to the making of such an order;

NOW I, the undersigned, pursuant to the powers conferred on me by s 47 of the Act, do hereby order –

THAT the *Cereal Processing, Extracting and Manufacturing Award No. 26 of 1970* be cancelled.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00299

HOSPITAL EMPLOYEES' (BRIGHTWATER) CONSOLIDATED AWARD 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ON THE COMMISSION'S OWN MOTION

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

TUESDAY, 14 APRIL 2015

FILE NO/S

APPL 34 OF 2010

CITATION NO.

2015 WAIRC 00299

Result Award cancelled

Representation

Mr D Ellis and later Ms K Heal, on behalf of the Health Services Union of Western Australia (Union of Workers)

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 24th day of March 2010 of an intention to make an order cancelling the award pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act") ([2010] WAIRC 00109);

AND WHEREAS at the hearing on the 5th day of May 2010, the Health Services Union of Western Australia (Union of Workers) ("the Union") objected to the cancellation of the award on the basis that it is not clear that the employer named as a party is a constitutional corporation;

AND WHEREAS this application was adjourned in order for the Union to provide submissions;

AND WHEREAS this application was relisted on the 9th day of April 2015 to hear further submissions from the Union whether its objections are still maintained;

AND WHEREAS at the hearing on the 9th day of April 2015 the Union did not object to the cancellation of the award;

AND WHEREAS the requirements of s 47(3) of the Act have been met;

AND HAVING given reasons for decision ex tempore;

NOW I, the undersigned, pursuant to the powers conferred on me by s 47(1!) of the Act, do hereby order –

THAT the *Hospital Employees' (Brightwater) Consolidated Award 1981* be cancelled.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00302

HOSPITAL SALARIED OFFICERS (WORKPOWER) AWARD OF 1996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ON THE COMMISSION'S OWN MOTION

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

TUESDAY, 14 APRIL 2015

FILE NO/S

APPL 36 OF 2010

CITATION NO.

2015 WAIRC 00302

Result Award cancelled

Representation

Mr D Ellis and later Ms K Heal, on behalf of the Health Services Union of Western Australia (Union of Workers)

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 24th day of March 2010 of an intention to make an order cancelling the award pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act") ([2010] WAIRC 00109);

AND WHEREAS at the hearing on the 5th day of May 2010, the Health Services Union of Western Australia (Union of Workers) ("the Union") objected to the cancellation of the award on the bases that it is not clear (1) that the employer named as a party is a constitutional corporation, and (2) how the cancellation may affect the federal enterprise bargaining agreement;

AND WHEREAS this application was adjourned in order for the Union to provide submissions;

AND WHEREAS this application was relisted on the 9th day of April 2015 to hear further submissions from the Union whether its objections are still maintained;

AND WHEREAS at the hearing on the 9th day of April 2015 the Union did not object to the cancellation of the award;

AND WHEREAS the requirements of s 47(3) of the Act have been met;

AND HAVING given reasons for decision ex tempore;

NOW I, the undersigned, pursuant to the powers conferred on me by s 47(1) of the Act, do hereby order –

THAT the *Hospital Salaried Officers (Workpower) Award of 1996* be cancelled.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2015 WAIRC 00249

APPEAL AGAINST THE REFUSAL TO TERMINATE A TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TONI-LEE ALLEN

TONI ALLEN HAIR DESIGN MATTHEW GEORGE ALLEN

APPLICANT

-v-

GOVERNMENT OF WESTERN AUSTRALIA DEPARTMENT OF TRAINING AND
WORKFORCE DEVELOPMENT

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

WEDNESDAY, 25 MARCH 2015

FILE NO/S

APA 1 OF 2015

CITATION NO.

2015 WAIRC 00249

Result

Application dismissed

Order

WHEREAS this is an appeal pursuant to Section 60G of the *Vocational Education and Training Act 1996*; and

WHEREAS on the 19th day of March 2015 the appellant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

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

[L.S.]

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
T & HR Chiricosta (Antonio Chiricosta)	Aussie Car Carriers (David and Frank Federico)	Kenner C	RFT 2/2015	N/A	Referral of dispute	Discontinued

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2015 WAIRC 00292

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

NOTICE – INTENDED CANCELLATION OF AWARDS BY THE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the awards listed below on the grounds that there are no longer any employees to whom the awards apply due to the operation of the Fair Work Act 2009 (Cth).

AWU Gold (Mining and Processing) Award 1993;
 Brick Manufacturing Award 1979;
 Building Trades (Goldmining Industry) Award;
 Cement Tile Manufacturing Award No 3 of 1966;
 Clerks' (Control Room Operators) Award 1984;
 Clerks' (Credit and Finance Establishments) Award;
 Clerks' (Taxi Services) Award;
 Heat Containment Industries (Refractory Specialties) Award No. 3 of 1981;
 Lift Industry (Electrical And Metal Trades) Award, 1973;
 Materials Testing Employees' Award 1984;
 Mechanical and Electrical Contractors North West Shelf Project Platform Award 1986;
 Mooring Services Cape Cuvier Award 1982;
 Nurses' (ANF - RFDS Western Operations) Award;
 Paint and Varnish Makers' Award No. 22 of 1957;
 The Manufacturing Chemists Award 1976; and
 Wool Scouring and Fellmongery Industry Award.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such an order.

Please quote the award title on all correspondence.

(Sgd.) S BASTIAN,
 Registrar.

[L.S.]

8 April 2015