



Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 5

WEDNESDAY 27 MAY, 2015

Vol. 95—Part 1

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

95 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Unions—Cancellation of registration—

2015 WAIRC 00323

APPLICATION TO CANCEL THE REGISTRATION OF THE SALARIED PHARMACISTS' ASSOCIATION WESTERN AUSTRALIAN UNION OF WORKERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2015 WAIRC 00323
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S M MAYMAN
HEARD	:	THURSDAY, 16 APRIL 2015
DELIVERED	:	TUESDAY, 21 APRIL 2015
FILE NO.	:	FBM 2 OF 2015
BETWEEN	:	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Applicant AND SALARIED PHARMACISTS' ASSOCIATION WESTERN AUSTRALIAN UNION OF WORKERS Respondent

CatchWords	:	Industrial Law (WA) - Application to cancel the registration of an organisation on grounds of the number of employees and members of the organisation would not entitle it to registration and the organisation is defunct
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 53, s 62, s 73, s 73(12), s 73(12)(a), s 73(12)(b), s 73(12a), s 73(13) <i>Industrial Relations Commission Regulations 2005</i> (WA) reg 37, reg 76, reg 76(3)
Result	:	Order made
Representation:		
Applicant	:	Mr D Anderson (of counsel)
Respondent	:	No appearance
Solicitors:		
Applicant	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Re Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00861; (2013) 93 WAIG 1499

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

*Reasons for Decision***THE FULL BENCH:****The application and the requirements of the Act**

- 1 This is an application to cancel the registration of the Salaried Pharmacists' Association Western Australian Union of Workers (the union). The application was brought by the Registrar before the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act). Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under s 73(12) in every case where it appears to her that there are sufficient grounds for doing so. Section 73(13) also provides that proceedings for the cancellation of the registration of an organisation, or any of its rights under the Act, shall not be instituted otherwise than under s 73.
- 2 Pursuant to s 73(12) of the Act, the Full Bench is required to cancel the registration of an organisation if it is satisfied on the application of the Registrar that:
 - (a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under section 53 or section 54, as the case may be; or
 - (b) the organisation is defunct; or
 - (c) the organisation has, in the manner prescribed, requested that its registration be cancelled.
- 3 Whilst it is not clear from the application as to which subparagraph of s 73(12) of the Act that the application is brought, the evidence set out in the statutory declaration made by the Registrar, Susan Ivey Bastian, on 8 January 2015, and the submissions made on her behalf by Mr Anderson, made it plain that the application was made pursuant to s 73(12)(a) and s 73(12)(b) of the Act.
- 4 Regulation 76 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) provides for the procedure that the Registrar must comply with when an application to cancel the registration of an organisation is made under s 73(12) of the Act. Regulation 76 provides:
 - (1) Where an application is made by the Registrar under section 73(12) of the Act to cancel the registration of an organisation or association it is to be made in triplicate to the Full Bench in the form of Form 23.
 - (2) The application is to state clearly the grounds on which it is made and the application is to be accompanied by a statutory declaration setting out the facts on which the Registrar relies.
 - (3) The application is to be served on the organisation or association the registration of which is sought to be cancelled.
 - (4) Where the respondent organisation or association intends to oppose the application, it must give notice of that objection in an approved form within 14 days of being served with the application, and otherwise the provisions of regulation 15 apply with respect to any such objection.
 - (5) Where the respondent organisation or association intends to admit the facts (or any of them) on which the Registrar relies, it must, within 14 days of being served with the application, advise the Registrar in writing accordingly.
 - (6) After the expiration of the time prescribed in subregulations (4) and (5) the Registrar is to ascertain from the President a date for hearing the application and, as soon as practicable after setting a hearing date, is to notify the organisation or association of the hearing.
- 5 As required by reg 76, the Registrar filed an application on 8 January 2015, together with a statutory declaration made by her. Her statutory declaration sets out the grounds and facts upon which the application is made.
- 6 Whilst reg 76(3) requires that the application be served on the organisation the registration of which is sought to be cancelled, it is apparent from the matters set out in the statutory declaration of Ms Bastian, together with correspondence and other documents on the Commission file, that although the organisation's registration is current, it has no officers or members, nor an office upon which the Registrar could serve a copy of the application. The Health Services Union of Western Australia (Union of Workers) (the HSU) has held a 'caretaker' role on behalf of the union and its secretary, Mr Daniel Patrick Hill, had been the acting secretary of the union at least up until January 2003. In these circumstances, the Full Bench is of the opinion that the requirements to serve the application on the organisation should be waived pursuant to reg 37 of the Regulations. In any event, a copy of the application was served upon Mr Hill on 27 January 2015. The reason why the application was served upon Mr Hill is that the HSU in its caretaker role of the union has provided the information to the Registrar upon which she relies to make this application to cancel the registration of the union.
- 7 In her statutory declaration the Registrar sets out the following evidence in support of the application:
 - (a) A search of the records of the union indicates that the union last submitted a financial return on 25 February 1999. That financial return contained information relevant to the financial period covering three years to 31 December 1992.

- (b) In 2001, an officers and membership return was filed. That document declared the organisation had office bearers and financial members at that time. The acting secretary of the union, Mr Hill, declared that as at 1 January 2001, there were 40 members of the union and three persons holding office in the union.
- (c) A subsequent officers and membership return submitted by the union, containing information current as at 1 January 2002, was declared by Mr Hill in May 2003. That return declared that the number of members of the union was zero and the only person holding office was Mr Hill himself, as the acting secretary.
- (d) In May 2003, Mr Hill submitted an officers and membership return for the union which contained information current as at 1 January 2003. The 2003 return declared again that the number of the members of the union was zero, and that the only person holding office was Mr Hill himself, as the acting secretary.
- (e) From 2004 onwards, the Commission requested annually, that the union submit its outstanding returns, without success. Thus, the union has failed to comply with its reporting obligations under the Act and the Regulations for some considerable time.
- (f) On 8 May 2012, Ms Sally Anderson, registry services manager, met with Mr Chris Panizza, an officer of the HSU, and a solicitor for the HSU, Mr Simon Millman. At the meeting, the status of the union and the Registrar's view that an application ought to be made to cancel its registration was discussed.
- (g) The meeting held on 8 May 2012 concluded on the basis that the HSU would finalise the process to alter its rule relating to eligibility for membership and to make a formal application to the Full Bench of the Commission to expand the constitutional coverage of the HSU to allow persons currently falling within the constitutional coverage of the union, to become members of the HSU.
- (h) On 30 May 2013, the HSU made an application (FBM 4 of 2013) to the Full Bench of the Commission pursuant to s 62 of the Act to alter its r 3 – Constitution. The alteration sought was to alter r 3 to cover persons eligible to be members of the union and the W.A. Dental Technicians' and Employees' Union of Workers, Perth (DTEU) on grounds that the union and the DTEU existed separately in name only and were no longer able to protect and further the interests of the employees within their scope of coverage without the efforts of the HSU being made on their behalf.
- (i) FBM 4 of 2013 was granted on 3 October 2013 by the Full Bench. In its decision the Full Bench determined that the union had ceased to function as an employee organisation: *Re Health Services Union of Western Australia (Union of Workers)* [2013] WAIRC 00861; (2013) 93 WAIG 1499 [2], [15] - [17].
- 8 In support of this application Mr Hill filed a statutory declaration made on 3 February 2015 in which he states that the union no longer exists as an entity and has no residual debts, liabilities, funds or property.

Conclusion

- 9 After having regard to the facts set out in the statutory declarations, the Full Bench is satisfied that the number of members of the union would not entitle it to registration under s 53 of the Act which requires an organisation to consist of not less than 200 employees and that the organisation is defunct. In these circumstances, the Full Bench is required to grant the application.
- 10 Where a Full Bench is satisfied on the application of the Registrar that an organisation has, in the manner prescribed, requested that its registration be cancelled, the Full Bench is required by the use of the mandatory word 'shall' in s 73(12) of the Act to cancel the registration of the organisation: *The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers* [2004] WAIRC 11936; (2004) 84 WAIG 2190.
- 11 After hearing from Mr Anderson on behalf of the Registrar the Full Bench made the following order on 16 April 2015 that:
The registration of the Salaried Pharmacists' Association Western Australian Union of Workers be and is hereby cancelled on and from the 16th day of April 2015.

2015 WAIRC 00311

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	SALARIED PHARMACISTS' ASSOCIATION WESTERN AUSTRALIAN UNION OF WORKERS	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	CHIEF COMMISSIONER A R BEECH	
	COMMISSIONER S M MAYMAN	
DATE	THURSDAY, 16 APRIL 2015	
FILE NO.	FBM 2 OF 2015	
CITATION NO.	2015 WAIRC 00311	

Result	Order issued
Appearances	
Applicant	Mr D J Anderson (of counsel) and Ms S Anderson
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on 16 April 2015, and having heard Mr D J Anderson (of counsel) and Ms S Anderson on behalf of the applicant, and no appearance on behalf of the respondent, the Full Bench hereby orders —

The registration of the Salaried Pharmacists' Association Western Australian Union of Workers be and is hereby cancelled on and from the 16th day of April 2015.

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

[L.S.]

2015 WAIRC 00322

APPLICATION TO CANCEL THE REGISTRATION OF THE W.A. DENTAL TECHNICIANS' AND EMPLOYEES' UNION
OF WORKERS, PERTH

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2015 WAIRC 00322
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S M MAYMAN
HEARD	:	THURSDAY, 16 APRIL 2015
DELIVERED	:	TUESDAY, 21 APRIL 2015
FILE NO.	:	FBM 1 OF 2015
BETWEEN	:	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
		Applicant
		AND
		W.A. DENTAL TECHNICIANS' AND EMPLOYEES' UNION OF WORKERS, PERTH
		Respondent

CatchWords	:	Industrial Law (WA) - Application to cancel the registration of an organisation on grounds of the number of employees and members of the organisation would not entitle it to registration and the organisation is defunct
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 53, s 62, s 73, s 73(12), s 73(12)(a), s 73(12)(b), s 73(12a), s 73(13) <i>Industrial Relations Commission Regulations 2005</i> (WA) reg 37, reg 76, reg 76(3)
Result	:	Order made
Representation:		
Applicant	:	Mr D Anderson (of counsel)
Respondent	:	No appearance
Solicitors:		
Applicant	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Re Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00861; (2013) 93 WAIG 1499

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

*Reasons for Decision***THE FULL BENCH:****The application and the requirements of the Act**

- 1 This is an application to cancel the registration of the W.A Dental Technicians' and Employees' Union of Workers, Perth (the union). The application was brought by the Registrar before the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act). Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under s 73(12) in every case where it appears to her that there are sufficient grounds for doing so. Section 73(13) also provides that proceedings for the cancellation of the registration of an organisation, or any of its rights under the Act, shall not be instituted otherwise than under s 73.
- 2 Pursuant to s 73(12) of the Act, the Full Bench is required to cancel the registration of an organisation if it is satisfied on the application of the Registrar that:
 - (a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under section 53 or section 54, as the case may be; or
 - (b) the organisation is defunct; or
 - (c) the organisation has, in the manner prescribed, requested that its registration be cancelled.
- 3 Whilst it is not clear from the application as to which subparagraph of s 73(12) of the Act that the application is brought, the evidence set out in the statutory declaration made by the Registrar, Susan Ivey Bastian, on 5 January 2015, and the submissions made on her behalf by Mr Anderson, made it plain that the application was made pursuant to s 73(12)(a) and s 73(12)(b) of the Act.
- 4 Regulation 76 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) provides for the procedure that the Registrar must comply with when an application to cancel the registration of an organisation is made under s 73(12) of the Act. Regulation 76 provides:
 - (1) Where an application is made by the Registrar under section 73(12) of the Act to cancel the registration of an organisation or association it is to be made in triplicate to the Full Bench in the form of Form 23.
 - (2) The application is to state clearly the grounds on which it is made and the application is to be accompanied by a statutory declaration setting out the facts on which the Registrar relies.
 - (3) The application is to be served on the organisation or association the registration of which is sought to be cancelled.
 - (4) Where the respondent organisation or association intends to oppose the application, it must give notice of that objection in an approved form within 14 days of being served with the application, and otherwise the provisions of regulation 15 apply with respect to any such objection.
 - (5) Where the respondent organisation or association intends to admit the facts (or any of them) on which the Registrar relies, it must, within 14 days of being served with the application, advise the Registrar in writing accordingly.
 - (6) After the expiration of the time prescribed in subregulations (4) and (5) the Registrar is to ascertain from the President a date for hearing the application and, as soon as practicable after setting a hearing date, is to notify the organisation or association of the hearing.
- 5 As required by reg 76, the Registrar filed an application on 5 January 2015, together with a statutory declaration made by her. Her statutory declaration sets out the grounds and facts upon which the application is made.
- 6 Whilst reg 76(3) requires that the application be served on the organisation the registration of which is sought to be cancelled, it is apparent from the matters set out in the statutory declaration of Ms Bastian, together with correspondence and other documents on the Commission file, that although the organisation's registration is current, it has no officers or members, nor an office upon which the Registrar could serve a copy of the application. The Health Services Union of Western Australia (Union of Workers) (the HSU) has held a 'caretaker' role on behalf of the union and its secretary, Mr Daniel Patrick Hill, had been the acting secretary of the union at least up until January 2003. In these circumstances, the Full Bench is of the opinion that the requirements to serve the application on the organisation should be waived pursuant to reg 37 of the Regulations. In any event, a copy of the application was served upon Mr Hill on 27 January 2015. The reason why the application was served upon Mr Hill is that the HSU in its role of caretaker of the union has provided the information to the Registrar upon which she relies to make this application to cancel the registration of the union.
- 7 In her statutory declaration the Registrar sets out the following evidence in support of the application:
 - (a) A search of the records of the union indicates that the union last submitted a financial return on 24 March 1993. That financial return contained information relevant to the financial period covering two years to 31 May 1992.
 - (b) In 2001, an officers and membership return was filed. That document declared the organisation had office bearers and financial members at that time. The acting secretary of the union, Mr Hill, declared that as at 1 January 2001, there were 21 members of the union and, in addition, identified three officers of the union.
 - (c) A subsequent officers and membership return submitted by the union, containing information current as at 1 January 2002, was declared by Mr Hill in May 2003 as the acting secretary of the union. That return declared that the number of members of the union was zero and the only person holding office was Mr Hill himself, as the acting secretary.

- (d) In May 2003, Mr Hill submitted an officers and membership return for the union which contained information current as at 1 January 2003. The 2003 return declared again that the number of the members of the union was zero, and that the only person holding office was Mr Hill, as acting secretary.
- (e) From 2004 onwards, the Commission requested on at least an annual basis, that the union submit its outstanding returns, without success. As a result, the union has failed to comply with its reporting obligations under the Act and the Regulations for some considerable time.
- (f) On 8 May 2012, Ms Sally Anderson, registry services manager, met with Mr Chris Panizza, an officer of the HSU, and a solicitor for the HSU, Mr Simon Millman. At the meeting, the status of the union and the Registrar's view that an application ought to be made to cancel its registration was discussed.
- (g) The meeting held on 8 May 2012 concluded on the basis that the HSU would finalise the process to alter its rule relating to eligibility for membership and to make a formal application to the Full Bench of the Commission to expand the constitutional coverage of the HSU to allow persons currently falling within the constitutional coverage of the union, to become members of the HSU.
- (h) On 30 May 2013, the HSU made an application (FBM 4 of 2013) to the Full Bench of the Commission pursuant to s 62 of the Act to alter its r 3 – Constitution. The alteration sought was to alter r 3 to cover persons eligible to be members of the union and the Salaried Pharmacists' Association Western Australian Union of Workers (SPA) on grounds that the union and the SPA existed separately in name only and were no longer able to protect and further the interests of the employees within their scope of coverage without the efforts of the HSU being made on their behalf.
- (i) FBM 4 of 2013 was granted on 3 October 2013 by the Full Bench. In its decision the Full Bench determined that the union had ceased to function as an employee organisation: *Re Health Services Union of Western Australia (Union of Workers)* [2013] WAIRC 00861; (2013) 93 WAIG 1499 [2], [15] - [17].
- 8 In support of this application Mr Hill filed a statutory declaration made on 3 February 2015 in which he stated that the union no longer exists as an entity and has no residual debts, liabilities, funds or property.

Conclusion

- 9 Where a Full Bench is satisfied on the application of the Registrar that an organisation has, in the manner prescribed, requested that its registration be cancelled, the Full Bench is required by the use of the mandatory word 'shall' in s 73(12) of the Act to cancel the registration of the organisation: *The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers* [2004] WAIRC 11936; (2004) 84 WAIG 2190.
- 10 After having regard to the facts set out in the statutory declarations, the Full Bench is satisfied that the number of members of the union would not entitle it to registration under s 53 of the Act which requires an organisation to consist of not less than 200 employees and that the organisation is defunct. In these circumstances, the Full Bench is required to grant the application.
- 11 After hearing from Mr Anderson on behalf of the Registrar the Full Bench made the following order on 16 April 2015 that:
The registration of the W.A. Dental Technicians' and Employees' Union of Workers, Perth be and is hereby cancelled on and from the 16th day of April 2015.

2015 WAIRC 00310

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	W.A. DENTAL TECHNICIANS' AND EMPLOYEES' UNION OF WORKERS, PERTH	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	CHIEF COMMISSIONER A R BEECH	
	COMMISSIONER S M MAYMAN	
DATE	THURSDAY, 16 APRIL 2015	
FILE NO.	FBM 1 OF 2015	
CITATION NO.	2015 WAIRC 00310	

Result	Order issued
Appearances	
Applicant	Mr D J Anderson (of counsel) and Ms S Anderson
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on 16 April 2015, and having heard Mr D J Anderson (of counsel) and Ms S Anderson on behalf of the applicant and no appearance on behalf of the respondent, the Full Bench hereby orders —

The registration of the W.A. Dental Technicians' and Employees' Union of Workers, Perth be and is hereby cancelled on and from the 16th day of April 2015.

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

[L.S.]

2015 WAIRC 00318

APPLICATION TO CANCEL THE REGISTRATION OF THE WEST AUSTRALIAN BRANCH, AUSTRALASIAN MEAT
INDUSTRY EMPLOYEES UNION, INDUSTRIAL UNION OF WORKERS, PERTH

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2015 WAIRC 00318
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 CHIEF COMMISSIONER A R BEECH
 COMMISSIONER J L HARRISON
HEARD : THURSDAY, 16 APRIL 2015
DELIVERED : MONDAY, 20 APRIL 2015
FILE NO. : FBM 3 OF 2015
BETWEEN : THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS
 COMMISSION
 Applicant
 AND
 WEST AUSTRALIAN BRANCH, AUSTRALASIAN MEAT INDUSTRY EMPLOYEES
 UNION, INDUSTRIAL UNION OF WORKERS, PERTH
 Respondent

CatchWords : Industrial Law (WA) - Application to cancel the registration of an organisation on grounds that the number of employees and members of the organisation would not entitle it to registration and the organisation is defunct
Legislation : *Industrial Relations Act 1979* (WA) s 53, s 63, s 65, s 71, s 73(12), s 73(12)(a), s 73(12)(b), s 73(12a), s 73(13)
Industrial Relations Commission Regulations 2005 (WA) reg 37, reg 76, reg 76(3), reg 78, reg 79
Result : Order made
Representation:
 Applicant : Mr D J Anderson (of counsel)
 Respondent : No appearance
 Solicitors:
 Applicant : State Solicitor for Western Australia

Case(s) referred to in reasons:

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

Reasons for Decision

THE FULL BENCH:

The application and the requirements of the Act

1 This is an application to cancel the registration of the West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth (the union). The application was brought by the Registrar, Susan Ivey Bastian, before the Full Bench pursuant to s 73(12) of the *Industrial Relations Act 1979* (WA) (the Act).

- 2 Pursuant to s 73(12a) of the Act, the Registrar is required to make an application under s 73(12) in every case where it appears to her that there are sufficient grounds for doing so. Section 73(13) provides that proceedings for the cancellation of the registration of an organisation, or any of its rights under the Act, shall not be instituted otherwise than under s 73.
- 3 Pursuant to s 73(12) of the Act, the Full Bench is required to cancel the registration of an organisation if it is satisfied on the application of the Registrar that:
- (a) the number of members of the organisation or, the number of employees of the members of the organisation would not entitle it to registration under section 53 or section 54, as the case may be; or
 - (b) the organisation is defunct; or
 - (c) the organisation has, in the manner prescribed, requested that its registration be cancelled.
- 4 The Registrar brings the application under s 73(12)(a) and s 73(12)(b) of the Act.
- 5 Regulation 76 of the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) provides for the procedure that the Registrar must comply with when an application to cancel the registration of an organisation is made under s 73(12) of the Act. Regulation 76 provides:
- (1) Where an application is made by the Registrar under section 73(12) of the Act to cancel the registration of an organisation or association it is to be made in triplicate to the Full Bench in the form of Form 23.
 - (2) The application is to state clearly the grounds on which it is made and the application is to be accompanied by a statutory declaration setting out the facts on which the Registrar relies.
 - (3) The application is to be served on the organisation or association the registration of which is sought to be cancelled.
 - (4) Where the respondent organisation or association intends to oppose the application, it must give notice of that objection in an approved form within 14 days of being served with the application, and otherwise the provisions of regulation 15 apply with respect to any such objection.
 - (5) Where the respondent organisation or association intends to admit the facts (or any of them) on which the Registrar relies, it must, within 14 days of being served with the application, advise the Registrar in writing accordingly.
 - (6) After the expiration of the time prescribed in subregulations (4) and (5) the Registrar is to ascertain from the President a date for hearing the application and, as soon as practicable after setting a hearing date, is to notify the organisation or association of the hearing.
- 6 As required by reg 76, the Registrar filed an application on 11 February 2015, together with a statutory declaration made by her. Her statutory declaration and the attachments to her statutory declaration set out the grounds and the facts upon which the application is made. Whilst reg 76(3) of the Regulations requires that the application be served on the organisation the registration of which is sought to be cancelled, it is apparent from the matters set out in the statutory declaration made by the Registrar, together with the attachments to her statutory declaration, that although the organisation's registration is current, it has no officers or members nor an office upon which the Registrar could serve a copy of the application.
- 7 In these circumstances, the Full Bench was of the opinion that the requirement to serve the application on the organisation should be waived pursuant to reg 37 of the Regulations. In any event, a copy of the application was served upon:
- (a) Mr Graham Smith, the Federal secretary of the Australasian Meat Industry Employees' Union;
 - (b) Mr John Da Silva, branch organiser, Australasian Meat Industry Employees' Union; and
 - (c) Mr Peter Legg, organiser, Australasian Meat Industry Employees' Union.
- 8 The reason why the application was served upon these officers of the Australasian Meat Industry Employees' Union is that the union is the holder of a certificate made pursuant to s 71 of the Act made on 24 June 1981 exempting the union from the requirement to hold elections as its counterpart Federal body is the Australasian Meat Industry Employees' Union.

The grounds and factual circumstances supporting the application

- 9 The Registrar in her statutory declaration sets out the following relevant facts and circumstances in support of the application:
- (a) In 2009, Deputy Registrar Sue Hutchinson became aware that the union had not complied with its reporting obligations under the Act and Regulations for a number of the preceding reporting periods.
 - (b) In December 2012, Ms Hutchinson, along with Registry Services Manager, Ms Sally Anderson, met with Mr Graham Smith who is the Federal secretary of the Australasian Meat Industry Employees' Union. The purpose of that meeting was to inquire as to the status of the union and discuss whether its registration ought to be maintained. At the meeting, Mr Smith provided the following relevant information:
 - (i) On 11 September 2009, alterations were made to the rules of the Australasian Meat Industry Employees' Union by Fair Work Australia. Those alterations extended the boundaries of constitutional coverage of the South Australian Branch of the Australasian Meat Industry Employees' Union so as to encompass the entire State of Western Australia, which in effect, resulted in the dissolution of the Western Australian Branch of the Australasian Meat Industry Employees' Union.
 - (ii) Following the 2009 rule alterations, the administration of the Australasian Meat Industry Employees' Union Western Australian membership was conducted in South Australia, by the South Australian Branch, which now maintained constitutional coverage of eligible employees residing in Western Australia.
 - (iii) The union had no financial activity, no assets, and no members.

- (c) On 11 February 2013, the Commission received an undated letter from Mr Smith in which Mr Smith stated as follows:
- (i) He agreed it was appropriate for the Registrar to initiate an application to cancel the registration of the union on the basis that it had become defunct.
 - (ii) The union had no financial members and its committee of management had not met since the amalgamation of the Western Australian Branch of the Australasian Meat Industry Employees' Union with the South Australian Branch some three years ago.
 - (iii) The union no longer exists, other than on paper. It holds no assets and has no financial dealings of any sort.
 - (iv) Unfortunately during the amalgamation consideration was not given to the winding up of the union and they now find themselves with no membership to call the meeting to dissolve the union as per its rules.
- (d) The Registrar formed the view from the information provided by Mr Smith that there were no longer any financial members of the union and no duly elected committee of management to convene a special meeting to dissolve the union in accordance with r 37 of the rules of the union.
- (e) In February 2013, Ms Hutchinson and Ms Anderson met with Mr Legg and Mr Da Silva who were past officers and members of the committee of management of the union. Mr Da Silva had been its vice-president and Mr Legg an organiser. At the meeting in February 2013, Mr Legg and Mr Da Silva informed Ms Hutchinson and Ms Anderson that the information provided by Mr Smith was, on the face of it, complete and accurate.
- (f) On 24 April 2013, Mr Smith made a statutory declaration in which he reiterated relevant matters that he had previously addressed in the meeting with Ms Hutchinson and Ms Anderson and in his letter received by the Commission on 11 February 2013.
- (g) On 6 May 2013, Mr Legg and Mr Da Silva made statutory declarations in which they each stated that they were in agreement with the statutory declaration provided by Mr Smith dated 24 April 2013.
- (h) The records held by the Commission record that the most recent officers and membership return submitted on behalf of the union in satisfaction of the requirements of s 63 of the Act and reg 78 of the Regulations was filed on 13 February 2009.
- (i) The records held by the Commission also record that the most recent financial return submitted on behalf of the union in satisfaction of the requirements of s 65 of the Act and reg 79 of the Regulations was on 20 November 2007. The Registrar, however, noted that the financial statements provided at that time appear to relate to the counterpart Federal body and not the union.
- 10 Where a Full Bench is satisfied on the application of the Registrar that an organisation has, in the manner prescribed, requested that its registration be cancelled, the Full Bench is required by the use of the mandatory word 'shall' in s 73(12) of the Act to cancel the registration of the organisation: *The Registrar v Master Hairdressers' Association of WA, Industrial Union of Employers* [2004] WAIRC 11936; (2004) 84 WAIG 2190.
- 11 After having regard to the circumstances of this matter set out in the statutory declaration made by the Registrar and the attachments to that document, including the statutory declarations made by Mr Smith, Mr Da Silva and Mr Legg, the Full Bench was satisfied that the number of members of the union would not entitle it to registration under s 53 of the Act which requires an organisation to consist of not less than 200 employees and that the organisation is defunct. In these circumstances, the Full Bench was required to grant the application.
- 12 After hearing from Mr Anderson on behalf of the Registrar, the Full Bench made the following order on 16 April 2015 that:
The registration of the West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth be and is hereby cancelled on and from the 16th day of April 2015.

2015 WAIRC 00309

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-and-	
	WEST AUSTRALIAN BRANCH, AUSTRALASIAN MEAT INDUSTRY EMPLOYEES UNION, INDUSTRIAL UNION OF WORKERS, PERTH	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON	
DATE	THURSDAY, 16 APRIL 2015	
FILE NO.	FBM 3 OF 2015	
CITATION NO.	2015 WAIRC 00309	

Result	Order issued
Appearances	
Applicant	Mr D J Anderson (of counsel) and Ms S Anderson
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on 16 April 2015, and having heard Mr D J Anderson (of counsel) and Ms S Anderson on behalf of the applicant and no appearance on behalf of the respondent, the Full Bench hereby orders —

The registration of the West Australian Branch, Australasian Meat Industry Employees Union, Industrial Union of Workers, Perth be and is hereby cancelled on and from the 16th day of April 2015.

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

[L.S.]

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2015 WAIRC 00332

**WA HEALTH - HSUWA - PACTS INDUSTRIAL AGREEMENT 2014
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2015 WAIRC 00332
CORAM	:	CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	:	MONDAY, 23 FEBRUARY 2015, TUESDAY, 24 FEBRUARY 2015, THURSDAY, 26 FEBRUARY 2015
DELIVERED	:	THURSDAY, 23 APRIL 2015
FILE NO.	:	PSAAG 19 OF 2014
BETWEEN	:	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, THE PEEL HEALTH SERVICES BOARD, AND WA COUNTRY HEALTH SERVICE Applicant AND HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) Respondent

CatchWords	:	Commission in Court Session – <i>WA Health – HSUWA – PACTS Industrial Agreement 2014</i> – Arbitration of salary increases in industrial agreement – Public Sector Wages Policy Statement 2014 – State of WA economy – Government expenditure – Principal objects of the Act – WA public health system – Timing of the implementation of the government wages policy – Equity in salary rates – Internal equities – Comparison salary increases of registered nurses and medical practitioners – Productivity and efficiency improvements – Changes within the public health system – 4 Hour Rule – National Emergency Access Target (NEAT) – Overall fairness
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 42G, s 42G(4), s 26, s 26(1)(a), (c) & (d), s 26(2A) - (2C)
Result	:	Salary increases determined

Representation:

Counsel:

Applicant : Mr D Matthews of counsel and with him Mr J Carroll of counsel

Respondent : Mr M Ritter SC and with him Mr S Millman of counsel

Solicitors:

Applicant : State Solicitor for Western Australia

Respondent : Slater and Gordon Lawyers

Case(s) referred to in reasons:

Civil Service Association of Western Australia Incorporated, Department of Indigenous Affairs and Others [2004] WAIRC 12131 at [160]; (2004) 84 WAIG 2535

Health Services Union of Western Australia (Union of Workers) v Minister for Health – The Minister for Health is Incorporated as the Board of the Hospitals formerly comprised in the Metropolitan Health Service Board under s7 of the Hospitals and Health Services Act 1927 (WA) and has delegated all the powers and duties as such to the Director General of Health [2014] WAIRC 00371; (2014) 94 WAIG 566

Hospital Salaried Officers Association of Western Australia (Union of Workers) v Hon Minister for Health and others [2006] WAIRC 03473 at [14]; (2006) 86 WAIG 279 (“Health Professionals Work Value case”)

Hospital Salaried Officers Association of Western Australia (Union of Workers) v Royal Perth Hospital and others [2002] WAIRC 07218; (2002) 83 WAIG 23 at [156] (“Clinical Psychologists case”)

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 Minister v The Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00836; (2013) 93 WAIG 1565 (“Frontline Clerical Positions case”)

The Minister for Health in his incorporated capacity under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel Health Services Board, WA Country Health Service and the Western Australian Alcohol and Drug Authority v United Voice WA [2014] WAIRC 01083; (2014) 94 WAIG 1621 (“UV case”)

Reasons for Decision

1 This is our unanimous decision. The *WA Health – HSUWA – PACTS Industrial Agreement 2014* (‘the 2014 Agreement’) was registered on 8 December 2014. The parties to the Agreement were not able to agree on the salary increases to apply. They have agreed under s 42G of the *Industrial Relations Act 1979* (the Act) that the increases are to be determined by the Commission within the following limits:

1. The first salary increase arbitrated within a range of 2.75% to 4% and which will apply on and from 1 July 2014; and
2. A second salary increase arbitrated within a range of 2.5% to 5% and which will apply on and from 1 July 2015.

The legislation

2 Section 42G of the Act gives an express power to the Commission to make an order as to specified matters on which agreement has not been reached. In deciding the terms of an order the Commission may have regard to any matter it considers relevant (s 42G(4)). The manner in which the Commission is to exercise its jurisdiction is set out in s 26 as follows.

- (1) In the exercise of its jurisdiction under this Act the Commission —
 - (a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and
 - (b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and
 - (c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and
 - (d) shall take into consideration to the extent that it is relevant —
 - (i) the state of the national economy;
 - (ii) the state of the economy of Western Australia;
 - (iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;
 - (iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;
 - (v) any changes in productivity that have occurred or are likely to occur;

- (vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;
 - (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.
- (2A) In making a public sector decision the Commission must take into consideration the following —
- (a) any Public Sector Wages Policy Statement that is applicable in relation to negotiations with the public sector entity;
 - (b) the financial position and fiscal strategy of the State as set out in the following —
 - (i) the most recent Government Financial Strategy Statement released under the *Government Financial Responsibility Act 2000* section 11(1) and made publicly available under section 9 of that Act;
 - (ii) the Government Financial Projections Statement;
 - (iii) any submissions made to the Commission on behalf of the public sector entity or the State government;
 - (c) the financial position of the public sector entity as set out in the following —
 - (i) the part of the most recent budget papers tabled in the Legislative Assembly that deals with the public sector entity under the title “Agency Information in Support of the Estimates” or, if the regulations prescribe another part of those budget papers, that other part;
 - (ii) any submissions made to the Commission on behalf of the public sector entity or the State government.

3 The Commission also has regard for the principal objects of the Act.

Outline of the position of the Minister for Health

- 4 The Minister seeks an order that the salary increases be 2.75% and 2.5% respectively. This is appropriate because it will, if the current forecast is accurate, exceed the Consumer Price Index increase for the financial year 2014/2015 and match the CPI increase forecast for 2015/2016. This will maintain or slightly increase the real value of salaries which is fair. The Minister states that it is incumbent on a party seeking higher increases to point to factors which would make the increases proposed by the Minister unfair.
- 5 The Minister points to s 26 of the Act and submits that the factors which the Commission must take into account means the Commission is to have regard to the ‘overall fairness’ of an outcome. This involves taking account of the interests of the employer, the employees and, no less importantly, the interests of the community or the public interest. Sections 26(2A) – (2C) make clear, to the extent that it was not previously so, that where the government has a strategy on behalf of the people of Western Australia in relation to its financial position, the Commission must consider the impact of the exercise of its jurisdiction upon that strategy. Public Sector Wages Policy Statements must be taken into account by the Commission.
- 6 The Minister submits that the State’s financial position is problematic and the government has devised a strategy on behalf of the people of Western Australia to address the problems. The Public Sector Wages Policy Statement 2014 is central, perhaps paramount, to the success of that strategy. The Minister submits that given the tenuous bases for salary increases greater than the maintenance of real wages, the government’s strategy is decisive.
- 7 The Minister submits that there is nothing unfair to the employees covered by the 2014 Agreement resulting from the Minister’s position given:
- (a) the absence of productivity improvements in the 2014 Agreement;
 - (b) increased activity in some areas of the public health system alone is not a sound basis for a salary increase for any employee, let alone an across the board increase; and
 - (c) salary increases awarded to other, different, employee groups is an unsound and dangerous basis for salary increases for employees under the 2014 agreement even if they have the same employer. This is especially so where, as here, those salary increases occurred for reasons particular to the groups receiving them, at a different time and in different circumstances.
- 8 The Minister called evidence from Mr Neil Fergus, the Assistant Director, Health Industrial Relations Service for the Department of Health and from Mr Richard Watson, the Acting Executive Director of the Economic Business Unit of the WA Department of Treasury, which provides advice to the government on economic and financial policy issues, including responsibility for financial arrangements with the Commonwealth, monitoring and forecasting economic and revenue performance, State taxation policy and the statutory reporting on State finances.

Outline of the position of the HSU

- 9 The Health Services Union of Western Australia (Union of Workers) (HSU) submits that it represents more than 16,000 people employed in the WA public health system, being allied health and other professional staff, administrative, clerical and technical staff (PACTS).
- 10 It claims increases in salaries and wages comparable to the increases recently received by other public health workers in Western Australia such as doctors, nurses and support staff, who received pay rises of around 4%. It says efficiencies, improvements and increased complexity of work mean that a wage increase in excess of what the Minister has offered is fair.

- 11 The HSU says that the employees represented by the HSU have contributed to the unprecedented level of change within the public health system including new hospitals and services, service reconfiguration, funding changes and other changes, all of which are, according to the government itself, directed towards delivering better and more efficient and productive health services.
- 12 The HSU points to changes to work design and work practices such as the 4 Hour Rule, significant and ongoing productivity improvements in health service delivery to which employees under the 2014 Agreement have contributed directly and in conjunction with other health service employees who are engaged in the delivery of health services within the integrated and multidisciplinary environment within which health services are delivered.
- 13 The HSU also points to equity within the level of increases in rates of salary for PACTS in comparison with other employees in the public health system, ongoing efficiencies and improvements gained from the continuing flexibilities and customised provisions in the 2014 Agreement. The HSU says there are no economic considerations such that they would preclude the Commission from making an order for the salary increases the union seeks.
- 14 The HSU called evidence from Mr Dan Hill who is the secretary of the HSU and who has held that position for over 21 years, having been employed by the HSU for over 35 years. There are 66 attachments to Mr Hill's statement.
- 15 The HSU also called evidence from the following:
 - Mr Jonathan Nugent, Pharmaceutical Benefits Scheme Reform Pharmacist at Sir Charles Gairdner Hospital for 19 months and who has been employed by WA Health for nine years.
 - Mr Ian Cooper, Head of Department, Physiotherapy at Sir Charles Gairdner Hospital and who has been in that position for two years, and employed by WA Health for 29 years.
 - Ms Cheryl Hamill, Acting Chief Librarian at Fiona Stanley Hospital and who has been in that position for two months and employed by WA Health for 36 years.
 - Mr Benjamin Devine, Complex Care Coordinator at North Metropolitan Health Service and who has been in that position for more than four years, and employed by WA Health for over nine years.
 - Ms Mary Joyce is Head of the Social Work Department at Sir Charles Gairdner Hospital and who has held that position for 15 years and employed by WA Health for 34 years.
 - Mr David Miotti, who is General Manager, PathWest at Fiona Stanley Hospital and has been in that position for eight years, and employed by WA Health for 26 years.
- 16 The HSU says that the application of the government wages policy to the employees covered by the 2014 Agreement would be unfair for three reasons. The first is what it described as the 'internal equities' argument.
 - **The 'internal equities' issue – HSU submission**
- 17 The HSU emphasises a comparison only with other public health system employees who work alongside and with HSU members in providing the WA health service, arguing it would be unfair to grant all groups but HSU members a pay rise of 3.5 - 5% in the context in which those pay rises were given.
- 18 The HSU's reference to other health employees is primarily to registered nurses. The HSU points to the wage increases in the industrial agreements applicable to registered nurses under various industrial agreements such as the *WA Health – Australian Nursing Federation – Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses Industrial Agreement 2013* (the registered nurses agreements) registered on 16 October 2014 and which have a nominal expiry date of 30 June 2016. The wage increases are:
 - (1) 5% on and from 1 July 2013,
 - (2) 4% on and from 1 July 2014, and
 - (3) 5% on and from 1 July 2015.
- 19 The HSU notes that the total wage increases of 14% agreed to by the government with The Australian Nursing Federation, Industrial Union of Workers Perth (ANF) for registered nurses were in excess of the 12.75% capped high point of the government wages policy that applied at the time the rates were agreed (ex D). Further, the government did not restrict the increases only to registered nurses. The government also agreed to pay the same wage increases to enrolled nurses and aboriginal health workers and others employed under the *WA Health – United Voice – Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2014* (the UV Enrolled Nurses Agreement 2014). The registered nurses agreements and the UV Enrolled Nurses Agreement 2014 are estimated to cover approximately 17,200 employees.
- 20 The HSU acknowledges that there is no formal or historical link between wages increases for registered nurses within the public health system and salary increases for the PACTS represented by the HSU (evidence of Mr Hill, ts 106). The HSU also acknowledges that headline percentage increases for HSU members since 1996 show that sometimes PACTS have received higher percentage salary increases than the percentage increases received by registered nurses, and sometimes they have received lower increases (ts 108).
- 21 However, the HSU points to the fact that the dates of the two wage increases under the 2014 Agreement are the same as the second two wage increases under the registered nurses agreements, namely 1 July 2014 and 1 July 2015. The HSU says that it sought only a two-year term for the 2014 Agreement in order that the dates of the two wage increases align with the registered nurses agreements.
- 22 The point made by the HSU is that the wage increases for registered nurses cannot be explained on the basis of some reduction or compromise of conditions, or for structural efficiencies, nor was it in recognition of any work value assessment of registered nurses. The HSU acknowledges that the wage increases agreed to be paid to registered nurses were agreed on the eve of a

State election and there were particular circumstances that gave rise to them occurring (ts 138) but the fact that it was then flowed on to the UV Enrolled Nurses Agreement 2014 and, according to the HSU, to medical practitioners, shows it would be unfair to preclude the HSU members from a similar wage increase.

- 23 The HSU submits that not to apply the same percentage increases to PACTS as applied to registered nurses would be to reward those who took industrial action, or threatened to escalate industrial action, but not those who sought arbitration. It would send the wrong message to the HSU, unions and employees throughout the State (ts 138). It would be contrary to the principal objects of the Act which include the promotion of goodwill in industry and seeking to provide means for preventing and settling industrial disputes not resolved by amicable agreement.
- 24 The HSU's reference to other health employees is also to medical practitioners. The HSU points to the industrial agreements covering medical practitioners which came into effect on 23 December 2013. The salary increases payable are:
- (1) 3.75% on and from 1 October 2013;
 - (2) 3.75% on and from 1 October 2014; and
 - (3) 3.5% on and from 1 October 2015.
- 25 The HSU says that the industrial agreements covering medical practitioners were negotiated under the terms of the 2009 government wages policy and noted that there are no linked improved efficiency/work practice reform initiatives contained in their terms, however there were a number of improved conditions and benefits for medical practitioners (ex 8 at [55]).
- 26 The HSU makes the submission that an Australian Medical Association (WA) Incorporated circular to its members (ex 8, DPH 18) lists a number of efficiency measures that have not been actually specified in the agreements. While the effective implementation of those measures requires the active participation of medical practitioners, effective implementation also relies heavily on the active engagement and support of PACTS.
- 27 These efficiency measures are the reason the medical practitioners received increases above projected CPI to the level of the WPI forecast at the time, however the government refused to offer increases above government wages policy to the HSU for the 2014 Agreement. This is unfair.
- 28 The HSU notes that employees covered by the UV Enrolled Nurses Agreement 2014 received more favourable treatment given that in their case the forecast applied was the forecast at the commencement of negotiations and was a forecast more favourable than the forecast applied to the negotiations for medical practitioners. This shows the government applies its wages policy in different ways at the same time to two different groups of employees employed by the same employer. The HSU suggests this shows the arbitrary way in which the government applies its wages policy, or alternatively that the policy should be regarded more as a guide than as a strict parameter. The current wages policy was announced by the government on 13 June 2013, however, it was not implemented until 1 November 2013, being applied to all public sector industrial agreements that expire after that date.
- 29 The HSU also refers to the industrial agreement for health support workers, the *United Voice – Support Workers Agreement 2012* AG 51 of 2012 which provides for the following wage increases:
- (1) 4.5% agreed from 5 December 2012;
 - (2) 4.25% arbitrated from 1 August 2013, and
 - (3) 4.25% arbitrated from 1 August 2014.

- 30 In Mr Hill's evidence the HSU notes that the support workers agreement straddles what it sees as the major industrial agreements operating in the public health system. The support workers agreement represented 'the last of that previous wage round' and wage rates were arbitrated rather than agreed (ex 8 at [76]). The support workers agreement formed part of the background of rates taken into account by the HSU in considering what is a fair wages outcome for its members, however the emphasis is on the wage increases received by nurses and also by medical practitioners.

- **The 'internal equities' issue – the Minister's submission**

- 31 The Minister submits that the salary increases for registered nurses were achieved in unique circumstances, having no application to the present case. In the lead up to the 2013 State election, registered nurses took industrial action and planned a strike for 25 February 2013 with rolling stoppages to continue thereafter. The agreement was reached with the ANF on 25 February 2013. The Minister points out that the HSU itself conducted an industrial campaign in support of the 2014 Agreement, including a stop work rally held at Parliament House on 25 June 2014 (ex A at [35]) and 12 hour rolling stoppages ([38]), before the Commission on its own motion convened a conference and made recommendations which resulted in industrial action being suspended.
- 32 The Minister rejects any submission that the salary increases received by medical practitioners is relevant to the salary increases to be applied to the PACTS. The evidence of Mr Fergus emphasises that the pay increases for any given discrete employee group or groups within the public health system is not a reliable or reasonable way to determine the pay increase for another discrete group. This is because pay increases have been arrived at by a variety of measures, in a variety of circumstances, have taken into account matters which may be applicable only to the particular group concerned, have been arrived at with different policies applying, do not necessarily involve any comparison or assessment of the duties of one employee group as against those of another employee group, and are arrived at in the context of varying economic and financial circumstances.
- 33 In Mr Fergus' evidence the circumstances of the industrial agreements for medical practitioners included:
1. Provision for doctors in training to break their employment to undertake a period of employment in privately operated hospitals within the State in certain circumstances;

2. One additional week of professional development leave for senior practitioners;
 3. Articulation of enforceable obligations for the professional responsibilities of practitioners;
 4. Changing the structure of the head of department allowance;
 5. Improved contract completion payment provisions for senior practitioners;
 6. Capacity to engage interns on a part time basis; and
 7. The higher duties provision moved from the general provisions section of the industrial agreement to the doctors in training provision (ex A at [89]).
- 34 The Minister rejects any suggestion that the salary increases to be determined by the Commission should take into account salary increases achieved by medical practitioners and registered nurses employed by the Minister. The Minister does not dismiss the facts that they have the same employer as the HSU's members, that those members work alongside medical practitioners and registered nurses in the delivery of healthcare, and that they all work in the public health system in Western Australia; however, there is no established historical link between salary increases for medical practitioners and registered nurses and salary increases for HSU members.
- 35 In the Minister's view, the Commission's task is to undertake a far more objective and sophisticated analysis of the matter and it must assess the exact extent to which it is actually unfair that the salary increases for medical practitioners and registered nurses is greater than the salary increases offered to PACTS by the Minister.
- 36 The Minister submits that, objectively, the difference between the amount the Minister says the Commission should award and the salary increases achieved by medical practitioners and registered nurses is not unfair in any way. It is not demonstrative of something negative about the way the Minister regards and treats the respondent's members, especially given the good pay increases they have received over a long period of time. The Minister says that the HSU's members are well paid, including by interstate comparisons. Once the circumstances of the economic considerations and the significance of the Public Sector Wages Policy Statement 2014 are fully understood, the differences in the salary increases achieved by medical practitioners and registered nurses could not result in a finding that the salary increases of 2.75% and 2.5% were unfair in such a way that the Commission should award a higher increase.
- 37 The Minister submits that even under the concept of comparative wage justice, there had to be something intrinsic about the value of the work being done to warrant the salary increase, even if the assessment was only whether the work being done had the same value when compared to the work of the group being paid the higher wage. There are many considerations which affect salary increases for each group and, the Minister submits, the endless variety of those considerations means that a comparison of the outcomes is at best inexact and at worst completely meaningless.
- 38 The Minister submits that the economic circumstances that were present when the registered nurses received their wage rise in 2013 and when the medical practitioners received their salary rise are not present now: things have changed, and for the worse. The government has a plan to address that, and those circumstances mean that even if there could be said to be a link between the wage increases received by those groups of employees and the PACTS, the change in economic circumstances ought to be determinative.
- 39 The Minister also submits that there are many HSU-covered employees who do not work alongside medical practitioners and registered nurses.
- The 'internal equities' issue – Consideration**
- 40 We find that there is no historical link or nexus between the salary increases given to registered nurses and the salary increases given to the PACTS represented by the HSU.
- 41 The evidence of past wage increases in the statements of both Mr Fergus and Mr Hill does show a general consistency in the percentage increase to registered nurses and the PACTS represented by the HSU. This is likely to be, as the Minister suggests, by coincidence rather than by design because of the cycle of enterprise agreement negotiations common to both groups of employees and, in recent years, the application of a government wages policy to the circumstances of the employees to be covered by the enterprise agreement being negotiated.
- 42 The lack of any historical link or nexus between the salary increases given to registered nurses and the salary increases given to the PACTS means the HSU's submission that the 2014 Agreement should contain the same percentage wage increase given to nurses must fail. It is clear that headline percentage increases for PACTS since 1996 sometimes were higher than the percentage increases received by registered nurses and sometimes lower.
- 43 The HSU submits that to not apply the same percentage increases to PACTS as applied to registered nurses will reward those who took industrial action, or threatened to escalate industrial action, but not those who sought arbitration. We do not agree: those who took industrial action, or threatened to escalate it, have received the reward of the increases the government offered to them.
- 44 We find also that there is no established or historical link between the salary increases granted to medical practitioners and the PACTS. Increases granted to medical practitioners in their industrial agreements do not, of themselves, provide a basis for increasing the salaries in the 2014 Agreement by a corresponding percentage.
- 45 Nevertheless, there has been a general consistency in the past percentage increases to the salaries of medical practitioners and to the salaries of PACTS. As is the case with the percentage increases to nurses' wages over time, this is likely to be result of coincidence rather than design.
- 46 The HSU submits that to the extent to which medical practitioners received the benefit of what flowed from the agreement reached with nurses, then it should apply also to the PACTS. However, the extent to which medical practitioners did receive a benefit from a 'flow on' from the wage increase to nurses has not been established.

47 In our view, there is substance in the HSU submission that effective implementation of efficiency measures including those identified in the medical practitioners agreement also relies heavily on the active engagement and support of PACTS. The extent of this was not the subject of detailed evidence and is not easy to quantify, however, it is a relevant consideration.

- **A further issue – Timing**

48 Before reaching a conclusion on what the HSU described as the ‘internal equities’ argument, it is necessary to consider the HSU’s third reason why the application of the government wages policy would be unfair.

49 The HSU points to the timing of the implementation of the government wages policy. The HSU acknowledges, correctly, that the Commission is not to judge the fairness of the government wages policy. What the HSU does submit is that the application of the 2014 policy has caused an unfairness due to the timing of its application because the other employees within the integrated health system will have reached two sets of industrial agreements under the 2009 policy but the PACTS represented by the HSU will have reached only one.

50 The HSU urges the Commission to look in a holistic way at the position it presents in relation to the wage and salary increases in the registered nurses agreements, in the UV Enrolled Nurses Agreement 2014 and in the medical practitioners agreements on the one hand, and the salary increase sought for PACTS who work alongside them. It states that all of these employees together are part of an integrated workforce that provides health services and it would be unfair to grant all groups but one a pay rise of between 3.5% to 5%, for example, because of the context in which those pay rises were given.

51 The State Government Wages Policy 2009 is the wages policy which applied prior to the State Government Wages Policy 2014. It applied to enterprise agreements expiring after 1 July 2009. It was based, generally, upon wage increases being no greater than forecast movements in the CPI for Perth, but wage increases could be negotiated up to the higher level of the forecast movement in the Wage Price Index for Perth in exchange for trade-offs or efficiencies.

52 However, the evidence shows that both salary increases of 2.75% from 1 July 2014 and 2.5% from 1 July 2015 for PACTS in the 2014 Agreement are significantly less in percentage terms than the corresponding wage increases in the registered nurses agreements and the UV Enrolled Nurses Agreements 2014 of 4% and 5%, and the corresponding salary increases for medical practitioners of 3.75% and 3.5%. They are also significantly less than the arbitrated wage increase for support workers of 4.25% from 1 August 2014.

53 The fact that the salary increase offered to the PACTS in the 2014 Agreement is significantly less than the increase received by registered nurses is largely, though not entirely, the result of the difference between the 2009 and 2014 State wage policies. The wage increase available under the 2009 government wages policy was able to be 4.25% (the projected WPI) compared with 2.75% (the projected CPI) available now.

54 It is also the result of the further 0.75% in the first year, 0.25% in the second year and 0.75% in the third year agreed between the government and the ANF. The fact that the government reached an agreement with the ANF on the eve of an election for a wage increase which exceeded the then government wages policy has formed the most significant part of the HSU case, perhaps inevitably. It is no surprise that it would be relied upon by the HSU in its negotiations for the 2014 Agreement, and in these proceedings. It has not assisted the Minister’s argument that the State government wages policy should be applied uniformly and without exception.

55 We note that fairness is a relative concept, and the circumstances of each industrial agreement being reached are different. In that regard, we endorse the comments of Scott C that:

Comparative wage justice is not available as a basis for salary increases. One cannot use any particular individual or group of bargaining outcomes external to this group as the basis of a salary increase for this group for a number of reasons. The first consideration is that each set of negotiations brings with it unique circumstances. These include the history of bargaining for that group and whether it took account of structural or classification changes, work value, or adjustments to conditions as part of a total package. For example, one agreement might focus on costly adjustments to conditions applicable to a large group at a particular location, and another may aim to provide greater benefits to a group at the lower levels of classification according to their numbers. Another consideration might recognise a higher qualification, and yet another might need to take account of attraction and retention issues. The terms of an agreement and the timing of it may also be considerations. The realities of negotiations often mean that one segment of employees within the group has a greater need than another. A satisfactory outcome to any particular set of negotiations often involves pragmatic considerations which may not be able to be assessed by an external party attempting to apply quantitative measurements.

*Civil Service Association of Western Australia Incorporated,
Department of Indigenous Affairs and Others
[2004] WAIRC 12131; (2004) 84 WAIG 2535 at [160]*

56 Even though comparative wage justice is no longer a valid reason by itself for the Commission to award an across the board salary increase, it is understandable that an employee assesses whether he or she has been treated fairly by reference to how others in similar circumstances are treated. In this case, there is some validity in the HSU’s depiction of the registered nurses and UV enrolled nurses having been treated more favourably by receiving a wage increase exceeding the government wages policy in a context where they, medical practitioners and the PACTS who work alongside them, are part of an integrated workforce that provides health services.

57 That there is a perception of unfairness, or of PACTS being devalued, is evidenced in some of the statements of the witnesses called by the HSU. It is not a perception going to a comparison between the actual salaries of particular classifications. The evidence of Mr Hill in relation to the salary comparison between the entry-level health professionals classification and the entry-level rate for a registered nurse from 1996 through to 2014 (ts 107 and ex B1 and B2) makes that clear.

- 58 However, in the context of a past general consistency of industrial agreement wage and salary increases to PACTS, registered nurses and medical practitioners in at least the more recent past, a significantly lesser percentage increase to PACTS is undesirable. While this is not by itself a reason why the HSU's claim is made out, it is a relevant consideration.
- **Productivity and efficiency improvements**
 - o **The HSU submission**
- 59 The second reason why the HSU says that the application of the government wages policy to the employees covered by the 2014 Agreement would be unfair is that there have been productivity and efficiency improvements since the 2011 Agreement. Further, a summary of the changes made in the 2014 Agreement from the 2011 Agreement is attached to Mr Hill's statement (DPH 34).
- 60 The HSU emphasises that the 2014 Agreement has built into it a capacity for flexibility which has an ongoing life. It includes various flexibilities as a rollover set of clauses, which have ongoing application and which facilitate productivity changes and efficiencies which then occur. By way of example, cl 8.5 refers to agreement flexibilities as a whole allowing for the substitution of mutually agreed terms and conditions; clause 9.1(a) refers to the employment of employees as appropriate in the circumstances; clause 14.1(f) allows the hours of work to be reviewed and changed and clause 14.3 generally discusses flexible work arrangements.
- 61 Mr Nugent's evidence in summary is that Pharmaceutical Benefits Scheme (PBS) reform applies to all public hospitals except King Edward Memorial Hospital. PBS reform in 2013/2014 has delivered \$35 million in revenue to WA. Approximately 60% of the total revenue from PBS is new revenue. The ABF/ABM (activity based funding/activity based management) reconfiguration programme in 2014 has led to a reduction in hospital costs which has saved Sir Charles Gairdner Hospital (SCGH) \$1.7 million in 2014/15. Mr Nugent also refers to separate changes in the public health system leading to increased efficiencies by changes to work design and work practices. Pharmacists are involved in the ongoing adaptation and implementation of the 4 Hour Rule. A satellite pharmacy arrangement has been introduced to meet interim NEAT (national emergency access targets) targets. The complexities of pharmacists' work have increased.
- 62 Mr Cooper's evidence is that physiotherapists at SCGH have delivered the same patient outcomes with 20% less staff. There have been significant changes in practice to achieve previous outcomes with minimal impact on patient care. The emerging role of Advance Scope Physiotherapist has allowed for a medical substitution model in selected clinics, and physiotherapists in those clinics perform work previously done by medical practitioners, allowing for significant savings via salary and efficiency costs. In July 2014 an ABF model was introduced. In 2013/2014 there was a 23% reduction of FTE (full-time equivalent) in physiotherapy and over 40% to staffing levels of occupational therapists, requiring significant changes in practice to achieve previous outcomes with minimal impact on patient care.
- 63 Ms Hamill referred to a major example of work redesign and change which resulted from the merging with the Royal Perth Hospital library and the move to Fiona Stanley Hospital to provide a combined set of resources to six public hospitals and two area health services. Systems of information support for those involved in developing standards commenced in 2013 and the library service now requires staff with higher level skills.
- 64 Mr Devine referred to the development of the Complex Needs Coordination Team (CoNeCT) multi-disciplinary and inter-professional team from allied health disciplines working together. They have built on the experience in a way that it can be more effectively used now as a bridge between hospital and community settings. Involvement of CoNeCT has reduced by approximately half the total number of Emergency Department presentations. It has streamlined the process where patients involved in guardianship matters may be managed in the community while awaiting hearing instead of occupying a bed.
- 65 Ms Joyce gave evidence that the national health target for accessing Emergency Departments for 2015 has increased to 76%. In 2012 there was the introduction of an activity-based funding model and she stated how that has involved retraining staff to optimise the funding opportunities. She refers to the upskilling of social work staff and broadening of responsibilities to change to a ward-based model which is a more specialist model and which has continued from late 2013 with 4% less staff. She gave evidence about significant and ongoing productivity improvements and the increased complexity of her work.
- 66 Mr Miotti gave evidence of a new PathWest laboratory for the Fiona Stanley Hospital to be a central hub and reference laboratory, consolidating laboratory services with less duplication of services, equipment and staffing resulting in a higher level of efficiency. There has been an increase in productivity of 15.5% between 2009/2010 to 2013/2014, or 3.9% pa, relating to the number of test panels per operational FTE. This was achieved by staff within PathWest performing an increased workload through more efficient work practices.
- 67 The HSU maintains that the Commission is able to take into account increased efficiencies from the 4 Hour Rule which commenced prior to the 2014 Agreement because the targets required by NEAT which were introduced in 2012 have required greater efficiencies to meet a 90% compliance. This could not have been taken into account in the 2011 Agreement.
- 68 The HSU also submits that the increased productivities and efficiencies which were raised in *the Frontline Clerical Positions case* ([2013] WAIRC 00836; (2013) 93 WAIG 1565), but which could not be taken into account in that case because it was a work value claim, should be taken into account in this matter.
- 69 The HSU accepts that it did not call witnesses from the general division but states that does not mean there is no evidence of changes to efficiencies and productivities within those areas. In particular, the HSU refers to changes and reforms in the medical practitioners industrial agreement which necessarily will require work to be done by administrative and clerical staff. The same applies with respect to the NEAT. Further, Mr Hill referred to the National Safety of Quality Health Standards and the role of administrative, clerical and supervisory staff in their implementation.
- 70 The HSU says that the evidence overall allows the Commission to infer there have been productivity increases and efficiencies across the board without the HSU needing to call further witnesses. The changes that are being talked about in the public

health system are large-scale changes and it would be wrong to think that does not involve major change by the PACTS to assist in those changes.

71 Significantly, according to the HSU, the minimalist changes made in the UV Enrolled Nurses Agreement 2014 compare closely to the minimalist changes made in the 2014 Agreement and are in contrast to the significant improvements in conditions granted to employees employed under the registered nurses agreement.

72 There is evidence too that some matters in the support workers agreement are already dealt with in the 2014 Agreement, at least to some extent (ts 31): simplified contract of service provisions; additional circumstances for the engagement of fixed term contract employees; circumstances for the engagement of fixed term contract employees; clarification of redundancy and redeployment provisions; simplification of processes to agreed changes to work cycles and roster changes; provisions dealing with underpayments and overpayments; a process to address excessive annual leave; long service leave in single days; changes to the parental leave process; although the evidence of Mr Fergus is that the savings and efficiencies these might have represented in *the UV case* ([2014] WAIRC 01083; (2014) 94 WAIG 1621) are not present in the 2014 Agreement (ex A at [53]).

o The Minister's submission

73 The Minister points to the lack of any evidence about what changes, if any, have flowed from the medical practitioners agreement, where they have occurred and to what extent persons in the general division have contributed to them.

74 The Minister says the 2014 Agreement contains no measurable savings or efficiencies, referring to the evidence of Mr Neil Fergus. Mr Fergus' role includes the key responsibilities of the occupational groups industrially covered by the ANF and the HSU, as well as other unions, ensuring that industrial relations practices are congruent with the whole of health governance framework and meet all public sector compliance and accountability requirements. He has been involved in negotiating the industrial instruments applicable to the HSU for the past five years.

75 In the evidence of Mr Fergus (ex A at [97]), the changes to the 2014 Agreement include:

- (a) Amendments to improve the interpretation of existing provisions being formatting, grammar and typographical errors;
- (b) Amendments to allowances linked with movements in the Public Service Award 1992 consistent with the provisions of those clauses with such a link;
- (c) Clarification of multiple recall provisions consistent with custom and practice;
- (d) Inclusion of additional Health Professionals and other Specified Callings consistent with relevant decisions since the 2011 Agreement;
- (e) An option to access half the period of annual leave at double pay for the purposes of clarity and access to this entitlement; and
- (f) Enhanced parental leave entitlements, consistent with improvements contained in the Public Service and Government Officers General Agreements 2011 and 2014, in particular:
 - Higher duties for continuous period of 12 months part of the first four weeks of paid parental leave;
 - Clarification of options for part-time employees – the greater will apply of average or contractual hours to calculate paid parental leave;
 - Access to personal leave for one week of simultaneous leave (partner leave);
 - Increase to maximum eight weeks of simultaneous leave on approval (partner leave);
 - Clarification that paid parental leave remains intact whether birth results in other than a live child after 20 weeks;
 - Special temporary employment option;
 - Clarification that entitlements at half pay option does not extend service beyond full pay equivalent;
 - Definition of unpaid grandparental leave includes adoption of grandchild; and
 - Clarification that unpaid grandparental leave is to a maximum of 52 continuous weeks but can be taken anytime up to 24 months from birth/adoption.

76 It is the evidence of Mr Fergus that these changes are not of a kind, or of sufficient significance, to have an effect on the quantum of salary. Further, it is not sustainable for value to be harvested for continuing flexibilities each time an industrial agreement is subject to negotiation.

77 The Minister states that any argument that changes have increased work value must be addressed on a case by case basis; there is a robust reclassification review system within the Commission to allow this to occur and it is one to which the HSU and the Minister have had resort, to mutual benefit, in the past.

78 Further, structural changes should not form the basis for across the board salary increases given that such changes do not affect everyone and the impact upon those that they do affect is unequal. The unequal distribution of contribution to change does not provide a reasonable justification for an across the board wage increase. The HSU's submission that 'everyone needs assistance from clerical and administration staff' is vague and does not tie in the General Division to any productivity improvements that may have occurred. It does not explain in a way that the Commission could be comfortable relying upon that the General Division has delivered productivity improvements.

- 79 The 2011 Agreement expressly provided that salary increases provided in that agreement were in full and final settlement of productivity improvements up to the date of the commencement of the agreement, being 27 September 2011 ('WA Health – Health Services Union – PACTS – Industrial Agreement 2011' PSAAG 18 of 2011, clause 7.3). Therefore, productivity improvements or efficiencies achieved under a prior industrial agreement, or existing before those agreements, cannot be relied upon to ground a claim for a salary increase under the 2014 Agreement.
- 80 The 4 Hour Rule commenced in April 2009 and there is presently insufficient evidence to conclude on what basis efficiency improvements from changes to work design and work practices could support an across the board salary increase. Other than for amendments to parental leave, productivity improvement changes accepted by the Commission in the UV support workers case are not present in the 2014 Agreement.
- 81 Further, the wage increases for any given discrete employee group or groups need to recognise that the results have been arrived at by a variety of measures, some by agreement and some as a result of arbitration. There has been a variety of circumstances and the results take into account matters applicable only to the group concerned. Previous results have been arrived at with different policies applying, especially government wages policies, and do not necessarily involve any comparison or assessment of the duties of that employee group as against those of another employee group.

- Conclusion regarding productivity and efficiency improvements

- 82 Section 26(1)(d)(v) obliges the Commission to take into account any changes in productivity that have occurred or are likely to occur. The 2011 Agreement expressly stated that salary increases provided in that agreement were in full and final settlement of productivity improvements up to the date of the commencement of the agreement, being 27 September 2011.
- 83 There is evidence demonstrating that there have been changes to productivity since the 2011 Agreement, however, not all aspects can be relied on.
- 84 The HSU refers to changes associated with multidisciplinary teams. However, the introduction of such teams was relied upon as being part of the increased work value relied on initially in *the Clinical Psychologists case* ([2002] WAIRC 07218; (2002) 83 WAIG 23 at [156]) and was claimed and accepted as applying equally in *the Health Professionals Work Value case* ((2006) 86 WAIG 279; [2006] WAIRC 03473 at [14]). Therefore, this is a matter already accounted for and cannot be relied on in this case.
- 85 There is also a claim that the emerging role of Advance Scope Physiotherapist, allowing for a medical substitution model, is an example of significant savings and improved efficiencies by different methods of working. This matter came before the Public Service Arbitrator in 2014 ([2014] WAIRC 00371; (2014) 94 WAIG 566). The evidence in that matter was that the role was trialled from 2006 and formal approval given for the creation of the positions in 2010. There was then a delay in a number of years in the formal creation of the position due to disputation about the classification level. That classification level was determined by the Arbitrator in the decision in 2014. However, the work of the position has been ongoing since 2006 (see [4] – [12] of that matter). Therefore, this too is not a matter which can be relied on in this case.
- 86 The development of the 4 Hour Rule is also relied on as demonstrating increased flexibility and efficiency. The background to the 4 Hour Rule is set out in *the Frontline Clerical Positions case* ([2013] WAIRC 00836; (2013) 93 WAIG 1565). The 4 Hour Rule commenced in 2009 as part of the National Emergency Access Target (NEAT) programme. This set out a staged process, with progressively increasing targets, over a period of years. The objective was that the percentage of patients to be seen and either discharged from Emergency Departments of hospitals or admitted to wards within four hours would increase over time. The first stage related to tertiary hospitals, and other types of hospitals followed at later stages. The percentages of patients to be dealt with within four hours increased as the years progressed. The NEAT comparison shows the target NEAT for 2013 as being 81%, for 2014 being 85% and for 2015 being 90% (see ex JMN2).
- 87 The National Elective Surgery Target (NEST) is a similar programme but relating to elective surgery.
- 88 These two programmes, along with others, demonstrate that efficiency and productivity measures are not necessarily achieved and accounted for in one bite. Rather, they may be one-off programmes or part of an ongoing programme with progressive targets which are assessed, reviewed and revised over time.
- 89 Therefore, while the 4 Hour Rule as it was in 2009 may be completely accounted for in the 2011 Agreement, since 2011 there have been further efficiency and productivity increases through the same programmes, which the HSU is entitled to rely on.
- 90 Also, while the 4 Hour Rule may have been rejected in respect of a work value claim in the *Frontline Clerical Positions case*, it has currency as part of the ongoing programme in NEAT.
- 91 It is true that NEAT has application particularly to Emergency Department staff, be they medical practitioners, nurses, or PACTS, all working to achieve the same target. However, it has a flow-through effect in that the wards of the hospitals need to coordinate with the Emergency Departments and to be managed in such a way as to allow for the acceptance of patients from the Emergency Department within the time allowed, according to the targets. This requires ongoing improvements in efficiency and productivity, beyond the Emergency Department, part of which was recognised as increased workload and efficiency in the *Frontline Clerical Positions case*. It also has application in areas such as pathology and, as demonstrated by Mr Nugent's evidence, in pharmacy.
- 92 The National Safety of Quality Health Standards is another programme requiring the active participation of PACTS for the benefit of efficiency and proper operation. Mr Hill referred to the Australian Commission on Safety and Quality in healthcare (ex 8, DPH 18) and the role of PACTS in their implementation, giving evidence that HSU members are engaged in all of the identified segments of the health workforce achieving the standards (ex 8 at [244]).
- 93 The PBS reforms have also produced benefits for the public health system through the work of PACTS.

- 94 Therefore, while there is not evidence of a uniform level of increased productivity and efficiency across all groups of PACTS within the ambit of the HSU, there is evidence of broad ranging, as well as particular, measures which apply equally to those employees as they do to registered nurses and medical practitioners.
- 95 These are valid points and should be given some weight when the Commission takes into consideration any changes in productivity that have occurred or are likely to occur.
- 96 With respect to both registered nurses and medical practitioners, the salary increases they received were able to be greater than the projected movement in the CPI because their agreements were concluded under the 2009 government wages policy which permitted an increase greater than CPI where there were demonstrated increased productivities and efficiencies. In our view, the changes to conditions in the 2014 Agreement going to increased productivity and efficiency, together with the increased productivity and efficiency changes referred to by the witnesses called by the HSU, are matters the Commission is required by the Act to take into account.
- 97 One of the underlying expectations of enterprise bargaining is that the resulting agreement will contain increased productivities and efficiencies tailored to the employer's operations. This is part of the Public Sector Wages Policy Statement 2014 at 4. If these are not given value, and not recognised in the salary outcome, it may lessen the incentive for them to be negotiated. In turn this may lessen one of the perceived advantages of enterprise bargaining.
- 98 The Commission in an arbitration under s 42G is not being asked to determine an increase in work value for a particular group of employees, nor the reclassification of an employee or class of employees and nor is it being asked to award differential wage increases to all of the employees covered by the 2014 Agreement. It is being asked to decide a fair salary increase for all PACTS. In this respect, the Commission stands in the shoes of the parties.
- 99 The Commission, deciding the matter according to equity, good conscience and the substantial merits of the case, and taking into account the matters required under s 26, should be slow to depart from the manner in which the parties have successfully concluded and implemented industrial agreements in the past, and which they urge upon the Commission on this occasion.
- 100 It is within the concept of enterprise bargaining across a workforce that there is an element of generalisation, perhaps even pragmatism, given that the history of industrial agreements to which we have been referred in the evidence shows in each case wage increases applied generally, or across the board. The evidence does not suggest that in each case there were improvements in productivity and efficiency by each one of the employees covered by the respective agreements in equal measure, or at all. Determining a valuation to these changes to produce an across the board increase is not a mathematical exercise. There is much to be said for the evidence of Mr Hill (ts 121) that in more recent times, there has been less science attached to measuring what efficiencies are worth in dollar terms.

The Government's wages policy and financial strategy

- 101 This formed a significant part of the Minister's case.
- **The Minister's submission**
- 102 The Minister refers to the statement of Mr Watson (ex C) which contained the Public Sector Wages Policy Statement 2014, which is the most recent government financial strategy statement; the 2014-15 Government Mid-Year Financial Projections Statement; and the part of the most recent budget papers under the title 'Agency information in support of the estimates dealing with the Department of Health'.
- 103 The Minister submits that the government is now budgeting for a deficit of \$1.3 billion in 2014/2015 and \$900 million in 2015/2016. If the Public Sector Wages Policy Statement 2014 is not adhered to, the deficits will be larger than currently predicted. The government's financial strategy is to return the budget to surplus in the shortest possible time while still meeting its responsibilities. The size of public sector wages and salaries is central to this financial strategy. The importance of adherence to the Public Sector Wages Policy Statement 2014 cannot be overstated.
- 104 The 2013/2014 Budget measures included a cap on general government agencies' salaries budgets with increases limited to the projected growth in the Perth CPI and the introduction of a new public sector wages policy. In Mr Watson's evidence, the Department of Health's budget does not have the capacity to pay for above CPI wage increases without impacting on service delivery.
- 105 The government has a financial strategy. That strategy includes ensuring that general government sector expense growth does not exceed revenue growth; to maintain a cash surplus from operating activities for the general government sector of at least 50% of infrastructure spend per year; to maintain the total non-financial public sector net debt to revenue ratio at or below 55%; and to maintain a cash operating surplus for the public sector net debt of at least 5% of operating cash receipts. It also seeks to provide a fair and efficient taxation system that is competitive with other Australian States. WA's headline credit rating has been downgraded one notch by Moody's Investor Services.
- 106 The government is committed to responsibly managing the State's finances and regaining the State's triple-A credit rating. Recent measures have been specifically targeted to address concerns raised by credit rating agencies in their downgrade announcements.
- 107 Measures contained in the Mid-Year Review are the latest instalment in a reform programme delivering ongoing efficiency improvements in the public sector. This includes a new public sector wages policy that caps wage increases to inflation. These measures have resulted in the lowest growth in salaries since 2000-2001 of 5.2%. Salaries expenditure is the single largest component of general government recurring spending and as such, limiting growth in salaries expenses remains critical to ensuring the overall sustainability of the State's finances. Even relatively small increases in salaries expenditure have the potential to increase pressure on the State's finances and dilute the impact of corrective measures implemented by the government and may require offsetting reductions in service provision, higher taxes and/or put pressure on forecast levels of net debt.

- **The government wages policy**

108 The government wages policy requires that increases in wages and associated conditions for all industrial agreements be capped at the projected growth in the Perth CPI as published from time to time by the Department of Treasury. Compliance with the wages policy is crucial to achieving a return to budget surplus. Since it came into operation in November 2013, all negotiated wage outcomes have been settled at projected CPI, which includes wage agreements reached in 2014 for police, firefighters, general public servants, teachers, TAFE lecturers and various Public Transport Authority groups.

- **The Department of Health's financial position**

109 The financial position of the Department of Health as presented in the 2014-15 Budget Paper No. 2, pages 127 – 153 were referred to by Mr Watson. It identifies spending risks and major spending changes. The annual wages bill for employees covered by the 2014 Agreement was \$1,226 million in 2013/2014, including allowances and superannuation costs. It estimates that granting the HSU's claim which would amount to a 9% increase over the two year life of the Agreement as an additional \$59 million. This figure includes not just the cost of salaries but also the associated cost of leave entitlements.

110 Mr Watson's evidence is that the Department of Health is funded for a wage increase consistent with projected CPI and would be expected to absorb the cost of any additional wage increase. The Department's budget is already under pressure from a range of sector-wide saving measures and the requirement to realise efficiency improvements to achieve convergence with the national PAC for hospital services by 2017/2018. The cost of any additional wage increase is thus expected to impact on service delivery.

111 In his evidence, Mr Watson acknowledged that the government did provide for greater amounts in the Health budget in relation to the increase to the wages of nurses, however it chose not to do so in relation to the increase to the salaries of medical practitioners. It is correct to say that there is no intended decrease in health services offered to the WA public as a result of the wage increase granted to nurses. In relation to the salary increase for medical practitioners, it is not anticipated that it would decrease the quality of health services provided to the WA public (ts 51/52).

112 The cost of the HSU's claim in this matter of \$19.9 million is 0.25% of the Health budget. It is 0.07% of the total budget expenditure of government of \$28.4 billion.

113 The Minister submits that s 26(2A) and (2B) requires the Commission to have regard to the government's strategy for dealing with the economic situation in which the State finds itself. The Commission is required to look at the State's budgetary position quite apart from the State's economy, although it may always have been part of looking at the State's economy, but it must also look at what impact its decision is going to have on the State's plans in relation to that budgetary position. The Minister urged strongly that in this case even if there was a link between the salaries of PACTS and the salaries of nurses, the changed economic circumstances will prevail. If the budgetary position is to be improved, it is crucial, as Mr Watson's evidence is, that wages growth comes within CPI.

- **The HSU's submission**

114 The HSU submits that the Commission has always had regard to the government wages policy, the government's financial statements and forecasts and plans in making its decisions. The question of weight is one entirely for the Commission. It submits that the policy in this case cannot be said to apply throughout the public sector without exception because the wage offer made to nurses is outside the policy; it is therefore of 'limited weight'.

115 The HSU says the Commission can have regard to whether limiting wage increases to CPI for this group of employees is, in all of the circumstances, fair or unfair. The question that needs to be examined is what is the fair and reasonable wage rise in all of the circumstances, including the wages policy and other economic evidence.

116 The HSU's submission is that the economic evidence does not loom large in this case because of the relatively small impact that the wage increases sought by the HSU will have on the government budget. The estimate of an additional \$59 million cost includes leave liability which may or may not be taken in the financial year to which the figure relates and is not necessarily the impact of the proposed wage increase, it is the possible impact (ts 59). Further, the evidence of the impact of the wage increases sought will be minimal; there is no realistic or cogent evidence that any health services will decrease as a result. There has been no decrease in health services from the wage and salary increases resulting from the agreements with registered nurses, UV enrolled nurses and medical practitioners. As, on the evidence, the 2015/2016 Budget has not as yet been drawn, the wage rises sought would be accommodated within that.

- **Conclusion regarding the government wages policy and financial strategy**

117 Other than whether the calculation of the cost of the HSU claim should take into account the cost of leave, the evidence of Mr Watson was not challenged and is accepted.

Consideration

118 This is the first occasion on which the Commission has been required to consider s 26(2A).

119 The Minister says the question for determination by the Commission is whether there are any other factors present which are so overwhelming as to make the salary increases offered by the Minister unfair in such a way that the Commission, despite the matters referred to in s 26(2A) and (2B), feels compelled to award a higher increase. However, formulating the question in this way suggests that the matters referred to in s 26(2A) and (2B) are a standard against which other factors are to be judged and we do not agree that is an appropriate description of the Commission's task.

120 The HSU says the task of the Commission is to answer the question - what is the fair and reasonable wage rise in all of the circumstances, including the State government wages policy and the other economic evidence? This more closely describes the obligation on the Commission in s 26 of the Act than does the question posed by the Minister but it too, with respect, does not fully describe the Commission's task.

- 121 Notwithstanding the recent insertion of s 26(2A) and (2B) the Commission is still to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms: s 26(1)(a) of the Act. It is to have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole: s 26(1)(c).
- 122 In doing so, it must take into consideration the matters in s 26(1)(d) and, in this case where the Commission is making a public sector decision, it also must take into consideration not just the public sector wages policy but also the financial position and fiscal strategy of the State and the financial position of the Department of Health: s 26(2A).
- 123 The legislation does not make s 26(2A) a standard against which the other considerations are to be assessed. Nor is s 26(2A) of greater weight than those matters in s 26(1)(d). Section 26(2C) specifies that '[t]he matters the Commission is required to take into consideration under subsection (2A) are in addition to any matter it is required to take into consideration under subsection (1)(d).' Each of the considerations in s 26(1)(d) and (2A) are to be given their own weight. Deciding what is the fair outcome of this arbitration under s 42G of the wage increases for the 2014 Agreement involves a balancing of the parties' respective positions in the context of those considerations.
- 124 The HSU has demonstrated a past general consistency of industrial agreement wage and salary increases to registered nurses, medical practitioners and support workers in at least the more recent past, and that a significantly lesser percentage increase to PACTS is undesirable.
- 125 The evidence of some dissatisfaction of HSU members at the size of the salary increases in the 2014 Agreement compared to nurses, medical practitioners and support staff and consequent loss of morale is undesirable in the context of the need for PACTS to work together to provide the standard of healthcare in the community.
- 126 The application of the government wages policy from November 2013 needs to rest upon an equitable basis. The HSU has shown that in its case it does not rest on an equitable basis. The PACTS are part of a health workforce that, in the cases of registered nurses and medical practitioners, received the higher wage or salary increases available under the 2009 government wages policy. The salary increases under the 2014 Agreement are significantly lower.
- 127 It produces a situation where the PACTS are making a greater contribution to the recovery of the State's financial position and fiscal strategy than the medical practitioners, registered nurses and support staff with whom they closely work. That is inequitable.
- 128 We take into account that what became the 2014 Agreement commenced in close proximity to the end of the application of the 2011 wages policy. The HSU commenced consultation with its members prior to Christmas 2013 (ex 8 at [144]). Bargaining for the 2014 Agreement formally commenced by letter dated 23 December 2013, from Mr Fergus as Acting Director, received by the HSU on 31 December 2013, which proposed the commencement of negotiations for a new agreement (ts 103 and ex 8, DPH 32). This is less than six weeks after the Public Sector Wages Policy Statement 2014 itself commenced. The HSU's formal claim is dated 7 April 2014 (DPH 33).
- 129 The timing of the 2014 Agreement, which with the expiry dates of the registered nurses and the medical practitioners agreements and the arbitration of the support workers' agreement together can be seen as 'the last of that previous wage round' as Mr Hill described, and the significantly lesser percentage salary increases to PACTS in the 2014 Agreement compared to those received over the same periods of time by nurses, medical practitioners and support workers, is significant.
- 130 The HSU has also shown that there are some changes in productivity and efficiency since the 2011 Agreement in the work performed, and in the 2014 Agreement that have occurred or are likely to occur. Although the extent of productivity improvements and the value to be attached to them is controversial, there is a need to facilitate the efficient organisation and performance of work according to the needs of the Department of Health. While it is not clear the extent to which the wage increases received by registered nurses were based upon significant changes to productivity and efficiency, there should not be a perception of workplace inequality from a significantly different wages increase.
- 131 This arbitration is occurring at a time when the State is experiencing the most challenging fiscal environment for many years and ongoing global economic uncertainty. While the state of the national economy is not a consideration relevant to this matter, the state of the economy of WA, and the capacity of the Department of Health to pay, are part of the considerations under s 26(1)(d) and (2A).
- 132 The rate of growth will be the slowest rate of growth since 1990-91 and State final demand is expected to fall by 1% in 2014-15. Revenue estimates in the Mid-Year Review have been revised down since the 2014-15 Budget by \$5 billion over the forward estimates period, due mainly to weaker commodity prices, particularly for iron ore and oil, as well as lower taxation revenue forecasts due to moderating economic conditions and weaker employment and wages growth. There is an estimated general government sector operating deficit in 2014-15 of \$1.3 billion. Net debt for the total public sector is forecast to increase from \$20.8 billion at 30 June 2014 to reach \$30.9 billion by 30 June 2018.
- 133 We recognise that compliance with the government wages policy is crucial to achieving a return to budget surplus. The Department of Health is funded for a wage increase consistent with government wages policy and would be expected to absorb the cost of any additional wage increase. The Department's budget is already under pressure.
- 134 Although the government wages policy has been shown to have been exceeded by the government in the case of registered nurses and UV enrolled nurses, the background of wage agreements reached on the basis of government wages policy in 2014 for police, firefighters, general public servants, teachers, TAFE lecturers and various public transport authority groups is compelling. It demonstrates a recognition of the significantly changed economic circumstances applying now than applied at the time the registered nurses and medical practitioners agreements were made. There is much to be said for the submission on behalf of the Minister that in these circumstances salary increases for PACTS in line with the projected CPI for Perth, and which may exceed CPI if the current forecast is accurate, are fair.

- 135 We have concluded that HSU has shown that it has not had a fair go and that fairness requires a salary increase in excess of projected CPI. While it is clear that there is no historical link or nexus between the salary increases of PACTS and those of registered nurses and medical practitioners, it is unhelpful and not conducive of productive working relationships, for there to be a significant disparity over time.
- 136 Although s 26(1) and (2A) of the Act provide an opportunity for the Commission to consider claims for salary increases greater than projected CPI should the circumstances warrant, and each case will be considered on its merits, arbitrated wage or salary increases greater than projected CPI should be the exception rather than the rule due to the State experiencing the most challenging fiscal environment for many years.
- 137 To prescribe a salary increase greater than CPI in the 2014 Agreement is not taken lightly. It will be in the interests of the persons immediately concerned but it may impact upon the Department of Health's ability to provide health services to the community, although it is not inevitable that it will do so. The salary increase to be ordered is not to be reached with mathematical precision, particularly in circumstances where there is no agreed valuation of any productivity and efficiency improvements.
- 138 In our view salary increases of 3.75% and 3% are fair in the circumstances of the wage and salary increases received by medical practitioners, nurses and support workers over the corresponding period, the timing of the 2014 Agreement, and that there has been some increase in productivity and efficiency since the 2011 Agreement. The increases will provide salary increases to the PACTS in the public health system which have greater consistency with the wage and salary increases received by medical practitioners, nurses and support workers over the corresponding period but take account also of the economic circumstances facing the State and its fiscal strategy to deal with them.
- 139 There will be a consequent, though marginal, cost increase to the Department of Health's budget. There will be a negligible effect on the State's economy, and no evidence to suggest it will have any effect upon the level of employment or inflation.
- 140 A minute of proposed order now issues.

2015 WAIRC 00347

WA HEALTH - HSUWA - PACTS INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, THE PEEL HEALTH SERVICES BOARD, AND WA COUNTRY HEALTH SERVICE

APPLICANT

-v-

HEALTH SERVICES UNION OF WESTERN AUSTRALIA
(UNION OF WORKERS)

RESPONDENT**CORAM**

CHIEF COMMISSIONER A R BEECH
ACTING SENIOR COMMISSIONER P E SCOTT
COMMISSIONER S M MAYMAN

DATE

THURSDAY, 30 APRIL 2015

FILE NO/S

PSAAG 19 OF 2014

CITATION NO.

2015 WAIRC 00347

Result	Salary increases determined
Representation	
Applicant	Mr D Matthews of counsel and with him Mr J Carroll of counsel
Respondent	Mr M Ritter SC and with him Mr S Millman of counsel

Order

HAVING HEARD Mr D Matthews of counsel and with him Mr J Carroll of counsel on behalf of The Minister for Health in his incorporated capacity under s7 of the *Hospitals and Health Services Act 1927* as the hospitals formerly comprised in the Metropolitan Health Service Board, the Peel Health Services Board, and WA Country Health Service, and Mr M Ritter SC and with him Mr S Millman of counsel on behalf of the Health Services Union of Western Australia (Union of Workers), the Commission, pursuant to the requirements of s 42G of the *Industrial Relations Act 1979* hereby orders:

1. THAT the *WA Health – HSUWA – PACTS Industrial Agreement 2014* provide for salary increases of 3.75% on and from 1 July 2014 and 3.00% on and from 1 July 2015.

2. THAT the rates of the Mortuary Staff Allowance be adjusted to reflect the salary increases provided in Order 1 above by amending clause 32.3 Annual Allowance Rate, of *the WA Health - HSUWA - PACTS Industrial Agreement 2014*, and the table contained therein to read:

32.3 Annual Allowance Rate

Existing Rate	On and from 1 July 2014	On and from 1 July 2015
\$2,290	\$2,376	\$2,447

3. THAT to give effect to Order 1 above, the *WA Health - HSUWA - PACTS Industrial Agreement 2014* include the terms specified in the following schedule.

(Sgd.) A R BEECH,
Chief Commissioner,
Commission In Court Session.

[L.S.]

SCHEDULE

That the following Schedules be inserted into **PART 11 - SCHEDULES** of *the WA Health - HSUWA - PACTS Industrial Agreement 2014*

SCHEDULE 1 - SALARIES - GENERAL DIVISION

Classification and increment	Existing Rate	On and from 1 July 2014	On and from 1 July 2015
		3.75%	3.0%
Under 17 yrs	\$23,545	\$24,428	\$25,161
G-17 yrs	\$27,492	\$28,523	\$29,379
G-18 yrs	\$32,092	\$33,295	\$34,294
G-19 yrs	\$37,143	\$38,536	\$39,692
G-20 yrs	\$41,713	\$43,277	\$44,576
G-1/2.1	\$45,824	\$47,542	\$48,969
G-1/2.2	\$48,304	\$50,115	\$51,619
G-1/2.3	\$49,609	\$51,469	\$53,013
G-1/2.4	\$50,951	\$52,862	\$54,448
G-1/2.5	\$52,260	\$54,220	\$55,846
G-1/2.6	\$53,729	\$55,744	\$57,416
G-1/2.7	\$54,746	\$56,799	\$58,503
G-1/2.8	\$56,242	\$58,351	\$60,102
G-2.1	\$52,260	\$54,220	\$55,846
G-2.2	\$53,729	\$55,744	\$57,416
G-2.3	\$54,746	\$56,799	\$58,503
G-2.4	\$56,242	\$58,351	\$60,102
G-3.1	\$57,901	\$60,072	\$61,874
G-3.2	\$59,414	\$61,642	\$63,491
G-3.3	\$61,018	\$63,306	\$65,205
G-3.4	\$63,504	\$65,885	\$67,862
G-4.1	\$66,097	\$68,576	\$70,633
G-4.2	\$68,042	\$70,594	\$72,711
G-4.3	\$70,874	\$73,532	\$75,738

Classification and increment	Existing Rate	On and from 1 July 2014	On and from 1 July 2015
		3.75%	3.0%
G-5.1	\$72,349	\$75,062	\$77,314
G-5.2	\$74,373	\$77,162	\$79,477
G-5.3	\$76,457	\$79,324	\$81,704
G-5.4	\$78,601	\$81,549	\$83,995
G-6.1	\$82,733	\$85,835	\$88,411
G-6.2	\$85,797	\$89,014	\$91,685
G-6.3	\$90,158	\$93,539	\$96,345
G-7.1	\$92,490	\$95,958	\$98,837
G-7.2	\$95,441	\$99,020	\$101,991
G-7.3	\$98,501	\$102,195	\$105,261
G-8.1	\$102,975	\$106,837	\$110,042
G-8.2	\$106,640	\$110,639	\$113,958
G-9.1	\$112,576	\$116,798	\$120,302
G-9.2	\$116,446	\$120,813	\$124,437
G-10.1	\$120,690	\$125,216	\$128,972
G-10.2	\$127,731	\$132,521	\$136,497
G-11.1	\$133,184	\$138,178	\$142,324
G-11.2	\$138,734	\$143,937	\$148,255
G-12	\$146,844	\$152,351	\$156,921
G-13	\$152,003	\$157,703	\$162,434
G-14	\$157,884	\$163,805	\$168,719

SCHEDULE 2 - SALARIES - PROFESSIONAL DIVISION & OTHER SPECIFIED CALLINGS

Classification and increment	Existing Rate	On and from 1 July 2014	On and from 1 July 2015
		3.75%	3.0%
P-1.1	\$64,222	\$66,630	\$68,629
P-1.2	\$68,042	\$70,594	\$72,711
P-1.3	\$72,349	\$75,062	\$77,314
P-1.4	\$76,457	\$79,324	\$81,704
P-1.5	\$82,733	\$85,835	\$88,411
P-1.6	\$90,158	\$93,539	\$96,345
P-2.1	\$92,490	\$95,958	\$98,837
P-2.2	\$95,441	\$99,020	\$101,991
P-2.3	\$98,501	\$102,195	\$105,261
P-3.1	\$102,975	\$106,837	\$110,042

Classification and increment	Existing Rate	On and from 1 July 2014	On and from 1 July 2015
		3.75%	3.0%
P-3.2	\$106,640	\$110,639	\$113,958
P-4.1	\$112,576	\$116,798	\$120,302
P-4.2	\$116,446	\$120,813	\$124,437
P-5.1	\$120,690	\$125,216	\$128,972
P-5.2	\$127,731	\$132,521	\$136,497
P-6.1	\$133,184	\$138,178	\$142,324
P-6.2	\$138,734	\$143,937	\$148,255
P-7	\$146,844	\$152,351	\$156,921
P-8	\$152,003	\$157,703	\$162,434
P-9	\$157,884	\$163,805	\$168,719

SCHEDULE 3 - SALARIES - SENIOR OFFICER DIVISION

Classification	Existing Rate	On and from 1 July 2014	On and from 1 July 2015
		3.75%	3.0%
Class 1	\$166,780	\$173,034	\$178,225
Class 2	\$175,676	\$182,264	\$187,732
Class 3	\$184,568	\$191,489	\$197,234
Class 4	\$193,460	\$200,715	\$206,736

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2015 WAIRC 00316

TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

MONDAY, 20 APRIL 2015

FILE NO/S

APPL 8 OF 2014

CITATION NO.

2015 WAIRC 00316

Result

Award varied

Order

HAVING heard Mr M Amati on behalf of The State School Teachers' Union of W.A. (Incorporated) and Ms E McAdam on behalf of the Director General of the Department of Education, and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Teachers (Public Sector Primary and Secondary Education) Award 1993 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 5th day of December 2014.

[L.S.]

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

SCHEDULE

1. Clause 53 – Locality Allowance: Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) Adjustment of rates

(a) For the purposes of this subclause:

- (i) “*prescribed district allowance rate*” means the rate provided for in COLUMN II – STANDARD RATE – of Schedule D – District Allowance of the *Public Service Award 1992* (PSA), or its replacement, in accordance with the District in which a locality is named in Schedule E – Locality Allowance of this Award is situated; unless the relevant locality is named in COLUMN III – EXCEPTIONS TO STANDARD RATE TOWN OR PLACE – of Schedule D – District Allowance of the PSA, where the prescribed district allowance rate is provided in COLUMN IV of that Schedule;
- (ii) “*District*” means a district defined in clause 43(2) of the PSA.

(b) A locality allowance rate in Schedule E – Locality Allowance of this Award shall remain unchanged until such time as the locality allowance rate is aligned with the prescribed district allowance rate in accordance with the following:

- (i) Subject to subclause (b)(iii), where a locality allowance rate is greater than the prescribed district allowance rate, the locality allowance shall remain unchanged.
- (ii) Where the prescribed district allowance rate is greater than the locality allowance payable in a locality, the locality allowance shall be adjusted to reflect the prescribed district allowance rate.
- (iii) Any adjustments to the locality allowance rate shall be in accordance with movements in the prescribed district allowance rate. The locality allowance rate shall not fall below the locality allowance rate applicable at 16 December 2008 (89 WAIG 151).

(c) Any adjustments to locality allowance rates pursuant to subclause (b) shall be by way of an application to the Industrial Relations Commission to vary Schedule E – Locality allowance of this Award.

2. Schedule E – Locality Allowance: Delete this schedule and insert the following in lieu thereof:

District 1	\$	District 2	\$
Badgingarra	461	Bremer Bay	1140
Ballidu	166	Cascade	1012
Beacon	743	Condingup	1140
Bencubbin	166	Coolgardie	890
Binnu	383	Esperance	1091
Borden	383	Fitzgerald	1012
Buntine	166	Grass Patch	1012
Cadoux	166	Hopetoun	1012
Carnamah	166	Jerdacuttup	1140
Cervantes	461	Kalgoorlie	432
Coorow	166	Kambalda	827
Dalwallinu	166	Lake King	1012
Eneabba	420	Mt. Hampton	1140
Gairdner River	461	Marvel Loch	1154
Hyden	420	Moorine Rock	1085
Jerramungup	383	Mukinbudin	827
Jurien	461	Munglinup	1012
Kalannie	166	Newdegate	827
Latham	166	Norseman	1091
Leeman	461	Ravensthorpe	1091
Mingenew	166	Salmon Gums	1091
Morawa	166	Scaddan	1012
Mt Many Peaks	420	Southern Cross	827
Mullewa	166	Varley	1012
Narembeen	166	Westonia	919

District 1	\$	District 2	\$
Ongerup	381	Wialki	1319
Perenjori	166		
Pingrup	383		
South Stirling	418		
Three Springs	166		
Tincurrin	383		
Wellstead	642		
Wubin	166		
Yuna	383		
District 3	\$	District 4	\$
Cue	2010	Blackstone	3869
Kalbarri	1508	Burringurrah (Mt James)	2866
Laverton	2010	Carnarvon	1723
Leinster	2059	Gascoyne Junction	2725
Leonora	2010	Irruntja (Wingellina)	3869
Meekatharra	1829	Manta Maru (Jameson)	4355
Menzies	1500	Rawlinna	2644
Mt. Magnet	2010	Shark Bay	2085
Mt. Margaret	2145	Tjirrkarli (Warburton West)	3980
Sandstone	2293	Tjukurla	3980
Useless Loop	2085	Warakurna (Giles)	3869
Wiluna	2281	Warburton	4912
Yalgoo	2010	Warnarn	4356
		Yintarri (Coonana)	2351
District 5	\$	District 6	\$
Bayulu (Gogo)	4589	Cygnets Bay	4437
Broome	3469	Duwul (Doon Doon)	4437
Camballin	4544	Glen Hill	4437
Cherrabun	4381	Kalumburu	4645
Dampier	3469	Koolan Island	4437
Exmouth	3469	Kununurra	4437
Derby	3469	One Arm Point	4437
Fitzroy	4888	Oombulgurri	4507
Goldsworthy	3469	Wananami (Mt Barnett)	4798
Halls Creek	4888	Wyndham	4437
Hedland	3976	Christmas Island	4437
Jigalong	3469	Cocos Island	4437
Karratha	4273		
Kiwirrkurra (Pollock Hills)	4031		
La Grange	4031		
Marble Bar	4544		
Mt. Cooke	4356		
Muludja (Fossil Downs)	4589		
Newman	3469		
Nullagine	4888		
Onslow	3469		
Pannawonica	4537		
Paraburdoo	3469		
Roebourne	3469		
Shay Gap	3469		
Telfer	4355		
Tom Price	3469		
Wangkatjunga (Christmas Creek)	4381		
Wickham	3469		
Yandeyarra	4132		

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2015 WAIRC 00324

INTERPRETATION OF CLAUSES 3.1.1, 3.1.2 AND 6.7 OF THE PUBLIC TRANSPORT AUTHORITY (TRANSPERTH TRAIN OPERATIONS RAIL CAR DRIVERS) INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00324
CORAM : COMMISSIONER S J KENNER
HEARD : TUESDAY, 24 FEBRUARY 2015
DELIVERED : TUESDAY, 21 APRIL 2015
FILE NO. : APPL 36 OF 2014
BETWEEN : THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES,
 WEST AUSTRALIAN BRANCH
 Applicant
 AND
 PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
 Respondent

Catchwords : Industrial law (WA) - Agreement - Interpretation of clauses of the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2013 - Interpretation of cls 3.1.1, 3.1.2 and 6.7 - Principles applied - Method of rostering drivers who take annual leave - Terms of the Agreement read as a whole - Standard hours and ordinary hours - Declaration issued
Legislation : *Industrial Relations Act 1979* (WA) s 46
Minimum Conditions of Employment Act 1993 (WA) ss 5, 18(1), 23
Result : Declaration issued
Representation:
Counsel:
Applicant : Mr K Singh
Respondent : Mr R Andretich of counsel

Case(s) referred to in reasons:

Amtcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241

BHP Billiton Iron Ore Pty Ltd v The Australian Workers' Union Western Australian Branch, Industrial Union of Workers & Ors (2006) 86 WAIG 2696

Director General, Department of Education v United Voice WA (2014) 94 WAIG 1

Kucks v CSR Limited (1996) 66 IR 182

Norwest Beef Industries Limited v Australian Meat Industry Employees Union, Industrial Union of Workers, Perth (1984) 64 WAIG 2124

Re Engine Drivers' Award – State (1980) AILR 314

Re The Vehicle Industry – Repair, Services and Retail – Award 1976 (1979) 38 FLR 267

The Annual Leave Cases 1971 (1972) 144 CAR 528

Reasons for Decision

- 1 When a railcar driver employed by the Public Transport Authority goes on one week's annual leave, in the first week of a fortnightly cycle, the practice of the Authority is to deduct 38 hours from the employee's leave balance and when the employee returns, require the driver to work 42 hours in the second week of the fortnightly roster cycle. For that fortnightly cycle, the driver is paid for 78 hours at their ordinary rate of pay and accumulates two hours towards "credit days". Credit days are days that may be taken off work by a driver on full pay. They result from four hours of each fortnightly roster cycle of 80 hours of work, being credited to the driver.
- 2 The method of rostering drivers who take annual leave is disputed by the Union. It contended that on its proper construction, the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2013 requires drivers to be paid overtime for time worked in excess of 40 hours in the second week of the fortnightly roster cycle, after a driver takes one week of annual leave. This is on the basis that in the second week, a driver can only accrue two hours towards a credit day, over and above 38 ordinary hours per week.

- 3 As the parties cannot agree as to the proper construction of the terms of the Agreement, in particular cls 3.1.1, 3.1.2 and 6.7, the Union brings this application for a formal interpretation by the Commission. Declarations and orders are sought.

Questions posed

- 4 Apart from question 4.3 in the application, which the parties agree is not necessary to be answered for the purposes of resolving the present disagreement, the questions posed for answer in these proceedings are:
- 4.1 Are rail car drivers employed on a 76 hour per fortnight basis?
 - 4.2 Do 76 hours per fortnight represent a rail car driver's ordinary hours?
 - ...
 - 4.4 Do rail car drivers, who are regular day shift employees, accrue four weeks' annual leave (with reference to their ordinary hours)?
 - 4.5 Do rail car drivers, who are seven day shift employees, accrue five weeks' annual leave (with reference to their ordinary hours)?
 - 4.6 When a rail car driver takes a week of annual leave, should 38 hours be deducted from their leave balance?
 - 4.7 When a rail car driver takes a week of annual leave in a fortnightly cycle, are they only required to work 38 hours in the following week to make up their ordinary hours?
 - 4.8 When a rail car driver takes a week of annual leave in a fortnightly cycle, can they only accumulate a maximum of two hours towards credit days in the following week?
 - 4.9 When a rail car driver takes a week of annual leave in a fortnightly cycle, is any rostered time above 40 hours in the following week rostered overtime?

Provisions of the Agreement

- 5 It is convenient to set out the relevant provisions of the Agreement referred to in the application. They are cls 3.1.1, 3.1.2 and 6.7 which are in the following terms:
- 3.1.1 The ordinary hours of full-time employment shall be seventy six (76) hours per fortnight, and shall consist of up to ten shifts which shall constitute a fortnight's work.
 - 3.1.2 For the purposes of subclause 3.1 the seventy six (76) hour fortnight shall be worked in accordance with the following provisions:
 - (a) The Standard Hours of full-time employment in each fortnightly cycle will be 80 hours.
 - (b) Four hours in each fortnightly cycle will be accumulated towards Credit Days, which may be cleared in accordance with subclause 6.6 - Taking of Leave or be cashed out in accordance with subclause 6.5 - Cashing out of Leave Entitlements.

6.7 Annual Leave

6.7.1 Regular Day Shift Employees

- (a) Except as herein provided a period of four (4) consecutive weeks leave with payment at the employee's base rate of wage, plus a leave loading of seventeen and a half percent (17.5%) shall be allowed annually to an employee by the Employer.
- (b) Entitlements to Annual Leave accrue pro rata on a weekly basis.

6.7.2 Seven Day Shift Employees

- (a) Shift employees who work other than regular day shift shall be entitled and allowed an additional week's leave on full pay inclusive of leave loading of twenty (20%) percent.
- (b) This provision shall also apply to any other employee whose rostered hours of work can be extended over Saturdays and Public Holidays and whose hours of duty vary throughout the twenty-four (24) hours of the day and who may be called upon to work Sundays.
- (c) Notwithstanding anything elsewhere contained herein this subclause shall not apply to any employee whose rostered hours of work must be completed between Monday and Friday inclusive and not on Public Holidays.

- 6.7.3 Part Qualifying Period Seven Day Shift Employee: Where an employee with twelve (12) months' continuous service is engaged for part of a qualifying twelve (12) monthly period as a seven day shift employee, the employee shall be entitled to have the period of Annual Leave to which the employee is otherwise entitled under this subclause increased by one-twelfth of a week for each completed month the employee is continually so engaged, and shall be paid for the Annual Leave plus the extra leave at the employee's Base Rate of Pay, plus a loading calculated at eighteen and three quarter (18.75%) percent for the Annual Leave taken.

6.7.4 Annual Leave Loadings: An employee shall be entitled to:

- (a) the amount of loading calculated in accordance with subclauses 6.7.1, 6.7.2 or 6.7.3 as the case may be.
- (b) The Annual Leave Loading shall not exceed the Average Weekly Total Earnings of all males in Western Australia as published by the Australian Bureau of Statistics for the September Quarter of the year immediately preceding that in which the leave commences.

- 6.7.5 The maximum Annual Leave Loading payable to shift employees who are granted an additional week's leave shall not exceed 5/4th of the Average Weekly Total Earnings of all Males in Western Australia, as published by the Australian Bureau of Statistics, for the September quarter of the year immediately preceding that in which the leave commences.
- 6.7.6 No Deduction: An employee's entitlement to Annual Leave continues to accrue for the period an employee is off duty through sickness for any continuous period of up to three (3) calendar months.

Contentions

- 6 Both the Union and the Authority helpfully filed written submissions which they supplemented by oral submissions in the course of the hearing.
- 7 In summary the Union contended that on its proper construction, the Agreement in cl 3.1.2 does not provide for the circumstances where a railcar driver is unable to work up to ten shifts in a fortnightly period, because he or she is on annual leave during that time. The submission of the Union was that it would be an absurd result if drivers were required to meet their standard hours of employment of 80 hours in a fortnight, where they are unable to work up to ten shifts over that period.
- 8 Rather, the Union submitted that where a driver takes a week's annual leave, and is accordingly unavailable to work five shifts in that fortnightly cycle, then on their return, they should only be required to work 38 hours to meet their ordinary hours' requirement, plus an additional two hours as accumulated time towards credit days. Thus, a driver is only required to work 40 hours in the second week of a fortnightly cycle, before the requirement to pay overtime applies.
- 9 On the other hand, the Authority submitted that it is clear from the terms of the Agreement read as a whole, that accrued annual leave is taken at the rate of 38 hours per week, being part of a driver's ordinary hours of work. In the situation where an employee takes one weeks' annual leave in the first week of a fortnightly cycle of 80 standard hours, that first week of leave is paid at 38 ordinary hours. The Authority contended that there is no accrual of two hours towards credit days because payment of 38 ordinary hours satisfies the requirements of cl 3.1.1. In the following week on return from leave, the driver is required to work in accordance with clause 3.1.2, providing for rostered hours of up to 42 in that week prior to overtime rates being applicable. This is on the basis that over the fortnightly cycle, a maximum of 80 ordinary hours may be worked prior to overtime being applied.

Consideration

- 10 The interpretation of an industrial agreement, as with any other instrument, is essentially a text based activity. The Commission should adopt the ordinary and natural meaning of the provisions in the award or industrial agreement, having regard for the context in which the words in question appear: *BHP Billiton Iron Ore Pty Ltd v The Australian Workers' Union Western Australian Branch, Industrial Union of Workers & Ors* (2006) 86 WAIG 2696; *Norwest Beef Industries Limited v Australian Meat Industry Employees Union, Industrial Union of Workers, Perth* (1984) 64 WAIG 2124. In the case of industrial agreements, the language of an agreement should be construed in accordance with its industrial purpose and context, avoiding a narrow or pedantic approach to interpretation: *Director General, Department of Education v United Voice WA* (2014) 94 WAIG 1 per Buss J adopting and applying *Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 and *Kucks v CSR Limited* (1996) 66 IR 182.
- 11 There is a distinction in the Agreement between "ordinary hours" and "standard hours". By cl 3.1.1 ordinary hours are 76 hours per fortnight. By extension, this means 38 ordinary hours are the ordinary hours per week, having regard to the definition of a "day" in cl 1.5.8 of 7.6 hours. On the other hand, "standard hours", are by cl 1.5.28, defined as those specified in cl 3.1.2. Standard hours are paid at "base rates only". By cl 1.5.5, "base rate of pay" is that set out in cl 4.1. This base rate of pay is the ordinary weekly rate for a railcar driver.
- 12 Construed as a whole, as the Agreement must be, it seems clear that the distinction between ordinary hours and standard hours, is for the purposes of enabling a work cycle of hours to include a "credit day" as it is defined in cl 1.5.6, on the basis that a driver works 80 hours in a fortnightly cycle, and accrues four hours per fortnight, or eight hours per month, to be taken as time off at a later date. That in itself is wholly unremarkable. Many awards and industrial agreements make provision for how a 38 hour week may be worked, this being one of them. Importantly, for present purposes, the Authority may roster a railcar driver to work 80 ordinary hours, prior to the obligation to pay overtime in any fortnightly period.
- 13 From the combined effect of cls 6.7.1, 3.1.1, 1.5.8, 1.5.5 and 4.1, in my view, a weeks' annual leave must be construed as a period of absence for five working days of 38 ordinary hours. This is on the additional basis that by s 23 of the Minimum Conditions of Employment Act 1993, implied into all awards and industrial agreements by s 5 of the MCE Act, is an entitlement to four weeks' annual leave based on an employee's ordinary hours of work.
- 14 As a matter of long standing industrial principle, a period of annual leave is to be generally regarded as time worked and service performed by an employee. An employee whilst on annual leave is entitled to receive, subject to the terms of any industrial instrument applicable to their employment, the payments they would otherwise have received for ordinary working hours, had they not been on leave: *The Annual Leave Cases 1971* (1972) 144 CAR 528; *Re The Vehicle Industry – Repair, Services and Retail – Award 1976* (1979) 38 FLR 267; *Re Engine Drivers' Award – State* (1980) AILR 314. This may extend to over award payments, shift loadings and various allowances payable for working ordinary hours. Thus the annual leave benefit, whether conferred by industrial instrument or statutory provision, relieves an employee from the obligation to attend at work, whilst receiving remuneration for an ordinary week's work (see too s 18(1) MCE Act).
- 15 In my view, this principle assists in answering the central proposition thrown up by this matter. Whilst a railcar driver is on annual leave for one week of a fortnightly cycle, they are still, for the purposes of the Agreement, regarded as being "at work". Their service, for award or benefit purposes, is continuous. However, as they are not actually required to work 40 hours, as part of the standard hours of work for the purposes of cl 3.1.2 of the Agreement, they do not accumulate two hours towards

credit days. A railcar driver whilst on leave is paid his or her ordinary hours for a week as prescribed in cl 3.1.1 which is 38 hours pay.

- 16 It follows from this, that when a railcar driver returns to work in the second week of a fortnightly work cycle, the Authority, consistent with its rights under cl 3.1.2, is able to roster the driver such that the standard hours are met over the fortnightly period, of 80 hours. This means, having “worked” 38 hours in the first week while on annual leave, the Authority may roster a driver for up to 42 hours in the second week, to meet the standard hours requirement in cl 3.1.2, prior to overtime hours becoming payable. The approach to construction adopted by the Union in effect means, that when a driver takes a period of leave in a fortnightly cycle, then their standard hours revert to only 78 for that fortnightly period. In my view, that is not consistent with the scheme of hours of work as contemplated by the relevant clauses in the Agreement.
- 17 In my view, the approach I have adopted in this matter is consistent with the terms of the Agreement, considered as a whole. It is consistent with the dual concepts of “ordinary hours” and “standard hours” in cls 3.1.1 and 3.1.2 of the Agreement, and preserves the integrity of both. It is an approach that does not involve any absurdity or repugnancy with the terms of the Agreement as a whole. The Agreement provides for 38 hours to be an ordinary working week, but also provides for 80 hours in a fortnight to be worked prior to the payment of overtime, to account for the accumulation of credit days. The interpretation adopted in this matter is consistent with these two concepts.

Answers to questions posed

18 Based upon the above consideration, the answers to the questions posed are:

- (a) 4.1 – yes
- (b) 4.2 – yes
- (c) 4.3 – unnecessary to answer
- (d) 4.4 – yes
- (e) 4.5 – yes
- (f) 4.6 – yes
- (g) 4.7 – no. A driver is required to work 40 hours.
- (h) 4.8 – yes
- (i) 4.9 – no. Overtime will only apply after 42 hours is worked

19 A declaration now issues.

2015 WAIRC 00329

INTERPRETATION OF CLAUSES 3.1.1, 3.1.2 AND 6.7 OF THE PUBLIC TRANSPORT AUTHORITY (TRANSPERTH TRAIN OPERATIONS RAIL CAR DRIVERS) INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE WEDNESDAY, 22 APRIL 2015

FILE NO. APPL 36 OF 2014

CITATION NO. 2015 WAIRC 00329

Result Declaration issued

Representation

Applicant Mr K Singh

Respondent Mr R Andretich of counsel

Declaration

HAVING heard Mr K Singh on behalf of the applicant and Mr R Andretich of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares for the purposes of the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2013 –

- (1) THAT railcar drivers are employed on a 76 hour per fortnight basis.

- (2) THAT 76 hours per fortnight represents a railcar driver's ordinary hours.
- (3) THAT railcar drivers, who are regular day shift employees accrue four weeks' annual leave (with reference to their ordinary hours).
- (4) THAT railcar drivers who are seven day shift employees accrue five weeks' annual leave (with reference to their ordinary hours).
- (5) THAT when a railcar driver takes a week of annual leave, 38 hours should be deducted from their leave balance.
- (6) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, they are required to work 40 hours in the following week to make up their ordinary hours.
- (7) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, they can only accumulate a maximum of two hours towards credit days in the following week.
- (8) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, overtime will only apply after 42 hours are worked in the following week.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00325

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2015 WAIRC 00325
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 4 MARCH AND THURSDAY 5 MARCH 2015
DELIVERED : WEDNESDAY 22 APRIL 2015
FILE NO. : M 125 OF 2012
BETWEEN : DR LI-ON LAM

CLAIMANT

AND

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF
THE HOSPITALS AND HEALTH SERVICE ACT 1927 (WA) AS THE HOSPITALS
FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

RESPONDENT

FILE NO. : M 126 OF 2012
BETWEEN : DR T LEYS

CLAIMANT

AND

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF
THE HOSPITALS AND HEALTH SERVICE ACT 1927 (WA) AS THE HOSPITALS
FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

RESPONDENT

FILE NO. : M 127 OF 2012
BETWEEN : DR M SCADDAN

CLAIMANT

AND

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF
THE HOSPITALS AND HEALTH SERVICE ACT 1927 (WA) AS THE HOSPITALS
FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

RESPONDENT

FILE NO. : M 128 OF 2012
BETWEEN : PROF RICHARD CAREY SMITH

CLAIMANT

AND

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF
THE HOSPITALS AND HEALTH SERVICE ACT 1927 (WA) AS THE HOSPITALS
FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

RESPONDENT

Catchwords	:	Construction of Clause 32 of the Child and Adolescent Health Service, North Metropolitan Area Health Service, South Metropolitan Area Health Service Orthopaedic Trauma Surgery Roster Agreement (2011)
Legislation	:	<i>Industrial Relations Act 1979</i> Industrial Magistrates Courts (General Jurisdiction) Regulations 2005
Case(s) referred to in Reasons	:	<i>Director General, Department of Education v United Voice WA</i> [2013] WASCA 287 <i>Currie v Dempsey (1967)</i> 69 SR(NSW) 116 <i>Miller v Minister of Pensions (1947)</i> 2AER 372
Instruments	:	Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011 Sir Charles Gairdner Hospital Orthopaedic Consultant Interim Agreement 2008 Child and Adolescent Health Service, North Metropolitan Area Health Service, South Metropolitan Area Health Service Orthopaedic Trauma Surgery Roster Agreement (2011) Child and Adolescent Health Service, North Metropolitan Area Health Service, South Metropolitan Area Health Service Plastic Surgery Roster Agreement (2011)
Result	:	Claims proven in part.
Representation:		
Claimants	:	Mr S Ellis (Counsel) appeared for the Claimants as instructed by their agent, the Australian Medical Association (WA) Incorporated
Respondent	:	Mr M Aulfrey (Counsel) appeared for the Respondent

REASONS FOR DECISION

Background

- 1 Emergency Departments (EDs) within major Western Australian public hospitals run continuously. Medical and other staff are needed at all times to service patients who present to EDs. Some patients at EDs require specialist and/or surgical treatment.
- 2 The greatest proportion of patients presenting at public hospital EDs are those who have suffered some form of trauma. Plastic and Orthopaedic Surgeons are most involved in their treatment.
- 3 Plastic and Orthopaedic trauma surgery at public hospitals is provided (at least in part) by private practitioners employed on a part time or sessional basis.
- 4 The need to treat trauma patients presenting to EDs after hours is met by an after-hours “on-call” roster. Private Plastic and Orthopaedic Surgeons participate in the roster arrangements and are typically paid an allowance for being on-call and are also paid extra for attending the hospital on “call-back”.
- 5 The claimants are Orthopaedic Surgeons on the after-hours on-call rosters. They allege that they have not been paid their correct entitlements when they were called back to hospital.

Industrial Arrangements – After-Hours

- 6 There are a number of separate roster agreements that govern the remuneration of specialists who are on-call and who are called back to hospital.
- 7 The agreements tend to be discipline specific. By way of example there exist the *Cardio-Thoracic On-Call and Call-Back Roster (Agreement) 2012*; the *Pathologists Agreement 2011*; the *Metropolitan Inter-Hospital Vascular Services After Hours On-Call Roster Agreement 2011*; the *Breast Screen Agreement 2011* and the *Clinical Academics Industrial Agreement 2011*. There is also a *General Surgeons Agreement* setting out the call-back arrangements for general surgeons throughout the public hospital system.
- 8 As at 30 June 2011, the on-call and call-back arrangements of Plastic and Orthopaedic surgeons were governed by:
 - (a) *The Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011* (MHS Agreement); and
 - (b) *The Sir Charles Gairdner Hospital Orthopaedic Consultant Interim Agreement 2008* (SCG Agreement).
- 9 The SCG Agreement was negotiated directly by Orthopaedic Surgeons at Sir Charles Gairdner Hospital. It resulted from the need to ensure that there were a sufficient number of private Orthopaedic Surgeons available and willing to provide after-hours services at Sir Charles Gairdner Hospital.
- 10 Prior to the creation of the SCG Agreement, the number of private Orthopaedic Surgeons on the Sir Charles Gairdner Hospital after-hours roster was critically low. A reason for the lack of participation in the roster was the inadequate remuneration paid to

private Orthopaedic Surgeons called back to hospital. The new agreement provided a much higher level of remuneration aimed at encouraging participation in the roster.

- 11 The far superior level of call-back remuneration paid to Orthopaedic Surgeons under the SCG Agreement caused controversy because it created disparity in what Orthopaedic Surgeons working at Sir Charles Gairdner Hospital received in comparison to Orthopaedic Surgeons working at other public hospitals.
- 12 Two new agreements were negotiated in order to standardise the on-call and call-back remuneration payable to Plastic and Orthopaedic Surgeons working in public hospitals. The agreements were facilitated by clauses 7 and 33(7) of the MHS Agreement.
- 13 The two new agreements were:
 - (a) *The Child and Adolescent Health Service, North Metropolitan Area Health Service, South Metropolitan Area Health Service Orthopaedic Trauma Surgery Roster Agreement* (Orthopaedic Surgery Agreement) concluded on 30 September 2011; and
 - (b) *The Child and Adolescent Health Service, North Metropolitan Area Health Service, South Metropolitan Area Health Service Plastic Surgery Roster Agreement* made on 6 October 2011.

Claims

- 14 The Claimants, Mr Toby Leys, Mr Matthew Scaddan, Mr Li-On Lam and Professor Richard Carey Smith are Orthopaedic Surgeons in private practice. They were on the after-hours on-call roster at public hospitals. Mr Li-On Lam worked at Fremantle Hospital whereas the other Claimants worked at Sir Charles Gairdner Hospital.
- 15 It is not in issue that, at all material times, the Claimants and the Respondent were bound by the Orthopaedic Surgery Agreement.

Mr Lam

- 16 In the period 9 February 2012 to 12 August 2012, both dates inclusive, Mr Lam was rostered as Duty Surgeon and "on-call" at Fremantle Hospital. Whilst on-call he was called back to hospital.
- 17 Mr Lam claims that he was not correctly paid for working as Duty Surgeon, for being on-call and for his called back duties. He asserts that he should have been paid \$39,315.00 in call-back payments but only received \$21,828.00. He also alleges that the Respondent has breached Clauses 50 and 51 of the MHS Agreement by failing to respond to letters from his agent concerning his underpayment.
- 18 The Respondent says that Mr Lam was paid his correct entitlements and that what he claims is in excess of entitlements accruing under Clause 32 of the Orthopaedic Surgery Agreement.

Mr Scaddan

- 19 Mr Scaddan's claim relates to the period 9 January 2012 to 25 September 2012. In that period he was rostered to work and worked as Duty Surgeon at Sir Charles Gairdner Hospital. During that period he was called back to the hospital whilst on-call.
- 20 He alleges that despite being on-call he was not paid his on-call allowance for 9, 23, 27, 28 and 29 January 2012. He also asserts that he was not paid his correct Duty Surgeon shift entitlement (Clause 26 of the Orthopaedic Surgery Agreement) and call-back entitlements (Clause 32 of the Orthopaedic Surgery Agreement).
- 21 He says that he is owed \$4,886.00 in unpaid on-call allowance; \$19,111.00 in Duty Surgeon shift allowance and \$42,382.00 in call-back entitlements.
- 22 Mr Scaddan also alleges that, in failing to respond to letters about the alleged underpayment, the Respondent has breached Clauses 50 and 51 of the MHS Agreement.
- 23 The Respondent denies that the Duty Surgeon shift allowance is outstanding and says that it was paid and received by Mr Scaddan in "pay period 470".
- 24 The Respondent submits that in respect of the period 9 to 29 January 2012, Mr Scaddan was paid pursuant to a more generous arrangement for work undertaken by him and that the Orthopaedic Surgery Agreement did not apply to his work at that time.
- 25 The Respondent says that Mr Scaddan has been correctly paid all of his entitlements.

Mr Leys

- 26 Mr Leys' claim relates to the period 13 February 2012 to 11 September 2012.
- 27 During that period he was called back to Sir Charles Gairdner Hospital whilst rostered on-call. In that same period he was also rostered to work and did work as Duty Surgeon.
- 28 He alleges that despite being on call he was not paid his on-call allowance for 16 July 2012. Further, he claims to be owed \$25,334.00 in call-back entitlements.
- 29 Mr Leys contends also that the Respondent has breached Clauses 50 and 51 of the MHS Agreement in not responding to his agent's letters concerning his underpayment.
- 30 The Respondent does not admit the non-payment of the on-call allowance on 16 July 2012 and otherwise denies Mr Leys' claim.

Professor Carey Smith

- 31 Professor Carey Smith's claim is with respect to the period 1 February 2012 to 27 September 2012.

- 32 During that period, he was called back to hospital whilst rostered on-call and also worked as Duty Surgeon whilst rostered to do so.
- 33 He alleges that he was underpaid his duty surgeon shift allowances (Clause 26 of the Orthopaedic Surgery Agreement) in the sum of \$10,528.00 and his on-call entitlements (Clause 32 of the Orthopaedic Surgery Agreement) in the sum of \$24,858.00. He also claims not to have been paid his on-call allowance for the afternoon of 27 May 2012.
- 34 Professor Carey Smith also alleges that the Respondent has failed to comply with Clauses 50 and 51 of the MHS Agreement by not responding to letters from his agent concerning his underpayment.
- 35 The Respondent denies that it has failed to pay Professor Carey Smith his correct Duty Surgeon staff allowance entitlements and contends that he was paid his correct on-call allowance for 27 May 2012. The breach of Clauses 50 and 51 of the MHS Agreement is also denied.
- 36 The Respondent contends that all call-back payments made to him were correct. The Respondent suggests that what Professor Carey Smith seeks is in excess of that required by Clause 32 of the Orthopaedic Surgery Agreement.

Determination

- 37 The parties agree that only liability be determined at this stage. If required, quantum is to be decided later.

Burden of Proof and Standard of Proof

- 38 Each Claimant carries the legal burden of proof with respect to his Claim.
- 39 The general rule is that the burden of proving a fact or issue is upon the party who asserts that fact or issue and not upon the party who denies it. Where there are allegations and counter allegations in the claim the onus of proof shifts between the parties according to which party is the proponent of the fact or issue. The onus is on the respondent if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an avoidance of the claim which prima facie the Claimant has (*Currie v Dempsey* (1967) 69 SR(NSW) 116 per Walsh JA at 125).
- 40 The standard of proof required to discharge the burden of proof is on the balance of probability. This standard was explained by Lord Denning in *Miller v Minister of Pensions* (1947) 2AER 372. He said at 374
- “That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “We think it more probable than not”, the burden is discharged but, if the probabilities are equal it is not.”*
- 41 In these reasons if I say that “I am satisfied” it means that I am satisfied on the balance of probabilities as to a fact or matter. If I say “I am not satisfied” then I am not satisfied on the balance of probabilities as to a fact or matter.

Issues to be determined

- 42 The main issue to be determined with respect to these claims is whether the Claimants are correct in their contentions that they have not been paid their correct call-back entitlements.
- 43 A determination of factual issues that remain in dispute on the pleadings is also required. The parties have identified those issues to be:
1. Under which industrial arrangement was Mr Scaddan engaged during the period 9 January 2012 to 29 January 2012?
 2. Was Mr Scaddan paid the amounts specified in Column 8 of Table B in pay period 470?
 3. Was Mr Leys rostered on-call on 16 July 2012, and if so, what was the period of time worked by him on that occasion?
 4. What amount was Mr Leys entitled to be paid by way of Duty Surgeon shift payment under Clause 26 of the Orthopaedic Surgery Agreement?
 5. Was Professor Carey Smith paid the amounts identified in Column 6 of Table D, and if so, when?
 6. Was Professor Carey Smith paid the amount of \$735.00 in respect of work done in the afternoon of 27 May 2012?
 7. Did each of the Claimants make claims for payments in respect of the call-back periods worked within the pay period within which the entitlement to payment arose, or in the following pay period?
 8. Did the Respondent fail to respond to correspondence from the Australian Medical Association (WA) Incorporated (AMA), sent on behalf of the Claimants, and dated 26 October 2012?

Were the Claimants Paid their Correct Call-Back Entitlements?

- 44 The parties attribute different meanings to Clause 32 of the Orthopaedic Surgery Agreement which provides the payment regime for Orthopaedic Surgeons who are on-call, and who are called back to hospital.
- 45 Clause 32 of the Orthopaedic Surgery Agreement provides (underlining added):
- “32. *An On-Call Surgeon: rostered On-Call, who is called back to the hospital is paid (in addition to the prescribed Flat Rate On-Call payment) the prescribed flat rate allowance for each attendance. If one attendance at the hospital is for a continuous period of more than 4 hours then an additional flat rate allowance is paid for each additional period or part period worked by adding each of the rates for each subsequent 4 hour period or part period of attendance as illustrated below*

<i>Continuous Period of Attendance</i>	<i>Ordinary Call-Back Payment 01-Jul-11</i>	<i>Sunday Call-Back Payment 01-Jul-11</i>	<i>After Midnight Call-Back Payment 01-Jul-11</i>	<i>Public Holiday Call-Back Payment 01-Jul-11</i>
<i>up to 4 hours</i>	\$671	\$671	\$744	\$1,007
<i>more than 4 hours but less than 8 hours</i>	\$1,342	\$1,342	\$1,488	\$2,013
<i>more than 8 hours but less than 12 hours</i>	\$2,013	\$2,013	\$2,232	\$3,020
<i>more than 12 hours but less than 16 hours</i>	\$2,685	\$2,685	\$2,966	\$4,027
<i>Continuous Period of Attendance</i>	<i>Ordinary Call-Back Payment 01-Jan 12</i>	<i>Sunday Call-Back Payment 01-Jan 12</i>	<i>After Midnight Call-Back Payment 01-Jan 12</i>	<i>Public Holiday Call-Back Payment 01-Jan 12</i>
<i>up to 4 hours</i>	\$698	\$735	\$840	\$1,047
<i>more than 4 hours but less than 8 hours</i>	\$1,396	\$1,470	\$1,680	\$2,094
<i>more than 8 hours but less than 12 hours</i>	\$2,094	\$2,205	\$2,520	\$3,141
<i>more than 12 hours but less than 16 hours</i>	\$2,792	\$2,940	\$3,360	\$4,188
<i>Continuous Period of Attendance</i>	<i>Ordinary Call-Back Payment 01-Jan 13</i>	<i>Sunday Call-Back Payment 01-Jan 13</i>	<i>After Midnight Call-Back Payment 01-Jan 13</i>	<i>Public Holiday Call-Back Payment 01-Jan 13</i>
<i>up to 4 hours</i>	\$729	\$830	\$948	\$1,094
<i>more than 4 hours but less than 8 hours</i>	\$1,459	\$1,660	\$1,896	\$2,188
<i>more than 8 hours but less than 12 hours</i>	\$2,188	\$2,490	\$2,844	\$3,282
<i>more than 12 hours but less than 16 hours</i>	\$2,918	\$3,320	\$3,792	\$4,376

”

Competing Construction

- 46 The Claimants construe Clause 32 of the Orthopaedic Surgery Agreement to mean that the monetary figures specified in the boxes of each column of the table accumulate. The Respondent on the other hand, contends that the figure in each box is a stand-alone figure which represents the total amount payable for the period set out in the column entitled *Continuous Period of Attendance*.
- 47 If one considers an ordinary call-back situation for an Orthopaedic Surgeon called back to hospital for 15 hours in the period 1 July 2011 to 31 December 2011, on the Claimants' interpretation, an amount of \$6,711.00 is payable. That amount is comprised of \$671.00 for the first four hours, and then \$1,342.00 for the next four hours, then \$2,013.00 for the following four hours and \$2,685.00 for the balance of hours worked. On the Respondent's interpretation, an amount of \$2,685.00 is payable, which is comprised of an entitlement of \$671.00 for each four hour period or part thereof, plus \$1.00 (4 x \$671 + \$1).

Construction of Clause 32

- 48 The parties agree that the meaning of Clause 32 is borne out by its plain reading in the context of the rest of the Orthopaedic Surgery Agreement. Each say that the provisions read in context is not ambiguous and that resort to extrinsic materials for the purpose of interpretation will not be necessary.
- 49 Despite contending that the terms of the clause are clear and unambiguous, they nevertheless construe it quite differently.
- 50 In *Director General, Department of Education v United Voice WA* [2013] WASCA 287, Pullin J said at [18] and [19] that an agreement has to be construed to determine what the intention of the parties was at the time it was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the clause to mean, taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction. Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning.

Respondent's Submissions

- 51 The Respondent argues the following:
- 52 Clause 32 is clear.
- 53 The use of the phrase 'flat rate' is significant. 'Flat rate' as used in Clause 32 is also used in Clauses 30 and 31 of the Orthopaedic Surgery Agreement. It refers to a non-variable sum. The flat rate allowance is prescribed and defined by the figures on the first line of Clause 32's table. The figures on the last line simply denote the tariff payable to a practitioner who is called back to hospital, regardless of the time period for which he is called back.

- 54 It would be fallacious to suggest that the word ‘prescribed’ preceding ‘flat rate’ is referring to figures denoted at the second and succeeding lines of the table. The clause sets out that “the prescribed flat rate allowance” is payable for the act of attendance, irrespective of its duration. Further the use of the word “the” constrains any change in the rate.
- 55 Clause 32 specifies that payments increase in an arithmetic progression. A single additional four hour period affects a single additional iteration of the “flat rate allowance”. The table within the clause is consistent with that. The arithmetic progression present in the table, and the consistent use of the word “additional” in reference to both “flat rate allowance” and “period or part period” militates against the construction that “an additional flat rate allowance” contemplates a variable amount.
- 56 The reference to “the rates” does not refer to the rates specified in the table. That would be inconsistent with the use of the words “as illustrated” in the clause. The provisions could have easily specified “the rates set out in the table below” if that was the intent. The rates simply refer to successive iterations of the flat rate payable on successive four hour periods, which is consistent with the arithmetic progression applied in the table.
- 57 The use of the words “as illustrated below” is also significant in analysing the clause. The word “illustrated” does not have the same meaning as “defined”. To “illustrate” means “to make clear or intelligible as by examples” (Macquarie Dictionary 5th Edition). The table illustrates an arithmetic progression in remuneration for the call-back attendees of increasing duration.
- 58 The table simply provides a matrix of payments applying to any given attendance. The first column is headed “Continuous Period of Attendance” and the remaining columns are headed “Call Back Payment”, differing only as to the occasion of the attendance. The phrase “Call Back Payment” refers to a single figure payable. That is inconsistent with cumulative sums for increasing lengths of attendances. Were the intent to render the various sums cumulative, the phrases “Call Back Payments” or “Call Back Allowances” would have been used.

Meaning of Clause 32

- 59 The contentious issue to be determined is what is meant by the second sentence of Clause 32 which provides:
- “...If one attendance at the hospital is for a continuous period of more than 4 hours then an additional flat rate allowance is paid for each additional period or part period worked by adding each of the rates for each subsequent 4 hour period or part period of attendance as illustrated below”* (my emphasis).
- 60 It provides for additional remuneration in the event of continuous attendance in excess of four hours. That is to be contrasted with the first sentence of the clause which deals with discrete attendances of four hours or less.
- 61 The prescribed “flat rate allowance” is that which applies to the first period of up to four hours of continuous attendance. The reference to “flat rate allowance” conveys that the amount payable is the same, however many hours are worked during the four hour period. The provision for the payment of “an additional flat rate allowance” does not constrain the rate to be the same as the prescribed “flat rate allowance”, payable for a discrete attendance of four hours or less.
- 62 The second sentence of the clause requires “an additional flat rate allowance” to be paid for each additional four hour period or part period worked, by adding “each of the rates” for each subsequent period (my emphasis added). The use of the word “rates” as opposed to “rate” is critical. Its plurality denoted different rates not the same rate. Further, the second sentence instructs that there must be an “adding of each of the rates for each subsequent 4 hour period or part period of attendance as illustrated below”.
- 63 The rates illustrated are the rates payable for each specified four hour period. Each rate is discrete for that period. The clause requires the “adding” of each of the rates for subsequent four hour periods or part thereof.
- 64 The Respondent’s textual construction must be rejected because:
1. there is no addition of “rates”. The Respondent’s construction would not have required the specification of different rates but could have been simply achieved by providing for a fixed payment for each four hour period or part thereof;
 2. it would render the words preceding the table otiose as the amount payable would be entirely determinable by the illustrative table; and
 3. there is not a strict arithmetic progression in each instance. As previously indicated the amounts do not always add up.
- 65 I accept that on its plain reading, Clause 32 should be construed as suggested by the Claimants.
- 66 Although the parties agreed that the meaning of Clause 32 could be ascertained on plain reading in the context of the rest of the Orthopaedic Surgery Agreement, they nonetheless have addressed me in detail about alternate methods of construing Clause 32. It is therefore appropriate that I say something about those matters despite it now being unnecessary. I stress that what I say below about these further matters did not affect my conclusion concerning the construction Clause 32 on its plain meaning.
- 67 If the meaning of Clause 32 had not been apparent on its plain reading I would have preferred the Claimants’ construction in any event, because that is more consistent with the objective purpose and industrial context of the Orthopaedic Surgeons Agreement.
- 68 The purpose of the Orthopaedic Surgeons Agreement was to:
1. equalise pay rates of Orthopaedic Surgeons providing “on-call” services across all public hospitals;
 2. provide a level of remuneration which encouraged Consultant Orthopaedic Surgeons to participate in the after-hours roster;
 3. retain the services of Consultant Orthopaedic Surgeons at public hospitals; and

4. encourage Orthopaedic Surgeons who return to hospital on-call to remain at the hospital rather than having them come and go.
- 69 Such objectives are clearly discernible from the evidence given by Peter Lynne Jennings (Affidavit sworn 17 February 2014 – paragraphs 6 and 11) (Jennings Affidavit), the evidence of Marshall Warner (Affidavit sworn 24 June 2014 – paragraph 6) (Warner Affidavit) which I accept, and from the Orthopaedic Surgeons Agreement itself (see clause 37(iii), 37(iv) and 37(v)).
- 70 If required I would have found the following to be the relevant factual and industrial context in which the Orthopaedic Surgeons Agreement was created,:
1. in 2008 the number of Consultant Orthopaedic Surgeons prepared to be rostered on-call at Sir Charles Gairdner Hospital was so critically low that the SCG Agreement was needed to entice surgeons onto the roster and to retain those already on it. The SCG Agreement was an interim arrangement which principally dealt with remuneration. It provided a significant increase in the rate payable for on-call work (viva voce evidence of Professor Gerard Hardisty);
 2. the SCG Agreement produced a much higher level of remuneration to Consultant Orthopaedic Surgeons working at Sir Charles Gairdner Hospital as compared to their counterparts working at other public hospitals (Affidavit of Matthew Scaddan sworn 19 February 2014 - paragraph 11)(Scaddan Affidavit);
 3. such disparity in the pay rates for being on-call caused significant dissatisfaction (Jennings Affidavit - paragraphs 4 and 6; Affidavit of Toby Leys (sworn 21 February 2014)- paragraph 11 (Leys Affidavit); Scaddan Affidavit at paragraphs 10 and 11 and Warner Affidavit at paragraph 6);
 4. Orthopaedic Surgeons regarded the requirements to be on-call as disruptive (Jennings Affidavit at paragraph 4; Leys Affidavit at paragraphs 14 to 17; Affidavit of Li-On Lam (sworn 19 February 2014) at paragraphs 12 and 13 (Lam Affidavit); Affidavit of Richard Carey Smith (sworn 28 February 2014) at paragraph 11 and Warner Affidavit at paragraph 3);
 5. Consultant Orthopaedic Surgeons were paid a much higher amount for less stressful and demanding work both in private practice and in the public system (Leys Affidavit at paragraph 12, Scaddan Affidavit at paragraph 12, Jennings Affidavit at paragraph 6, Lam Affidavit at paragraph 15 and Mr Scaddan viva voce evidence in re-examination); and
 6. the amounts payable for being on-call under the SCG Agreement exceed that payable under the Orthopaedic Surgery Agreement (viva voce evidence of Mr Leys).
- 71 Given the contextual circumstances existing at the time that the Orthopaedic Surgery Agreement was negotiated, a construction in accordance with the Claimants' submission is in keeping with the objective of providing a sufficiently attractive level of remuneration to induce Orthopaedic Surgeons, including those at Sir Charles Gairdner Hospital, to participate in the after-hours roster.
- 72 Although the quantum of remuneration may not be the sole determinative factor for participation in the on-call roster, it clearly looms large. Indeed, the SCG Agreement was aimed at setting a level of remuneration sufficiently attractive so as to encourage Orthopaedic Surgeons to participate in the on-call roster. An adequate level of remuneration was of particular relevance in concluding the Orthopaedic Surgery Agreement.
- 73 The rates payable on the Claimants' construction of Clause 32 is more in keeping with payments received by Orthopaedic Surgeons at Sir Charles Gairdner Hospital under the SCG Agreement. The Respondent's construction provides for a much lower remuneration. Absent any other obvious benefit arising from the Orthopaedic Surgery Agreement, there is no reason for the provision of much inferior remuneration.

Factual Issues in Dispute on the Pleadings

Under Which Industrial Arrangement was Mr Scaddan Engaged in the Period 9 to 29 January 2012?

- 74 Mr Scaddan argues that he should have been remunerated in accordance with the SCG Agreement during the period 9 to 29 January 2012. The Respondent says that the Orthopaedic Surgery Agreement applied to him on and from 30 September 2011.
- 75 There is no dispute that the Orthopaedic Surgery Agreement applied to Mr Scaddan on and from 30 September 2011. In the circumstances I cannot understand how it can be that the SCG Agreement would have continued to apply to his remuneration in the period 9 to 29 January 2012.
- 76 The fact that he may have been mistakenly paid under the SCG Agreement after the inception of the Orthopaedic Surgery Agreement is of no import. In the period 9 to 29 January 2012 his remuneration was governed by the Orthopaedic Surgery Agreement and he should have been paid in accordance with its terms.

Was Mr Scaddan Paid the Amounts Specified at Colum 8 of Table B in Pay Period 470?

- 77 Mr Scaddan claims he has not been paid his correct Duty Surgeon shift payments pursuant to Clause 26 of the Orthopaedic Surgery Agreement. He says he is owed \$19,111.00 in that regard.
- 78 There can be no doubt that Mr Scaddan was initially not paid his Duty Surgeon shift allowance entitlements in the sum of \$19,111.00. However, on 17 January 2013 he received that sum.
- 79 At paragraph 21(b) of his Affidavit, Mr Scaddan says that given there was no breakdown of what that payment related to, he is unable to confirm payment. When cross-examined about the issue, Mr Scaddan conceded that he was eventually remunerated correctly in that regard.
- 80 The amount of \$19,111.00 paid to him corresponds exactly to the amount said to be outstanding as set out in Column 8 of Table B of his claim. I am satisfied that he was paid that amount on 17 January 2013.

81 The only reference that I could find relating to pay period 470 is found in Column 14 of Table D of Professor Carey Smith's claim. That suggests that the date of pay period 470 was 21 June 2012. If that is correct, it follows that Mr Scaddan was not paid in pay period 470.

82 Irrespective of when it was received, I am satisfied that payment of \$19,111.00 was made to Mr Scaddan.

Was Mr Leys Rostered On-Call on 16 July 2012, and if so, what was the Period of Time Worked by Him on that Occasion?

83 This issue is no longer in dispute. Mr Leys conceded in his viva voce evidence that he was correctly remunerated for 16 July 2012.

What Amount was Mr Leys Entitled to be Paid by Way of Duty Surgeon Shift Payment Under Clause 26 of the Orthopaedic Surgery Agreement?

84 The issue is not about liability, but rather quantum. There is in the circumstances no need for a determination to be made at this stage. I observe in any event that Mr Leys may have been slightly overpaid in that regard.

Was Professor Carey Smith Paid the Amounts Identified in Column 6 of Table D of his Claim, and if so, when?

85 It is asserted on Professor Carey Smith's behalf that the Respondent has not produced evidence of the full payment of his Duty Surgeon's shift entitlement. The Respondent pleads that Professor Carey Smith has received his full entitlement in that regard.

86 Professor Carey Smith said at paragraphs 18 and 19 of his Affidavit that he received lump sum payments on 21 June 2012, 22 November 2012 and 17 January 2013. He says that the payslips accompanying those payments for previously unpaid on-call and periods of call-back were unintelligible and it is impossible for him to know what the payments were for.

87 In Column 9 of Table D to his claim, it shows that a payment of the Duty Surgeon shift entitlement was made on 17 January 2013, however, it is alleged that that payment was only a part-payment of such entitlements. Column 13 of Table D shows however, that on the same day (17 January 2013) Professor Carey Smith received other payments which have been allocated to his call-back claim. Why that allocation occurred is unclear.

88 Professor Carey Smith's evidence is not that he has not been paid but rather that he cannot tell whether he has been paid or not, or if he has been paid, the amount he has actually received for a specific purpose.

89 The Respondent asserts that Professor Carey Smith has been paid the amount claimed. It follows that the onus rests with the Respondent to prove on the balance of probabilities that Professor Carey Smith has been paid his correct entitlements. The Respondent is required to establish what payments were made to satisfy Professor Carey Smith's Duty Surgeon's entitlements. On the available evidence, I cannot be satisfied that he was paid his full Duty Surgeon shift entitlements on 17 January 2013.

90 The evidence as it stands does not enable a determination of what payment was made and when.

Was Professor Carey Smith Paid the Amount of \$735.00 in Respect to Work Done in the Afternoon of 27 May 2012?

91 Professor Carey Smith submits that there is no evidence that payment was made to him for work done on the afternoon of 27 May 2012. The Respondent asserts that the Claimant has been paid his full entitlement.

92 At Column 14 of Table D of his claim, Professor Carey Smith acknowledges having received \$698.00 on 21 June 2012. The dispute which remains with respect to this issue is whether \$37.00 is outstanding.

93 The Respondent carries the burden of proving that the payment has been made. He has not discharged that onus. There is no evidence of the payment of the outstanding \$37.00.

Did Each of the Claimants Make Claims for Payment in Respect of the Call-Back Periods Worked Within the Pay Period Within Which the Entitlement to Payment Arose or the Following Pay Period?

94 Clause 50(1)(a) of the MHS Agreement provides:

"Practitioners shall submit claims for payment of overtime, call backs or other entitlements for which they have not been formally rostered in the pay period within which the entitlement arose or in the following period."

95 The evidence of Mr Leys (Leys Affidavit – paragraph 15) establishes that he claimed payment for on-call and call-back work once a fortnight in accordance with Clause 50(1)(a) of the MHS Agreement. Mr Lam, Mr Scaddan and Professor Carey Smith did likewise (see Lam Affidavit at paragraphs 16, 17 and 18; Scaddan Affidavit at paragraph 18; Carey Smith Affidavit at paragraphs 13 and 14).

96 I find that each of the Claimants complied with Clause 50(1)(a) of the MHS Agreement.

97 In any event, the Respondent has indicated in written submissions that he will not be relying on any alleged breach of Clause 50(1)(a).

Did the Respondent Fail to Respond to Correspondence From the AMA Dated 26 October 2012 on Behalf of the Claimants?

98 On 26 October 2012, Mr Gary Bucknall, Executive Officer – Industrial of the AMA wrote separate letters on behalf of each Claimant to Dr David Russell-Weisz, Acting Director General of the Department of Health, advising that each Claimant had not received his correct Duty Surgeon shift allowance, on-call and call-back entitlement under Clauses 26, 30, 31 and 32 of the Orthopaedic Surgery Agreement. A schedule outlining the underpayment was attached to each letter.

99 Each letter sought rectification of the underpayment within seven days, plus the payment of interest. Those demands were made in accordance with Clause 51 of the MHS Agreement. Mr Bucknall demanded (pursuant to Clause 50(1)(b) of the MHS Agreement) that if the claims were rejected, that written reasons be given for that decision.

100 Relevantly, Clause 51(1) of the MHS Agreement provides:

“51. RECOVERY OF UNDERPAYMENTS AND OVERPAYMENTS

(1) Underpayments

(a) Where a practitioner is underpaid in any manner:

(i) the employer will, once the employer is aware of the underpayment, rectify the error as soon as practicable;

(ii) where possible the underpayment shall be rectified no later than in the pay period immediately following the date on which the employer is aware that an underpayment has occurred; and

(iii) where a practitioner can demonstrate that an underpayment has created a serious financial hardship, the practitioner shall be paid by way of a special payment as soon as practicable.

(b) An employer shall compensate a practitioner for costs resulting directly from an underpayment, where it is proven that the costs resulted directly from the underpayment. This includes compensation for overdraft fees, dishonoured cheque costs, and dishonour fees related to routine deductions from the bank account into which a practitioner’s salary is paid.

(c) Nothing in this clause shall be taken as precluding the practitioner’s legal right to pursue recovery of underpayments.”

101 The Claimants contend that there was no response to the AMA’s letters of 26 October 2012, other than belated payments as identified in the schedule annexed to each claim.

102 The Respondent says that a written response was not required. He says in any event that subsequent to the receipt of those letters, a number of meetings were held between the AMA representing the Claimants and representatives of the Respondent. Any response required was constituted by those meetings.

103 Clause 51(1) of the MHS Agreement requires that any underpayment be rectified as soon as practicable after the error in payment has become known. It also requires the payment of compensation in some circumstances. The only response in fact required is rectification of any error causing underpayment.

104 To the extent that an error was made, as accepted by the Respondent, he rectified it by making payments to the Claimants on 17 January 2013. Those payments were for Duty Surgeons shift entitlements under Clause 26 of the Orthopaedic Surgery Agreement, and for call-backs under Clause 32 of the same Agreement.

105 Given the very large work force employed by the Respondent, the various workplaces it controls and the complexity of its workplace arrangements, the investigation and review of each claim will have inevitably taken some considerable time. I accept the evidence of Steve Gregory (Affidavit of Steve Gregory (sworn 29 June 2014) at paragraphs 5, 6 and 7) that the resolution of the claims within a short time frame was not logistically possible.

106 Whilst I accept that there was a considerable delay between the date of notification of an error and the subsequent rectification (to the extent the error was acknowledged) there is nothing to indicate that the error was not rectified as soon as practicable.

107 The onus is on the Claimants to establish, on the balance of probabilities, that the errors were not rectified as soon as practicable. That, they have failed to do.

108 The Respondent has otherwise informed the Claimants in writing as to why it disputes aspects of their Claims. Clause 50(1)(b) of the MHS Agreement which requires written reasons to be given for the non-acceptance of claims for payments of entitlements has been complied with.

109 The alleged breaches of Clauses 50 and 51 of the MHS Agreement have not been proven.

Objection to Evidence

110 Prior to the Trial commencing, the parties came to agreement about the exclusion of evidence. Large portions of Affidavit evidence have, by consent, been excluded from my consideration. There is some Affidavit evidence remaining to which objection has been taken by either one party or the other, however it will be unnecessary to determine whether such evidence ought to be admitted.

111 Regulation 35(4) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (the Regulations) provides:

“Except as provided in these regulations, a Court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.”

112 It is clear that evidentiary material that would not otherwise be admissible can be received by this Court at Trial.

113 Objection is taken to some evidence which would not otherwise be admissible. Such evidence consists of hearsay, evidence of personal circumstances not relevant to my considerations and includes evidence of individual desires, hopes and expectations.

114 The process of going through each of the remaining objections concerning otherwise inadmissible evidence is of little utility. Pursuant to regulation 35(4) of the Regulations, such evidence can be received. What is required is to ensure that there is procedural fairness and that such evidence, if taken into account, is treated with caution.

G CICCHINI

INDUSTRIAL MAGISTRATE

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

2015 WAIRC 00350

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 9 JULY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ORONTIDE MADCO PTY LTD (ABN 91 009 939 355)

APPLICANT

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

MONDAY, 4 MAY 2015

FILE NO/S

APPL 18 OF 2014

CITATION NO.

2015 WAIRC 00350

Result

Consent Order issued

Representation**Applicant**

Mr B Jackson 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 25th day of March 2015 the Commission convened a Directions hearing; and

WHEREAS at that hearing it was agreed that the parties file and serve Statements of Facts, the applicant by the 30th day of April 2015 and the respondent by the 14th day of May 2015; and

WHEREAS by email on the 30th day of April 2015 the parties filed a Minute of Consent Orders requesting an extension of time in which to file the Statements of Fact;

WHEREAS the Commission is of the opinion that it is appropriate to extend the time for filing the Statements of Fact;

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 file and serve a detailed Statement of Facts upon which it will rely at the hearing by the 11th day of May 2015.
2. THAT the respondent file and serve a detailed Statement of Facts upon which it will rely at the hearing by the 3rd day of June 2015.
3. THAT paragraphs 1, 4 and 5 of the correspondence from the Commission to the parties dated the 26th day of March 2015 confirming the outcome of the Directions hearing will remain in place.

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

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00365

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BEVERLEY JOAN BIGGS

APPLICANT

-v-

UNITING CHURCH IN AUSTRALIA, PARISH OF BUSSELTON

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 8 MAY 2015

FILE NO/S

U 145 OF 2014

CITATION NO.

2015 WAIRC 00365

Result	Application dismissed
Representation	
Applicant	Mr K Trainer as agent
Respondent	Ms E Hartley of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 28th day of August 2014 the Commission convened a conference for the purpose of conciliation and scheduling;
 and
 WHEREAS at the conclusion of that conference the parties agreed to engage in further discussions; and
 WHEREAS on the 30th day of April 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.

2015 WAIRC 00338

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PENELOPE ANNE BRIFFA	APPLICANT
	-v-	
	AEG OGDEN (PERTH) PTY LTD	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 24 APRIL 2015	
FILE NO/S	B 6 OF 2015	
CITATION NO.	2015 WAIRC 00338	

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*.
 On 10 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.
 On 17 March 2015 the applicant advised the Commission that she did not wish to proceed with the matter.
 The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 14 April 2015 and the respondent consents to the matter being discontinued.
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
 Commissioner.

2015 WAIRC 00339

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PAUL BURKE

APPLICANT

-v-

OK YOUTH SERVICES INC

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE FRIDAY, 24 APRIL 2015
FILE NO/S B 17 OF 2015
CITATION NO. 2015 WAIRC 00339

Result Order issued
Representation
Applicant In person
Respondent Mr M Parker

Order

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

On 23 February 2015 the Commission convened a conciliation conference.

At this conference Mr Michael Parker, the respondent's former Chief Executive Officer, acknowledged that the respondent owed the applicant wages in the amount of \$6,473.68. He indicated that the respondent does not have the funds to pay him the amount he is owed.

On 6 March 2015 the applicant requested that the Commission issue an order for payment of the wages owed to him.

There is no dispute that the respondent owes the applicant the wages he is claiming. The Commission will therefore issue an order that the respondent pay the applicant the wages owing to him.

The respondent was incorrectly named in the application. Given the powers under s 27(1) of the Act it is appropriate in the circumstances to amend the respondent's name.

On 10 March 2015 the Commission issued a Minute of Proposed Order and the applicant requested a Speaking to the Minutes.

At the Speaking to the Minutes held on 24 April 2015 the applicant sought orders with respect to identifying the respondent's board members and the respondent's assets.

The Commission is of the view that it is not appropriate to issue the additional orders the applicant is seeking on the basis that these matters were not relevant to the issue in dispute between the parties.

The applicant was advised that the order would issue in the same terms as the minute apart from two minor amendments and the inclusion of a timeframe for the wages owing to the applicant to be paid.

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

1. THAT the name of the respondent be deleted and that OK Youth Services Inc be substituted in lieu thereof.
2. THAT the respondent pay the applicant \$6,473.68 in outstanding wages within 14 days of the date of this order.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00380

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
RICHARD CARDWELL

APPLICANT

-v-

DORAL MINERAL SANDS PTY LTD

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 15 MAY 2015
FILE NO/S B 36 OF 2015
CITATION NO. 2015 WAIRC 00380

Result	Application dismissed
Representation	
Applicant	Mr R Cardwell on his own behalf
Respondent	Mr P Robertson as agent

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 24th day of April 2015 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
 WHEREAS on the 12th day of May 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.

2015 WAIRC 00320

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DIANNE DICKINSON	APPLICANT
	-v-	
	DR JULES JOSEPH VANDENBERGH	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 20 APRIL 2015	
FILE NO/S	B 243 OF 2014	
CITATION NO.	2015 WAIRC 00320	

Result	Application dismissed
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Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS the matter was set down for hearing on the 14th day of April 2015; and
 WHEREAS on the 13th day of April 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.

2015 WAIRC 00321

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DIANNE DICKINSON

APPLICANT

-v-

JULES JOSEPH VANDENBERGH
COLLIE VETERINARY SERVICES

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 20 APRIL 2015

FILE NO/S U 220 OF 2014

CITATION NO. 2015 WAIRC 00321

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS the matter was set down for hearing on the 14th day of April 2015; and
 WHEREAS on the 13th day of April 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.

2014 WAIRC 01285

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2014 WAIRC 01285
 CORAM : COMMISSIONER S J KENNER
 HEARD : TUESDAY, 26 AUGUST 2014, TUESDAY, 28 OCTOBER 2014, FRIDAY, 14 NOVEMBER 2014
 DELIVERED : THURSDAY, 27 NOVEMBER 2014
 FILE NO. : U 171 OF 2013
 BETWEEN : PHILLIP DIGNEY
 Applicant
 AND
 THE BLACK COCKATOO PRESERVATION SOCIETY OF AUSTRALIA (ABN: 75 980 610 063)
 Respondent

Catchwords : Industrial law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Whether the respondent is a trading or financial corporation – Whether the applicant was an employee or an independent contractor – Principles applied – Lack of significant or substantial trading activity – Totality of the relationship considered – Claim within jurisdiction – Application to be listed for hearing

Legislation : *Commonwealth Constitution* s 51(xx)
Associations Incorporation Act 1987 (WA) ss 14, 15
Fair Work Act 2009 (Cth) ss 14, 26
Industrial Relations Act 1979 (WA) s 7

Result : Jurisdiction found

Representation:

Counsel:

Applicant : In person
 Respondent : Mr G Dewhurst and with him Ms C Dewhurst

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] (2008) 89 WAIG 243

Hollis v Vabu Pty Limited (2001) 207 CLR 21

Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers (2004) 85 WAIG 5

Case(s) also cited:

E v Australian Red Cross Society (1991) 27 FCR 310

Educang Ltd v Queensland Industrial Relations Commission (2006) 154 IR 436

Hughes v Western Australian Cricket Association (Inc) (1986) 19 FCR 10

Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc (2002) 120 FCR 191

Quickenden v O'Connor (2001) 109 FCR 243

Shahid v Australasian College of Dermatologists (2007) 72 IPR 555

The Commonwealth of Australia and anor v The State of Tasmania and others (1983) 158 CLR 1

The Queen v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Incorporated) (1979) 143 CLR 190

United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board (1998) 83 FCR 346

Reasons for Decision

- 1 By this application the applicant Mr Digney claims he was unfairly dismissed by the respondent, The Black Cockatoo Preservation Society of Australia on 26 September 2013. Mr Digney was the former General Manager of the Society. Mr Digney contends that he was forced to resign from his position with the Society, by reason of the conduct of the Society's Board.
- 2 The matter has had a somewhat torturous history. Before the Commission as otherwise constituted, various proceedings have taken place to date. The matter was reallocated to my Chambers on 25 September 2014. The matter has been listed for hearing to deal with various issues of jurisdiction raised by the Society. The two issues dealt with in these reasons are:
 - (a) Whether the Society is a trading corporation and therefore is a national system employer for the purposes of the Fair Work Act 2009 (Cth); and
 - (b) If the Society is not a constitutional corporation, whether Mr Digney was engaged by the Society as an employee or as an independent contractor.
- 3 Briefly, Mr Digney has asserted that he was constructively dismissed following various events, including the bringing of a bullying complaint by him against several members of the Society's Board. Additionally, Mr Digney contended that the Society's conduct in bringing baseless allegations of misconduct against him in early September 2013 and his suspension from the Society, whilst these matters were being dealt with, was part of the Society's conduct that made it untenable for him to remain as the Society's General Manager.
- 4 For the Society it was initially contended in its notice of answer filed on 28 October 2013, that there was no dismissal in this case, because Mr Digney was engaged on a fixed term six month contract from 15 April to 11 October 2013, which contract was not ongoing because of a lack of funding for Mr Digney's position. By an amended notice of answer filed on 23 May 2014, it is further asserted that Mr Digney was not an employee, but was employed as an independent contractor.
- 5 By a further amended notice of answer filed by the Society on 25 August 2014, the Society has now further contended that it is a trading corporation and is subject to the federal jurisdiction under the FW Act. It is less than satisfactory that it has taken some seven months and 10 months respectively, for the Society to raise these various matters going to the jurisdiction of the Commission to deal with Mr Digney's claims. I note in passing that the Society was represented in these proceedings by a firm of solicitors until 5 August 2014.

Constitutional corporation

- 6 The first matter to deal with is the assertion by the Society that it is a constitutional corporation for the purposes of s 51(xx) of the Commonwealth Constitution. If it is, then by reason of ss 14 and 26 of the FW Act, the application must be dismissed for want of jurisdiction.
- 7 The relevant test as to whether a corporation is a trading or financial corporation was dealt with by the Industrial Appeal Court in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* (2008) 89 WAIG 243. In this case, Steytler P, with whom Pullin J agreed, set out the relevant principles dealt with by six decisions of the High Court, as to the test in determining

whether a corporation should be regarded as a trading corporation. At par 68 Steytler P summarised the relevant principles falling from those cases in the following terms:

- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
 - (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
 - (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].
 - (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
 - (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board* (304 - 306); *E* (343). Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).
 - (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).
 - (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].
 - (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler*; *Hardeman* [26].
- 8 It is therefore a question of fact and degree as to whether the trading activities of a corporation are sufficient for the corporation to be characterised as a trading corporation.
- 9 Evidence relevant to this issue is as follows. Ms Griffiths is a member of the Board of the Society and is its Treasurer. She has been on the Board since about 2008. Ms Griffiths gave some evidence as to the nature of the Society and its activities. The Society is an incorporated body formed for charitable purposes, and is the primary organisation of three, dedicated to the preservation of the Black Cockatoo species of bird. The Society operates from a property called "Kaarakin", which is the Black Cockatoo Conservation Centre in Martin, Western Australia. The aims of the Society, set out in its constitution, provide that it is directed towards the "Preservation of endangered Black Cockatoos and Black Cockatoos which are not nominated on the endangered list." Ms Griffiths said that the Society has a Board, presently one full time and two part time employees and a number of volunteers.
- 10 Ms Griffiths is involved in the financial management of the Society. She testified that the Society is principally funded from grants. These grants may be for designated projects. The major source of grant funding is from Lotterywest, a State Government statutory authority. Other sources of grant funding include from LandCorp; the Department of Environment Regulation; Alcoa and others; and some local government organisations. Ms Griffiths testified that the vast majority of income for the Society comes from these sources.
- 11 Another source of income is from donations, although Ms Griffiths testified that this is a small proportion of total income, for example for the 2012-13 year, it represented some \$74,000. The third source of income is from various fundraising work. This source of income represents a smaller proportion again, for example for 2012-13 the fundraising income was about \$29,000. The fundraising activities described by Ms Griffiths include for example, "sausage sizzles" at Bunnings stores, auctions and other types of activity.
- 12 Ms Griffiths was involved in the preparation of the formal accounts of the Society. Exhibit R4 is a copy of the income and expenditure statement for the Society for 2012-13 and 2013-14 financial years. The 2012-13 statement is audited.
- 13 From these statements, for the 2012-13 year, the total income of the Society was \$610,444.80. The figure for the 2013-14 year was \$457,691.22. Income is described in the statements broadly consistent with Ms Griffiths' evidence. Under the heading "Venture Partnerships & Support" which is in essence donations of various kinds from private organisations and others, the figure for 2012-13 was \$131,045.15 and for 2013-14 \$69,806.37. Under the heading "Fund Raising Activities/Events" which included sausage sizzles, auctions, open days and sales of merchandise, the figure for 2012-13 was \$28,996.95 and for 2013-14 some \$19,042.15. A further heading "Projects & Business Activities", reflect grants of one form or another, most of which is from Alcoa, and shows for 2012-13 \$192,486.82 and for 2013-14 \$195,676.24. Under a heading "Other income", comprising bank interest and other items, including "Presentations/Training" and "Sales - Shirts" is income for 2012-13 of \$30,902.93 and for 2013-14 \$11,003.45. Finally, is the major component of the Society's income which is headed "Lotterywest Income" which for 2012-13 was \$227,012.95 and for 2013-14 \$143,271.86.

- 14 Mr Digney also gave some evidence about these matters, from his position as General Manager. He testified that he was involved in preparing the grant application for Lotterywest. His evidence was generally that in relation to the Lotterywest grant, and other grants to the Society, there was no tradeable commodity or product of any form flowing from the Society to the grantor or funder as the case may be, in return for the funds provided to the Society.
- 15 From the evidence of Ms Griffiths, the terms of the accounts of the Society tendered in evidence, and from the evidence of Mr Digney, it is plain that the vast bulk of the income of the Society comes from grants, of one form or another, from both government and private sector organisations. The Society provides no services as such, for this income. The income, on Ms Griffiths' evidence, pays for the upkeep of the Kaarakin property, running costs and various items of capital expenditure. Additionally, funding is also obtained for particular projects, identified by the Society as necessary for pursuing its aims in relation to conservation of the Black Cockatoo species.
- 16 While the Society is responsible for ensuring the disbursement of this grant income is done efficiently in accordance with the purposes for which the funds are provided, that in and of itself cannot connote trading activity. Tendered as a bundle of documents as exhibit R17, were various funding agreements between funders and the Society. Whilst for example, the "Western Australian NRM Program Funding Agreement" is quite detailed, it in the main concerns legal requirements in relation to the application of the funding and its use in this particular case, of some \$40,000 for a particular project to rehabilitate part of a Black Cockatoo habitat. The Lotterywest grant of \$240,370 paid for the staff of the Society including the General Manager and others, and for some property improvements as required. The grant from Alcoa, again, involved habitat restoration for the Black Cockatoo and covered revegetation, planting and volunteer time.
- 17 Having regard to all of this evidence, and having regard to the aims of the Society as set out in its constitution, it cannot be said that the bulk of the Society's income results from trading activities of any kind. In my view, there is a distinct lack of "commerciality" in any of these grant and funding arrangements.
- 18 The only activities that could be considered trading activities are those in the category of "fundraising" in the statements of account. For 2012-13, these activities generated some \$28,996.95 in revenue. If one generously added to this about \$5,000 for "Presentations/Training" and "Sales - Shirts", this totals \$34,000 approximately. This represents about 5.6% of the Society's total revenue for that year. In my opinion, on the authorities, this cannot be regarded as "significant or substantial" trading activity, in the context of the overall activities of the Society. For the 2013-14 year, about 4.7% of income could be regarded as from trading activities, of this kind.
- 19 Therefore I am far from persuaded that the Society is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and therefore the Society is not a national system employer for the purposes of the FW Act.

Employee or independent contractor

- 20 Essential for the purposes of the Commission's unfair dismissal jurisdiction, is that Mr Digney had been, at all material times, an "employee" for the purposes of s 7 of the Industrial Relations Act 1979. Section 7 of the Act provides as follows:

7. Terms used

- (1) In this Act, unless the contrary intention appears —

...

employee means —

- (a) any person employed by an employer to do work for hire or reward including an apprentice; or
- (b) any person whose usual status is that of an employee; or
- (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or
- (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,
but does not include any person engaged in domestic service in a private home unless —
- (e) more than 6 boarders or lodgers are therein received for pay or reward; or
- (f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged;

- 21 The answer to this question requires consideration of the relevant common law principles.
- 22 In relation to this issue, the Society asserted in its amended notice of answer that "The applicant was offered employment by the Society, he, however declined this request and asked to be paid on an ABN basis". On the other hand, Mr Digney contended that at all material times he was an employee of the Society and was employed as its General Manager under a written contract of employment with effect from 22 August 2012.
- 23 The relevant principles as to whether a person should, as a matter of fact and law, be regarded as an employee or an independent contractor, have been dealt with by the Industrial Appeal Court. In *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2004) 85 WAIG 5, Steytler J dealt with this issue at pars 20-28, EM Heenan J at pars 50-52 and Simmonds J dealt with the issue at pars 98-100. In particular, Simmonds J said at pars 95-101 as follows:

- 95 The common law test for distinguishing a relationship of employer/employee, on the one hand, and principal/independent contractor, on the other, has recently been reviewed in some detail in the judgment of

Hasluck J of this Court in *Birighitti* (*supra*), at [57] to [67]. The other members of the Court (Anderson J, who dissented on the jurisdictional issue in the case, and Scott J) did not find it necessary to enter into the question in as much detail because of the case's particular facts.

96 In this case, where it seems to me the matter is rather more evenly balanced than in *Birighitti*, I consider it is necessary to review the matter again, particularly as it was contended in this case that there had been a shift in the law not entered into in *Birighitti*. I review the matter again without meaning to depart from the view of Hasluck J there in any way, but to emphasise matters of first principle particularly relevant to this case.

97 The most recent High Court authority in point, for the purposes of vicarious liability for the negligence of a bicycle courier, is *Hollis v Vabu Pty Ltd* (*supra*). There was a clear majority on the issue of the application of the test, that of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, with McHugh J dissenting, and Callinan J not expressing a concluded view on the matter. As to the test itself, however, I see no clear difference between all of the members of the Court who expressed a concluded view.

98 The test set out in *Vabu* by the majority is expressed in terms of the difference between a person (an employee) whose work serves another, and is done **in that other's business**, on the one hand, and a person whose work is likewise for the benefit of another's business, but is done in the course of the carrying on of a **trade or business of the person doing the work**, on the other. The majority referred (*Vabu*, at 39) for this purpose to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, at 48, per Dixon J, and to *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, at 217 per Windeyer J, where language of this sort is used. The *Vabu* majority also referred to *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, at 366 per McHugh J, where the distinction is expressed in terms of the independent contractor as a person who does the work not as "the representative of the employer".

99 For the application of the test, and particularly for the relevance of the matter of "control" of the work done, the *Vabu* majority refer to the dicta in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, at 29 per Mason J. There, his Honour acknowledges the historical significance of the "control test" and the difficulties in using it in the historical ways in modern working conditions, where he says

"The common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers* [(1955) 93 CLR 461, at 571]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."

100 What his Honour meant by the reference to the factors, including but not limited to control, subsumed by the "totality of the relationship" is indicated by an earlier passage in his judgment in *Stevens* (*supra*), which is not referred to in *Vabu*, but which is a passage quoted in *Odco* as setting out the law on this point ((*supra*) at 754):

"The approach of this court has been to regard it [control] merely as one of a number of indicia which must be considered in the determination of the question: *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552; *Zuijs' case* [*supra*]; *FCT v Barrett* (1973) 129 CLR at 401; 2 ALR 65; *Marshall* [*supra*] at 218. Other relevant factors include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

101 As these dicta tend to indicate, the application of the test is a matter of some difficulty, as this case illustrates. I need to consider that question separately.

24 His Honour then went on to apply the test set out in the various decisions of the High Court referred to, and took into account a number of factors including control, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax, the delegation of work, indicia of a separate business, integration in the organisation, and the language of the parties' written contract: see pars 108-150 inclusive.

25 The "multi factor" test referred to and applied by Simmonds J, as set out above, was referred to and applied by the High Court in *Hollis v Vabu Pty Limited* (2001) 207 CLR 21.

26 The issue in this case is the status of Mr Digney as at the time of the termination of the relationship he had with the Society as at September 2013. Mr Digney testified that when he started at the Society as the General Manager, he inherited the former General Manager's terms and conditions of employment. The only difference was that because of his tax situation at that time, he requested, and the Society agreed, to pay him on an "ABN basis". That is, he would be responsible for paying his own income tax to the Australian Taxation Office.

27 In terms of his position, Mr Digney testified that he worked as the General Manager under the direction and control of the Board of the Society. He said that he only provided his labour to the Society and nothing else. He did not work for any other organisation. Mr Digney testified he was responsible for all aspects of the management of the Society, including in conjunction with assistance provided by an organisation called the South East Regional Centre for Urban Landcare, on all human resources and payroll issues.

28 The role of SERCUL was outlined in the evidence of Ms Robert, the Chief Executive Officer of the organisation. Ms Robert testified that SERCUL had entered into an agreement with the Society (see exhibit R15) to effectively provide human resources and payroll services. SERCUL provides these services to other bodies similar to the Society, which do not have the administrative infrastructure to deal with these matters themselves. In return for providing the payroll management service, SERCUL charged a fee to the Society. Ms Robert confirmed that in relation to employees of the Society, apart from the provision of payroll services, and the payment of insurances etc for employees, SERCUL has no day to day involvement with

the duties and responsibilities of Society employees. There was no reporting relationship between the employees of the Society and SERCUL.

- 29 Mr Digney's most recent written contract of employment was tendered as exhibit R2. This document is described as "Offer of 6 Month Employment Contract". The cover page to the document sets out Mr Digney's appointment as the General Manager for a six month contract commencing on 15 April and terminating on 11 October 2013. The location is specified as Martin, Western Australia. The hours of work are specified as commencing at 8:00am and there is an express expectation that the General Manager will work the hours necessary to achieve the responsibilities of the position. The responsibility and duties are set out in accordance with an attached duty statement. The remuneration is provided as \$109,400 "paid on an ABN basis".
- 30 In the following pages is a detailed document headed up "Status of employment contract". The document sets out in some detail the position of General Manager of the Society. The contract specifies the hours of work, the organisational responsibilities, the duties of the General Manager, the salary and superannuation arrangements, provision for annual leave, sick leave, long service leave, carer's leave and unpaid carer's leave. Furthermore, provision is made for bereavement leave and public holidays. Other terms include a termination of employment clause specifying that either the Society or Mr Digney could terminate the employment by the giving of the required notice. The agreement also contained a redundancy clause specifying what would occur in the event of the employee being made redundant.
- 31 The most recent contract, which was due to expire on 11 October 2013, was signed by Mr Digney and co-signed by Ms Griffiths, as the Treasurer of the Society and Board member. It seems that she did so in or about June 2013. An issue was made in relation to Ms Griffiths' capacity to sign the contract of employment. I am not persuaded to any extent by arguments as to that issue. Ms Griffiths was a member of the Board. She was the only signatory to the significant contract between the Society and SERCUL in relation to the services agreement between the two organisations. Whilst there was some suggestion by the Society that only the Chair and Vice Chair of the Board could sign employment contracts, it was accepted that no such provision exists in the constitution of the Society. Furthermore at the time the contract was signed by Ms Griffiths, nor any time shortly thereafter, was any suggestion made by Ms Griffiths or any other member of the Board, that Ms Griffiths signed the contract under duress or alternatively she had no lawful authority to do so. In my view, Ms Griffiths had ample actual authority to sign Mr Digney's contract, and certainly had the ostensible authority to do so.
- 32 The position of members of committees of management of incorporated associations, in terms of their duties and responsibilities to members and the incorporated body itself, are probably analogous to those of company directors. Aside from specific statutory obligations set out in relevant legislation applying to incorporated associations, the obligations and duties of members of committees of management are those established by equitable and common law principles: LexisNexis, *Halsbury's Laws of Australia* (at 19 November 2014) [435-205].
- 33 For the purposes of this matter, the terms of the Associations Incorporation Act 1987 are particularly relevant. Sections 14 and 15 of the AI Act are in the following terms:

14. Contracts by incorporated associations, how made etc.

- (1) Contracts may be made by or on behalf of an incorporated association as follows —
- (a) a contract which, if made between natural persons, would be required to be in writing under seal may be made by the incorporated association under its common seal; and
 - (b) a contract which, if made between natural persons, would be required to be in writing signed by the parties may be made on behalf of the association in writing by any person acting under its express or implied authority; and
 - (c) a contract which, if made between natural persons, would be valid although not in writing signed by the parties may be made orally on behalf of the association by any person acting under its express or implied authority.
- (2) A contract may be varied or rescinded by or on behalf of an incorporated association in the same manner as it is authorised to be made.

15. Contracts, when validity of affected by deficiency in association's legal capacity

- (1) A contract made with an incorporated association is not invalid by reason of any deficiency in the legal capacity of the association to enter into, or carry out, the contract unless the person contracting with the association has actual notice of the deficiency.
 - (2) An incorporated association that enters into a contract that would, but for the provisions of subsection (1), be invalid is empowered to carry out the contract.
 - (3) This section does not prejudice an action by a member of an incorporated association to restrain the association from entering into a transaction that lies beyond the powers conferred on the association by this Act or its rules.
- 34 The contract between Mr Digney and the Society was not one required to be made under seal. Nor was it required, as a matter of law, to be in writing. An employment contract, although preferably, it should be in writing or evidenced in writing, may be oral. Ms Griffiths is not only a member of the Board of the Society but is also its Treasurer. She was, as I have mentioned above, a signatory to the contract with SERCUL. I am satisfied, that consistent with s 14 of the AI Act Ms Griffiths had, if not express, then certainly implied authority to sign the contract with Mr Digney, on behalf of the Society.
- 35 In any event, as s 15 of the AI Act makes plain, the contract with Mr Digney cannot be invalidated, except in circumstances where he had notice of any deficiency, which at or around the time of entry into the contract, he did not. Furthermore, as a

matter of fact, the parties acted on the terms of the contract for its duration and the Society cannot now, in retrospect, seek to avoid its terms on the basis contended.

- 36 The evidence of the Society, through Mr Garrett, the Vice Chair of the Board at the time, and Ms Griffiths, was that Mr Digney, when he first started in the position, wanted to be paid on an "ABN basis". It was on that basis that the Society considered Mr Digney to be an independent contractor and not an employee.
 - 37 The law in relation to this issue is that a range of indicia is used in assessing whether the true nature of the relationship is one of employment or that of independent contractor. This requires a court to assess the totality of the relationship, having regard to a broad range of factors. The following factors I will consider, having regard to the relevant authorities set out earlier in these reasons. Additionally, I will have regard to the "Factors in the assessment" as set out in pars 2.105 to 2.170 in Sappideen C, O'Grady P, Warburton G and Eastman K, *Macken's Law of Employment* (6th ed, 2009) 52-64.
 - 38 Firstly in relation to control, the issue in relation to this criterion is not just the actual exercise of day to day control by an employer over an employee but the residual right to exercise it. In this case, Mr Digney was the General Manager of the Society and was given a large degree of autonomy in the work to be performed. However, it was clear from the evidence and exhibit R2, that Mr Digney was responsible to the Board of the Society and the Board plainly had the capacity to direct and control Mr Digney if necessary.
 - 39 In relation to working for others, this can be an indicator of independence, along with having the capacity to do so. In this case there was no evidence that at the time of the last contract entered into between Mr Digney and the Society, that Mr Digney did any substantial work for anyone else other than the Society.
 - 40 In relation to the existence of a separate workplace and advertising for business, there was no suggestion on the evidence in this case that Mr Digney worked from other business premises in his own right or sought clients or customers to perform work independent of that performed for the Society.
 - 41 In relation to the investment of capital, in this case Mr Digney did not invest in any capital necessary for the performance of his work. All that was provided by him was his own management skill and experience.
 - 42 As to the criteria of delegation, an indicator of independent contractor status is the right to delegate performance of work to others. There was no suggestion on the evidence that in this case, Mr Digney had any capacity to delegate his duties as General Manager to any other person.
 - 43 As to the criteria of integration, in this matter, there was no suggestion that Mr Digney, as General Manager of the Society, was regarded as other than an integral part of the Society as its General Manager. Indeed, as the General Manager of the Society, he was responsible for providing leadership and the overall running of the organisation.
 - 44 In relation to taxation, tax considerations can be influential but are often neutral. The test for income tax deductions by an employer under income taxation legislation is not the same as the test at common law as to whether a person is an employee or an independent contractor. In the present case, Mr Digney's taxation arrangement to be paid on an "ABN basis", could point towards independence, however of itself, without other indicia, it is certainly not conclusive. Furthermore, in this case, the evidence shows that Mr Digney's request to be paid on this basis prior to commencing as the General Manager of the Society was because of property investments that he then held, not because of any purported claim to operating an independent business.
 - 45 In relation to the method of payment and other benefits, payment by results or on completion of tasks, rather than by salary or wage, may indicate independence. In this case, Mr Digney was paid an annual salary, on a six month pro rata basis. As I have already set out above, the contract of employment document also provided for the usual leave entitlements that are applicable to an employer/employee relationship.
 - 46 In terms of an employer's right to dismiss, a contractual right in those terms empowering the employer party to terminate the relationship is an indicator of employment. In this case, Mr Digney's contract with the Society contained such a right.
 - 47 Finally, the express declaration of the parties can be influential. However, a label cannot be attached to the relationship in an attempt to alter its essential substance. In this case, the terms of exhibit R2 sets out in some detail a contract document which presents in all respects, Mr Digney as an employee of the Society as its General Manager.
 - 48 The Commission needs to consider all of the evidence and assess the totality of the relationship, to determine whether a person was an employee, or an independent contractor. In this case, having regard to the indicia, in my view, it is not the case that Mr Digney was an operator of his own business in his own right. I am satisfied that, at all material times, Mr Digney was an employee of the Society for the purposes of the Act, despite the fact that he requested to be paid in the manner which he was.
 - 49 Accordingly, I am satisfied that the Commission has jurisdiction to enquire into and deal with Mr Digney's unfair dismissal claim against the Society. The matter will now be re-listed to hear his claim on the merits. This will include, of course, whether Mr Digney was "dismissed" by the Society.
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2015 WAIRC 00218

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	PHILLIP DIGNEY	APPLICANT
	-v-	
	THE BLACK COCKATOO PRESERVATION SOCIETY OF AUSTRALIA (ABN: 75 980 610 063)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 6 MARCH 2015	
FILE NO.	U 171 OF 2013	
CITATION NO.	2015 WAIRC 00218	
Result	Directions issued	
Representation		
Applicant	In person	
Respondent	Mr G Dewhurst and with him Ms C Dewhurst	

Directions

HAVING heard the applicant on his own behalf and Mr G Dewhurst and with him Ms C Dewhurst on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT applicant file and serve its amended particulars of claim by 13 March 2015.
- (2) THAT the respondent file and serve its further amended particulars of answer within 7 days of service of the applicant's particulars of claim.
- (3) THAT each party shall give an informal discovery by letter of request for production to the other party within 7 days of service of the respondent's further amended particulars of answer.
- (4) THAT the matter be listed for hearing for 5 days on dates to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00231

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	PHILLIP DIGNEY	APPLICANT
	-v-	
	THE BLACK COCKATOO PRESERVATION SOCIETY OF AUSTRALIA (ABN: 75 980 610 063)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 13 MARCH 2015	
FILE NO/S	U 171 OF 2013	
CITATION NO.	2015 WAIRC 00231	
Result	Application discontinued by leave	
Representation		
Applicant	In person	
Respondent	Mr G Dewhurst	

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00337

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BRENDON ELLMER	APPLICANT
	-v-	
	AEG OGDEN PERTH	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 24 APRIL 2015	
FILE NO/S	B 5 OF 2015	
CITATION NO.	2015 WAIRC 00337	

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*.

On 10 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.

On 23 March 2015 the applicant advised the Commission that he did not wish to proceed with the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 14 April 2015 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00245

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MICHAEL ALEXANDER GIBSON	APPLICANT
	-v-	
	TURQUOISE DEVELOPMENTS PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 20 MARCH 2015	
FILE NO/S	B 182 OF 2014	
CITATION NO.	2015 WAIRC 00245	

Result	Application discontinued
Representation	
Applicant	Mr K Trainer
Respondent	Mr W Millward

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00366

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DAVID GICHANGA
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APPLICANT

-v-

PRECISION CATERING & EQUIPMENT PTY LTD

RESPONDENT

CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 8 MAY 2015
FILE NO/S	B 42 OF 2015
CITATION NO.	2015 WAIRC 00366

Result	Application dismissed
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Order

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

WHEREAS a conference was scheduled to be convened on the 21st day of April 2015; and

WHEREAS at that time there was no appearance for the respondent and the applicant indicated the parties had reached an agreement in principle; and

WHEREAS on the 24th day of April 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.

2015 WAIRC 00369

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00369
CORAM : COMMISSIONER J L HARRISON
HEARD : WEDNESDAY, 22 APRIL 2015
DELIVERED : MONDAY, 11 MAY 2015
FILE NO. : B 237 OF 2014
BETWEEN : JENNA JONES
 Applicant
 AND
 JAMES DOSSETTER, ORANGE AUSTRALIA, PREVIOUSLY ORS TRADES &
 MINING
 Respondent

Catchwords : Industrial Law (WA) - Contractual benefits claim - Jurisdiction to deal with claim - Whether salary exceeds prescribed amount - Whether commission and accrued annual leave paid to applicant is included in salary for the purposes of s 29AA(4) - Commission satisfied applicant's salary does not exceed prescribed amount - Declaration and Order issued
Legislation : *Industrial Relations Act 1979* s 27(1), s 29(1)(b)(ii) and s 29AA(4) and (5)
 Industrial Relations (General) Regulations 1997 reg 5
Result : Declaration and Order issued
Representation:
Applicant : In person
Respondent : Mr J Dossetter and Mr M Collins

Case(s) referred to in reasons:

Bridge Shipping Pty Ltd v Grand Shipping SA and Anor [1991] 173 CLR 231
Budimlich v J-Corp Pty Ltd (2014) 94 WAIG 503
Papps v Robe River Mining Co Pty Ltd (2005) 85 WAIG 3565
Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Reasons for Decision

- On 3 December 2014 Jenna Jones (the applicant) lodged this application claiming that she was owed benefits under her contract of employment with James Dossetter, Orange Australia, previously ORS Trades & Mining (the respondent). The respondent disputes that the applicant is entitled to the benefits she is seeking.
- The respondent raised a preliminary issue. That is, whether the Commission has jurisdiction to deal with the applicant's claim given the terms of s 29AA(4) of the *Industrial Relations Act 1979* (the Act). Section 29AA(4) of the Act provides that the Commission must not determine such a claim if the employee's salary exceeds the prescribed amount. The prescribed amount as at 1 July 2014 which applies to this application is \$149,400.

Name of the respondent

- During the hearing to deal with this preliminary matter it became apparent that the respondent was incorrectly named. Given the Commission's powers under s 27(1) of the Act and as it is appropriate for the respondent to be correctly named, I will issue an order that James Dossetter, Orange Australia, previously ORS Trades & Mining be deleted as the named respondent in this application and be substituted with Orange Recruitment Australia Pty Ltd (see *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* [1991] 173 CLR 231).

Background

- The parties agreed on the following facts. The applicant was employed by the respondent as its general manager between 17 February 2008 and 18 August 2014. When the applicant ceased working with the respondent she was employed on a full-time basis, she worked approximately 42.5 hours per week and she was paid a salary of \$120,000 gross per annum plus commission if she met set targets. The applicant's terms and conditions of employment were set out in written contracts of employment, the last one of which she signed on or about 9 September 2011 (exhibit R2). The applicant's employment was not covered by an award or industrial agreement.
- The parties agreed on the quantum of the applicant's income during the 12 month period prior to her cessation of employment with the respondent. In addition to the applicant's annual salary of \$120,000 gross, which was paid on a weekly basis, the

respondent paid the applicant commission plus leave entitlements due to her. Between 19 August 2013 and 17 August 2014 commission paid to the applicant was as follows:

Pay period ending	Amount
30/03/2014	\$4,918.35
04/05/2014	\$7,487.85
01/06/2014	\$5,551.33
29/06/2014	\$7,007.60
03/08/2014	<u>\$13,206.13</u>
Total commission	<u>\$38,171.26</u>

(extract exhibit R1)

Submissions

Respondent

- 6 The respondent argues that commission and leave entitlements are components of the applicant's salary for the purposes of s 29AA(4) of the Act. The applicant's salary was therefore higher than the prescribed amount. The respondent claims that the decision of *Papps v Robe River Mining Co Pty Ltd* (2005) 85 WAIG 3565 supports this claim.

Applicant

- 7 The applicant claims that a number of the Commission's decisions have determined that commission paid to an employee is not regarded as salary under s 29AA(4) of the Act. After excluding commission paid to her during the relevant period the applicant's salary was \$120,000 which is lower than the prescribed amount.

Does the applicant's salary exceed the prescribed amount?

- 8 Section 29AA(4) and (5) of the Act state as follows:
- (4) The Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if —
- an industrial instrument does not apply to the employment of the employee; and
 - the employee's contract of employment provides for a salary exceeding the prescribed amount.
- (5) In this section —
- industrial instrument** means —
- an award; or
 - an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section; or
 - an industrial agreement; or
 - an employer-employee agreement;
- prescribed amount** means —
- \$90 000 per annum; or
 - the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section.
- 9 Regulation 5 of the *Industrial Relations (General) Regulations 1997* is as follows:
- 5. Prescribed amount — section 29AA**
- For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act the specified salary is \$90 000, or that amount as affected by indexation in accordance with regulation 6.
 - For the purposes of paragraph (b) of the definition of "prescribed amount" in section 29AA(5) of the Act the salary provided for in an employee's contract of employment is to be worked out as follows —
 - for an employee who was continuously employed by an employer and was not on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the greater of —
 - the salary that the employee actually received in that period; and
 - the salary that the employee was entitled to receive in that period;
 - for an employee who was continuously employed by an employer and was on leave without full pay at any time during the period of 12 months immediately before the dismissal or claim — the total of —
 - the actual salary received by the employee for the days during that period that the employee was not on leave without full pay; and
 - for the days that the employee was on leave without full pay an amount worked out using the formula —

remuneration mentioned in subparagraph (i) x days
on leave without full pay

days not on leave without full pay;

or

- (c) for an employee who was continuously employed by an employer for a period less than 12 months immediately before the dismissal or claim — the amount worked out using the formula —

$\frac{\text{remuneration received} \times 365}{\text{days employed.}}$

days employed.

Consideration

- 10 The issue of whether commission forms part of an employee's salary with respect to s 29AA(4) of the Act was discussed by Beech CC in *Budimlich v J-Corp Pty Ltd* (2014) 94 WAIG 503. In this decision Beech CC found that the commission paid to Mr Budimlich did not constitute salary for the purposes of s 29AA(4) of the Act. Beech CC stated as follows:

Whether the word 'salary' in s 29AA(4) can include a commission has not received the direct attention of the Commission previously although it has arisen indirectly. In *Millar v JB & BL Nominees Pty Ltd trading as Southern Cross Traders* ([2005] WAIRC 02857; (2005) 85 WAIG 3802) Smith C (as she then was) was not required to decide whether amounts paid as commission can at law constitute 'salary'. At [87] she observed that the value of the use of a motor vehicle and accommodation cannot be taken into account for the purposes of r 5 of the Regulations because they are not 'salary' within the meaning of s 29AA(4) and (5) and r 5, and 'nor can any amount claimed or received as commission be characterised as 'salary''. She observed that whilst the formula in r 5(2)(c) refers to 'remuneration', the opening words to r 5(2) qualifies that word so that it must be read down to only include amounts that can be characterised as salary [13].

Kenner C in *Rowley v BHP Billiton Iron Ore* [2013] WAIRC 00581 concluded that on its plain meaning, for the purposes of r 5(2)(b)(ii), 'remuneration' means 'salary' in its common law sense and not the wider concept of remuneration [14].

The word 'salary' has been, helpfully, the subject of consideration by the Industrial Appeal Court in *The Totalisator Agency Board v Fisher* (1997) 77 WAIG 1889. That case, which occurred prior to s 29AA(4) being inserted into the Act, considered the issue whether Ms Fisher, being a person employed by the TAB and remunerated by commission only, was a person employed on the salaried staff of a public authority [17].

In his Honour's view [Kennedy J in *The Totalisator Agency Board v Fisher*], the dictionary definition of 'salary' being a fixed payment made periodically to a person as compensation for regular work made the concept of a fixed payment central to the definition. It was impossible to identify any fixed payment in Ms Fisher's entitlement to remuneration under her contract [19].

Anderson J observed [20]:

...

In my opinion although it can be helpful to see how words have been defined in other cases, the starting point is the ordinary meaning of the words. As Lord Haldane LC said in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 113, "... I think that the only safe course is to read the language of the statute in what seems to be its natural sense". We were referred to several dictionaries. There is not much difference between them as to what salary in its ordinary sense means. In the *Macquarie Dictionary* the following meaning is given:

"A fixed periodical payment, usually monthly, paid to a person for regular work or services, especially work other than that of a manual, mechanical or menial kind."

In the *New Shorter Oxford English Dictionary* the following meaning is given -

"Fixed regular payments made by an employer to an employee in return for work."

The respondent makes the point that *The Totalisator Agency Board v Fisher* was not dealing with s 29AA(4) of the Act. That is true, however, the Industrial Appeal Court was interpreting the word 'salary' as it appears in the words 'employed on the salaried staff of a public authority' by giving the words their natural and ordinary meaning [21].

I can see no reason not to follow, with respect, Anderson J's observation that the dictionary definition of 'salary', being a fixed payment made periodically to a person as compensation for regular work, makes the concept of a fixed payment central to the definition. To hold that the word 'salary' includes a commission, which is not a fixed payment, would be contrary to the definitions of the word referred to by Anderson J [22].

In my opinion, the ordinary and natural meaning of the words 'the employee's contract of employment provides for a salary exceeding the prescribed amount' is that the word 'salary' means a fixed payment made periodically to a person as compensation for regular work [23].

Further, to hold otherwise would mean the words of s 29AA(4)(b) would have to be read as though they say: 'the employee's contract of employment provides for a commission exceeding the prescribed amount' [24].

- 11 I find that the applicant's salary is within the prescribed amount for the purposes of s 29AA(4) of the Act. I find that the commission the respondent paid the applicant during the relevant period and accrued annual leave entitlements paid to the applicant at termination do not form part of the applicant's salary.
- 12 When taking into account the authorities cited above with respect to what constitutes salary, I find that salary for the purposes of s 29AA(4) of the Act is a fixed payment made to an employee in return for undertaking regular work. During the relevant period the respondent paid the applicant a weekly income based on the applicant's annual salary of \$120,000 gross. As this

payment was fixed and paid on a regular basis I find that this payment constitutes salary for the purposes of s 29AA(4) of the Act. I find that the varying amounts of commission paid to the applicant from time to time is not to be regarded as salary as it was not a fixed payment made to the applicant in return for her undertaking her regular work. I find that accrued annual leave paid to the applicant at termination is not included in her salary for the purposes of s 29AA(4) of the Act. Accrued annual leave is usually taken by an employee during their employment and when an employee takes this leave they are paid their normal salary during this period. When accrued annual leave is paid to an employee at termination it is the payment of the entitlement to annual leave not taken by that employee. The payment of accrued annual leave to the applicant was a one-off payment. It was not a regular, fixed payment made to her in return for undertaking her normal duties. If I am wrong in reaching the conclusion that accrued annual leave paid at termination does not constitute salary for the purposes of s 29AA(4) of the Act and is to be regarded as salary, the amount paid to the applicant at termination for this entitlement plus her salary of \$120,000 gross would not put the applicant's salary above the prescribed amount in any event.

13 A declaration will issue that the applicant's salary did not exceed the prescribed amount.

2015 WAIRC 00376

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	JENNA JONES	APPLICANT
	-v-	
	ORANGE RECRUITMENT AUSTRALIA PTY LTD	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	THURSDAY, 14 MAY 2015	
FILE NO/S	B 237 OF 2014	
CITATION NO.	2015 WAIRC 00376	

Result	Declaration and Order issued
Representation	
Applicant	In person
Respondent	Mr J Dossetter and Mr M Collins

Declaration and Order

HAVING HEARD the applicant on her own behalf and Mr J Dossetter and Mr M Collins on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (the Act), hereby:

1. DECLARES THAT the applicant's salary did not exceed the prescribed amount for the purposes of s 29AA(4) of the Act.
2. ORDERS THAT the name of the respondent be deleted and Orange Recruitment Australia Pty Ltd be substituted in lieu thereof.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00348

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	FREDERICK NELSON MACKENZIE	APPLICANT
	-v-	
	CAPEL BAKERY	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 1 MAY 2015	
FILE NO/S	B 155 OF 2014	
CITATION NO.	2015 WAIRC 00348	

Result Application dismissed

Order

WHEREAS this is an application referred to the Commission under Section 29(1)(b)(ii) of the *Industrial Relations Act 1979* by which the applicant claims denied contractual benefits from his employment as a baker/pastry cook in the respondent's commercial and retail bakery; and

WHEREAS the matter was listed for hearing on the 24th day of April 2015 at 10.30 am; and

WHEREAS at that hearing the applicant submitted a Current Company Extract for Capel Bakehouse Pty Ltd ACN 158 370 113 from ASIC which, together with information provided by the applicant demonstrates that the applicant's employer:

- (1) is a trading corporation; and
- (2) the applicant's claim relates to entitlements which arise under an award of the Fair Work Commission, and are not denied contractual benefits arising from his contract of employment;

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.

2015 WAIRC 00349

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FREDERICK NELSON MACKENZIE

APPLICANT

-v-

TAMEKA DENNISON

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 1 MAY 2015

FILE NO/S U 154 OF 2014

CITATION NO. 2015 WAIRC 00349

Result Application dismissed

Order

WHEREAS this is an application referred to the Commission under Section 29(1)(b)(i) of the *Industrial Relations Act 1979* by which the applicant claims that he was harshly, oppressively and unfairly dismissed from his employment as a baker/pastry cook in the respondent's retail bakery; and

WHEREAS the matter was listed for hearing on the 24th day of April 2015 at 10.30 am; and

WHEREAS at that hearing the applicant submitted a Current Company Extract for Capel Bakehouse Pty Ltd ACN 158 370 113 from ASIC which, together with information provided by the applicant demonstrates that the applicant's employer was:

- (1) not the named respondent;
- (2) a trading corporation.

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.

2015 WAIRC 00368

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	DEANNE MARLOW	APPLICANT
	-v-	
	SOUTH COAST REALTY PTY LTD T/AS RENTAL SOLUTIONS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	FRIDAY, 8 MAY 2015	
FILE NO/S	B 208 OF 2014	
CITATION NO.	2015 WAIRC 00368	

Result	Application discontinued
Representation	
Applicant	Ms D Marlow
Respondent	Ms F Stanton (of counsel)

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS on 17 November 2014 and 11 February 2015 conferences between the parties were convened;
AND WHEREAS at the conclusion of the conference held on 11 February 2015 an agreement was reached between the parties;
AND WHEREAS on 6 May 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2015 WAIRC 00252

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2015 WAIRC 00252
CORAM	: COMMISSIONER S J KENNER
HEARD	: WEDNESDAY, 11 MARCH 2015
DELIVERED	: THURSDAY, 26 MARCH 2015
FILE NO.	: B 152 OF 2014
BETWEEN	: JENNIFER PORTER
	Applicant
	AND
	CITY OF STIRLING
	Respondent

Catchwords	: Industrial law (WA) – Contractual benefits claim – Claim for a shift allowance – Whether there was a variation of the contract to remove the allowance – Principles applied – Unilateral variation to the terms of the contract of employment – No agreement to or acceptance of the variation – No duress applied – No consideration – A promise to perform an existing legal duty is not consideration – Shift allowance remains a contractual entitlement – Application upheld
Legislation	: <i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(ii) <i>Fair Work Act 2009</i> (Cth)
Result	: Application upheld

Representation:

Applicant : Mr K Trainer as agent
 Respondent : Mr J Uphill as agent

Case(s) referred to in reasons:

Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia (1999) 90 IR 211

Bridgewater v Leahy (1998) 194 CLR 457

Buckman v Barnawartha Abattoirs Pty Ltd (1994) 140 IR 376

Martech International Pty Ltd v Energy World Corporation Limited [2006] FCA 1004

The Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447

Visscher v Giudice (2009) 239 CLR 361

Reasons for Decision

- 1 The applicant, Ms Porter, commenced employment with the City of Stirling in January 2008 as a Gatekeeper, and has been employed as a Weighbridge Operator as of 15 October 2008 at the Recycling Centre in Balcatta, Western Australia. Ms Porter is responsible for weighing vehicles, charging customers fees for the disposal of their waste, weighing the City's waste trucks, making records and reconciling daily takings. Ms Porter claims she has been denied benefits due to her under her contract of employment entered into on 13 October 2008, in the form of the payment of a 15% "shift allowance", which was paid in addition to her ordinary salary. The payment of the shift allowance ceased on 1 January 2014 in circumstances which are controversial.
- 2 Ms Porter claimed that the City unilaterally varied the terms of her contract of employment when it advised that she was no longer entitled to the allowance. The removal of the allowance in January 2014 meant that Ms Porter has suffered an ongoing loss of \$323.62 gross per fortnight.
- 3 The City opposed Ms Porter's claim for the 15% shift allowance and contended that the allowance is no longer a term of the contract. The City said that Ms Porter received the allowance from 15 October 2008 until the end of December 2013, but ceased paying the allowance on the basis that, at a meeting on 23 October 2013, the parties agreed to a variation of the contract to remove the allowance because the allowance had been paid to Ms Porter in error. The City contended that Ms Porter accepted the variation to the contract evidenced by a letter of 6 November 2013, which she endorsed on 20 December 2013. Ms Porter claimed that she signed that letter under duress, and there was no genuine agreement on her part to forego the allowance.
- 4 Further and in the alternative, the City argued that a letter of 1 March 2012, reclassifying Ms Porter's position, varied her contract so as to remove the 15% shift allowance. It said that from March 2012 onwards Ms Porter had no contractual entitlement to the allowance, and the payment of the allowance after that time was an error. The City did not seek back pay from Ms Porter.
- 5 At the time the contract was entered into by the parties in October 2008, Ms Porter was covered by the City of Stirling Waste Services – General Union Collective Agreement 2008, and later she was covered by the City of Stirling Outside Workforce Agreement 2011.
- 6 Whether Ms Porter remains entitled to the 15% shift allowance depends on whether there was a variation to Ms Porter's contract. This requires consideration of the principles regarding unilateral variation of contracts, duress and consideration.

Agreed facts

- 7 The parties agreed the following facts:
 1. The Applicant was initially employed as a casual Gatekeeper commencing in January 2008.
 2. In July 2008, the Applicant was offered the full time position of Gate Attendant on the terms of the Waste Services - General Union Collective Agreement 2008. The offer did not involve the 15% shift allowance.
 3. In October that year, the Applicant applied for the permanent position of Weighbridge Operator.
 4. The Applicant was appointed to the position of Weighbridge Operator (the Employment) and commenced work in that position on 15 October 2008.
 5. A Copy of the City's letter of offer is Attachment 1. In addition to the weekly payments,
 - 5.1. The City expressly offered a "shift allowance" payment of 15%
 - 5.2. The City expressly offered payment of a productivity allowance of \$8.00 for each day worked
 - 5.3. The employment conditions were subject to the terms of the Waste Service General Union Collective Agreement 2008.
 6. The Applicant's work hours of duty were 76 per fortnight based on a roster system that included regularly working weekends and public holidays.
 7. The Applicant received four weeks annual leave until 2012 when it increased to five weeks.
 8. The productivity allowance referred to in the letter of offer has since been increased and the Applicant has been paid the increase in each instant.

9. In each pay period from 13 October 2008 until the end of December 2013, the Applicant was paid the 15% loading.
10. A new Weighbridge Operator (Rachel Kendall) commenced employment
 - 10.1. Initially she was not paid either the 15% loading or the productivity allowance as she was casual
 - 10.2. Subsequently, when Ms Kendall was made permanent and full time, she was paid both allowances
 - 10.3. Payment of the allowances was back paid
11. In March 2012, the Applicant received a letter which related to a reclassification of her position to Weighbridge Attendant – Level 5, a position that was covered by the City of Stirling Outside Workforce Agreement 2011
 - 11.1. The letter made no reference to the allowances
 - 11.2. The City continued to pay both the shift and the productivity allowance
12. On 3 September 2014, the Applicant received a letter from the City notifying her that in the City's view, the 15% shift allowance had been incorrectly paid and she was invited to attend a meeting on the matter.
13. On 18 September 2014, the Applicant received an invitation to attend a meeting on 16 October 2014 to discuss the payment of the shift allowance.
14. The meeting actually took place on 23 October 2012. In addition to the Applicant, Ms Phillips and Mr Sciberras from the City attended the meeting
15. A letter dated 6 November 2014 was sent to the Applicant. In part the letter sought an acknowledgement from the Applicant that the 15% shift allowance would cease from 1 January 2014
16. On 14 December 2014, the Applicant sent a further letter to the Respondent appealing the decision to remove the allowance.
17. On 19 December 2014, the Applicant was invited to attend a meeting about her letter of 14 December 2014 on 24 December 2014. The meeting actually took place on 20 December 2014
18. After 1 January 2014, the Applicant continued to receive payment for the productivity allowance

The evidence

- 8 Ms Porter's offer of employment dated 13 October 2008, for the position of Weighbridge Operator level 4 step 2, is signed by Ms Phillips, the then Coordinator – Resourcing, and was tendered as exhibit A1. The offer, formal parts omitted, states as follows:

Offer of Employment

Congratulations on your appointment to the position of Weighbridge Operator within the Infrastructure Directorate. I have great pleasure in confirming your appointment details below:

POSITION TITLE	:	Weighbridge Operator
POSITION NUMBER	:	WMLA02
START DATE	:	Wednesday 15 October 2008
SALARY RANGE	:	Level 4 (WW004 - MEU)
SALARY	:	\$841.94 per week (Level 4 Step 2)
OTHER ALLOWANCES	:	\$8.00 per day. Productivity Allowance payable for actual days worked.
	:	15% shift allowance
STATUS/HOUR	:	Permanent – 38 hours per week, as per roster however this roster may be subject to future change in which appropriate notice will be given to suit business needs.
ROSTER	:	76FI
EMPLOYMENT CONDITIONS	:	
	•	As per the Waste Services – General Union Collective Agreement 2008. Please find enclosed your position description.
	•	Permanent status will be confirmed after you have completed a successful three month probation period. This may be extended if required.

...

Please sign the attached copy of this letter and return it to the Human Resource Business Unit to indicate your acceptance of this position. The City looks forward to continuing a most beneficial association with you.

- 9 It was not in dispute that the above letter of appointment created a contractual entitlement of a 15% shift allowance in Ms Porter's favour. The allowance was unrelated to the terms and conditions of employment contained in any enterprise agreement applying to Ms Porter's employment.

- 10 There were many versions of the Weighbridge Operator position description in evidence. The position description given to Ms Porter in October 2008 makes reference to the 15% shift allowance, while another reviewed in December 2010 does not, and yet another reviewed in August 2013 again makes reference to an allowance.
- 11 Ms Porter works a permanent 76 hour fortnightly roster, of 9.5 hours per day on an eight day fortnight. Ms Porter commences at 7.15am and finishes work at 5.15pm.
- 12 By way of a letter of 1 March 2012, the Coordinator Employee Relations at the time informed Ms Porter that her position of Weighbridge Operator had been reclassified to level 5, step 3 effective 1 July 2011, which meant that Ms Porter's salary increased about 50 to 80 cents per hour. That letter was tendered as exhibit A9, which I set out as follows:

Reclassification of Position - Outside Workforce Agreement 2011

As part of the implementation of the Outside Workforce Agreement 2011, I have pleasure in confirming the classification of your position as outlined below:

Position Title:	Weighbridge Operator
Position Number:	WMLA02
Classification Effective Date:	1 July 2011
Classified Level:	Level 5, Step 03
Classified Salary:	\$51,367.68 per annum

Your current pay has been processed and funds deposited into your nominated bank account. This pay includes back-pay on any position held by you since 1 July 2011 using your new classification.

Your existing annual leave will be converted over to annual leave plus leave loading (17.5%) within the next 4 weeks, and your tax scale has been changed accordingly. Annual leave will now accrue on a monthly basis.

All other terms and conditions of your employment are as per the Outside Workforce Agreement 2011. A copy of the Agreement is enclosed for your reference and is available on the City's intranet site.

- 13 As to the last paragraph of the above letter, Mr Sciberras the Manager, Waste and Fleet, testified that the phrase "as per the...Agreement" was the typical phrase used by the City in all of the letters like this that he has seen. He said that Ms Porter was being reclassified in accordance with the Mercer reclassification principles, assessed according to her role and responsibilities.
- 14 Ms Phillips, the current Coordinator Employee Relations, said she became aware that Ms Porter was receiving the 15% allowance in mid-2013 when the City was negotiating for the current City of Stirling Outside Workforce Agreement 2014. As part of the process, the City reviewed all outside workforce employees' conditions of employment. Ms Phillips said it was Mr Sciberras who discovered that Ms Porter was receiving the 15% allowance.
- 15 In his evidence, Mr Sciberras confirmed that he started the review for the new enterprise agreement in July 2013, and it was in about December 2013 that he concluded his view that the Weighbridge Operators were not entitled to the allowance. Mr Sciberras said that a large reason why the City made the decision to stop paying the allowance was because it was not in the 2011 Agreement. Mr Sciberras said allowances are covered by the Agreement and as the 15% shift allowance was not in it, he could not justify the continued payment: TT62-66.
- 16 Following the City's focus on the 15% shift allowance, a series of meetings were called. What was said at these meetings was the subject of a considerable amount of evidence. It started with a letter of 3 September 2013 inviting Ms Porter to a meeting on 11 September 2013, which relevantly stated it had "come to the City's attention that the shift allowance you currently receive has been applied incorrectly to the position of Weighbridge Operator. The City would like the opportunity to discuss this matter with you in person to determine next steps".
- 17 Ms Porter accepted that invitation and met with Mr Sciberras. According to Ms Porter, she was told that Weighbridge Operators had been paid an allowance which they were not supposed to receive, as it was not in the Agreement. Ms Porter testified that, at the meeting, she expressed her view that she disagreed with the removal of the allowance and said it was unfair. Mr Sciberras said that he told the Weighbridge Operators that the allowance was not in the Agreement and it would be looked into, and he needed to investigate further. According to Mr Sciberras, at that stage, he had not yet reached a view as to whether or not the Weighbridge Operators were entitled to the allowance, as he wanted to gather information.
- 18 Following the first meeting, Ms Porter wrote a "letter of appeal" to the City, dated 27 September 2013. In essence, Ms Porter was appealing against the decision to cease the allowance on the basis that she was entitled to the shift allowance "as was first intended".
- 19 There followed another letter of invitation dated 18 September 2013, expressed in similar terms to the letter of 3 September 2013, inviting Ms Porter to attend a further meeting, which took place on 23 October 2013. For the purposes of these proceedings, this particular meeting assumed some significance.
- 20 Another Weighbridge Operator, Ms Kendall, along with Mr Sciberras and Ms Phillips were at the meeting on 23 October 2013. Ms Porter testified that she raised the financial impact the removal of the allowance would have on her, and the conditions she worked under. Ms Porter said there was discussion that the allowance would cease in 2014, and the City explained how they believed the 15% shift allowance had been paid in error. This is similar to Ms Phillips' evidence, who said they discussed that the allowance was not contained in the Agreement and it was the City's view that the Weighbridge Operators were not entitled to the allowance. Ms Phillips' handwritten notes from the meeting stated "Remove effective 1 Jan 2014". This was said to be the suggested date of the cessation of the payment of the allowance.

- 21 A letter dated 6 November 2013 was tendered as exhibit A8, and was sent to Ms Porter after the meeting, and which she signed some time later on 20 December 2013. The letter states:

RE: END OF SHIFT ALLOWANCE ARRANGEMENT

This letter is to confirm the agreement made at our meeting on Wednesday 23 October 2013 which was attended by yourself, Pele Phillips, Coordinator Employee Relations and myself.

At the meeting, we confirmed that you were incorrectly paid a 15% shift allowance which is not applicable under either the *City of Stirling Waste Services Enterprise Agreement 2008* or the *City of Stirling Outside Workforce Agreement 2011* and as such the payment of this allowance needs to cease.

Following the meeting and after further consideration, it has been decided that the shift allowance arrangement will cease effective 1 January 2014 and your salary and level will be reflective of your position as a Weighbridge Operator, Level 5-step 3 (\$56,094.79 per annum). We also confirmed at the meeting that the City has agreed that you will not have to backpay the difference in monies between today's date and the date of when the shift allowance came into effect.

Please sign this letter and return it to the Human Resources Business Unit as soon as possible to indicate your acceptance of these changes.

...

I hereby accept the above terms and conditions as part of my employment with the City of Stirling.

- 22 The letter was drafted by Ms Phillips, and signed by Mr Sciberras. Ms Phillips said that the purpose of the meeting on 23 October was to consult and advise that the City was going to remove the allowance, and whether Ms Porter signed the letter was irrelevant as the City's intention was to remove the allowance.
- 23 Ms Porter strongly disputed that she entered into an "agreement" with the City on 23 October 2013 to remove the allowance, contrary to the first sentence of exhibit A8. During cross-examination, Ms Phillips said that she could not be sure if Ms Porter in fact agreed to the removal of the allowance, despite what she stated in her letter. Mr Sciberras' evidence was that Ms Porter "resigned" to having the 15% allowance taken away, and while she was unhappy with the change, she agreed with it. Ms Phillips said that it was evident at the meeting on 23 October that Ms Porter was not happy that the allowance would be removed, which was evidenced by Ms Porter's further appeals to the City.
- 24 After the meeting, Ms Porter wrote a letter of 11 November 2013 to the City, which was tendered as exhibit A11, stating that her offer of employment included the shift allowance, which the City had chosen to pay for a long time, and which formed part of her contract. Ms Porter stated in the letter:

...

The fact that now, after five years of being paid those allowances (as per my Offer of Employment), the City is now proposing to withdraw those payments, can only be treated as a breach of contract. My Position Title has not changed, the Position Number hasn't changed and nor have I signed a new Offer of Employment.

- 25 Again, on 14 December 2013, Ms Porter wrote a further letter to the City which included concerns about the cancellation of the shift allowance which had been in place since 2005. On 19 December 2013, the City sent another letter to Ms Porter inviting her to a meeting which took place on 20 December 2013. Ms Kendall, Mr Sciberras and Ms Phillips were again in attendance.
- 26 Ms Phillips' handwritten notes of the meeting on 20 December refers to discussion that the 15% shift allowance was not in the 2011 Agreement, that Ms Porter would be getting an additional week's leave and that the City would not be seeking back pay. Ms Porter testified that she raised concerns that the City was choosing to take away the shift allowance, while the productivity allowance remained, and she said that Mr Sciberras' response was to the effect that "if you're going to complain I'll take that away too" in an annoyed tone. Mr Sciberras denied that he said that. Mr Sciberras said he mentioned that as of 1 January 2014, the allowance would cease and mention was also made of the five weeks' annual leave. The meeting then concluded.
- 27 In her evidence, Ms Porter described how she came to sign exhibit A8 on 20 December 2013. She was out in the corridor, after the meeting and her evidence at TT22-23 was as follows:

We were out in the corridor, Rachel and myself. We were prepared to leave and Sean Sciberras followed - followed us out there and just, sort of, outside there's another door leading to the other offices, in the corridor he said:

"Have you got that letter I asked you to sign?"

And I said yes and he said:

"Have you signed it?"

And I said no and he said:

"Have you got yours, Rachel?"

And she said, no, I don't have it with me and so his attention turned to me and he said:

"You haven't signed it. I need it signed."

And I said I don't want to sign it, because I don't agree with it and he said:

"I need it signed now."

And motioned me with a pen to sign it.

All right. Did he tell you why you had to sign it then and there?---No.

All right. Can you tell the Commissioner his tone of voice when he was saying this to you?---I felt intimidated, felt that I had to sign it, that he was leaving me no choice, the tone, tone of him.

Other than yourself, Ms Kendall and Mr Sciberras did anyone else - or was there any other witness to these events?---I believe Pele Phillips would have been in the corridor as well.

All right. Okay. So at the end of it you did sign?---I did.

- 28 Ms Porter said that while Mr Sciberras did not shout, she felt intimidated and said he forcefully asked her to sign the letter. Ms Porter was in possession of the letter of 6 November 2013 for almost two months before she signed it. Ms Porter said that she signed the letter in the end because her objections were futile because, according to Ms Porter, the City's decision to remove the allowance was made back in early September. It was put to Ms Porter in cross-examination that she had an opportunity to consider whether or not she would agree to the removal of the allowance. Ms Porter said that she took the opportunities to "fight it, to object to it, but because it was going to commence on 1 January 2014; time had run out, it was going to happen anyway. It was made abundantly clear in the letters to me": T29.
- 29 Mr Sciberras said that he asked Ms Porter if she was going to sign, and strongly disagreed that he forced her to sign. Mr Sciberras said he did not believe she had to sign it, as it was more of a formality.
- 30 Ms Phillips said that on 20 December they were outside in the corridor at the depot and Ms Porter signed the letter on a little table. She described it as just a "normal meeting" and Ms Porter was not pressured into signing. Ms Phillips disputed that Ms Porter was told to sign the letter. Ms Phillips testified that from the City's point of view, it made no difference whether Ms Porter signed the letter or not, because the City had decided to remove the shift allowance from 1 January 2014 and believed it had consulted and given sufficient notice. The decision to take away the allowance was made sometime around the 23 October 2013.
- 31 Exhibit A3 were copies of Ms Porter's payslips for the pay dates 18 December 2013 and 15 January 2014, before and after the shift allowance ceased. Ms Porter said that she has not been paid the shift allowance since 20 December 2013 onwards. The \$323.62 "Shift 15%" does not appear on Ms Porter's payslip dated 15 January 2014.

Consideration

- 32 I have considered all the oral and documentary evidence in this matter. It is first necessary to determine whether there was a variation of Ms Porter's contract in March 2012. As noted above, it is not in dispute that the shift allowance formed part of Ms Porter's contract of employment, which is outlined in her offer of employment dated 13 October 2008. It is also not in dispute that up until 1 March 2012, Ms Porter had a contractual entitlement to the allowance. The parties agreed that the allowance was paid in each pay period from 13 October 2008 to the end of December 2013.
- 33 Ms Porter said the City unilaterally varied her contract when it removed the 15% shift allowance. The City said the reclassification letter of 1 March 2012 changed Ms Porter's contract, and after that time the allowance was paid to Ms Porter in error, which was discovered in mid-2013 in the lead up to bargaining negotiations. The City said that was why it took action to consult and remove the allowance. Mr Sciberras said a major reason why the City decided to stop paying the allowance was because it was not in the 2011 Agreement. The City further contended that the letter constituted a variation because it is silent in respect of the allowance and states that all other terms and conditions of Ms Porter's employment are "as per the Outside Workforce Agreement 2011".
- 34 It is possible that a unilateral variation to an employment contract can amount to a breach of the contract: see for example *Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia* (1999) 90 IR 211. While it is clear that employers must have some ability to alter aspects of the employment relationship, changes imposed must be consistent with the contract of employment and cannot be a unilateral variation of that contract: Thomson Reuters, *The Laws of Australia* (as at 1 April 2011) 26 Labour Law, 'Individual Employment' [26.1.2090].
- 35 In this case, since she started employment as a Weighbridge Operator, Ms Porter had a contractual entitlement to the allowance. The City's argument that the reclassification letter of 1 March 2012 constituted a valid variation of Ms Porter's contract gives rise to several difficulties.
- 36 It is clear on the evidence that Ms Porter did not consent or agree to the removal of the allowance, which resulted in a reduction of her pay, equating to \$323.62 per fortnight. A mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of a contract: McKendrick EG, 'Discharge by Agreement' in *Chitty on Contracts: General Principles* (27th ed, 1994) 1083. More specifically, in the employment context, the reduction in an employee's pay without consent can amount to a unilateral variation, breaching the employment contract: see TLA [26.1.2090].
- 37 The letter of 1 March 2012 deals with the subject of the reclassification of Ms Porter's position; it is brief and refers to the 2011 Agreement in general terms. In his evidence, Mr Sciberras confirmed that "All other terms and conditions of your employment are as per...the Agreement" is a typical phrase used in all letters like this; for example, Ms Porter's offer of employment of 13 October 2008 includes a similar phrase. When the letter of 1 March 2012 was given to Ms Porter, there was no evidence of a response or that the letter was discussed with her. Mr Sciberras confirmed in his evidence that Ms Porter was being reclassified in accordance with the normal reclassification principles, having regard to her role and responsibilities.
- 38 The letter cannot be taken to express all the terms between the parties, and there was no evidence that the reclassification letter was intended to have contractual effect. Rather, on the evidence of Ms Phillips, the City said that it discovered that Ms Porter was being paid the allowance in mid-2013, well after the letter was sent to Ms Porter in March 2012.
- 39 Generally speaking, continuing to work under a varied contract will not amount to acceptance of the unilateral variation: TLA [26.1.2070]; *Visscher v Giudice* (2009) 239 CLR 361. While it is possible that a failure to protest about a unilateral variation may result in consent to the variation, that circumstance does not arise on these facts: TLA [26.1.2070]; *Buckman v*

Barnawartha Abattoirs Pty Ltd (1994) 140 IR 376. Ms Porter continued to receive the allowance from 1 March 2012, and it was over a year later, in about September 2013, that the City started raising issues with the shift allowance being applied incorrectly. During this period, Ms Porter continued working for the City apparently unaware that there had been any proposed alteration to her allowance. Ms Porter could not have agreed to the variation as she did not appear to know about it. Further support for this finding is, on learning in September 2012 onwards that the City raised issues with the allowance, Ms Porter sent numerous letters of objection, and raised her concerns at the meetings and continued to protest its removal.

- 40 There could be little doubt from this that the City was aware that Ms Porter never earlier consented to varying her contractual entitlement to the allowance.
- 41 The City's actions in removing the allowance in January 2014 on the basis that it varied Ms Porter's contract by way of the letter of 1 March 2012, was inconsistent with Ms Porter's contractual right. There is no evidence that Ms Porter agreed to the variation, particularly as the allowance continued to be paid. Ms Porter demonstrated that she was vocal about her point of view after later being notified of the City's intentions to remove the allowance. It cannot be said that as a matter of fact and law, Ms Porter agreed to the variation, which would in effect reduce Ms Porter's income by a significant amount. The City's actions constituted a unilateral variation of Ms Porter's contract.
- 42 Thus, the suggestion by the City, that it did not require the written authorisation from Ms Porter of 6 November 2013 to remove the allowance, given there had already been a variation to Ms Porter's contract on 1 March 2012, cannot be sustained.
- 43 The next issue that arises is whether the letter of 6 November 2013, which was signed by Ms Porter on 20 December 2013, varied the contract so that Ms Porter was no longer entitled to the 15% shift allowance. The City said the meeting on 20 December 2013 resulted in acknowledgement by Ms Porter that the allowance would be removed, and her signature on the letter of 6 November was a clear indication that she reluctantly agreed with the removal. The City submitted that it properly obtained Ms Porter's authorisation to remove the allowance from 1 January 2014, as a result of her signing the letter dated 6 November. Ms Porter argued that there was never any genuine agreement to forgo the allowance, and she signed the letter of 6 November under duress. The letter of 6 November 2013 provides that "it has been decided that the shift allowance arrangement will cease effective 1 January 2014..." and Ms Porter signed the letter under the words she "accepts the above terms and conditions are part of her employment with the City".
- 44 Much of the evidence in the proceedings was focused on the statement in the letter that "This letter is to confirm the agreement made at our meeting on Wednesday 23 October 2013..." Ms Porter's evidence was that she did not agree at that meeting and her subsequent letters show there was no agreement to the change, and the submission was made that the letter was misleading. While Ms Porter tried to make something of the fact that she consistently opposed the removal of the allowance at all the meetings and by way of letters of protest, in the end, she signed the letter. Ms Phillips' evidence was it made no difference whether Ms Porter signed the letter of 6 November as the City was going to remove the allowance in any event, and she was of the view that the City had advised of its intent to remove it.
- 45 Ms Porter said that she signed the letter under pressure amounting to duress. For Ms Porter to argue that the City applied duress in relation to the signing of the letter dated 6 November 2013, the following elements must be present: (1) the City used illegitimate pressure, physical, economic or psychological, to compel her to assent to the transaction; (2) that pressure left Ms Porter with no reasonable alternative but to assent to the transaction; and (3), the pressure caused Ms Porter to assent to the transaction or was a cause of her assenting to it. Duress can overlap with undue influence and unconscionable dealing, especially if the pressure is psychological: see Seddon N, Bigwood R and Ellinghaus M, *Cheshire & Fifoot Law of Contract* (10th ed, 2012) at 743.
- 46 I note in passing that undue influence is concerned with unfair persuasion and the quality of consent, and often arises where there is a special relationship of influence between the parties: Sneddon et al at 760-767. Unconscionable conduct involves a stronger party dealing with a weaker party who is under a special disability, where the stronger party takes advantage of that disability to obtain a benefit against the other party's interests: *Bridgewater v Leahy* (1998) 194 CLR 457; *The Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447.
- 47 Given allegations of duress are made, it is important to consider the particular circumstances and the reasonableness of Ms Porter's response. The pressure must be "sufficiently grave to justify the assent from the victim in the sense that it left the victim with no reasonable alternative": see Seddon et al at 754-755. Putting Ms Porter's evidence in context, it is clear that Ms Porter demonstrated that she had no hesitation in standing up to the City and asserting her point of view over the course of many months. Ms Porter said she voiced her objection at all of the meetings, and sent numerous letters which were tendered in evidence.
- 48 Ms Porter may have, in the end, resigned to signing the letter because she thought her objections were futile because the City had already made its decision. While Ms Porter may have been reluctant to agree to the removal of her allowance, she had the letter of 6 November in her possession for well over a month, she had adequate time to consider her position, and the allowance had been the subject of numerous discussions.
- 49 Further, there were considerable conflicts in the evidence as to the interaction between Ms Porter and Mr Sciberras after the meeting on 20 December 2013. In his evidence, Mr Sciberras strongly disagreed that he pressured Ms Porter into signing the letter or threatened to take away another entitlement, which was generally supported by Ms Phillips' evidence. In any event, the alleged statement made by Mr Sciberras, "I need it signed now", in context, cannot show that Ms Porter was compelled and had no reasonable alternative but to sign.
- 50 Even if the conflict in the evidence between Ms Porter and Mr Sciberras was resolved in Ms Porter's favour, taking her evidence at its highest, I am not persuaded that Ms Porter has established that the City applied illegitimate coercive pressure on her to force her to sign the letter on 20 December 2013. Given I have found that the City did not apply duress in relation to the signing of the letter of 6 November 2013, the final issue to consider is whether the letter varied Ms Porter's contract.

- 51 Generally, a promise is not binding as a contract unless it is made under deed or supported by consideration. This means that something of value in the eye of the law must be given for a promise in order to make it enforceable as a contract: *Chitty* at 165-166. As to a variation of a contract, it is settled that there is no consideration where parties agree to vary the contract in a way that is considered to be capable of conferring a legal benefit on one party only: *Chitty* at 207.
- 52 The City argued that the additional week's annual leave that arose under cl 20.7 of the 2011 Agreement which came into operation in February 2012, the additional remuneration that came about as a result of the introduction of the new Agreement, and the reclassification of Ms Porter's position to level 5 was consideration for the variation of the contract.
- 53 It is well-established that a promise to perform an existing legal duty is not consideration: Lindgren KE, 'Consideration' in Lindgren KE et al *Contract Law in Australia* (1986) 92, 100, and see for example *Martech International Pty Ltd v Energy World Corporation Limited* [2006] FCA 1004 at pars 138-146 per French J, as his Honour then was. In this case, the City was conferring nothing more than what Ms Porter was already entitled to and receiving in any event. There was no consideration moving from the City because the City was already legally bound to provide Ms Porter with her entitlements under the enterprise agreement and she had been working under her higher classification for some time.
- 54 Furthermore, the obligations and entitlements under the enterprise agreement arose independently of the contract between the parties and resulted from an agreement between the relevant employees generally and the City, which also covers the relevant Unions. There was no evidence that Ms Porter was at any time, made aware that any term of the Agreement, was to be a "trade off" for any later change to her contract of employment. The agreement was given statutory force by the terms of the Fair Work Act 2009 (Cth). Additionally, the purported consideration was remote in time to the variation said by the City to be effective to remove the allowance.
- 55 I also pause to note that, as discussed above, the letter of 1 March 2012 made no mention of the allowance, and Ms Porter's reclassification was effective as of 1 July 2011. The same consideration issue may be raised in relation to the 1 March 2012 letter that the City attempted to rely on to constitute a variation, as Ms Porter received her higher reclassification independently of the removal of the allowance.
- 56 The letter of 6 November proposed to reduce Ms Porter's income by a considerable amount. There was no detriment suffered by the City, as Ms Porter was receiving the benefits of the enterprise agreement and the reclassification in any event.
- 57 I find that there was no consideration, and the signed letter of 6 November 2013 was of no contractual effect.

Conclusion

- 58 In 2008 the parties entered into a contractual arrangement and the 15% shift allowance formed part of that contract, which went beyond the terms of the then 2008 Agreement. It is trite to observe that not all terms and conditions of an employee's employment must be expressed in an enterprise agreement, and it is common for employees to have contractual entitlements that sit above the relevant enterprise agreement.
- 59 Having regard to all of the evidence I am satisfied that the 15% shift allowance was a contractual entitlement and it was not open to the City to unilaterally vary Ms Porter's contract to remove it. Further, given the signed letter of 6 November 2013 was unsupported by consideration, that letter did not vary Ms Porter's contract to remove the allowance.
- 60 Ms Porter remains entitled to 15% shift allowance which forms part of her contract of employment. She has been denied by the City a contractual benefit by way of payment of the 15% allowance from 1 January 2014 to date. The parties are requested the file a minute of proposed order, setting out the amount of the allowance owed to Ms Porter, within 14 days.

2015 WAIRC 00295

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JENNIFER PORTER

APPLICANT

-v-

CITY OF STIRLING

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

MONDAY, 13 APRIL 2015

FILE NO.

B 152 OF 2014

CITATION NO.

2015 WAIRC 00295

Result

Declaration issued

Representation

Applicant

Mr K trainer as agent

Respondent

Mr J Uphill as agent

Declaration

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr J Uphill as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT the applicant was denied by the respondent a contractual benefit in the form of a shift allowance in the sum of \$10,347.79 gross over the period 1 January 2014 to 26 March 2015.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00296**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2015 WAIRC 00296
CORAM : COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 11 MARCH 2015
DELIVERED : MONDAY, 13 APRIL 2015
FILE NO. : B 152 OF 2014
BETWEEN : JENNIFER PORTER
 Applicant
 AND
 CITY OF STIRLING
 Respondent

Catchwords : Industrial law (WA) – Contractual benefits claim – Claim for a shift allowance upheld – Amount owed was paid – Declaration made
 Legislation : *Industrial Relations Act 1979* (WA)
 Result : Declaration issued
Representation:
 Applicant : Mr K Trainer as agent
 Respondent : Mr J Uphill as agent

Further Reasons for Decision

- 1 In the Commission's reasons for decision of 26 March 2015 the applicant's claim for back payment of the shift allowance was upheld. The parties were directed to confer and inform the Commission within 14 days of that date of the appropriate amount for the purposes of an order to be issued.
- 2 On 8 April 2015 my Associate was informed by the agent for Ms Porter that Ms Porter has in fact now been paid by the City the amount owed to her, in the amount of \$10,347.79. Accordingly, there is little purpose in the Commission issuing an order obliging the City to pay Ms Porter an amount which she has already received. In the alternative, in recognition of the action taken by the City, the Commission will simply issue a declaration to the effect that the amount paid was due and owing to Ms Porter over the period of the claim.

2015 WAIRC 00336**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION****PARTIES**

LORRAINE MAY RICE

APPLICANT

-v-

AEG OGDEN (PERTH) PTY LTD

RESPONDENT

CORAM : COMMISSIONER J L HARRISON
DATE : FRIDAY, 24 APRIL 2015
FILE NO/S : B 4 OF 2015
CITATION NO. : 2015 WAIRC 00336

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*.

On 10 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.

The Commission was advised on 16 March 2015 that the applicant did not wish to proceed with the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 10 April 2015 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00342

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PETER GRAHAM ROBINS

APPLICANT

-v-

AEG OGDEN PERTH PTY LTD

RESPONDENT

CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 28 APRIL 2015
FILE NO/S	B 8 OF 2015
CITATION NO.	2015 WAIRC 00342

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*.

On 10 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.

The Commission was advised on 18 March 2015 that the applicant did not wish to proceed with the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 17 April 2015 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00379

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BARRIE SCHULZE	APPLICANT
	-v- SHIRE OF CORRIGIN	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 15 MAY 2015	
FILE NO/S	U 38 OF 2015	
CITATION NO.	2015 WAIRC 00379	
Result	Application dismissed	

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 8th day of May 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.

2015 WAIRC 00319

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MRS SONYA SHAHEED	APPLICANT
	-v- THE KARRAKATTA CLUB INC.	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 20 APRIL 2015	
FILE NO/S	U 37 OF 2015	
CITATION NO.	2015 WAIRC 00319	
Result	Application dismissed	
Representation		
Applicant	Mrs S Shaheed on her own behalf	
Respondent	Ms L Sowden of counsel	

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 31st day of March 2015 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conclusion of that conference the parties reached an agreement in principle; and
 WHEREAS on the 14th day of April 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.

2015 WAIRC 00335

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ELLEN-MARIE THOMAS **APPLICANT**

-v-
JENNIFER DAVIS 'TOP LOCKS HAIR STUDIO' **RESPONDENT**

CORAM COMMISSIONER J L HARRISON
DATE FRIDAY, 24 APRIL 2015
FILE NO/S U 235 OF 2014
CITATION NO. 2015 WAIRC 00335

Result Discontinued
Representation
Applicant In person
Respondent Ms J Davis

Order

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

On 14 January 2015 the Commission convened a conference for the purpose of conciliating between the parties and the Commission was advised on 9 March 2015 that the parties had reached an agreement to settle the matter.

On 15 April 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* in respect of the application and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00374

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MITCHELL THOMAS **APPLICANT**

-v-
AEG OGDEN (PERTH) **RESPONDENT**

CORAM COMMISSIONER J L HARRISON
DATE WEDNESDAY, 13 MAY 2015
FILE NO/S B 10 OF 2015
CITATION NO. 2015 WAIRC 00374

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*.

On 10 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.

On 23 March 2015 the applicant advised the Commission that he did not wish to proceed with the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 1 May 2015 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

SECTION 29(1)(b)—Notation of—

Parties	Number	Commissioner	Result
Adam James Guyatt East Kimberley Job Pathways	U 230/2014	Commissioner J L Harrison	Consent order issued
Miss Dorinda Cox Department of Health (Department: Public Health Ambulatory Care)	B 240/2014	Commissioner J L Harrison	Consent order issued
Peter Stringfellow Cartridge World Thornlie	U 25/2015	Commissioner J L Harrison	Consent Order
Renee Anna-Lee Tarapacz Anita Louise Bell, Platinum Hair (ABN 54312668464)	U 15/2015	Commissioner J L Harrison	Consent Order

CONFERENCES—Matters arising out of—

2015 WAIRC 00315

DISPUTE RE NEGOTIATIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD AND INCORPORATED AS THE BOARD OF THE WA COUNTRY HEALTH SERVICE, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA)

APPLICANT

-v-

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE FRIDAY, 17 APRIL 2015

FILE NO/S C 175 OF 2013

CITATION NO. 2015 WAIRC 00315

Result Interim order revoked; application discontinued

Representation

Applicant Ms K Worlock (of counsel)

Respondent Ms V Loveridge

Order

This application, made pursuant to s 44 of the *Industrial Relations Act 1979* (the Act), was filed on 19 February 2013. The applicant sought interim orders that members of the respondent union (the ANF) cease industrial action taking place in public hospitals.

On 22 February 2013 the Commission issued an interim order concerning industrial action being undertaken by the ANF (the Order).

The Commission is aware that the dispute between the parties the subject of this application has been resolved. The applicant advised the Commission on 20 March 2015 that it has no objection to the file being closed and the respondent confirmed on 24 March 2015 that it agrees to this occurring.

This application will therefore be discontinued and the Order revoked.

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

1. THAT the Order which issued in this matter dated 22 February 2013 (being Order 2013 WAIRC 00100) is hereby revoked.
2. THAT this application be, and is otherwise hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00333

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00333
CORAM : ACTING SENIOR COMMISSIONER P E SCOTT
 PUBLIC SERVICE ARBITRATOR
HEARD : BY WRITTEN SUBMISSIONS
DELIVERED : THURSDAY, 23 APRIL 2015
FILE NO. : PSAC 20 OF 2013
BETWEEN : AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
 Applicant
 AND
 THE MINISTER FOR HEALTH
 Respondent

CatchWords : Public Service Arbitrator – Application to amend the current application – Non-renewal of contract – Fixed term contract – Denial of procedural fairness – Unlawful and unfair suspension – Industrial matter – Medical practitioner – Dispute settlement procedure – Jurisdiction – Powers of the Public Service Arbitrator – Public Service Arbitrator’s jurisdiction compared to Public Service Appeal Board – Employment Standard – Government officer

Legislation : *Industrial Relations Act 1979* s 7(1), s 23(2a), s 29(1)(b)(i), s 44, s 44(1), s 44(7)(a)(i), s 44(9), s 72B(2), s 80E, s 80E(1), s 80E(7), s 80E(7)(b), s 80I(1)(c), s 80I(1)(e)
Public Sector Management Act 1994 s 97, s 97(1), s 97(1)(a)
Public Sector Management (Breaches of Public Sector Standards) Regulations 2005
Public Sector Management (Examination and Review Procedures) Regulations 2001
Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013
Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011

Result : Application filed on 25 June 2013 to be amended
 Jurisdiction found

Representation:
Applicant : Mr R Hooker of counsel
Respondent : Mr D Matthews of counsel

Reasons for Decision

- 1 The applicant seeks to amend the application filed on 25 June 2013 and the respondent opposes the amendments on jurisdictional grounds.

Background

- 2 This matter has a lengthy history. It commenced with the applicant filing an application, C 204 of 2013, for a conference pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) on 30 May 2013, to the Commission’s general jurisdiction. The application dealt with the circumstances of the suspension from duty of Dr James Savundra, a Plastic and Reconstructive Surgeon employed by the respondent at Royal Perth Hospital (RPH). The suspension was said to have occurred on 12 March 2013, by letter dated that day.

- 3 The letter advised Dr Savundra, amongst other things, that the Director General of Health had directed that a preliminary enquiry be undertaken into Dr Savundra's conduct said to be in connection with industrial action by medical staff of the Plastic Surgery Department of RPH. The respondent suspended Dr Savundra from duty, with full pay, pending a decision on whether a formal disciplinary investigation was warranted. Dr Savundra was also directed not to attend for duty until further notice and not to communicate with hospital staff (the directions). The application alleged that there had been a denial of natural justice, and challenged the power relied on by the respondent to suspend Dr Savundra and to issue the directions.
- 4 The Commission convened conferences and the parties reached agreement on Dr Savundra returning to duty at RPH, and he did so on 10 June 2013.
- 5 On 6 June 2013, the Acting Director General advised Dr Savundra in writing, of findings that industrial action in the form of withdrawal of labour had occurred and further action was threatened; and that Dr Savundra had failed to comply with a verbal directive not to attend RPH on 15 February 2013 (the adverse findings).
- 6 On 25 June 2013, the applicant filed the current application in relation to Dr Savundra's suspension, this time to the Public Service Arbitrator (the Arbitrator) on the basis that Dr Savundra is a government officer who falls within the Arbitrator's jurisdiction. The current application set out some of the same background as was contained in the previous application. It also included that, despite being permitted to return to work, Dr Savundra and accordingly the applicant, were aggrieved about the respondent's failure to provide procedural fairness with respect to the suspension and the directions; that adverse findings were made against Dr Savundra; the impact of the suspension on Dr Savundra's professional standing and reputation; the impact of the suspension on the welfare of Dr Savundra's patients at RPH; and the attempt by the respondent, in the directions, to impair Dr Savundra's freedom of communications on matters pertaining to his profession and his employment with RPH. Dr Savundra denies the allegations against him.
- 7 I convened a conference on 4 July 2013, and as part of that conciliation process, issued Directions ([2013] WAIRC 00405) requiring the respondent to inform the applicant of a number of matters and to respond to particular assertions made by the applicant.
- 8 There were further conferences and direct communications between the parties. Some of the issues raised in the application were not resolved and were to be referred for hearing and determination under s 44(9) of the Act. There were further communications between the parties with a view to resolving these remaining issues and a further conference was convened on 29 October 2013. The parties were then to exchange information and divulge their attitudes to particular outstanding issues.
- 9 A further conference was convened on 28 November 2013. Some of the issues between the parties at that point, all of which arose from the suspension, related to Dr Savundra's own circumstances as a medical practitioner and employee, and some related to his concerns for his patients' welfare which may have been affected by delays in their treatment while Dr Savundra was suspended.
- 10 The applicant was to provide a status report by late January 2014. In late January 2014 and early March 2014, following enquiries by my Associate as to the status of the matter, the applicant's solicitors undertook to provide a report. The parties continued to have discussions and on 25 March 2014, the applicant requested a further report back conference be convened around 14 April 2014. This conference took place on 14 April 2014, and the parties were confident they could now resolve the matter without further assistance.
- 11 On 30 September 2014, having heard nothing from the parties, I enquired of the applicant, through the Associate, as to the status of the matter. A further conference was convened at my initiative, on 24 October 2014. At that conference, the applicant advised that agreement in principle had been reached, however, Dr Savundra's contract of employment for RPH was due to expire on 1 November 2014 and he had been advised that it would not be renewed. The applicant questioned the respondent's grounds for not doing so and expressed concern that the non-renewal was based on Dr Savundra's previous suspension. Accordingly, the applicant was not in a position to finalise the matter. The applicant indicated that it intended to seek to amend the application to include issues associated with the non-renewal of the contract. The conference adjourned to allow the applicant to consider its position. A further conference was to be convened in early December 2014.
- 12 The applicant then filed an application to amend the current application to include the issue of the non-renewal of the contract and on 11 December 2014, a conference was convened. There was no agreement that the application be amended and the conference concluded on the basis that the application to amend would be determined, and the parties would file and serve written submissions in respect of that matter in December or January. There were significant delays in some of those documents being filed, for various reasons which do not require comment.

The application to amend

- 13 The application to amend seeks to add what occurred from 28 July 2014, when the respondent advised Dr Savundra that his RPH contract would not be renewed when it expired on 1 November 2014, and notes that the contract did in fact expire and was not renewed. In the interim, the parties exchanged correspondence and met to discuss Dr Savundra's circumstances.
- 14 The application to amend also sets out that the respondent's employment records for Dr Savundra include a 'Termination Form' which is said to reflect 'an understanding by the Respondent of the events [that the contract was for a fixed term and that the contract would expire and was not to be renewed] as constituting, or involving, a termination of part of Dr Savundra's employment with the Respondent' ([16] of the application to amend). (It appears that Dr Savundra was and continues to be employed by the respondent elsewhere than RPH. It was his contract at RPH that was not renewed.)
- 15 New paragraphs [17] to [20] of the application to amend say:
 17. The reasons which caused, or alternatively contributed to, Dr Savundra not being offered by the Respondent any more employment at Royal Perth Hospital after 1 November 2014 were, or included:
 - (a) the adverse findings;

- (b) allegations by the Respondent that Dr Savundra had bullied or intimidated other staff members of the Respondent; and
 - (c) an allegation by the Respondent that Dr Savundra has a polarising effect on people he works with and needs to learn to work with management in a more cohesive way.
18. The allegations made by the Respondent referred to at subparagraphs 17(b) and (c) above have not been put to Dr Savundra or the Applicant at all, let alone with any particularity, let alone have either of them been invited to respond to the allegations.
19. The decision of the Respondent to decline to offer Dr Savundra any more employment at Royal Perth Hospital after 1 November 2014, made by the Respondent at some time unknown to Dr Savundra or to the Applicant before 28 July 2014 (the RPH Contract Decision), was made without the matters referred to at paragraphs 2-6 and 18 above being put to Dr Savundra or the Applicant, let alone a fair hearing (or in fact any hearing at all) having been so much as attempted to be provided by the Respondent.
20. The RPH Contract Decision, which is or reflects an industrial matter within the meaning of that expression in the *Industrial Relations Act 1979* (WA) (the Act), was accordingly made:
- (a) in a manner devoid of natural justice;
 - (b) in a manner that took into account considerations which were based solely on assumptions made, or conclusions drawn, by the Respondent on allegations or other material which are unknown to Dr Savundra or the Applicant and thus which relevantly were irrelevant considerations;
 - (c) manifestly unreasonably;
 - (d) unfairly to Dr Savundra and numerous other doctors employed by the Respondent at Royal Perth Hospital; and
 - (e) unlawfully.
- 16 The applicant says that the reasons for the respondent not offering Dr Savundra further employment at RPH include those matters the subject of the original allegations and the adverse findings. The matters are said not to have been put to Dr Savundra or the applicant, nor was Dr Savundra invited to respond to them. Therefore, Dr Savundra was not provided with a fair hearing, or any hearing at all. The applicant also says that the respondent has continued to treat the allegations as having been and continuing to be valid. The respondent is said to have recorded further allegations relating to bullying and Dr Savundra's having a polarising effect in the workplace.
- 17 The applicant seeks to pursue the issue of the denial of natural justice, the manner in which the allegations were considered and the conclusions drawn. The applicant seeks to include within this application, claims for relief including:
1. reviewing the decision not to renew the contract and the circumstances which preceded it; and
 2. nullifying that decision.
- 18 As well as relying on the new issues relating to an industrial matter and being within jurisdiction, the applicant also relies on clause 55 – Dispute Settling Procedures, subclause (3)(a) of the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2011* or cl 54 of its replacement agreement, the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013* (the Agreement) as empowering the Arbitrator to deal with the dispute.

The respondent's position

- 19 The respondent opposes the application to amend on a number of grounds. Firstly, it says that the Arbitrator does not have jurisdiction to enquire into and deal with the expiry of a genuine fixed term contract. He says that the applicant seeks to draw an illusory distinction between the expiry of a fixed term contract and a 'decision' to not offer another contract.
- 20 The respondent says that '[w]hile factually there may have been a decision to not offer another contract..., as a matter of law and the jurisdiction of the [Arbitrator], the relevant facts are that the fixed term contract expired and there is no new contract.' The reasons for non-renewal are said to not be reviewable by the Arbitrator.
- 21 Secondly, the respondent says that the matter of a decision to not renew the contract is a matter to which the Employment Standard established under the *Public Sector Management Act 1994* (PSM Act) applies. The *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (the Regulations 2005) provide a procedure for review of breaches of the Employment Standard and, according to s 80E(7)(b) of the Act, that is a matter excluded from the Arbitrator's jurisdiction.
- 22 The respondent also says that the Arbitrator has jurisdiction only according to the Act, and dispute settlement procedure clauses of awards and agreements cannot and do not grant jurisdiction or powers which the statute does not provide.
- 23 Finally, the respondent says the decision to not offer a new contract is equitable in all of the circumstances.

The applicant's submissions

- 24 The applicant says that the issue at the heart of the current application is the alleged unlawfulness and unfairness of the respondent's suspension of Dr Savundra from his employment at RPH where there was a denial of natural justice and a failure to identify the source of power to suspend. There is no challenge to this being an industrial matter. The proposed amendment deals with the continuation and exacerbation of the unlawfulness and unfairness. This is because, even though there was in-principle agreement to resolve the current application, it was not resolved due to the respondent's subsequent action and:
- (a) the adverse findings of 6 June 2013 continue to be regarded by the respondent as valid; and

- (b) further serious allegations of bullying and a polarising working style have been raised and treated as being substantiated.
- 25 Those adverse conclusions are reflected in the respondent's employment records without Dr Savundra being given any form of hearing.
- 26 The applicant says that merely because one particular consequence of the adverse conclusions has been that the respondent has declined to offer Dr Savundra another contract to work at RPH, does not alter the essential character of the applicant's expanded grievance as to an industrial matter, and says that 'it is open to characterise that particular consequence as a further or additional industrial matter in its own right'.
- 27 Therefore, the applicant says that the industrial matter encompasses:
- (a) the maintenance of the adverse findings of 6 June 2013;
- (b) the reflection of the respondent's position marring Dr Savundra's employment record;
- yet this does not deny or prevent the characterisation of the matter as involving or including a decision not to offer Dr Savundra a further contract at RPH.
- 28 The proposed amendments are not simply about the non-renewal of a fixed term contract.
- 29 The applicant denies that the matter is excluded from the Arbitrator's jurisdiction because of s 80E(7)(b) of the Act. The Employment Standard established under the PSM Act, is no barrier to jurisdiction in the circumstances of this case. Proper consideration of its terms and effect demonstrate that this matter does not relate to the circumstances contemplated by the Employment Standard.

Considerations and Conclusions

- 30 There are a number of issues which the applicant seeks to include in the current application which arose since the application was filed. They are directly connected with the suspension and the directions, that is, they arise from allegations and findings as to Dr Savundra's conduct at the time of the alleged industrial action.
- 31 Industrial matters referred to the Commission under s 44 of the Act rarely remain static, in the state in which they were at the time of the referral. It is not at all unusual for an industrial matter to evolve during the course of conciliation.
- 32 As her Honour the Acting President noted in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority of Western Australia* [2013] WAIRC 01022, (2013) 93 WAIG 1804 at [37]:

The scope of an industrial matter or matters should not by the nature of industrial disputes between employees and employers and/or unions be confined narrowly or to matters contained within an application for a conference brought to the Commission under s 44 of the Act. The Commission is not a court of pleadings. Also, the nature of industrial matters is that they are fluid and often are not about existing obligations, but are about the creation of future rights and obligations. In *The Director General, Department of Education v The State School Teachers' Union of WA (Inc)* [2011] WAIRC 00058; (2011) 91 WAIG 166, I observed:

The scope of matters that arise in a s 44 compulsory conference are not to be narrowly confined to the application and matters raised in submissions before the Commission but can encompass broader disputes and negotiations about matters that may sit behind an immediate dispute. In *The State School Teachers' Union of WA (Inc) v Director-General, Department of Education and Training* (2008) 88 WAIG 698 [40] (Ritter AP) (with whom Beech CC agreed [109]) found the scope of the matter in question in the s 44 conference encompassed the dispute beyond a dispute about directions given to members of the Union about industrial action and extended to the broader dispute and negotiations between the parties about a new industrial agreement and that specifically, s 26(2) of the Act allows the Commission to grant relief or redress without restriction as 'to the specific claim made or to the subject matter of the claim' [59].

- 33 In that matter, Kenner C also noted at [71]:

The s 44 compulsory conference power is a very broad power which enables the Commission to enquire into and deal with industrial matters promptly and with the minimum of form and technicality. Once invoked, the s 44 compulsory conference power enables the Commission to explore issues in dispute using the armoury of powers available to it under the Act. It is also the case, that industrial matters, once they are before the Commission under s 44 of the Act, may enlarge or contract, depending up on the circumstances in a particular matter or dispute. This quite commonly occurs. It did in this case.

- 34 Some issues in dispute may be resolved or refined by the provision of information or the exchange of views. Some may be resolved by action taken by one of the parties as a consequence of things which have occurred during conciliation. However, some issues may remain unresolved and others arise, all relating to the industrial matter the subject of the original application. Section 44(9), which provides for arbitration of any unresolved question, dispute or difficulty in relation to the industrial matter, envisages that the matter will have developed in the time between the matter first coming to the Commission and it being arbitrated.

Jurisdiction regarding expiry of fixed term contract and decision not to renew

- 35 The respondent's objections to the amendment of the application relate to issues of jurisdiction.
- 36 Firstly, I find that the application to amend seeks to bring within the industrial matter already referred to the Commission the non-renewal of the contract, the reasons for it and allegations of a denial of procedural fairness in that decision. That much is very clear from the terms of [15] to [20] of the application to amend. The remedies sought include reviewing the decision to

not offer a new contract and nullifying that decision, with the effect of providing Dr Savundra with natural justice by allowing him an opportunity to be informed of and respond to the allegations and findings which are said to found a decision to not offer a new contract. Those findings are said to be reflected in Dr Savundra's employment record.

- 37 The respondent asserts that there is no jurisdiction in the Arbitrator to enquire into and deal with the expiry of a genuine fixed term contract and the absence of a new contract, or the reasons for those events. The respondent cites the decision in *Brocklehurst v Director General, Ministry of Justice* (1994) 74 WAIG 2024 (*Brocklehurst*) as authority for the proposition that there is no capacity to review a decision not to offer a contract of employment on the expiry of a fixed term contract.
- 38 *Brocklehurst* was an appeal to the Public Service Appeal Board (PSAB) against a decision to dismiss. The PSAB decided that 'a failure to offer re-employment does not amount to a dismissal'... and that '[a] decision not to offer a contract of employment does not constitute a "decision" that can be reviewed by the Public Service Appeal Board' (2026).
- 39 The PSAB's jurisdiction is limited to hearing and determining specified matters, including an appeal 'from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed' (s 80I(1)(c) and (e) of the Act). That was the nature of Mr Brocklehurst's appeal to the PSAB. It required a decision to dismiss. Therefore, the PSAB may be excluded from hearing and determining matters relating to the non-renewal of a fixed term contract where there is no decision to dismiss. There is no such limitation in the scope of the Arbitrator's jurisdiction by reference to the definition of industrial matter and s 80E of the Act.
- 40 The Arbitrator's jurisdiction is different to that of the PSAB. It is to enquire into and deal with any industrial matter relating to a government officer, amongst other things (s 80E(1) of the Act). This takes the scope of the Arbitrator's jurisdiction to the definition of industrial matter in s 7(1) of the Act.
- 41 The definition of industrial matter is far wider than a dismissal. The definition of industrial matter under s 7(1) of the Act provides that it means:

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;
- (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
- (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
- (ca) the relationship between employers and employees;
- (d) any established custom or usage of any industry, either generally or in the particular locality affected;
- (e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;

...

- 42 The Commission, and thus the Arbitrator, may exercise the power conferred under s 44(1) of the Act by convening a conference to deal with an industrial matter on the application of an organisation (s 44(7)(a)(i)). The applicant is recognised as an organisation for that purpose (s 72B(2)).
- 43 The matter in this case is not simply about the expiration of a fixed term contract and that no new contract was offered. It encompasses a context of alleged denial of natural justice by the employer in respect of allegations and any findings about the employee's conduct. It includes whether the employer made a specific decision to not offer a further contract, and if so, the basis for that decision and whether it took account of the allegations and any findings. Those are issues involving considerations of fairness in the employment relationship, of the relationship between the employer and the employee, and the work, privileges and rights of the employee and the rights and duties of the employer. These are matters which fall squarely within the definition of industrial matter and, accordingly are within the scope of the Arbitrator's jurisdiction. There is no limitation based on the expiration of a fixed term contract and a lack of a new contract.
- 44 The application to amend says that a letter of 28 July 2014 from the respondent to Dr Savundra says that a decision had actually been made to not renew the contract, and this is said to be confirmed in a letter of 5 September 2014 to Mr Boyatzis, the Executive Director of the applicant ([12] – [14] of the application to amend). Together with the applicant's claim set out in [17] of the application to amend relating to those reasons said to be contained in the employee's employment record, these suggest that this may not merely have been the circumstance of the expiry of a fixed term contract, but of a positive decision to not offer a new contract based on circumstances which are in dispute, which relate to whether Dr Savundra was afforded natural justice in the respondent's dealing with allegations against him during his employment, that is, an industrial matter.
- 45 Therefore, I find that there is no jurisdictional impediment to the industrial matter contained in the current application being expanded to include those matters which may go behind a decision to not offer a new contract, including issues of denial of procedural fairness in the process of dealing with the allegations against Dr Savundra and any findings made regarding those allegations, and any such decision itself.

Reliance on the dispute settlement procedure

- 46 The applicant also relies on the dispute settlement procedure contained within the Agreement as providing the Arbitrator with the capacity to deal with this matter. However, a dispute settlement procedure clause within an agreement cannot provide the

Arbitrator with jurisdiction or powers not provided by statute. The Arbitrator's jurisdiction is a creature of statute (*Chief Executive Officer, Department of Agriculture and Food v Ward and others* [2008] WAIRC 00079). The parties cannot confer jurisdiction by consent where jurisdiction does not otherwise exist (*SGS Australia Pty Ltd v Trevor Taylor* (1993) 73 WAIG 1760 at 1762).

The Employment Standard

- 47 Section 80E(7)(b) of the Act provides that the Arbitrator does not have jurisdiction to inquire into or deal with 'any matter in respect of which a procedure referred to in the *Public Sector Management Act 1994* s 97(1)(a) is, or may be, prescribed under that Act.' Wheeler and Le Miere JJ in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244 found that reference to 'or may be' does not mean 'could be' made at some time in the future, but that the provision should be read to mean that a procedure 'is' made [45].
- 48 Section 97(1)(a) of the PSM Act provides for the Public Sector Commissioner 'to make recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures, whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards'.
- 49 The respondent says that the Regulations 2005 provide a procedure for review of breaches of public sector standards. The Employment Standard issued pursuant to the PSM Act deals with the issue of employment, and therefore s 97(1) of the PSM Act and s 80E of the Act exclude the Arbitrator's jurisdiction regarding any decision not to offer a new contract.
- 50 In *Director General Department of Justice v Civil Service Association of Western Australia Incorporated*, Wheeler and Le Miere JJ examined the provisions of the PSM Act as it stood at that time and in particular those regarding the role of the Commissioner for Public Sector Standards. (Since that decision, the role of the Commissioner for Public Sector Standards has been replaced by the Public Sector Commissioner, and therefore reference in s 97 is to the Public Sector Commissioner). Their Honours dealt with the then 'Recruitment, Selection and Appointment Standard'. They noted the *Public Sector Management (Examination and Review Procedures) Regulations 2001*. They found that:
- 49 The regulations deal with the notice to be given of decisions about appointments and selection. It provides that a public sector body is to give a written notice of a prescribed kind to each person who applies unsuccessfully to be appointed to fill a vacancy. A person may lodge a claim under that regulation if the person considers that a public sector body has breached a public sector standard established in respect of the recruitment, selection or appointment of employees. Such a claim may be made in relation to action taken by the body to appoint or not appoint a person to fill a vacancy, where the person is adversely affected by that action.
- 50 Other regulations then provide for the person making the claim to be given certain information, for the public sector body itself to consider and take steps to resolve the claim, and then if the claim is not resolved within a prescribed period, the public sector body is to ask the Commissioner to appoint an examiner to examine the claim. The functions of the examiner are then set out. The Commissioner considers the examiner's report and may either dismiss the claim or commence a further process which could eventually lead to the public sector body either giving notice to the affected person of action which will be taken by the public sector body to remedy the matter, or give notice to the person of why no action will be taken by the public sector body (reg 24(2)).
- ...
- 52 Turning, then, to a proper construction of subs (7), the procedures referred to in s 97(1) are procedures 'by way of appeal, review, conciliation, arbitration, mediation or otherwise'. There are plainly elements of conciliation and mediation in the regulations which we have described. Section 97(1) refers to procedures 'for employees and other persons to obtain relief'. As we have noted, the 'relief' which may ultimately be obtained under the regulations may be, in practical terms, that nothing is done. However, the expression 'relief' must be read against the background of the preceding words, which include conciliation, mediation 'or otherwise'. It seems to us that a procedure which may result in a conciliated or mediated resolution, or which may, after the recommendation made by a reviewer, result in the public sector body taking action to afford relief should be regarded as falling within the statutory description. The procedure then, which is prescribed by the regulations appears to be a procedure of the type contemplated by s 97(1).
- 53 The 'matter' in respect of which the procedure may be prescribed pursuant to s 97(1) is the matter of the 'breaching of public sector standards'. In the present case, there is a standard dealing with 'Recruitment, Selection and Appointment', and that is the 'matter' in respect of which the procedure is prescribed. That matter having been dealt with by the prescribing of a procedure pursuant to s 97(1)(a), it would follow, in our view, that the jurisdiction of the Arbitrator is therefore excluded in respect of it.
- ...
- 56 While s 80E(7) is in some respects not happily phrased, and while we acknowledge that as a matter of legal principle, it is undesirable to construe too broadly provisions which limit the right of persons to approach courts and tribunals, it seems to us that, having regard to the statutory context, s 80E(7) must be read as excluding jurisdiction in respect of a matter, wherever there is a matter in respect of which a relevant standard has been prescribed and in respect of which procedures of the type described in s 97(1)(a) have been prescribed. In this case, as we have noted, a standard has been prescribed in relation to selection and appointment, and the result of the prescription of procedures pursuant to s 97 of that standard is that the jurisdiction of the Arbitrator is excluded in relation to the whole of that 'matter', regardless of the precise allegations of misconduct or unfair conduct which may be made in respect of it.

...

60 First, on its face, s 80E(7) is not concerned whether the inquiry is into a 'matter' which is lawfully done or which is not lawfully done. Rather, the jurisdiction is excluded in relation to 'any matter' in respect of which a procedure has been prescribed. Understood as we have explained it, the relevant 'matter' in this case would be the matter of appointment and the standard relating to it. It might be determined during the course of the inquiry that the appointment was lawful or unlawful, as the case may be, but the jurisdiction is jurisdiction to embark on an inquiry into that matter. To read it as excluding jurisdiction only in relation to the 'matter' of an appointment which had been determined to be lawful, would be to read into it a restriction which is simply not there.

61 Further, as a matter of policy, it would seem odd that the legislature should have wished to exclude the jurisdiction of the Arbitrator to deal with acts which were lawful, but allegedly unfair, while leaving intact the jurisdiction where there had been some ground for finding illegality, however technical.

51 Hasluck J also noted at [91]:

However, on balance, I incline to the view that s 80E(7) is quite explicit that, in circumstances where a special regime has been created for dealing with complaints concerning public sector standards, the Arbitrator's usual jurisdiction to deal with industrial matters pursuant to s 80E(1) of the *Industrial Relations Act* is displaced. In other words, I am persuaded to the view reflected in par 26 of the appellant's outline of submissions that the result of the proclamation of the *Public Sector Management (Examination and Review Procedures) Regulations 2001* is that the Arbitrator did not have jurisdiction to hear the matter in the circumstances of the present case.

52 In a more recent case, Kenner C considered s 80E(7) of the Act, which applies to the Arbitrator, and s 23(2a) of the Act, which applies to the Commission, which are in the same terms. The claim related to the transfer of a Prison Officer and that it was covered by the Employment Standard. In considering that matter, Kenner C referred to the decision of Wheeler and Le Miere JJ at [53] – [56], noting:

23 By the paragraph immediately above, Wheeler and Le Miere JJ concluded that there needs to be a relevant standard that has application to the subject matter of the dispute before the Commission, and, procedures have been prescribed to deal with a breach of such a standard. It is also clear from the Court's decision, that there is no necessity for allegations of a specific breach of the relevant standard to be the subject matter before the Commission, for the Commission's jurisdiction to be ousted. It is sufficient for the operation of ss 23(2a) and 80E(7) of the Act, that the industrial matter before the Commission, concerns the subject matter of the relevant standard.

...

29 The Court in *Director General Department of Justice*, found it necessary to focus on both issues of the existence of a relevant public sector standard made under s 21(1)(a) of the PSM Act and whether procedures for a breach of such a standard have been prescribed under s 97(1)(a) of the PSM Act. In both *Director General Department of Justice* and *Ishmael's case*, there existed a public sector standard the terms of which applied to the relevant matter before the Arbitrator in each case. In the former, it was a standard in relation to the 'matter of appointment' and in the latter, it was a general standard in relation to the 'matter of transfer'.

30 To determine the jurisdictional challenge therefore, it is necessary to consider the terms of the Employment Standard and whether, it has any application to the industrial matter before the Commission in these proceedings. Axiomatically, the terms of s 23(2a) of the Act, read with s 21(1)(a) and s 97(1)(a) of the PSM Act, can only have operation when the relevant public sector standard under consideration applies to the 'matter' before the Commission. If the standard has no application to the matter before the Commission, and thus no procedure made under s 97(1)(a) could be invoked, then it could not be the case that the Commission's jurisdiction is ousted. If it was, the employee concerned would have no remedy at all. This would be nonsensical and could not have been the intention of the Parliament in enacting ss 23(2a) and 80E(7) of the Act.

31 The standard is entitled 'The Employment Standard'. This is a broad and generic heading. It is prefaced by a 'Statement of Intent' in the following terms:

Statement of Intent

This Commissioner's instruction (CI) establishes the minimum standards of merit, equity and probity to be complied with by the employing authority of each public sector body when filling a vacancy.

...

41 Apart from the terms of the Employment Standard itself, the preamble to it, which I have set out above, makes clear its scope of application. The limits of its operation are further marked out. As noted, the 'Statement of Intent', makes it plain that the standard applies to 'filling a vacancy'. The fact that the Employment Standard repeals and replaces the 'Recruitment, Selection and Appointment Standard', is a strong indicator, read with the rest of the standard, that it has application to various methods by which vacancies in the public sector may be filled.

42 Under the heading 'Reference', the public sector body, in addition to complying with the Employment Standard, is also required to comply with the 'CI on Filling a Public Sector Vacancy'. It goes without saying that other statutory obligations set out in the PSM Act will also apply. Further reference is made to other supporting information published by the Public Sector Commission in relation to assisting public sector bodies fill vacancies. Also, importantly, a 'Vacancy' is specifically defined, as set out above. It plainly means a vacant or unoccupied post, position or office that is required to be filled.

- 43 When an analysis of the Employment Standard is undertaken as set out above, the conclusion is compelling, that on its ordinary and natural meaning, the standard is a legislative instrument, directing public sector bodies that where they need to fill a vacancy in their organisation, they are obliged to do so in the manner set out in the Employment Standard. The Employment Standard does not apply to a transfer proposed by an employer, unrelated to filling a vacancy, in my view.

Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services [2014] WAIRC 00313; (2014) 94 WAIG 381

- 53 I respectfully adopt the approach taken by Kenner C in that matter, and note that the decision considers the terms of the Employment Standard. In those circumstances, the questions then are whether the matter which the applicant seeks to bring before the Arbitrator for conciliation and possibly arbitration by the amendment of the application, is covered by the Employment Standard, and if so, is there a procedure for employees to obtain relief for a breach of that standard?

- 54 The terms of the Employment Standard are:

Employment Standard

This Commissioner's Instruction - Employment Standard establishes the minimum Standards of merit, equity and probity to be complied with by the employing authority of each public sector body when filling a vacancy.

Outcome

The Employment Standard applies when filling a vacancy (by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting) in the Western Australian public sector.

The Employment Standard requires four principles to be complied with when filling a vacancy.

- 55 The Employment Standard then sets out the four principles of merit, equity, interest and transparency.

- 56 The Employment Standard also contains definitions. Those relevant are:

Recruitment The process used by an agency to attract, assess and select applicants to fill a vacancy.

Vacancy A vacant post, office or position within the public sector. A vacancy can result from the creation of a new office, post or position or by the temporary or permanent movement of another employee. For redeployment purposes a vacancy is defined as all offices, posts or positions, newly created, recently vacated or to be filled on a temporary basis in excess of six months.

- 57 Therefore, the Employment Standard is about the process of filling a vacant post, office or position within the public sector. That vacancy may result from a range of circumstances, to the filling of a vacancy by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting).

- 58 None of the circumstances set out in the definition of vacancy relates to an employer's decision not to offer further employment to an employee who was previously employed but whose contract has come to an end by the effluxion of time. The contentious part of this matter does not relate to the filling of a vacancy.

- 59 Therefore, I conclude that the Employment Standard does not apply to circumstances set out in the application to amend.

- 60 The Regulations 2005 provide a regime for a person to make a claim that a public sector standard has been breached and for the person to claim relief. It provides for a conciliation process and a review process, and for a process where the claim is not settled by agreement. The Regulations 2005 do not apply in this case because the matter raised in the application to amend is not covered by the Employment Standard. It follows that the exclusion to the Arbitrator's jurisdiction set out in s 80E(7) does not apply.

Conclusion

- 61 There is no jurisdictional impediment to the application being amended as the subject matter of the proposed amendments is an industrial matter and is not covered by the Employment Standard. Therefore, the current application is to be amended in the terms of the Minute of Proposed Amended Application. A further conference is to be convened within 14 days, at a date to be fixed.

2015 WAIRC 00364

DISPUTE RE DISCIPLINARY PROCESS

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

PARTIES

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 8 MAY 2015

FILE NO/S

C 10 OF 2015

CITATION NO.

2015 WAIRC 00364

Result	Application for orders under s 44(6)(ba) dismissed
Representation	
Applicant	Mr M Amati
Respondent	Mr D Anderson of counsel

Order

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

WHEREAS the application relates to disciplinary action taken by the respondent against the applicant's member, Ms Trudi Watts, in respect of two allegations made against her. Ms Watts is an employee of the respondent, having undertaken the role of a teacher and from 2005, a school administrator; and

WHEREAS as a result of the disciplinary action, the respondent imposed penalties on Ms Watts, in the case of the first allegation, of:

- a reduction in classification from School Administrator Level 3.4 to Teacher Level 2.9, resulting in an ongoing salary reduction of more than \$21,000 per annum; and
- transfer to another position within the Department,

and in the case of the second allegation, of:

- a reprimand; and
- a fine of one day's pay, totalling \$446.81; and

WHEREAS on Friday, 1 May and Thursday, 7 May 2015, the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the commencement of the conference on Thursday, 7 May 2015, the parties informed the Commission that following the previous conference, the respondent had decided to reduce the level of regression of classification so that Ms Watts's classification level would reduce to Teacher Level 3.2 instead of Teacher Level 2.9; and

WHEREAS at the conference on Thursday, 7 May 2015 it became clear that the matter would not be resolved by conciliation and is to be referred for hearing and determination pursuant to s 44(9) of the Act; and

WHEREAS on behalf of Ms Watts, the applicant seeks that the Commission issue orders pursuant to s 44(6)(ba)(i) of the Act, in the form of interim orders preventing the respondent from implementing the penalties against Ms Watts, except for the penalty of transfer to another position, pending the hearing and determination of the matter. Such interim orders are said to prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved the matter; and

WHEREAS the applicant says that the granting of the interim orders is fair in the circumstances of:

- (a) the challenges to the investigation conducted into the allegations against Ms Watts;
- (b) the penalties being disproportionate to the conduct, which conduct is denied by Ms Watts;
- (c) the financial detriment to Ms Watts who is the sole income-earner in her family and has financial commitments;
- (d) the professional humiliation which Ms Watts would suffer by the reduction in her level of classification, and in particular from the change in status from administrator to teacher; and
- (e) the balance of convenience lying with the applicant.

WHEREAS the respondent opposes the issuing of interim orders, and says that:

- (a) there is no demonstration of a serious or meaningful deterioration in industrial relations between the parties such as to warrant such orders; and
- (b) the balance of convenience lies with the respondent as, if the applicant is successful when the matter is heard and determined, Ms Watts will be paid for any loss suffered through the imposition of the penalties, whereas if the applicant is unsuccessful, there is no practical capacity for the respondent to recover the amounts paid through the imposition of the proposed interim orders, and recovery action is expensive and difficult.
- (c) given the findings of the investigation into the allegations and Ms Watts's refusal to recognise the inappropriateness of her conduct, the respondent does not have confidence in Ms Watts's performance of the responsibilities of administrator.

WHEREAS the Commission has considered the requirements of s 44(6)(ba)(i), s 6 and s 26(1) of the Act, including that:

- (a) there is no indication that the granting of interim orders sought would affect or prevent a deterioration of industrial relations between either the applicant and the respondent or Ms Watts and the respondent of any significance such as to warrant the requirement that the respondent be prevented from implementing its decision;
- (b) while the Commission takes account of the detrimental effect, in particular of a salary reduction, on Ms Watts, there is nothing to indicate that those circumstances are any different from the effect of a dismissal on an employee claiming harsh, oppressive or unfair dismissal, or the imposition of a penalty on any employee who has been the subject of disciplinary action;

- (c) issuing the interim orders sought will not relieve Ms Watts of the professional humiliation associated with the disciplinary action and the penalties; the only way for that to occur is for the applicant to be successful when the matter is ultimately heard and determined;
- (d) the balance of convenience lies with the respondent in that:
- (i) there will be difficulty in the respondent recovering the payments made as a consequence of the interim orders sought being granted, as compared with the respondent being required to make up any such reduction and penalties should the applicant be successful when the matter is ultimately heard and determined; and
 - (ii) in the circumstances, it would be difficult to maintain Ms Watts in an administration position pending the hearing and determination of the matter.

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

THAT the application for orders pursuant to s 44(6)(ba)(i) be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 01284

DISPUTE RE ALLEGED BREACH OF POLICY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

WEDNESDAY, 26 NOVEMBER 2014

FILE NO.

PSAC 23 OF 2014

CITATION NO.

2014 WAIRC 01284

Result	Directions issued
Representation	
Applicant	Mr G Upham
Respondent	Ms J Allen-Rana

Directions

HAVING heard Mr G Upham on behalf of the applicant and Ms J Allen-Rana 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 applicant and respondent file and serve an outline of submissions by no later than 15 January 2015.
- (2) THAT the parties have liberty to apply on short notice.

[L.S.]

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

2015 WAIRC 00276

DISPUTE RE ALLEGED BREACH OF POLICY**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2015 WAIRC 00276
CORAM : PUBLIC SERVICE ARBITRATOR
 COMMISSIONER S J KENNER
HEARD : TUESDAY, 21 OCTOBER 2014; WRITTEN SUBMISSIONS FRIDAY, 19 DECEMBER
 2014; THURSDAY, 15 JANUARY 2015; WEDNESDAY, 11 FEBRUARY 2015
DELIVERED : WEDNESDAY, 1 APRIL 2015
FILE NO. : PSAC 23 OF 2014
BETWEEN : WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND
 SERVICES UNION OF EMPLOYEES
 Applicant
 AND
 PUBLIC TRANSPORT AUTHORITY
 Respondent

Catchwords : Industrial law (WA) – Dispute regarding application and interpretation of the Alcohol and Other Drugs Policy – Positive test for the presence of alcohol – Reasonableness of the policy – Interpretation of 0.00% BAC in the policy – Principles applied – Assessment of the policy against acceptable industrial standards – Policy found to be reasonable – Legislation sets minimum obligations – Purpose and intention of the policy – Positive result under the policy – Recommendation issued

Legislation : *Industrial Relations Act 1979* (WA) s 44
Rail Safety Act 2010 (WA) ss 28, 74, Div 4 Pt 4
Road Traffic Act 1974 (WA)
Rail Safety Regulations 2011 (WA) reg 28
Rail Safety National Law (WA) Bill 2014 (WA) cl 128

Result : Recommendation issued

Representation:
 Applicant : Mr G Upham
 Respondent : Ms J Allen-Rana

Case(s) referred to in reasons:

Australian Railways Union of Workers, West Australian Branch and Others v Western Australian Government Railways Commission (1999) 79 WAIG 1215

BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australia Western Australian Branch (1998) 78 WAIG 2593

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Others v Argyle Diamond Mines Pty Limited (2001) 81 WAIG 324

Reasons for Recommendation

- 1 The Public Transport Authority has an Alcohol and Other Drugs Policy which is current from March 2014. The Policy deals with the Authority's stated "zero tolerance policy" to alcohol and other drugs in the workplace. The Policy is stated to ensure that "work performance, safety and health of people working on PTA business is not influenced by Alcohol or Other Drugs". All employees and contractors providing services to the Authority are required to comply with the Policy. The Policy also contains a testing regime for alcohol and drugs based both on "for cause", "due cause" and random testing. The Policy also provides for health assessments, pre-employment medicals and also fitness for work assessments and management programs.
- 2 A dispute has arisen between the Union and the Authority in relation to the application of the Policy. On 2 May 2014 there was a blanket testing of employees at the Authority's Claisebrook Depot. A member of the Union, Mr McGowan, is the Depot Master at the Claisebrook Depot. On the day of the blanket testing, Mr McGowan tested positive at work for the presence of alcohol, and returned a reading on a breath test of 0.006% BAC (breath alcohol concentration). The requirement under the Policy for the "Alcohol Cut-off Level" is 0.00% of BAC. On the basis of a confirmatory test undertaken in accordance with the Policy, Mr McGowan was regarded as having returned a positive test for alcohol. Occupying a safety critical position, he received a written warning and was referred to the Authority's employee assistance provider, in accordance with the Policy.
- 3 In these proceedings brought under s 44 of the Act, the Union disputes the finding by the Authority of a positive test result by Mr McGowan. It was contended by the Union that as Mr McGowan's test reading was 0.006% BAC, properly interpreted, this

was less than the cut-off point for alcohol of 0.00% BAC and he was not in breach of the Policy. Secondly, the Union contended that the cut-off level of 0.00% BAC for alcohol is unreasonable. The Union contended that the standard which is reasonable, is that presently prescribed by the Rail Safety Act 2010 and the Rail Safety Regulations 2011, which prescribe 0.02% BAC as the cut-off limit.

- 4 The Authority contended that on a proper interpretation of the Policy Mr McGowan was in breach and its actions in respect of him were appropriate. Furthermore, the Authority maintained that its Policy is reasonable and appropriate given the nature of the safety critical work involved in railway operations.
- 5 At a compulsory conference the parties requested, and the Commission agreed, to consider the parties' submissions in relation to the dispute in an informal manner, and make any recommendations that it sees fit having regard to the issues in dispute. In that respect, the parties have filed helpful written submissions, setting out their contentions, which I have carefully considered. I briefly set out those contentions now.

Contentions of the parties

- 6 The Union submitted that in relation to the interpretation of the Policy, the reference to the cut-off level for alcohol of 0.00% BAC does not mean an absolute zero reading. It was submitted that on the basis that the Policy makes no reference to rounding or relying on a third decimal point to ascertain a reading, in Mr McGowan's case, he was not in breach of the Policy. The broad submission of the Union was, when the terms of the Policy are read as a whole, in conjunction with the relevant Australian Standards, to include test results to the third decimal point falls outside of the scope of the Policy and the Authority has applied it incorrectly in Mr McGowan's case.
- 7 Whilst based on quite a technical analysis, the Union's submission contended that when considering the Australian Standards, in particular AS/NZS 3547, dealing with technical specifications for breath analysers, it is clear that devices referred to in the Australian Standards are not tested to be accurate to a third decimal place reading. According to the submission, having regard to the terms of the Australian Standards, and the breath analyser devices referred to in it, and the requirements for accuracy and allowable margins for error of these devices, a positive reading greater than the 0.00% BAC in the Policy, is 0.01% BAC. On this basis, the Union contended that Mr McGowan's test result was not physically possible on a device that satisfies both the Policy and the relevant Australian Standards. Accordingly, the Union contended that Mr McGowan's result of 0.006% BAC should be regarded as a negative test result.
- 8 Furthermore, the Union submitted that the reference to "zero tolerance" in the Policy, when read as part of the Policy as a whole, cannot mean an absolute zero level of alcohol or drugs present in an employee's body.
- 9 As to the second issue, regarding the reasonableness of the Policy itself, the Union submitted that it is not reasonable for the Authority to have a policy which "effectively allows the employer to dismiss an employee if they are actually not impaired by drugs or alcohol and are in fact fit for work". The submission of the Union was that the Authority's Policy sets a standard for alcohol which is higher than that specified in the RS Act and the RS Regulations, which is presently 0.02% BAC. Furthermore, reference was made to the standard of 0.05% BAC for motor vehicle drivers under the Road Traffic Act 1974. The submission of the Union was that the reference to the lower standard of 0.02% BAC in the State rail safety legislation is a specific indicator of whether or not an individual employee is impaired by alcohol.
- 10 According to the Union's submission, because of the Authority's standard of 0.00% BAC, an employee could be stood down without pay, and ultimately dismissed, for a contravention of the Policy, in circumstances where they suffer no actual impairment in their capacity to perform work. The Union contended that this was plainly unreasonable.
- 11 For the Authority a number of submissions were made. As to the application of the Policy to Mr McGowan, it contended that Mr McGowan's initial breath analysis concentration was undertaken one hour and 28 minutes after he commenced his shift at the Claisebrook Depot. At that time, he had a reading of 0.01% BAC. In accordance with the Policy, a second sample was taken 20 minutes later, one hour and 48 minutes into Mr McGowan's shift. This test result showed a reading of 0.006% BAC for alcohol. The Authority submitted that Mr McGowan's BAC results confirmed that he had alcohol in his system while on duty. The presence of alcohol in Mr McGowan's system was confirmed in a subsequent urine test.
- 12 The Authority attached some significance to the fact that Mr McGowan's first test result of 0.01% BAC, was approximately one and a half hours into his rostered shift. On this basis, it was contended that it would be reasonable to assume that a reading at the commencement of Mr McGowan's shift would normally be higher than at the time of the test result. Accordingly, this provided support for a "zero threshold" under the Policy, in order to provide a safe working environment in a safety critical organisation.
- 13 The Authority took issue with the Union's assertion in its submission that the cut-off for alcohol of 0.00% BAC means something other than zero. The Authority contended that the "numerical value of zero tolerance translates in the policy as 0.00". It was submitted that zeros appearing to the right of the decimal point in the cut-off point in the Policy, are trailing zeros, and do not change the value of the number. In this sense, 0.00% and 0.000% are the same and mean "zero", which gives effect to the Authority's zero tolerance approach to alcohol and drugs under the Policy.
- 14 As to the Union's submissions regarding the application of the Australian Standards, the Authority disputed the Union's position. The point was made in the Authority's submission that as to AS/NZS 4308, there is no prescribed cut-off level for alcohol under this Standard. In relation to AS 3547-1997, this Standard deals with testing devices. The Authority submitted that the Drager Alcotest 6510 unit, can measure BAC levels from 0-0.100% BAC. Such a measurement has a reproducibility of +/- 0.0016% BAC. On this basis, a positive result can be ascertained within a range of 0.004-0.008% BAC. This means that alcohol has been detected in the test. Mr McGowan's result was within that range.
- 15 On the broader issue of the reasonableness of the Policy generally, the Authority contended that the Policy has been effective since August 2013. Under a previous version, the Policy provided that a positive test was a result greater than 0.02% BAC. The Authority changed the Policy, when it moved to a "zero tolerance" approach to alcohol and drugs in the workplace, to prescribe a limit of 0.00% BAC for alcohol. The Authority made the point that at the time it was proposing this variation, it

undertook a consultation process with relevant Unions involved in its operations, and there was no objection taken to the proposed change at the time.

- 16 Reference was made by the Authority to two decisions of the Commission in relation to drug and alcohol policies in the workplace. These included the Commission in Court Session's decision in *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australia Western Australian Branch* (1998) 78 WAIG 2593 and that of Beech C in *Australian Railways Union of Workers, West Australian Branch and Others v Western Australian Government Railways Commission* (1999) 79 WAIG 1215. I also refer to the decision of the Commission in Court Session in *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Others v Argyle Diamond Mines Pty Limited* (2001) 81 WAIG 324. The submission of the Authority was to the effect that the Commission, in these decisions, has endorsed the application of drug and alcohol policies in the workplace not as measures of impairment, but rather, that the presence of drugs and alcohol in an employee's system is a proxy for potential impairment at work.
- 17 In relation to the legislation, the Authority submitted that the RS Act requires it to develop a policy for the safety of both the public and its employees. The legislation does not prevent the Authority from adopting a lower cut-off level than that presently prescribed in the RS Regulations, of 0.02% BAC for alcohol. Furthermore, and importantly, the Authority submitted that it amended its Policy, to lower the cut-off level, having regard to the terms of the Rail Safety National Law Bill 2014, presently before the State Parliament. This Bill, if enacted, will replace the existing State legislation and give effect to the Model National Rail Safety Law 2011.
- 18 The provisions of the Model Law prohibit any rail safety employees from working while they have "any concentration of alcohol in the blood". It was therefore submitted by the Authority that given the safety critical nature of railway operations, for both its employees and the general public, it is appropriate to have a zero tolerance approach to alcohol and drugs in the workplace. The steps taken by the Authority in its Policy, as now amended, are consistent with the principles underlying the National Model Law, and are reasonable and sensible.
- 19 Additionally, the Authority submitted that the Policy has a number of inbuilt safeguards. These include a requirement for a "confirmatory test" after an initial breath test. Secondly, there is also provision for a urine sample to be collected and analysed to detect the presence of alcohol to support a confirmatory BAC test result. Thirdly, protections exist under the Policy for those employees who are taking prescribed medication. Overall therefore, the Authority contended that it applied the terms of the Policy appropriately in Mr McGowan's case. Further, the terms of the Policy itself, are both appropriate and reasonable, given the nature of its operations.

Consideration

Is the Policy reasonable?

- 20 It is beyond question that the provision of public rail transport services involves safety critical work. The Authority is required to, as far as is reasonably practical, ensure the safety of its railway operations. To give effect to this obligation under Div 4 Part 4 of the RS Act, the Authority must have a safety management system for its railway operations. Part of the required safety management system is the implementation of a drug and alcohol management programme under s 74 of the RS Act. Significant penalties apply to a rail transport operator if it fails to comply with these obligations.
- 21 It is the case that presently, the RS Regulations, in reg 28, provide an alcohol concentration of 0.02% BAC. However, this is the level at or above which a criminal offence may be committed. Nothing in the rail safety legislation prevents a railway operator, from prescribing a level of alcohol concentration in its policy, lower than that set out in the Regulations.
- 22 The Commission in Court Session has, in the *BHPIO* and *Argyle Diamond Mines* cases, acknowledged the importance of drug and alcohol policies as a means of detecting the use of drugs and alcohol in the workplace that may lead to a person's impairment at work. Whilst drug and alcohol levels, for the purposes of a testing regime under a policy, do not mean impairment per se, the expert evidence led in those cases, suggested the presence of certain levels of drugs and alcohol has a correlation with the likelihood of impairment.
- 23 In the public rail transport system operated by the Authority, consideration not only should be given to the health and safety of employees, or others in the workplace such as contractors and visitors, as in mining operations. Consideration also needs to be given to the safety of the travelling public at large, and those who may be in the proximity of the Authority's railway operations.
- 24 As was said by the Commission in Court Session in both the *BHPIO* and the *Argyle Diamond Mines* cases, the role of the Commission in these types of matters is not to act as a surrogate manager for the employer, and to consider for itself, the most appropriate drug and alcohol policy terms. The Commission is rather, required to assess the Policy against acceptable industrial standards: *BHPIO* at 2594 and *Argyle Diamond Mines* at 324.
- 25 Looked at from this perspective, it is difficult to come to any conclusion other than that the Policy is reasonable. I appreciate the point made by the Union that the standard as made by the legislature, for alcohol concentration for railway employees is presently 0.02% BAC and therefore this should be the adopted industry standard. However, as noted, the level set by the legislation, as with terms and conditions of employment for example, set by the Commission in awards and industrial agreements, are minimum obligations. There is nothing to preclude a rail operator from exceeding the statutory minimum, if it considers it appropriate, in discharging its overall duty of care as provided for in s 28 of the RS Act.
- 26 On this basis, and having regard to the Policy as a whole, I consider that the Policy satisfies accepted industrial standards.

Did Mr McGowan breach the Policy?

- 27 I have set out the contentions of the Union and the Authority above. In essence, it reduces to the meaning of "0.00% BAC", in the context of the Policy as a whole. Does this mean, as contended by the Authority, a zero concentration of alcohol in a person's blood? Or, is the Policy to be construed, as the Union contended, consistent with the Standard AS/NZ S3547 of 1997,

which is said to mean that based on the devices to be used, a reading of 0.006% BAC must be construed as a negative test result?

- 28 Whilst the Union placed considerable weight on the Australian Standards, in its submissions, it should be noted that AS/NZ 4308 deals with the procedure for specimen collection and detection and quantification of drugs of abuse in urine. It does not deal with minimum or maximum BAC levels for alcohol testing. AS/3547 is concerned with the performance and testing of disposable and reusable breath alcohol testing devices for personal use. It is intended to ensure the integrity and reliability of breath alcohol testing devices. However, the Standard does not concern itself with what the cut-off levels for BAC should be.
- 29 Consistent with accepted principles of interpretation, the Policy should be construed in such a way to give effect to its purpose and intention. It also needs to be considered in a common sense fashion. Undistracted by technical arguments as to the testing capabilities of certain types of portable breath alcohol testing devices, having regard to the Policy overall, I consider that the "Alcohol Cut Off Level", of 0.00% BAC, was intended to mean zero, in absolute terms. Consistent with the Policy's stated purpose of a "zero tolerance" approach by the Authority to alcohol and drugs in the workplace, I consider that the introduction of 0.00% BAC was intended to mean a result requiring no concentration of alcohol in the blood of an employee or other person tested under the Policy.
- 30 This view is fortified by reference to the history of relevant changes to the Policy, to reduce the BAC level from 0.02% BAC, as referred to in the current rail safety legislation, to 0.00% BAC, to align with the Rail Safety Bill, presently before the State Parliament. The Bill, at cl 128, provides for a rail safety worker not to work with any concentration of alcohol in his or her blood, as the default position. Provision is made for future national regulations to prescribe some other concentration.

Conclusion and recommendation

- 31 Therefore, I consider that in this case, Mr McGowan's result in May 2014 was a positive result for the purposes of the Policy, construed consistent with its intended purpose and effect. I am satisfied that the Authority responded to this positive result in accordance with the terms of the Policy. However, I recommend that to avoid similar arguments in the future, that the reference to cut-offs and negative test results in the Policy, simply refer to "a test reading showing no concentration of alcohol in the blood", as apparently is used in another public rail operator's policy dealing with this subject matter. Other consequential amendments may also need to be made.

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

[L.S.]

CONFERENCES—Matters referred—

2014 WAIRC 00492

DISPUTE RE TRANSFER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)

PARTIES

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 17 JUNE 2014
FILE NO. CR 216 OF 2013
CITATION NO. 2014 WAIRC 00492

Result Directions issued
Representation
Applicant Mr M Amati
Respondent Ms S Young

Direction

HAVING heard Mr M Amati on behalf of the applicant and Ms S Young on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 16 July 2014. Documents referred to by a witness should be annexed to the witness statement.
- (2) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00227

DISPUTE RE TRANSFER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)

PARTIES**APPLICANT**

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM** COMMISSIONER S J KENNER**DATE** TUESDAY, 10 MARCH 2015**FILE NO/S** CR 216 OF 2013**CITATION NO.** 2015 WAIRC 00227**Result** Application discontinued**Representation****Applicant** Mr M Amati**Respondent** Ms S Young*Order*

HAVING heard Mr M Amati on behalf of the applicant and Ms S Young on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	Department of Health	Scott A/SC	C 29/2014	1/10/2014 20/10/2014 29/10/2014	Dispute re proposed changes to staffing structure	Discontinued
The Australian Nursing Federation, Industrial Union of Workers Perth	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 3/2013	8/01/2013 4/12/2014	Dispute re rostering	Discontinued
The Civil Service Association of Western Australia Incorporated	Professor Bryant Stokes Acting Director General Department of Health	Harrison C	PSAC 27/2014	N/A	Dispute re renegotiation of Dental Officers Industrial Agreement	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2015 WAIRC 00291

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SHANE MICHAEL FERGUSON

APPELLANT

-v-

THE COMMISSIONER OF POLICE

RESPONDENT**CORAM**

CHIEF COMMISSIONER A R BEECH

COMMISSIONER S J KENNER

COMMISSIONER J L HARRISON

DATE

WEDNESDAY, 8 APRIL 2015

FILE NO/S

APPL 109 OF 2015

CITATION NO.

2015 WAIRC 00291

Result

Appeal adjourned

Representation (by written correspondence)**Appellant**

Mr D Jones, of counsel

Respondent

Mr G Huggins, of counsel

Order

WHEREAS on 27 March 2015 Shane Michael Ferguson lodged an appeal pursuant to s 33P of the *Police Act 1892* (“the Police Act”) against his removal from WA Police on 27 February 2015;

AND WHEREAS on 27 March 2015 the appellant lodged an application for an adjournment of the hearing of the appeal pursuant to s 33T of the Police Act to 1 March 2016 until after the charges against the appellant are finally determined by a court of otherwise disposed of;

AND WHEREAS on 7 April 2015 the respondent lodged a request for a direction that a response is not required to be filed until 28 days after the hearing of the appeal resumes;

AND WHEREAS the adjournment is sought subject to any further applications by the parties to amend that date;

AND WHEREAS s 33T(3) obliges the Commission to grant an adjournment of the hearing of the appeal.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 33T of the Police Act, hereby orders -

1. THAT the hearing of the appeal be adjourned until 1 March 2016.
2. THAT the appeal be listed for mention on 1 March 2016.
3. THAT compliance with reg 91 of the *IR Regulations* by the Commissioner of Police need not occur until further order.
4. THAT either party may apply to vary the terms of this order.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

On Behalf of the Western Australian Industrial Relations Commission.

2010 WAIRC 00987

DISPUTE RE REQUEST FOR INFORMATION FROM MEMBERS REGARDING EMPLOYMENT STATUS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE DIRECTOR GENERAL DEPARTMENT OF EDUCATION

APPLICANT**-v-**LIQUOR HOSPITALITY AND MISCELLANEOUS UNION WESTERN AUSTRALIAN
BRANCH**RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 14 OCTOBER 2010
FILE NO/S C 43 OF 2010
CITATION NO. 2010 WAIRC 00987

Result Applications joined
Representation
Applicant Ms P Cameron and with her Mr K Dodd
Respondent Mr M Aulfrey of counsel

Order

HAVING heard Ms P Cameron on behalf of the applicant and Mr M Aulfrey of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the herein application be and is hereby joined with application C 35 of 2010.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2013 WAIRC 01014

DISPUTE RE STAFF PERFORMANCE MANAGEMENT TOOL
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 COMMISSIONER OF MAIN ROADS

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

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 2 DECEMBER 2013
FILE NO. P 4 OF 2013
CITATION NO. 2013 WAIRC 01014

Result Recommendation issued
Representation
Applicant Mr B J Kirwin
Respondent Ms J O'Keefe

Recommendation

WHEREAS on 27 September 2013 the applicant made an application under s 80E of the Industrial Relations Act 1979 for a s 32 conference in relation to an industrial dispute concerning a new staff performance management tool and alleged industrial action in response;

AND WHEREAS as a consequence of the commencement of a dispute resolution process by the respondent the parties have been conferring in relation to the matters raised in the application;

AND WHEREAS on 26 November 2013 the Arbitrator convened a conference under s 32 of the Act. At the conference, the Arbitrator was informed that the applicant was introducing a new staff performance management tool, to be known as an Individual Performance Agreement, to replace the applicant's former staff performance management tool, the Individual Development Plan;

AND WHEREAS the Arbitrator was informed that the new staff performance management tool was developed by the applicant arising from a review of its performance and staff development management processes in conjunction with developments elsewhere in the public sector in particular the Department of Transport. The applicant's review of its staff development and performance management processes have also been informed by assistance provided from the Public Sector Commission in relation to managing staff performance.

AND WHEREAS The Arbitrator was informed that following testing in May 2013, the proposed new system was completed on 5 July 2013 and relevant unions were notified of the new staff performance management process in late July 2013. The applicant informed the Arbitrator that union workplace delegates and officials were provided with information in relation to the new process, which was the subject of formal consideration at a Joint Consultative Committee meeting between representatives of the applicant and the respondent and other unions, on 6 August 2013;

AND WHEREAS the applicant informed the Arbitrator that the new system is not fundamentally different to the former system, but does place greater emphasis on performance management. The applicant also informed the Arbitrator that on 25 September 2013 an email from a delegate of the respondent, raising concerns about the new staff performance management tool led to the alleged refusal by employees to enter into IPAs, which the applicant considered to be a form of industrial action;

AND WHEREAS the respondent informed the Arbitrator that the concerns of its members in relation to the new staff performance management tool arise from a lack of compliance with consultation obligations under the relevant industrial instruments and compliance with the Public Sector Commission standard in relation to performance management. The respondent noted that there is no objection in principle to performance management and acknowledges the responsibility of the management of the applicant to manage its employees. The respondent expressed concerns that its members were being placed under duress to prepare and sign IPAs with the threat of punitive action if they did not. Furthermore, the respondent informed the Arbitrator that further concerns have been identified by the respondent and its members in relation to the proposed IPAs, in terms of their significant performance focus; the subjective nature of competencies and the lack of training, support and understanding as to the basis for the implementation of the new performance management tool;

AND WHEREAS the respondent confirmed that as a consequence of invoking the dispute resolution process under the Main Roads-CSA-Enterprise Agreement 2012, the parties have been conferring and making progress in identifying and working through a number of concerns identified by them;

AND WHEREAS the Arbitrator notes that the issues raised in the application are now the subject of the formal dispute resolution process contained in the Agreement and also notes the commitment by the applicant that no employee will be the subject of punitive action by not entering into an IPA, pending the completion of the discussion between the parties under the dispute resolution process;

AND WHEREAS the Arbitrator also informed the parties that having been appraised of the matters in dispute that it would consider making a recommendation in relation to the matters arising in the application;

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

- (1) THAT the parties continue to confer in relation to the implementation by the applicant of its new staff performance management tool in accordance with the dispute settlement procedure in the Agreement.
- (2) THAT in the interim, pending agreement being reached between the parties through the dispute settlement procedure and/or a further conciliation proceedings before the Arbitrator, employees not be required to enter into IPAs and that the existing staff performance management tool continue to be used by those wishing to do so; and
- (3) THAT the parties report back to the Arbitrator as to their progress in discussions under the dispute settlement procedure of the Agreement within 21 days.

[L.S.]

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

2015 WAIRC 00375

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JEFFREY ALAN LEVER

APPLICANT

-v-

CITY OF WANNEROO

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

WEDNESDAY, 13 MAY 2015

FILE NO.

U 35 OF 2015

CITATION NO.

2015 WAIRC 00375

Result	Direction issued
Representation	
Applicant	Mr P Nevin of counsel
Respondent	Mr B Taylor as agent

Direction

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

WHEREAS the application was set down for a Directions hearing on the 8th day of May 2015; and

WHEREAS by email the parties provided their respective proposed directions to be issued for the preparation of the hearing of the matter and the Commission heard from the parties; and

WHEREAS the Commission is of the opinion that the issuing of the Directions will assist in the conduct of the hearing of the matter;

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

1. THAT the applicant file and serve any witness statements constituting the whole of the evidence in chief of the witnesses on which he intends to rely on or before 5.00 pm on the 26th day of June 2015.
2. THAT the respondent file and serve any witness statements constituting the whole of the evidence in chief of the witnesses on which it intends to rely on or before 5.00 pm on the 17th day of July 2015.
3. THAT the applicant file and serve written submissions on or before 5.00 pm on the 24th day of July 2015.
4. THAT the respondent file and serve written submissions on or before 5.00 pm on the 31st July 2015.
5. THAT the evidence in chief for all witnesses shall be adduced by way of witness statements.
6. THAT no evidence in chief shall be adduced other than by witness statements without the leave of the Commission.
7. THAT the parties give notice to one another of witnesses they require to attend the proceedings for the purpose of cross-examination on or before 7 days prior to the date of the hearing.
8. THAT the matter be listed for a hearing of two days' duration.
9. THAT the parties have liberty to apply at short notice.

[L.S.]

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

2015 WAIRC 00307

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00307
CORAM	:	COMMISSIONER J L HARRISON
HEARD	:	TUESDAY, 24 FEBRUARY 2015
DELIVERED	:	WEDNESDAY, 15 APRIL 2015
FILE NO.	:	U 185 OF 2014
BETWEEN	:	YVONNE SIEGWART
		Applicant
		AND
		EDUCATION DEPARTMENT OF WESTERN AUSTRALIA
		Respondent

Catchwords	:	Industrial law - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles applied - Commission satisfied applying principles that discretion should be exercised - Acceptance of referral out of time granted - Order issued
Legislation	:	<i>Industrial Relations Act 1979</i> s 29(1)(b)(i), s 29(2) and s 29(3)
Result	:	Order issued

Representation:

Applicant : Mr C Siegart (as agent)
 Respondent : Mr K Dodd and Ms M Butler

Case(s) referred to in reasons:

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

Reasons for Decision

1 Yvonne Siegart (the applicant) lodged this application on 26 August 2014 under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) claiming that she was unfairly dismissed by the Education Department of Western Australia (the respondent). Section 29(2) of the Act requires that applications pursuant to s 29(1)(b)(i) of the Act be lodged no later than 28 days after the day on which an employee is terminated. As this application was lodged outside of the required timeframe the Commission must determine if this application should be accepted.

2 Section 29(3) of the Act reads as follows:

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

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

- ‘1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court’s discretion [26].’

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

I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims [74].

4 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission’s discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

Background

5 The applicant commenced employment with the respondent in January 2011 as a part-time French teacher at South Padbury Primary School (SPPS). The applicant has a Bachelor of Business qualification and a Graduate Diploma in Early Childhood. She also holds post graduate qualifications for teaching French and German. The applicant was on probation in her first six months of employment and she then became a permanent teacher. The applicant taught students French in years 1 through to 7 two days per week and she stated that prior to Mr David Knox becoming the Principal at SPPS in January 2013 her employment was uneventful.

Length of delay

6 There is a dispute about the date of the applicant’s resignation and therefore how many days this application is out of time. The respondent claims the applicant resigned on 30 April 2014 and the applicant claims her resignation was effective on 23 June 2014. The applicant sent an email to Mr Knox on 28 April 2014 indicating that she would be resigning with immediate effect. After sending this email she received advice from the respondent that her resignation was not effective until a notice period of 20 days after this date expired, which the applicant refers to in an email she sent to Mr Knox on 29 April 2014. However, Mr Knox gave evidence that he waived the required 20 day notice period but he did not inform the applicant of this. I find that the applicant ceased working for the respondent on 30 April 2014 when she sent the respondent its standard termination form confirming her resignation to SPPS on that date. As the applicant was required to give 20 days’ notice of her cessation of employment and as she was not informed that this notice period had been waived I find that the applicant’s resignation did not take effect until 20 working days after 30 April 2014, which was 28 May 2014. This application, which was lodged on 26 August 2014, has therefore been lodged 62 days outside of the required timeframe for lodging the application, which is a substantial period.

The reasons for the delay in lodging this application

- 7 The applicant stated that she was confused about whether she should lodge an application to the Public Service Appeal Board (PSAB) or lodge an application under s 29(1)(b)(i) of the Act. The applicant gave evidence that she was told by the Commission's registry staff to clarify if she was a public servant in order to determine which application she should lodge and a person at the Department of Education told her she was a public servant. She therefore filed a PSAB application in the Commission on 3 July 2014 which was 15 days outside of the required timeframe for lodging that application. The respondent filed a Notice of answer on 30 July 2014 claiming that the applicant's PSAB application was in the wrong jurisdiction and when the applicant realised that she should file an application under s 29(1)(b)(i) of the Act she did so on 26 August 2014. The applicant stated that the three week delay in lodging this application after receiving the respondent's response to her PSAB application was due to being unwell. The applicant gave evidence that she was very depressed and stressed at the time she submitted her resignation and in the period after this and it was difficult for her to make decisions and take action to contest her termination. The delay in lodging this application was also extended because her treating General Practitioner advised her to go on a holiday in order to improve her health which she did between 22 June 2014 and 1 July 2014 and 4 to 21 July 2014.

Is there an acceptable explanation of the delay that makes it equitable to extend time to accept this application?

- 8 I find that a significant reason for the delay in lodging this application resulted from conflicting advice the applicant received about where to file her claim for unfair dismissal and I find that this contributed to the delay in lodging this application. I find that this confusing advice resulted in the applicant initially lodging an application to the PSAB instead of lodging it under s 29(1)(b)(i) of the Act.
- 9 I find that the delay in lodging this application was exacerbated by the applicant being unwell and it appears that some of her medical issues resulted from the difficult relationship between the applicant and Mr Knox. Even though the applicant waited three weeks to lodge this application after becoming aware that she needed to lodge an application under s 29(1)(b)(i) I accept the applicant's evidence, which was supported by a number of medical documents and certificates, that she was very unwell when she submitted her resignation and was depressed at the time and in the period after this date (see medical certificate for the period 30 April 2014 to 30 May 2014 issued on 1 May 2014 – exhibit A3). I accept that this made it difficult for the applicant to act efficiently in ensuring that this application was lodged in a timely manner in the correct jurisdiction. In the circumstances I find that the applicant had an acceptable explanation for the delay in lodging this application.

Merits of the claim of unfair dismissal

- 10 The respondent claims that there is no merit to the applicant's application. The applicant resigned of her own accord and did so because she was under investigation for a serious breach of misconduct and because a substandard performance process against the applicant was about to commence around the time the applicant ceased employment with the respondent.
- 11 The applicant claims that she had no choice but to resign given Mr Knox's conduct towards her and the negative impact of his behaviour on her health. The applicant gave evidence that soon after Mr Knox commenced at SPPS she felt threatened by him. She gave as an example difficulties she experienced using the computer in the French room and Mr Knox's unsupportive response to this issue. The applicant claimed Mr Knox interrupted her in front of students and she felt put down. On one occasion she had to leave the school early and the school car park gate was locked which was unusual and the applicant had to ask Mr Knox to open the gate for her to leave. Of great concern to the applicant was Mr Knox's refusal to allow the purchase of new resources she required to be ordered at the beginning of 2014. She only found out some weeks after ordering the resources that Mr Knox had refused to allow the orders to proceed because she had not used a specific procedure that he wanted her to follow which she was unaware of. After she raised this matter with Mr Knox the orders were filled. This issue upset the applicant and affected her classroom delivery. The applicant felt harassed by Mr Knox. The applicant gave as an example a big fuss being made of one small mistake she made in a student's report. The applicant became afraid of Mr Knox because of his ongoing criticism and consistent negative comments and the applicant believed that Mr Knox was looking for problems with her teaching. When she was subject to an Employee Development Plan she was required to attend a meeting with her mentor Mr Peter Godfrey on 28 December 2013, which she did by attending the school, but no one was there. This incident exacerbated the stress she was suffering. After further negative interactions with Mr Knox she felt put down and very distressed by Mr Knox's actions and this culminated in her resignation.
- 12 An incident occurred when the applicant had time off on 21 November 2013 and the applicant claimed this contributed to the stress she was suffering and her depression. The applicant's son had been unwell so she was unable to teach on 21 November 2013 because she had been attending to him during the night. She had a medical certificate from a chiropractor to give to the respondent soon after 21 November 2013 for her absence on this date but Mr Knox would not accept it. Mr Knox claimed the applicant referred to taking different types of leave on 21 November 2013 so he referred the applicant's claim for one day of sick or carer's leave to the respondent's head office for investigation. The respondent held an inquiry into the applicant's claim for leave and found that the applicant had committed a breach of discipline in relation to this leave claim and in August 2014 the respondent notified the applicant that she had been fined and reprimanded for claiming carer's/sick leave when she was not entitled to do so. The applicant was also advised that she would not be eligible to be re-employed by the respondent in the future without the respondent's permission.
- 13 Mr Knox gave evidence that he did not discuss the applicant's resignation with her nor force her to resign. Mr Knox stated that the applicant had classroom management issues and did not co-ordinate her lesson plans with the relevant syllabus. It was because of these and other issues that he decided to refer the applicant for investigation into her possible substandard performance in early 2014.
- 14 I make no finding as to the merits of the applicant's claim that she was terminated nor do I make any findings in relation to whether the applicant was constructively dismissed. However, on the information and evidence currently before me I find that at this preliminary stage the applicant may have an arguable case that she was constructively dismissed. If the applicant can give more detailed evidence and information about her claims that she was treated unfairly by Mr Knox and the negative

impact this had on her health as well as the manner in which her performance review process was carried out which contributed to her resignation, then the applicant may well have some prospect of success.

Prejudice to the respondent

- 15 Apart from the French language no longer being taught at SPPS, the respondent does not rely on any prejudice it would suffer if time is extended to accept this application.

Whether the applicant had taken action to contest her dismissal other than by filing this claim

- 16 The applicant contacted the respondent after her resignation to obtain advice about contesting what she believed to be her dismissal by speaking to Mr Cliff Gillam, who is a senior person within the respondent's operations. The applicant lodged a PSAB application on 3 July 2014 and actively pursued what she claimed to be her unfair termination in this jurisdiction. The respondent therefore knew soon after the applicant's resignation that she would be contesting what she regarded as her dismissal. These are factors I take into account as to whether this application should be accepted out of time.

Conclusion

- 17 When taking into account the above findings and the relevant factors to consider with respect to extending time to file this application and the issue of fairness to both parties, and notwithstanding the significant delay in lodging this application, I find that it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application. An extension of time in order to lodge this application is therefore granted.

2015 WAIRC 00314

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	YVONNE SIEGWART	APPLICANT
	-v-	
	EDUCATION DEPARTMENT OF WESTERN AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 17 APRIL 2015	
FILE NO/S	U 185 OF 2014	
CITATION NO.	2015 WAIRC 00314	
Result	Order issued	
Representation		
Applicant	Mr C Siegwart (as agent)	
Respondent	Mr K Dodd and Ms M Butler	

Order

HAVING HEARD Mr C Siegwart as agent on behalf of the applicant and Mr K Dodd and Ms M Butler on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT application U 185 of 2014 be and is hereby accepted out of time.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00313

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	SANDRA BOULTER	APPLICANT
	-v-	
	MENTAL HEALTH LAW CENTRE (WA) INC	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 17 APRIL 2015	
FILE NO/S	U 247 OF 2014	
CITATION NO.	2015 WAIRC 00313	

Result	Order for discovery amended
Representation	
Applicant	Mr T Lyons of counsel
Respondent	Mr M Cox of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 1st day of April 2015 the Commission issued an Order [2015] WAIRC 00277 in relation to the applicant's application for discovery; and
 WHEREAS by email dated the 7th day of April 2015 the applicant requested an amendment to that Order to allow the respondent more time in which to provide discovery; and
 WHEREAS by email dated the 15th day of April 2015 the respondent confirmed its agreement to the amendment; and
 WHEREAS the Commission is of the opinion that it is appropriate to amend the Order;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT the Order issued on the 1st day of April 2015 [2015] WAIRC 00277 be amended by substituting:

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

with

"THAT within 28 days of the date of this order the respondent to provide discovery of the following categories of documents:".

[L.S.]

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

2015 WAIRC 00346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SANDRA BOULTER

PARTIES

APPLICANT

-v-

MENTAL HEALTH LAW CENTRE (WA) INC

RESPONDENT

CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 30 APRIL 2015
FILE NO/S	U 247 OF 2014
CITATION NO.	2015 WAIRC 00346

Result	Consent Order issued
Representation	
Applicant	Mr T Lyons of counsel
Respondent	Mr M Cox of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 1st day of April 2015 the Commission issued an Order [2015] WAIRC 00277 in relation to the applicant's application for discovery; and
 WHEREAS an amendment to that Order was issued on the 17th day of April 2015 [2015] WAIRC 00313; and
 WHEREAS on the 28th day of April 2015 the parties filed a Minute of Consent Order requesting a further extension of time for the respondent to provide discovery; and
 WHEREAS the Commission is of the opinion that it is appropriate to further extend the time for discovery;

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

THAT the date for the respondent to provide discovery of documents be extended to the 22nd day of May 2015.

[L.S.]

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

2015 WAIRC 00298

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ALEXIS NOAKES

PARTIES

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 13 APRIL 2015

FILE NO/S U 252 OF 2014

CITATION NO. 2015 WAIRC 00298

Result Direction amended

Direction

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

WHEREAS on the 3rd day of March 2015 the Commission issued a Direction [2015] WAIRC 00210 (Directions) in preparation for the hearing of this matter; and

WHEREAS by the 7th day of April 2015 the applicant had not filed and served witness statements in accordance with direction 6 of those Directions; and

WHEREAS by email on the 9th day of April 2015 the respondent requested an amendment to the Directions to take account of the applicant not having filed and served witness statements; and

WHEREAS the Commission is of the opinion that in the circumstances it is appropriate to amend the Directions;

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

THAT Direction 7 of the Directions issued on the 3rd day of March 2015 [2015] WAIRC 00210 be replaced by "THAT the respondent file and serve any signed witness statements of the witnesses it intends to rely upon no later than 7 working days from receipt of the applicant's witness statements".

[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 CSA Fire Service Provisions Agreement 2015 PSAAG 1/2015	7/05/2015	The Director General of the Department of Parks and Wildlife	Civil Service Association of WA	Acting Senior Commissioner P E Scott	Agreement registered
School Education Act Employees' (Teachers and Administrators) General Agreement 2014 - The AG 3/2015	20/04/2015	The State School Teachers' Union of W.A. (Inc.)	Director-General of the Department of Education	Acting Senior Commissioner P E Scott	Agreement registered
Shire of Harvey Leschenault Leisure Centre Enterprise Agreement 2014 AG 4/2015	24/04/2015	Western Australian Municipal Administrative, Clerical and Services Union of Employees	Shire of Harvey	Commissioner J L Harrison	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Western Australian TAFE Lecturers' General Agreement 2014 AG 5/2015	7/05/2015	Governing Council of the Central Institute of Technology AND OTHERS AND The State School Teachers' Union of W.A. (Incorporated)	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered

NOTICES—Appointments—

2015 WAIRC 00341

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner JL Harrison to be an additional Public Service Arbitrator for a period of one year from the 1st day of May, 2015.

Dated the 17th day of April, 2015.



(Sgd.) A.R. BEECH

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2015 WAIRC 00164

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 17 OCTOBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON BEHALF OF KEITH LAWES

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G SUTHERLAND – BOARD MEMBER
MR TONY CLARK – BOARD MEMBER

DATE

WEDNESDAY, 11 FEBRUARY 2015

FILE NO

PSAB 15 OF 2014

CITATION NO.

2015 WAIRC 00164

Result

Directions issued

Representation

Appellant

Mr K Rukunga of counsel

Respondent

Ms N Sagar and with her Ms K Loakes

Directions

HAVING heard Mr K Rukunga of counsel on behalf of the appellant and Ms N Sagar and with her Ms K Loakes on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent file and serve a notice of answer and counter proposal in answer to the notice of appeal by no later than 17 February 2015.
- (2) THAT evidence in chief in this matter be adduced by signed witness statements which will stand as evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Appeal Board.
- (3) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 3 March 2015 and any documents referred to in the statements should be attached.
- (4) THAT each party shall give informal discovery by serving its list of documents by 20 February 2015.
- (5) THAT the appeal be listed for hearing for one day on a date to be fixed.
- (6) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

2015 WAIRC 00165

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 17 OCTOBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON
BEHALF OF KEITH LAWES

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G SUTHERLAND – BOARD MEMBER
MR TONY CLARK – BOARD MEMBER

DATE

WEDNESDAY, 11 FEBRUARY 2015

FILE NO

PSAB 15 OF 2014

CITATION NO.

2015 WAIRC 00165

Result

Order issued

Representation

Appellant

Mr K Rukunga of counsel

Respondent

Ms N Sagar and with her Ms K Loakes

Order

HAVING heard Mr K Rukunga of counsel on behalf of the appellant and Ms N Sagar and with her Ms K Loakes on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the name of the respondent on the notice of appeal be amended by deleting the name “Director General, Department of Corrective Services” and inserting in lieu thereof the name “The Commissioner of Corrective Services”.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

2015 WAIRC 00294

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 17 OCTOBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESTHE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON
BEHALF OF KEITH LAWES**APPELLANT****-v-**

THE COMMISSIONER OF CORRECTIVE SERVICES

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G SUTHERLAND - BOARD MEMBER
MR T CLARK - BOARD MEMBER**DATE**

FRIDAY, 10 APRIL 2015

FILE NO

PSAB 15 OF 2014

CITATION NO.

2015 WAIRC 00294

Result Application discontinued**Representation****Appellant** Mr K Rukunga**Respondent** Ms N Sagar*Order*

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

On behalf of the Public Service Appeal Board.

[L.S.]

2015 WAIRC 00344

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**PUBLIC SERVICE APPEAL BOARD
ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
MS C BARNARD - BOARD MEMBER
MR G LEE - BOARD MEMBER**DATE**

THURSDAY, 30 APRIL 2015

FILE NO

PSAB 3 OF 2015

CITATION NO.

2015 WAIRC 00344

Result Part of appeal pursuant to s 80I(1)(a) dismissed

Order

HAVING heard Ms K Hagan of counsel 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 orders:

THAT the part of the appeal pursuant to s 80I(1)(a) be, and is hereby dismissed.

[L.S.]

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

2015 WAIRC 00363

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 28 OCTOBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CASEY NEWBY

APPELLANT

-v-

PILBARA DEVELOPMENT COMMISSION

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON - CHAIRPERSON
MS B CONWAY - BOARD MEMBER
MR P HUMPHRIES - BOARD MEMBER

DATE

FRIDAY, 8 MAY 2015

FILE NO

PSAB 16 OF 2014

CITATION NO.

2015 WAIRC 00363

Result	Discontinued
Representation	
Appellant	In person and later Mr S Butcher (of counsel)
Respondent	Mr A Jones and later Mr D Anderson (of counsel)

Order

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

A scheduling conference listed for 13 January 2015 was vacated on 5 January 2015 when the appellant advised that she was not proceeding with the matter.

On 16 January 2015 the appellant indicated that she now wished to proceed with her application and on 11 February 2015 a status conference was convened.

Following this conference the parties were given further time to resolve this application.

On 8 April 2015 the Board was advised that an in principle settlement had been reached.

On 30 April 2015 the appellant filed a *Form 14 - Notice of withdrawal or discontinuance* in respect of the appeal.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner,
On behalf of the Public Service Appeal Board.

2014 WAIRC 01188

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 5 SEPTEMBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SIMONE PHASEY

APPELLANT

-v-

THE HONOURABLE BARRY HOUSE MLC, PRESIDENT OF THE LEGISLATIVE COUNCIL

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G BROWN - BOARD MEMBER
MS C SULLIVAN - BOARD MEMBER**DATE**

WEDNESDAY, 22 OCTOBER 2014

FILE NO

PSAB 12 OF 2014

CITATION NO.

2014 WAIRC 01188

Result	Directions issued
Representation	
Appellant	Mr T Kucera of counsel
Respondent	Mr R Andretich of counsel

Directions

HAVING heard Mr T Kucera of counsel on behalf of the appellant and Mr R Andretich of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT each party shall give informal discovery by serving its list of documents within 14 days.
- (2) THAT the appeal be listed for hearing for one day on a date to be fixed.
- (3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

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 117/2015	N/A	N/A	Beech CC	Request for mediation re unpaid wages	N/A	Concluded

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2015 WAIRC 00283

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION : 2015 WAIRC 00283
CORAM : COMMISSIONER S M MAYMAN
HEARD : FRIDAY, 13 FEBRUARY 2015
DELIVERED : THURSDAY, 2 APRIL 2015
FILE NO. : OSHT 1 OF 2015
BETWEEN : FEWSTONE PTY LTD T/A CITY BEACH
 Applicant
 AND
 COMMISSIONER LEX MCCULLOCH WORKSAFE WA
 Respondent

CatchWords	Occupational Safety and Health Act 1984 – Notice referred for further review by Occupational Safety and Health Tribunal under s 51A - Nature of inquiry by WorkSafe Western Australia Commissioner - Interpretation of s 51A(5) – Relevant principles applied when carrying out an inquiry - Occupational Safety and Health Tribunal – WorkSafe Commissioner’s s 51 notice revoked – Inspector’s improvement notice cancelled.
Legislation	<i>Occupational Safety and Health Act 1984</i> (WA) s 3(1), s 48, s 48(1)(a), s 48(1)(b), s 51, s 51(1), s 51A, s 51A(1), s 51A(2), s 51A(5), s 51A(5)(a), s 51A(5)(b), s 51A(5)(c), s 51I <i>Occupational Safety and Health Regulations 1996</i> (WA) reg 3.20(2)
Result	Order issued revoking s 51 notice - cancelling improvement notice 64000646 - amending programming order
Representation:	
Applicant	: Ms M Saraceni (of counsel) and with her Ms J Hart (of counsel)
Respondent	: Ms S Duce (of counsel)

Case(s) referred to in reasons:

Reece Pty Ltd v The WorkSafe Western Australia Commissioner [2015] WAIRC 00057

The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd [2007] WAIRC 01273; (2007) 88 WAIG 22

Reasons for Decision

- 1 On 22 January 2015 Fewstone Pty Ltd trading as City Beach (City Beach) filed a Form 7 – Notice of Referral to the Occupational Safety and Health Tribunal (the Tribunal) in the Registry of the Western Australian Industrial Relations Commission. The purpose of the referral is outlined as:

has this day referred to the Tribunal: a review of the Commissioner’s decision in relation to Improvement Notice number 64000646 pursuant to section 51A(2) of the *Occupational Safety and Health Act 1984*.
- 2 Attached to the application is a three page document providing background and grounds for review.
- 3 At the request of City Beach the matter was listed on 2 February 2015 for a directions hearing. Out of that hearing the Tribunal issued a programming order (2015 WAIRC 00124) setting down a two day hearing for 8 and 9 April 2015. Workplace inspections were later arranged for 9 April 2015 at the premises of City Beach.

Background

- 4 Improvement Notice number 64000646 (the Notice) was issued by the inspector on 9 December 2014. The Notice states as follows:

Improvement Notice 64000646

1. In relation to: Sanitary etc. facilities, duties of employer
at 242 GROUND FLOOR MURRAY ST PERTH 6000 on 09 Dec 2014

I have formed the opinion that you are contravening regulation 3.20(2) of the Occupational Safety and Health Regulations 1996 and the grounds for my opinion are: You are the employer at the above-mentioned workplace, you have not ensured as far as is practicable that there are facilities (lunch room) provided at the workplace, for the use of persons working at the workplace, having regard to the reasonable requirements of the persons working at the workplace. I saw no

lunchroom provided for the approximately 120 employees employed at this workplace and further discussions made with the store manager confirmed that there is NO i.e. fridge, microwave oven, table, chairs, and or tea/coffee making facilities made available in this workplace.

You are required to remedy the above by no later than 09 Jan 2015 at 1700 hours.

2. You are directed to take the following measures: A person who, at a workplace, is an employer, the main contractor, a self-employed person or a person having control of the workplace must ensure that there are provided at the workplace for the use of persons working at the workplace reasonable other facilities, such as, provide an area for eating, drinking or resting.

- 5 Following the service of the Notice by the inspector City Beach sought a review of the Notice by the Worksafe Western Australia Commissioner (the Commissioner) pursuant to s 51 of the *Occupational Safety and Health Act 1984* (WA) (the OSH Act). On 15 January 2015 the Commissioner wrote a letter to counsel for City Beach. The letter states:

REVIEW OF IMPROVEMENT NOTICE 64000646

In response to your request of 9 January 2015, the above improvement notice has been reviewed in accordance with Section 51 of the *Occupational Safety and Health Act 1984* (the OSH Act).

In reviewing the above notice, I must ascertain whether there were reasonable grounds for the opinion that there was a breach of section 3.20(2) of the Occupational Safety and Health Regulations 1996 ('the OSH Regulations').

As you are aware, regulation 3.20(2) of the Occupational Safety and Health Regulations 1996 ('the OSH Regulations') requires an employer at a workplace to ensure that people working at that workplace have convenient access to sanitary facilities; and any other facility if the safety or health of a person working at the workplace would be at risk if the facility were not provided.

Your submission states "City Beach does not believe that the safety or health of Team Members is at risk due to an area for eating, drinking or resting not being provided".

I am advised that during Inspector ...'s visit, employees reported there are no facilities at the workplace to refrigerate or reheat meals and the only area available for seating were public benches located in the mall. This is disconcerting, as the only option available to employees is to purchase their meal and sit in the mall in order to take their break. I expect this would be especially disconcerting for female employees during night shift.

Employees also relayed instances to Inspector ... of vagrants approaching them in the mall during their break. Furthermore, it is unreasonable to expect staff to sit outside in inclement weather or if they are feeling unwell. This is an environment in which employees may be exposed to possible hazards.

In view of the above, I consider that there were reasonable grounds for issuing the improvement notice. Therefore, I affirm the notice and modify the date of compliance to 5.00pm on 31 March 2015.

...

Lex McCulloch

Application by respondent

- 6 On 11 February 2015 the Tribunal received an email application from the Commissioner foreshadowing that an application was to be made to seek orders from the Tribunal:

The purpose of the for mention is to seek orders to cancel the Improvement Notice, revoke the decision of the Commissioner for Worksafe and revoke the orders of Commissioner Mayman made on 04 February 2015. I understand that Ms Hart is seeking instructions from her client as to whether that order can be made by consent.

Can you please advise if there is any particular form I should file for the purpose of having the matter listed?

Yours faithfully

Shay Duce

- 7 In response the Tribunal outlined to the Commissioner (with a copy to City Beach) the following in Tribunal correspondence:

I have further considered your request to have the aforementioned matter listed for mention on Friday, 13 February 2015.

I understand from your correspondence that the purpose of the hearing is give consideration to an application you intend to make to:

- seek orders to cancel Improvement Notice number 64000646;
- revoke the decision of the Worksafe Western Australia Commissioner; and
- revoke the orders as issued by Commissioner SM Mayman on 4 February 2015 (2015 WAIRC 00124).

You should file your application by way of Form 1 – Notice of Application stating the orders sought and the reasons you seek those orders.

You may lodge the form online and the details of how to assist you in this process may be found online.

The application will not be able to be listed until after this application has been served. Whether it can be listed at such short notice and dealt with will depend also on whether the respondent is prepared to proceed with the application at such short notice.

The Tribunal may also raise with you which of the powers are available to the Tribunal under the *Occupational Safety and Health Act 1984* or the *Industrial Relations Act 1979* you are seeking to give effect to the orders sought.

- 8 On 12 February 2015 the Commissioner lodged a Form 1 – Notice of Application in the Registry seeking the orders earlier referred to. The Commissioner went on to specify the grounds associated with the application:

There is no evidence that there were any grounds for the opinion of the Inspector that issued Improvement Notice 64000646 [sic] that the Respondent was contravening Regulation 3.20(2) on 09 December 2014. In particular there is no evidence that there was any risk to the safety or health of a person working at the workplace by the failure to provide a lunch room.

For Mention Hearing

- 9 The Tribunal listed a for mention hearing at the request of the Commissioner on Friday, 13 February 2015.
- 10 The Commissioner submitted to the Tribunal that the powers outlined in s 51A(5) of the OSH Act, having careful regard for the preamble to that particular provision exist only where the Tribunal has concluded an inquiry into a matter as referred, in this case OSHT 1 of 2015. As the inquiry was listed for 8 and 9 April 2015 for hearing and determination this was not a case where the Tribunal was able to respond to the Commissioner's request in the absence of an inquiry and certainly not in circumstances at a for mention hearing. City Beach agreed with the Commissioner's submissions.
- 11 The Tribunal submitted to the Commissioner and City Beach, given the structure of the OSH Act and s 51A(5) in particular and having regard for s 51I of the OSH Act if the parties were each to agree to listing an inquiry into the matter as referred at short notice then these proceedings could be adjourned and the inquiry could be listed that morning, adjourning the for mention hearing and overcoming the issues associated with accessing the powers of s 51A(5). The Tribunal indicated both City Beach and the Commissioner would need to agree to the process as outlined. The Commissioner indicated a willingness to proceed with the procedural arrangements for the inquiry as outlined by the Tribunal and following a short adjournment to provide for consultation with their client counsel for the City Beach indicated a willingness to consent to the procedural arrangements. Accordingly the Tribunal formally adjourned the for mention hearing.

Inquiry

- 12 The Tribunal, having received a Form 1 application from the Commissioner in this matter (as earlier referred to) with the agreement of City Beach and the Commissioner and in accordance with s 51I of the OSH Act, waived the standard procedural requirements required for listing an inquiry into the s 51A matter as referred and at short notice set the matter down for hearing on Friday 13 February 2015.
- 13 Counsel for City Beach submitted there was simply no basis for the inspector to issue the Notice pursuant to s 48 of the OSH Act. In particular it was submitted there had not been a likely contravention of the OSH Act on the morning of 9 December 2014. In this particular workplace it had been suggested by the Notice failure to provide a lunchroom was an alleged breach of reg 3.20(2).
- 14 Counsel for City Beach submitted there was simply no basis to suggest that the health and safety of employees was at risk. In response to a question from the Tribunal City Beach replied that staff had their lunch in the Carillion Mall and in Forrest Chase.
- 15 City Beach referred specifically to the grounds for review raised in support of the original Form 7 - Notice of Referral which sought to:

The Tribunal revoke the decision of the Commissioner of 15 January 2015 and the Improvement Notice No 64000646 cease to have effect immediately.

- 16 Ms Saraceni as senior counsel for City Beach submitted that the insertion in the Notice by the inspector of the words 'you have not ensured as far as is practicable' ([1], line 2) was not appropriate. It was submitted this was not relevant given the inspector was trying to apply in this case a breach of a regulation, namely reg 3.20(2) of the *Occupational Health and Safety Regulations 1996* (the OSH Regs). The applicant had difficulty with the wording of the Notice in that they did not consider it appropriate to insert 'practicability' into an asserted breach of a regulation.
- 17 A relevant issue in relation to the notice, in particular s 48 of the OSH Act are the words inserted by the inspector into the Notice:

I have formed the opinion that you are contravening

- 18 Counsel for City Beach submitted that whilst the assertion by the inspector was that the Notice related to a contravention on the day the notice was issued, that being 9 December 2014, there was no specific time recorded by the inspector on the Notice. It was however in relation to a present contravention. Counsel for City Beach submitted that s 48(1)(a) of the OSH Act refers to the issuing of a Notice where there is a present contravention occurring as opposed to s 48(1)(b) which deals with circumstances where there has been or there is a continuing contravention:

48. Improvement notices: issued and effect of

- (1) where an inspector is of the opinion that any person –
- (a) is contravening any provision of this Act; or
- (b) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated,

the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention.

- 19 Given a significant emphasis within the Notice as outlined by the inspector both in her Notice and subsequently in the correspondence outlined under s 51 by the Commissioner in his review related to evening circumstances, City Beach submitted this did not relate to an ongoing contravention at all. These matters related to a contravention as at the time the notice was written, that being 9 December 2014, on the premises of City Beach at some time during the working day. It was submitted to the Tribunal it was not after hours or indeed late in the afternoon. The applicant relies on the grounds as set out in part two of the referral and suggests that most of the information contained in those grounds were actually in the mind of the inspector.
- 20 Counsel for the Commissioner submitted limited evidence could be led given that the relevant inspector was not in attendance. City Beach did indicate to the Tribunal there was no objection in relation to the inspector not being able to attend the inquiry. Counsel for the Commissioner Ms Shay Duce gave evidence, albeit limited, given Ms Duce was not in attendance on the day the Notice was issued to City Beach. All other information from the witness box by counsel for the Commissioner was provided in the form of submissions.
- 21 Ms Duce gave evidence the Form 1 application filed in the Registry on 12 February 2015 was supported by City Beach. Given the detail contained in the Form 1 application was being considered as part of the inquiry together with the referral as made by City Beach it was important that the inquiry was conducted together having regard for the application as made by the Commissioner.

- 22 The witness indicated:

I have – as the senior lawyer at WorkSafe with carriage of this matter, I have reviewed the investigation file - - - Yes? - - - of Ms The documents on that file are - are very limited, there are some handwritten notes that relate mostly to other Improvement Notices that aren't an issue today and then they are turned into an electronic form in a program called Wise, W-i-s-e. There's some administrative emails purely in relation to the Form 4 review and an internal memorandum from Ms ... to her team leader or principal inspector, which doesn't assist us. There is no record in any of the notes of any statements of employees as to things that would lead to a contravention of that regulation. There's no details in relation to any witnesses' contact details or anything like that, so essentially there is in that file - there is essentially no evidence of a contravention on 9 December 2014 by the failure to provide a lunchroom.

(ts 9 - 10)

- 23 This was not the person who issued the Notice answering these questions but then this was a Tribunal that in accordance with s 51I of the OSH Act is not required to strictly apply the rules of evidence. The witness indicated in her evidence that when the Commissioner carried out his s 51 review there were certainly some issues in relation to considering a contravention at the City Beach site on a specific date at a specific time. The witness gave evidence that the issue is not one of consideration of whether there was a continuing contravention because that was not what the inspector was required to consider given the Notice was issued pursuant to s 48(1)(a) of the OSH Act.
- 24 Ms Duce gave evidence there was no late night trading that day as it was normal business hours. To suggest there was evidence of vagrants approaching employees after hours while they were on their breaks was an issue that was referred to in the Commissioner's s 51 review:

Employees also relayed instances to Inspector ... of vagrants approaching the mall during their break. Furthermore, it is unreasonable to expect staff to sit outside in inclement weather or if they are feeling unwell. This is an environment in which employees may be exposed possible hazards.

(Notice of referral – attachment 3)

- 25 The witness was asked where did the Commissioner receive such information. In response the witness suggested:

There's certainly some issues with the - with the review. I - I - mostly in relation to not looking at it as far as it being a contravention on a specific date, which means that we - that we'd have to prove that there was a risk to the safety and health of the employees by the failure to provide a lunchroom on 9 December 2014 alone.

(ts 10)

- 26 Senior counsel for City Beach submitted that the relevant day that the inspector inspected the workplace was Tuesday, 9 December 2014. There was no late night trading in place prior to Christmas so it was normal business hours however counsel was not able to say which employees were working or what time the store was open.

- 27 Counsel for the Commissioner concluded her evidence and gave submissions relating to the fact that there were no notes by the inspector of any conversations with employees at City Beach's premises who were able to give evidence relating to whether employees were required to take breaks in the evening. There was no evidence that vagrants had approached employees in the mall on that day:

there's no evidence that vagrants pose a risk to their health and safety of employees on that date. There's several matters that - in the Commissioner's review of the notice that were irrelevant considerations and - and they are raised in the grounds by the - the applicant and that's in relation to they - the staff having to purchase their meals and also the inclement weather. Neither of those matters are - are relevant under the particular regulation.

(ts 11)

- 28 Counsel for the Commissioner's s 51 review specifically states:

Employees also relayed instances to Inspector... of vagrants approaching them in the mall during their break. Furthermore, it is unreasonable to expect staff to sit outside in inclement weather or if they are feeling unwell. This is an - this is an environment in which employees may be exposed to possible hazards.

(ts 11)

- 29 There are no notes within the Commissioner's files of information and therefore no witnesses that the Commissioner is able to call to give evidence to the Tribunal. The Tribunal queried whether the correspondence signed by the Commissioner (15 January 2015) was correct, namely the s 51 review, in light of the submissions that had been made regarding the lack of evidence of a breach of reg 3.20(2) of the OSH Regs. In response counsel for the Commissioner submitted that the detail contained in the Commissioner's correspondence was based on the inspector's internal memorandum and that it was not supported by any contemporaneous handwritten or electronic notes and therefore could not be supported by individual employees at WorkSafe. Counsel indicated there were difficulties in calling evidence to the inquiry to establish the contravention to the Notice. It would have to come from the inspector however there were no notes and no witnesses that were able to be called to give such evidence. Similarly there was no evidence on what was relied on by the Commissioner for the s 51 review by way of contemporaneous handwritten or electronic notes. Accordingly the Commissioner, supported by City Beach sought, pursuant to s 51A(5)(c):
- a revocation of the Commissioner's s 51 review dated 15 January 2015;
 - a cancellation of the Notice; and
 - a withdrawal of the Tribunal's order [2015] WAIRC 00124 issued on 4 February 2015.

Conclusion by Tribunal

- 30 Ms Duce gave limited evidence for the Commissioner to the Tribunal in that although employed by the Commissioner she was not involved with the creation and service of the s 48(1)(a) Notice on City Beach on 10 December 2014 or subsequently the s 51 review process before the Commissioner on 15 January 2015. Ms Duce has been involved substantively in an assessment process regarding the durability of the Notice and the review process. The evidence able to be given by Ms Duce was credible, and the Tribunal acknowledges her rectitude and the role she has played in exposing some rather sensitive issues.
- 31 The Tribunal finds that OSHT 1 of 2015 was filed in the Registry of the Western Australian Industrial Relations Commission on 22 January 2015. In accordance with s 51A(2) of the OSH Act the Tribunal considers the matter was referred within the seven day time period required by the statute given the s 51 of the OSH Act notice as reflected at Attachment 3 of the application (issued by the Commissioner on 15 January 2015).
- 32 City Beach gave effect to service on 29 January 2015. The Tribunal finds that by 29 January 2015 City Beach and the Commissioner in OHST 1 of 2015 had been notified and served.
- 33 Section 51A(5) of the OSH Act prescribes the powers to affirm revoke notices. It is the view of the Tribunal such powers are limited by virtue of the preamble as written which states:
- (5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may —
- (a) affirm the decision of the Commissioner; or
- (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
- (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,
- and the notice shall have effect or, as the case may be, cease to have effect accordingly.
- 34 The statute is clear that once a matter has been referred to the Tribunal for review pursuant to s 51A of the OSH Act provided the referral is within time and unless the applicant seeks to withdraw the application an inquiry must proceed in order to access the provisions contained in s 51A(5)(a), (b) or (c) of the OSH Act. Whether it be to endorse the decision of the Commissioner or endorse the decision with variations as the Tribunal considers apt or alternatively, to invalidate the determination of the Commissioner and create such other determination as is considered appropriate there must be an inquiry (my emphasis) into an improvement notice or a prohibition notice as issued by an inspector of WorkSafe before the Tribunal can access such provisions.
- 35 Beech CC in a recent decision *Reece Pty Ltd v The WorkSafe Western Australia Commissioner* [2015] WAIRC 00057 referred to a decision of the Full Bench *The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273; (2007) WAIG 22 (*The Original Croissant Gourmet*) where the Full Bench dealt with the process of s 51A inquiry pursuant to the OSH Act:
- The Full Bench noted that an Improvement Notice or Prohibition Notice may be referred for review to the WorkSafe Western Australia Commissioner in s 51(1) of the OSH Act and noted in [85] that the scope of the review by the WorkSafe Western Australia Commissioner is to inquire into the circumstances relating to the Improvement Notice which has been issued.
- ... In this case, the subject of the referral to the [WorkSafe Western Australia Commissioner] was the first and second improvement notices.
- 36 The Full Bench then considered the further review by the Tribunal. At [90] the Full Bench stated:
- As stated the "decision" of the appellant may be referred for further review to the Tribunal under s 51A of the OSH Act. It is that "decision" which is the "matter" referred to in s 51A(1) and (2) of the OSH Act ... The "notice" of the appellant referred to in s 51A(1) and s 51(6) of the OSH Act is the notice of the decision rather than the decision itself.
- 37 In the course of dealing with that appeal, the Full Bench stated the applicable legislation and the procedure which had been followed in the matter at first instance. The Full Bench noted that an improvement notice or prohibition notice may be referred for review to the Commissioner in s 51(1) of the OSH Act and noted in [85] that the scope of the review by the Commissioner is to inquire into the circumstances relating to the improvement notice which has been issued.

38 In *The Original Croissant Gourmet* it was said at [93] and [94]:

Section 51A(5) provides that the Tribunal shall “*inquire into the circumstances relating to the notice*”. This is the same expression as used in s51(5). In my opinion the “*notice*” referred to is the improvement or prohibition notice, as the case may be, as opposed to the notice of decision of the appellant provided for in s 51(6) of the *OSH Act*. An inquiry into the circumstances relating to the improvement/prohibition notice is thus required. This seems to contemplate the prospect of hearing evidence on the topic, as occurred in this instance. Having inquired into the circumstances, the Tribunal is in a position to review and assess the appellant’s decision. The Tribunal has 3 powers which it may exercise under s 51A(5) of the *OSH Act*. The first two follow the same form as the powers of the appellant in s 51(5)(a) and (b). Section 51A(5)(c) of the *OSH Act* is however cast in different terms to the power of the appellant under s 51(5)(c). The latter simply permits the cancellation of the notice whilst the former permits the revocation of the decision of the appellant and the making of “*such other decision with respect to the notice as seems fit*”. The reference to “*the notice*” here is to the improvement and prohibition notice and not the notice of the appellant’s decision. To some extent the difference in the power is to accommodate the fact that the Tribunal exercises a higher level of review than the appellant. Accordingly there are two levels of decision which have already occurred, the inspector issuing the notice and the appellant’s review. The *OSH Act* allows for the Tribunal in certain circumstances to make orders which impact on both of the prior levels of decision.

The *OSH Act* does not contain express criteria to guide the Tribunal in the exercise of its powers contained in s 51A(5). In other words it does not set out the particular facts and circumstances which may or may not lead to an affirmation or revocation of the decision of the appellant. It must be remembered however that the role of the Tribunal is to “*further review*” the “*matter*”, which is the appellant’s decision (see also s 51A(3)).

39 Comparatively, this has been a short inquiry when compared to other inquiries held by the Tribunal in the past. However the inquiry has been sufficient to inform the Tribunal that on the evidence given and submissions made there were some basic oversights by the inspector when the Notice alleging a breach of reg 3.20(2) of the *OSH Regs* was served on City Beach on 10 December 2014 in that the Tribunal finds:

- the inspector issued the Notice against s 48(1)(a) of the *OSH Act* by including in the wording on the Notice ‘I have formed the opinion that you are contravening’, implying an ongoing contravention;
- the Notice by virtue of the wording and subsequent s 51 review implied an ongoing contravention suggesting the inspector should not have served the Notice pursuant to s 48(1)(a) of the *OSH Act*;
- and accepts the evidence that was given that the inspector who issued the Notice seemingly took no notes from City Beach personnel having allegedly been approached by ‘vagrants’. This matter subsequently became the focus of the correspondence which was the basis of the s 51 review by the Commissioner (15 January 2015); and
- the inspector used the word in the Notice *practicable* when referring to a contravention of reg 3.20(2) of the *OSH Regs*, a standard provision applied to a breach of the *OSH Act* (see definition of *practicable* in s 3(1) of the *OSH Act*) rather than a breach of the *OSH regulations*.

40 Having said that, the Tribunal accepts the submissions of City Beach in that lunchroom facilities are currently not provided. During proceedings counsel for City Beach submitted:

My understanding is that they do have their lunch in – within the Murray St Mall or otherwise they have the opportunity to walk across the way which is about a 20-second walk and that will lead them immediately into the Carillion Arcades Food Court area where there are lunch tables provided for the staff to have their lunch.

(ts 2)

41 The Tribunal has considered the referral with as little formality as circumstances permit and had regard for the issues according to equity, good conscience and the substantial merits of the case in accordance with s 51I of the *OSH Act* without regard to technicalities or legal form. At the conclusion of the inquiry on 13 February 2015 and the consideration of the application by the Commissioner dated 12 February 2015 the Tribunal was satisfied that on 9 December 2014 having regard for:

- the lack of evidence held by the inspector (insufficient records of interviews held with City Beach personnel);
- the wording of the Notice as formulated against City Beach on 9 December 2014 by the inspector and served on 10 December 2014;
- the inclusion of the word *practicable* in the Notice when referring to a contravention of reg 3.20(2) of the *OSH Regs*; and
- service of the Notice pursuant to s 48(1)(a) of the *OSH Act*.

42 The Tribunal finds following the inquiry that there are a number of inaccuracies contained in the Notice and a lack of evidence held by the Commissioner. Further the Notice does not appropriately reflect the provisions of a breach by City Beach of reg 3.20(2) of the *OSH Regs* on the day in question. The Notice was served pursuant to s 48(1)(a) of the *OSH Act* when, from the evidence circumstances suggest it would have been more appropriate to consider service pursuant to an ongoing contravention under s 48(1)(b) of the *OSH Act*.

43 The Tribunal is satisfied and informed the parties that it was appropriate in the circumstances for an order to issue later that day [2015] WAIRC 00183 pursuant to s 51A(5)(c):

- revoking the Commissioner’s s 51 notice issued against City Beach;
- cancelling the Notice; and
- amending the Tribunal’s programming order [2015] WAIRC 00124.

In each respect the action to have effect as the order issued [2015] WAIRC 00183.

- 44 The parties were advised the Tribunal's reasons would issue at a later date. A subsequent order also issued relating to the setting aside of witness summons [2015] WAIRC 0018.
- 45 At the conclusion of the inquiry City Beach made a formal application for costs against the Commissioner and submitted a detailed schedule to the Tribunal associated with the application. The Tribunal later wrote to the parties seeking written submissions in that regard, the substance of which will be dealt with in supplementary reasons for decision.

2015 WAIRC 00327

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	:	2015 WAIRC 00327
CORAM	:	COMMISSIONER S M MAYMAN
HEARD	:	WRITTEN SUBMISSIONS BY FRIDAY, 27 MARCH 2015
DELIVERED	:	WEDNESDAY, 22 APRIL 2015
FILE NO.	:	OSHT 1 OF 2015
BETWEEN	:	FEWSTONE PTY LTD T/A CITY BEACH Applicant AND COMMISSIONER LEX MCCULLOCH WORKSAFE WA Respondent

CatchWords	:	Occupational Safety and Health Act 1984 – Application for costs – Principles applied - Application dismissed
Legislation	:	<i>Occupational Safety and Health Act 1984</i> (WA) s 51, s 51A, s 51G, s 51I <i>Industrial Relations Act 1979</i> (WA) s 26(1), s 27(1), s 27(1)(c), <i>Occupational Safety and Health Regulations 1996</i> (WA) pt 3 - div 1, reg 3.20(2)(c)
Result	:	Order issued dismissing application
Representation:		
Applicant	:	Ms M Saraceni (of counsel) and with her Ms J Hart (of counsel)
Respondent	:	Ms S Duce (of counsel)

Case(s) referred to in reasons:

Anthony & Sons Pty Ltd v Worksafe Western Australia Commissioner [2006] WAIRC 05671; (2006) 86 WAIG 3323

Commissioner of Police of Western Australia v AM [2010] WASCA 163

Brailey v Mendex Pty Ltd (1993) 73 WAIG 26

Owners of Argosy Court Strata Plan 21513 v Worksafe Western Australia Commissioner [2009] WAIRC 331; (2009) 89 WAIG 714

The Western Australian Builders Labourers, Painters and Plasterers Union of Workers v Clark (1996) 76 WAIG 4

Wormald Security Australia Pty Ltd v Rohan, Department of Occupational Health, Safety and Welfare (1994) 94 WAIG 2

Supplementary Reasons for Decision

- On Tuesday, 17 February 2015 the Occupational Safety and Health Tribunal (the Tribunal) issued an order [2015] WAIRC 00183 revoking the s 51 notice, cancelling the improvement notice 64000646 (the Notice) and amending the programming order issued by the Tribunal on 4 February 2015 [2015] WAIRC 00124. On Thursday, 2 April 2015 the Tribunal issued its reasons for decision in the same matter.
- The Notice of Referral was listed for mention on 13 February 2015 and prior to the hearing the respondent, the Commissioner for WorkSafe (the Commissioner) made application for orders to cancel the Notice, revoke the decision of the Tribunal of 15 January 2015 and revoke the programming order of the Tribunal made on 4 February 2015. At the for mention hearing the Tribunal advised the parties that it was unable to respond to the Commissioner's request in the absence of an inquiry under the *Occupational Safety and Health Act 1984* (the OSH Act). At the conclusion of the inquiry the applicant, Fewstone Pty Ltd trading as City Beach (City Beach) made a formal application for costs against the Commissioner submitting a detailed schedule associated with the costs application. Both City Beach and the Commissioner agreed the costs application should be dealt with by way of written submissions. A timetable for the provision of those submissions was put in place.

- 3 One of the leading authorities in dealing with costs in the Western Australian Industrial Relations Commission (the WAIRC) is the decision of the Full Bench in *Brailey v Mendex Pty Ltd* 73 WAIG 26, 27:

“Costs” includes fees, charges, disbursements, expenses and remuneration (see Halsbury's Laws of England (4th Edition), vol 37, para 712). Costs chargeable under party and party taxation are all that are necessary to enable the adverse party to conduct the litigation and no more (see *Smith v Buller* (1875) LR 19 Eq 473 at 475).

The general policy in industrial jurisdictions is that costs ought not to be awarded, except in extreme cases.

In this case, we are concerned with s.27(1)(c) of the Act. S.27(1)(c) gives a discretion to the Commission clearly conferred by the use of the word “may” (see s.3 and s.56 of the Interpretation Act 1984) to order any party to the matter to pay to any other party costs and expenses, including expenses of witnesses as are specified in the order. No costs are to be allowed for the services of any legal practitioner or agent.

The question is what does the phrase “costs and expenses” mean? “Costs”, as defined above, includes all of the expenses. No costs are allowed for the services of a legal practitioner or agent. Thus, the professional costs element is eliminated.

So then what are costs? It would seem to us that “costs and expenses” must, without the distinguishing ingredient of legal or professional costs, be read as a phrase which means all of the cost and expense which the applicant under s.27(1)(c) is entitled to claim. It seems to us that this can only be done on a party and party basis.

The application, too, must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not to be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award* (1983) AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order).

Background

- 4 The Notice of Referral of dispute was filed on 22 January 2015. On 27 January 2015 the Tribunal in accordance with the *Industrial Relations Commission Regulations 2005* (the IRC Regulations) directed City Beach serve the Notice of Reference of dispute on the Commissioner and file a Form 4 Statutory Declaration of Service in the Registry within 24 hours of service.
- 5 The Tribunal listed a directions hearing on 2 February 2015 and issued a consent order from that hearing [2015] WAIRC 00124, having regard for the OSH Act and the *Industrial Relations Act 1979* (the IR Act). The order outlined the directions necessary for hearing and determining the s 51A matter as referred, namely conducting an inquiry into the Notice as referred by City Beach. The hearing was scheduled for two days: on 8 and 9 April, 2015 in Perth.
- 6 On 12 February 2015 the Tribunal received a Form 1 application from the Commissioner seeking the:
- setting down the matter for urgent hearing on 13 February 2015;
 - revocation of the s 51 decision of the Commissioner of 15 January 2015;
 - cancellation of the Notice; and
 - revocation of Mayman C’s direction order [2015] WAIRC 00124.
- 7 By agreement between City Beach and the Commissioner the Tribunal listed a s 51A inquiry into the matter as referred at short notice on Friday, 13 February 2015. At the conclusion of the inquiry the Tribunal advised, following evidence and submissions from counsel representing the Commissioner and submissions from City Beach that in accordance with the provisions of s 51A(5) of the OSH Act the Tribunal was satisfied to issue an order:
- revoking the s 51 decision of the Commissioner of 15 January 2015;
 - cancelling the Notice of the inspector at first instance; and
 - amending Mayman C’s directions order [2015] WAIRC 00124.
- 8 The order was issued in the form of a minute and subsequently issued [2015] WAIRC 00183.

City Beach application for costs

- 9 At the conclusion of the s 51A inquiry City Beach made an application to the Tribunal for costs against the Commissioner in the form of a schedule with supporting documents. A summary of the costs was provided by way of a table:

Date	Particulars	Cost \$	Attachment
Various	Internal Photocopying	\$28.50	A
	Printing (Document Production)	\$162.20	A
	Postage and Petties	\$22.50	A
	Telephone	\$2.23	A
	Scanning	\$1.20	A
	Law in Order – Invoice #243819 – photocopying services	\$24.65	B
	Plus GST for Attachment A & B Items	\$24.13	
	Cancellation Fee – cancellation of Virgin Australia flight registration number DVQHNM	\$80.00	C

Date	Particulars	Cost \$	Attachment
	WAIRC – photocopying fee per transaction number 7997	\$26.40	D
	Personal Service of Witness Summons (inclusive of conduct money) per Allwest Investigations Group Pty Ltd invoice number 150095MP	\$235.18	E
	Law in Order – Inv #246031 – Relativity Hosting	\$3,174.60	F
	Portable hard drive – purchased from JB Hi-Fi for City of Perth CCTV footage	\$118.18	G
TOTAL DISBURSEMENTS		\$3,899.77	

Commissioner's notice of answer

- 10 The Commissioner in his notice of answer submitted that the OSH Act and the *Occupational Safety and Health Regulations 1996* (the OSH Regs) are silent as to the issue of costs relating to proceedings before the Tribunal. However, s 51I of the OSH Act provides that s 27 of the IR Act applies with respect to the jurisdiction of the Tribunal under s 51G of the OSH Act and therefore the matter of costs.
- 11 Section 27(1)(c) of the IR Act allows the WAIRC discretion to order one party to pay any other party such costs and expenses which may include expenses associated with bringing witnesses that may be specified in an order but exclude any costs associated with the services of a legal practitioner or agent. In this respect the IR Act does not define the term 'costs' or the term 'expenses'.
- 12 The Commissioner submitted that the *Legal Profession Act 2008* (WA) defines legal costs as amounts that the person has been or maybe charged, or may become liable to pay to a law practice for the provision of legal services including disbursements but not including interest. Further the same statute defines 'disbursements' as including outlays. The Commissioner noted that City Beach in these proceedings seeks a total of \$3,899.77 associated with expenses incurred in the preparation of OHST 1 of 2015.
- 13 A schedule of costs was provided by City Beach as relevant in preparing for OSHT 1 of 2015 annexing the following documents:
7. A. Page 6 of Account Ref 150093 showing Disbursements;
 - B. Law In Order Tax Invoice 243819 dated 21 January 2015;
 - C. Virgin Australia E-Ticket, Receipts and Tax Invoice DVQHNM and Virgin Australia webpage print out for Changes and Cancellations;
 - D. WA Industrial Relations Commission Tax Invoice 7997 dated 12 February 2015;
 - E. Allwest Investigations Group Pty Ltd Tax Invoice 150095MP;
 - F. Law in Order Tax Invoice 246031 dated 12 February 2015 and Law in Order documents related to above Tax invoice (4 pages); and
 - G. Disbursement Ledger Matter 150093 Client Thynne and Macartney dated 12 February 2015.
 8. A. Sundries payable by Thynne and Macartney to Kott Gunning such as internal photocopying, postage, scanning, telephone and printing;
 - B. Photocopying and filing by Law in Order;
 - C. Cancellation fee with Virgin Australia for airfare for Deanna Chambers on 06 to 10 April 2015;
 - D. Unknown transcript request from WAIRC;
 - E. Service of 2 summonses filed by Applicant;
 - F. Hosting and Consulting by Law in Order;
 - G. Purchase of 1 x 2GB External Hard drive for client Thynne and Macartney.
- ([7] & [8] from the Commissioner's notice of answer – 18 February 2015)
- 14 The Commissioner submitted 'expenses' had the same meaning as disbursements and outlays and therefore were not claimable under s 27(1)(c) of the IR Act as they are services of a legal practitioner. In the alternative it had been held in relation before the Commission that cost applications are generally not awarded except in exceptional circumstances: *Brailey v Mendex*.
- 15 In *Brailey v Mendex* the WAIRC determined that the power to order expenses should be exercised with restraint and for an order to issue awarding expenses such is generally considered to be rare. In *Anthony & Sons Pty Ltd v Worksafe Western Australia Commissioner* [2006] WAIRC 05671; (2006) 86 WAIG 3323 the Tribunal stated in relation to an application for costs by an expert witness that had been bought by the Commissioner:

In making this decision under s 27(1)(c) the Tribunal notes that such expenses ought not be awarded except in extreme cases where an applicant or respondent has demonstrated that an application has been frivolously or vexatiously instituted or defended. In this matter the Tribunal does not consider that the employer has acted frivolously or vexatiously. The Tribunal finds that the WorkSafe Commissioner's claim for witness expenses is without merit and in making this decision a factor taken into account has been the Tribunal received no evidence as to Mr Simms' expenses other than assertions made from the bar table.

- 16 Further proceedings in *Commissioner of Police of Western Australia v AM* [2010] WASCA 163 Buss J held in the context of an appeal against a decision of the WAIRC that the test for enlivening the power to order payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended. From an occupational health and safety perspective and applying the *Anthony & Sons Pty Ltd v Worksafe* the same test is applied. Buss J held the ordinary meaning of 'frivolous' is where there are no reasonable grounds for a claim and the ordinary meaning of 'vexatious' is instituting such a claim without sufficient grounds for success such as to cause trouble or annoyance to the other party. Buss J held that 'frivolous' in such circumstances is a subset of 'vexatious'.
- 17 At [36] Buss J said:
- ... something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90.
- 18 It was submitted by the Commissioner that in this matter, namely OSHT 1 of 2015, the Commissioner has not behaved in a manner which could be interpreted as either frivolous or vexatious. The Commissioner submitted he acted quickly and reasonably in resolving the matter, the relevant dates being as follows:
- the Notice of Referral was received on 28 January 2015. The Commissioner formally requested discovery from City Beach at the directions hearing on 2 February 2015 in order to consider its position on the Notice. A formal order was made to the Tribunal in relation to this matter [2015] WAIRC 00124. City Beach was on notice from that date that the Commissioner was considering his position;
 - on 10 February 2015 at 5:08 pm the Commissioner wrote to counsel for City Beach asking whether she would be available to attend the Tribunal on Friday, 13 February 2015 advising that the Commissioner would be forwarding a draft order seeking that the decision of the Commissioner be revoked, the Notice be cancelled and that the orders of the Tribunal as issued on 2 February 2015 be revoked; and
 - the draft orders were forwarded to City Beach by email at 9.38 am on 11 February 2015. A formal application as requested in writing by the Tribunal on 11 February 2015 was forwarded by email on 11 February 2015 at 5:58 pm and served by the Commissioner on 12 February 2015 prior to 11.00 am.
- 19 The Commissioner submitted there appeared to be no basis for the Tribunal to move away from the normal practice whereby costs are not commonly awarded in this jurisdiction.

City Beach submissions

- 20 At the conclusion of the inquiry before the Tribunal on 13 February 2015 City Beach sought to apply for the payment of costs. The OSH Act is silent as to the awarding of costs in proceedings before the Tribunal. However, s 51I of the OSH Act provides that certain provisions of the IR Act apply to proceedings commenced in the Tribunal including s 27 of the IR Act.
- 21 It is the submission of City Beach that s 27(1)(c) of the IR Act provides to the Tribunal a discretion to order one party to pay another party's costs and expenses, excluding costs for the service of a legal practitioner or agent in relation to any matter before the Tribunal. It is the view of City Beach that the term 'legal costs' as reflected in the *Legal Profession Act 2008* as submitted by the Commissioner is not relevant to interpreting s 27(1)(c) of the IR Act. The terms 'costs' and 'expenses' should in fact be understood to be in accordance with their ordinary meaning and therefore should include any costs or expenses that have been incurred by a party to an action except for those expenses incurred by a legal practitioner in the course of the provision of legal advice.
- 22 City Beach submitted that the expenses as outlined in the schedule of costs relate to expenses their client sustained in the course of preparing for the formal inquiry as undertaken on 13 February 2015, expenses that would have been met regardless of whether the services of a legal practitioner was used. City Beach detailed the schedule of costs in relation to:
- (a) Sundries incurred during the course of preparing documents and evidence to be utilised during the course of the formal inquiry;
 - (b) Photocopying and filing of documents and evidence - completed by Law in Order;
 - (c) The cancellation fee issued by Virgin Australia for the airfares of Deanna Chambers - a witness to the proceedings who was required to give evidence during the formal inquiry;
 - (d) The transcript request from WAIRC for the matter of the *Owners of Argosy Court Strata Plan 21513 v Worksafe Western Australia Commissioner* [2009] WAIRC 331, being the only matter located that was subject to a similar order as those sought by the application;
 - (e) The fee issued by a Process Server for personal service of witness summonses required to produce documents and ultimately provide oral evidence at the formal inquiry;
 - (f) The establishment and hosting Relatively Platform by Law in Order - a document management system utilised for the purposes of the applicant preparing its witnesses located in various states within Australia;

- (g) The purchase of a portable hard drive for use by the City of Perth Witness in response to a summons to produce documents, being CCTV footage.

([18] City Beach submissions 20 March 2015)

- 23 City Beach conceded that in the matter of *Brailey v Mendex* the general policy is that costs are not awarded except in extreme cases:
20. The Applicant submits that the circumstances of these proceedings constitute extreme cases because the expenses incurred by the Applicant were ultimately incurred unnecessarily as a result of the Respondent's Decision at first instance that could have never been upheld at the conclusion of a formal inquiry.
21. During the course of the formal inquiry, the solicitor for the Respondent gave evidence that:
- (a) "There is no record in any of the notes of any statements of employees as to things that would lead to a contravention of that regulation" (at page 10 of the Transcript of Proceedings);
- (b) "... there is essentially no evidence of a contravention on 9 December 2014 by the failure to provide a lunchroom" (at page 10 of the Transcript of Proceedings); and
- (c) "There's several matters that - in the Commissioner's review of the notice that were irrelevant considerations and - and they are raised in the grounds by the - the applicant and that's in relation to they - the staff having to purchase their meals and also the inclement weather. Neither of those matters are - are relevant under the particular regulation" (at page 11 of the Transcript of Proceedings).
- ([20] and [21] extract from City Beach submissions)
- 24 City Beach submitted that costs should be awarded where proceedings are frivolously or vexatiously defended. In *Anthony & Sons Pty Ltd v Worksafe* the Tribunal determined that costs and expenses should be awarded where a party has been able to demonstrate that an application has been frivolously or vexatiously commenced or defended.
- 25 In light of the very short time frame in which any party has leave to apply to the Tribunal seeking a review of the decision of a Commissioner, that being 7 days pursuant to a s 51A(2) matter under the OSH Act, City Beach submitted in these circumstances it is the obligation of the Commissioner to consider the merits of the claim and ultimately to abandon its defence as soon as is reasonably practicable following service of the Form 7 – Notice of Referral to the Tribunal.
- 26 Contrary to that approach it was submitted by City Beach that the Commissioner continued to defend these proceedings in a frivolous or vexatious manner for a period of time after it became clear to the Commissioner that the Commissioner's s 51 decision could never be upheld and in particular after the issuance of programming orders by the Tribunal and following the issuing of an order scheduling a formal inquiry on 4 February 2015.

Commissioner's further submissions

- 27 The Commissioner submits that [20] to [22] of City Beach submissions are not relevant to a consideration by the Tribunal on the question of costs. Such matters relate to an administrative decision on the basis of the Commissioner and do not form part of the proceedings. The Commissioner suggests in exercising his duty pursuant to s 51 under the OSH Act there were extraneous matters referred to in his decision to affirm the notice however such a consideration does not remove from those matters which ultimately led the Commissioner to affirm the notice.
- 28 The Commissioner submitted his position to be:
- The revised position of the Commissioner in this matter relates solely to the lack of any supporting evidence for a contravention on 09 December 2014 as opposed to a continuing or repeated contravention: see transcript OSHT 1 of 2015, 13 February 2015, at pages 10 and 11.
- (extract [4] Commissioner's further submissions 27 March 2015)
- 29 The Commissioner in relation to the awarding of costs reflected on the decision of *Brailey v Mendex* in that costs are generally not awarded except in the extreme cases. Extreme cases have been held in occupational health and safety matters to mean where an applicant or respondent has demonstrated that an application has been frivolously or vexatiously instituted or defended, that being *Anthony & Sons Pty Ltd v Worksafe*.
- 30 City Beach submitted that the Commissioner defended the proceedings frivolously and vexatiously. Such a submission is objected to by the Commissioner and the chronology of events in [3] to [9] of City Beach submissions is accepted by the Commissioner and demonstrates his timely response in resolving this matter. The Commissioner emphasises that within three business days of being served with the Form 7 application he had indicated an intention to attempt to resolve the matter without the need for a two day hearing: see transcript OSHT 1 of 2015, 2 February 2015, 23. Between the service of the Form 7 referral and the conclusion of the matter there was a lapse of only 13 business days. It is the submission of the Commissioner that there is no basis for any departure by the Tribunal from the normal practice that costs should generally not be awarded in this jurisdiction.

Conclusion

- 31 The awarding of costs by the Tribunal is a discretionary matter. The test, as reflected by the Industrial Appeal Court in *The Western Australian Builders Labourers, Painters and Plasterers Union of Workers v Clark* (1996) 76 WAIG 4 is an objective one. One of the leading authorities on costs *Brailey v Mendex* as earlier referred to in these reasons [3] has been relied upon by the Tribunal in arriving at its decision in this matter.

32 The Tribunal considers that the OSH Act, in particular s 51I, encompass specified provisions of the IR Act into the jurisdiction of the Tribunal including s 27 from the IR Act. Section 51I provides for the practice, procedure and appeals relating to the operation of the Tribunal.

51I. Practice, procedure and appeals

(1) The provisions of sections 22B, 26(1), (2) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 33, 34(1), (3) and (4), 36 and 49 of the *Industrial Relations Act 1979* that apply to and in relation to the exercise of the jurisdiction of the Commission constituted by a commissioner apply to the exercise of the jurisdiction conferred by section 51G —

(a) with such modifications as are prescribed under section 113 of that Act; and

(b) with such other modifications as may be necessary or appropriate.

33 Section 27(1)(c) of the IR Act provides a discretionary decision making power to the WAIRC to make an order for ‘costs’ and ‘expenses’, excluding those for any industrial agent or legal practitioner. *Brailey v Mendex* refers to the general policy in the state industrial jurisdiction that costs should not be awarded except in ‘extreme cases’. For the purpose of these proceedings the Tribunal adopts a similar approach that has been well versed and well-practiced under the IR Act.

34 Based on the decision of the Industrial Appeal Court in *Wormald Security Australia Pty Ltd v Rohan, Department of Occupational Health, Safety and Welfare* (1994) 94 WAIG 2 it is the view of the Tribunal that a s 51A review under the OSH Act is directed to establishing whether the inspector at first instance was justified in forming the opinion in question, be it related to an improvement or prohibition notice. In the case in question in OSHT 1 of 2015, clearly the matter related to an improvement notice. Details associated with the preparation and submission of a s 51 application to the Commissioner, whilst relevant, are not the primary element involved in a s 51A inquiry before the Tribunal.

35 Ritter AP in *The Worksafe Western Australian Commissioner v The Original Croissant Gourmet Pty Ltd* [2007] WAIRC 01273; (2007) 88 WAIG 22 stated that the process to be undertaken by the Tribunal when improvement notices or prohibition notices are referred for review is as follows:

85 As stated an improvement notice or prohibition notice may be referred for review to the appellant by the people specified in s51(1) of the *OSH Act*. The scope of the review by the appellant is set out in s51(5) of *the Act*. The appellant “shall inquire into the circumstances relating to the notice”. The reference to “the notice” is clearly to the improvement or the prohibition notice which has been issued. After undertaking the inquiry, s 51(5) provides the appellant with three alternative powers which may be exercised. They are to affirm the notice, affirm the notice with such modifications as seem appropriate or cancel the notice. Section 51(5) then provides that subject to s 51A the improvement or prohibition notice has effect or ceases to have effect accordingly.

86 Each of the appellant’s powers under s51(5) are about and directed to “the notice”. In this case, the subject of the referral to the appellant was the first and second improvement notices. In conducting the review, the appellant had no power to revoke or cancel the improvement notices and in their place issue a prohibition notice, or something similar. Indeed the powers of the appellant under s51(5) are tightly constrained as I have set out.

87 As referred to earlier, when *Wormald Security* was decided the jurisdiction to review which the appellant now possesses under s51 was held by the Commission. Accordingly, the observations by Franklyn J (with whom Ipp J agreed) in *Wormald Security* about the nature of the then review by the Commission are now apposite to that undertaken by the appellant. At page 4 his Honour said (with the “Commissioner” meaning the Commission and not the appellant): –

“A person to whom a prohibition notice is issued is entitled to refer that notice to the Industrial Relations Commission for review as of right (s51(1)). On such reference the Industrial Relations Commission (‘the Commissioner’) is required and obliged to “inquire into the circumstances relating to the notice”. Having done so he may affirm it as is or with such modification as seems appropriate or cancel it (s51(5)). Those provisions in my opinion make it clear that the review is directed to establishing whether, on the evidence available to the Commissioner, the Inspector was justified in forming the opinion in question.” (emphasis added)

88 Later on the same page Franklyn J added: –

“In other words he must approach the facts and circumstances as found by him on his inquiry as if he were the Inspector determining whether, on those facts and circumstances, he could reasonably form the opinion formed by the Inspector of the particular activity, having regard also to the reasons and matters set out in the notice. If so, he affirms the notice. If not, depending on the opinion formed by him as to such matters, he either affirms it with modifications or cancels it as is appropriate.”

36 I have considered fully the submissions of City Beach and the Commissioner with respect to the application for costs made by City Beach on 13 February 2015 at the conclusion of the s 51A inquiry.

37 The Tribunal concurs with the submissions of City Beach that the *Legal Profession Act 2008* (WA) is not a statute to be considered when considering the terms ‘costs’ and ‘expenses’. The Tribunal considers such terms should be adopted as per [3] of these reasons by the Full Bench in *Brailey v Mendex*.

38 The submission by City Beach that the defence of the proceedings by the Commissioner constitute extreme circumstances because the expenses incurred by City Beach (reference [20] and [21] from City Beach submissions) could never have been sustained had the matter proceeded to a s 51A inquiry in the normal manner. The Tribunal might agree in different circumstances. However, on Thursday, 12 February 2015 the Tribunal was notified by way of a Form 1 application from the Commissioner requesting, amongst other things, to cancel the Notice. Therefore the Tribunal does not accept the assertion by

City Beach that the circumstances preceding the s 51A inquiry (particularly those specified in [21] of City Beach submissions) were 'extreme'. In *Brailey v Mendex* in determining what was 'extreme' the Full Bench said such applications:

... must be determined under s.26 of the Act. However, part of that equity and good conscience includes what is settled law in industrial matters that costs ought not to be awarded, except in extreme cases, (eg) where proceedings have been instituted without reasonable cause (see *Hospital and Benevolent Homes Award (1983)* AILR 409 where costs were awarded in a matter where the applicant terminated the proceedings after putting the respondent to the expense of defending without obtaining an order).

39 In this matter the Tribunal is satisfied the actions by the Commissioner, having regard for equity and good conscience, cannot be considered to be 'extreme' in that the Commissioner, sought by formal application to the Tribunal on 12 February 2015 to:

- set the matter down for urgent hearing on 13 February 2015;
- revoke the s 51 decision of the Commissioner of 15 January 2015;
- cancel the Notice; and
- revoke Mayman C's direction order [2015] WAIRC 00124.

40 A copy of the Notice of Referral in this matter was received by the Commissioner on 28 January 2015. Some 11 working days then lapsed until the formal application was received by City Beach from the Commissioner. Contrary to the view submitted by City Beach, the Tribunal does not accept that the period of time between the receipt of the Notice of Referral until the lodging of the formal application to the Tribunal on 12 February 2015 was an 'extreme case' as envisaged by the Full Bench in *Brailey v Mendex*. In this matter the Commissioner had formally sought an order, [2015] WAIRC 00183.

41 The revised position of the Commissioner as notified in [4] of his submissions of 27 March 2015 indicate that his application to cancel the Notice relies solely on the evidence that was ultimately given at the s 51A inquiry:

The - the issue is that the Improvement Notice is written as a contravention on a specific date not as a continuing contravention under ---

... Can I go to the Form 1 - is there any other information you wish to give to the Tribunal that's relevant to the Form 1 application?---Only by way of submissions rather than evidence.

Please?---Essentially, there are no notes of any conversations with employees who could give evidence that they were required to take their breaks in the mall and at night. There's no - no evidence that employees were required to work at night on that particular date. There's no evidence that vagrants were approached or have approached employees in the mall whilst they're on that - the break on that date and there's no evidence and - and this is probably the biggest issue, there's no evidence that vagrants pose a risk to their health and safety of employees on that date. There's several matters that - in the Commissioner's review of the notice that were irrelevant considerations and - and they are raised in the grounds by the - the applicant and that's in relation to they - the staff having to purchase their meals and also the inclement weather. Neither of those matters are - are relevant under the particular regulation.

(ts 10,11 - combination of evidence and submissions by Ms Duce, counsel for Commissioner)

42 In considering whether the Commissioner had acted 'frivolously' and 'vexatiously' the Tribunal considered the decision of the *Commissioner of Police of WA v AM* at [36] per Buss J earlier referred at [19] of these reasons.

43 The Commissioner attempted to resolve the matter by communicating with counsel for City Beach and submitting formal advice to the Tribunal, the relevant dates being as follows:

- the Commissioner received the Notice of Referral from City Beach on 28 January 2015;
- the Commissioner formally requested discovery from City Beach at the directions hearing on 2 February 2015 in order to consider its position on the Notice;
- a formal order was made by the Tribunal in relation to this matter [2015] WAIRC 00124;
- City Beach was apparently on notice from that date that the Commissioner was considering its position;
- 10 February 2015 the Commissioner wrote to counsel for City Beach querying whether she would be available to attend the Tribunal on Friday informing that the Commissioner would be forwarding a draft order seeking that the s 51 decision of the Commissioner be revoked, the Notice be cancelled and that the orders of the Tribunal as issued on 2 February 2015 be revoked; and
- 11 February 2015 the Commissioner lodged a Form 1 in the registry of the WAIRC seeking that the s 51 decision of the Commissioner be revoked, the Notice be cancelled and that the orders of the Tribunal as issued on 2 February 2015 be revoked.

44 The Tribunal finds the actions by the Commissioner between the receipt of the Notice of Referral in OHST 1 of 2015 through to and including the date of the inquiry of 13 February 2015 reflect a prompt and reasonable response.

45 The Tribunal finds that the claim for costs by City Beach is without merit and in making this decision a factor taken into account by the Tribunal has been the view that the Commissioner acted promptly (Wednesday, 11 February 2015) in lodging an application to cancel the Notice. The Tribunal does not consider that the Commissioner has acted frivolously or vexatiously. Having regard to all of the circumstances of the case the Tribunal is not persuaded that the manner in which the Commissioner defended the proceedings could in any way considered to be 'extreme'.

46 Accordingly, an order is issued by the Tribunal pursuant to s 51I of the OSH Act dismissing the application.

- 47 The Tribunal notes the circumstances surrounding the issuance of the Notice on 9 December 2014 and the s 51 review against City Beach in 2015 were not entirely appropriate in terms of the application by a statutory authority, namely the Commissioner, seeking to uphold a supervisory process, however the provision of a lunchroom consistent with pt 3 – div 1, reg 3.20(2)(c) of the *Occupational Safety and Health Regulations 1996* was, and remains a regulatory requirement for Western Australian workplaces.

2015 WAIRC 00328

REVIEW OF IMPROVEMENT NOTICE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

FEWSTONE PTY LTD T/A CITY BEACH

APPLICANT

-v-

COMMISSIONER LEX MCCULLOCH WORKSAFE WA

RESPONDENT**CORAM**

COMMISSIONER S M MAYMAN

DATE

WEDNESDAY, 22 APRIL 2015

FILE NO/S

OSHT 1 OF 2015

CITATION NO.

Result Application dismissed. Application for costs by Fewstone Pty Ltd t/as City Beach dismissed

Representation**Applicant**

Ms M Saraceni (of counsel) and with her Ms J Hart (of counsel)

Respondent

Ms S Duce (of counsel)

Order

HAVING HEARD Ms M Saraceni (of counsel) and Ms J Hart (of counsel) on behalf of the applicant and Ms S Duce (of counsel) on behalf of the respondent (by way of written submissions), the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* and *Industrial Relations Act 1979* hereby orders –

THAT this application be, and is hereby dismissed.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2014 WAIRC 01147

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

A & JA DERJAHA

APPLICANT

-v-

BCG (AUSTRALIA) PTY LTD T/AS BGC TRANSPORT

RESPONDENT**CORAM**

COMMISSIONER S J KENNER

DATE

FRIDAY, 17 OCTOBER 2014

FILE NO/S

RFT 11 OF 2014

CITATION NO.

2014 WAIRC 01147

Result	Directions issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Ms C Vinciullo of counsel and with her Mr D Fletcher of counsel

Directions

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms C Vinciullo of counsel and with her Mr D Fletcher of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007, and by consent, hereby directs –

- (1) THAT the applicant file and serve an outline of submissions, including the facts upon which the applicant intends to rely, no later than 4pm on 12 November 2014.
- (2) THAT the respondent file and serve an outline of submissions, which responds to the facts asserted by the applicant and includes the facts upon which the respondent intends to rely, no later than 4pm on 26 November 2014.
- (3) THAT the applicant file and serve upon the respondent any signed witness statements upon which the applicant intends to rely by no later than 4pm on 12 November 2014 (any witness statements shall not exceed four pages in length).
- (4) THAT the respondent file and serve upon the applicant any signed witness statements upon which the respondent intends to rely by no later than 4pm on 26 November 2014 (any witness statements shall not exceed four pages in length).
- (5) THAT the applicant file and serve any other documentary material the applicant intends to rely on by 4 pm on 12 November 2014.
- (6) THAT the respondent file and serve any other documentary material the respondent intends to rely on by 4 pm on 26 November 2014.
- (7) THAT the applicant by 4 pm on 12 November 2014 and the respondent by 4 pm on 26 November 2014 file and serve any list of authorities upon which they intend to rely.
- (8) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00250

REFERRAL OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00250
CORAM	:	COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 28 NOVEMBER 2014, WEDNESDAY, 3 DECEMBER 2014, THURSDAY, 4 DECEMBER 2014
DELIVERED	:	THURSDAY, 26 MARCH 2015
FILE NO.	:	RFT 11 OF 2014
BETWEEN	:	A & JA DERJAHA
		Applicant
		AND
		BGC (AUSTRALIA) PTY LTD T/AS BGC TRANSPORT
		Respondent

Catchwords	:	Owner-driver contract – Referral of dispute – Whether the contract contained an implied term as to termination on notice – Allegations of bullying and harassment – Principles applied – Ongoing contractual relationship – Contract was subject to policies and procedures – Reasonable notice – Conflicting evidence – Conduct in breach of contractual obligations – Repudiation – Principles discussed regarding adverse inferences – No contractual obligation to give notice of termination – Application dismissed – Order made
Legislation	:	<i>Owner-Drivers (Contracts and Disputes) Act 2007</i> (WA)
Result	:	Application dismissed

Representation:

Counsel:

Applicant : Mr A Dzieciol of counsel
 Respondent : Mr D Fletcher of counsel and with him Ms C Vinciullo of counsel

Solicitors:

Applicant : Transport Workers Union of Australia WA Branch
 Respondent : K&L Gates

Case(s) referred to in reasons:*Jones v Dunkel* (1959) 101 CLR 298*Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115*Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205*Payne v Parker* [1976] 1 NSWLR 191*Shacam Transport Pty Ltd v Damien Cole Pty Ltd* (2013) 93 WAIG 1628*Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd* (2012) 92 WAIG 709*Reasons for Decision*

- 1 The applicant, Mr Derjaha, contracted to the respondent, BGC Transport, to haul cement tankers to service BGC customers. It was common ground that Mr Derjaha was an owner-driver and entered into an owner-driver contract for the purposes of the Owner-Drivers (Contracts and Disputes) Act 2007 commencing in March 2011 and ending in April 2014, in circumstances which are controversial.
- 2 It was also common ground that Mr Derjaha and another owner-driver engaged by BGC, Mr Strugnell, did not get on. There were a series of incidents involving Mr Derjaha and Mr Strugnell, resulting in Mr Strugnell accusing Mr Derjaha of bullying and intimidating behaviour. Mr Strugnell raised complaints about Mr Derjaha's alleged behaviour with BGC. Matters came to a head in a meeting between Mr Derjaha and BGC management in April 2014. In that meeting BGC alleges that Mr Derjaha was threatening and intimidating towards management which led to the termination of the owner-driver contract without notice.
- 3 Mr Derjaha alleged that BGC breached his contract and by these proceedings, claims damages of \$30,000 based on an implied obligation of two months' notice to terminate. BGC resisted Mr Derjaha's claim on the basis that it contended that his conduct in the meeting with management in April 2014 constituted a repudiation of the contract and furthermore, Mr Derjaha, by his conduct generally, represented an occupational health and safety risk to BGC's business. There were a number of incidents leading up to the termination of the contract. I outline them as follows.

Weighbridge incident – November 2013

- 4 Mr Strugnell testified that he was at BGC's Hazelmere yard in early November 2013 and was helping another driver with a mechanical problem. Mr Derjaha arrived at the yard and drove over towards Mr Strugnell's truck. Mr Derjaha got out of his truck and from some distance away, yelled out for Mr Strugnell to help Mr Derjaha to move a trailer. Mr Strugnell testified that in doing so, Mr Derjaha was rude and loud. He had not asked for help, certainly not in any reasonable fashion. Mr Strugnell testified that he said "no" and continued to assist the other driver. According to Mr Strugnell, Mr Derjaha again demanded Mr Strugnell's help and Mr Strugnell again refused. Mr Derjaha was said to then have told Mr Strugnell to "get f..." and got back into his truck and left.
- 5 Mr Derjaha denied that he used profane language towards Mr Strugnell. He did not know that Mr Strugnell was assisting another driver at the time, and simply called out for some help to move a tanker and Mr Strugnell ignored him. Mr Derjaha admitted that he did not request Mr Strugnell's assistance in a reasonable fashion but said "this was a transport yard": T26. Mr Derjaha testified that this incident led to his dislike of Mr Strugnell. Mr Derjaha denied any suggestion from Mr Strugnell that this incident led to Mr Derjaha "badmouthing" Mr Strugnell behind his back. I pause to note however, that another driver called to give evidence, Mr Karafilis, who is friendly with both Mr Strugnell and Mr Derjaha, testified that Mr Derjaha is very direct by nature, and if asked, would say what he thinks of someone, including Mr Strugnell. He did not however, consider this to be badmouthing Mr Strugnell. On the other hand, Mr Karafilis said that Mr Strugnell was the sort of person to not confront matters directly rather, he would raise his concerns with management. Mr Karafilis also confirmed that Mr Derjaha did not like Mr Strugnell.

Naval Base incident – March 2014

- 6 The next incident between Mr Strugnell and Mr Derjaha took place at BGC's Naval Base yard on 7 March 2014. Mr Strugnell testified that he was at silo 2 loading his truck. Mr Derjaha was also present loading his truck. Mr Strugnell testified that he wanted to "clear the air" after his last encounter with Mr Derjaha at the Hazelmere yard in November 2013. According to Mr Strugnell, he approached Mr Derjaha and asked him "what his problem was". Mr Strugnell testified that he was shocked by Mr Derjaha's response when Mr Derjaha called him a "lowlife c...". When asked again by Mr Strugnell as to Mr Derjaha's problem, Mr Strugnell testified that Mr Derjaha responded by telling him in words to the effect "you're my problem. You've been telling people about my business".

- 7 Mr Strugnell testified that he told Mr Derjaha he did not know about his business. Mr Derjaha then went up the stairs to the platform from which drivers enter data on a computer to load their trucks with cement. On doing so, and returning back down the stairs, Mr Strugnell said that he spoke with Mr Derjaha again and asked to “sort out” their difficulties. At this point, Mr Strugnell testified that Mr Derjaha said words to the effect “there’s nothing to sort out, you’re a low-life c... and that’s all there is to it”.
- 8 At this point, Mr Strugnell said that he went up the steps to the loading platform. On his return to the ground level, he again saw Mr Derjaha. According to Mr Strugnell, Mr Derjaha was some seven to eight metres away from him. Mr Strugnell described Mr Derjaha as “staring at me in an intense and intimidating way. He then started to walk towards me, staring at me all the while, with a fake limp, mimicking the way I walk – I have a prosthetic leg and walk with a limp”. Mr Strugnell testified that he was in shock in response to this deliberate behaviour by Mr Derjaha and could not believe it. Mr Strugnell then walked away. Whilst Mr Strugnell referred in his evidence to another driver, Mr Anton, being present at this time, and who was said to have had a clear view of the events, Mr Anton was not called by BGC to give evidence and no explanation was advanced for this. I will comment on this later in these reasons.
- 9 Mr Strugnell felt so strongly about what had happened in the Naval Base yard that he referred the matter to BGC management on the same day by way of an email. Mr Strugnell thought he may also have telephoned management as well. This was confirmed by Mr Houareau, the Head of Logistics for BGC. He testified that on 7 March he received a telephone call from Mr Strugnell. Mr Strugnell told him he had just had “some words” with Mr Derjaha at the Naval Base yard. Mr Houareau testified that Mr Strugnell reported being verbally abused by Mr Derjaha and of more concern, Mr Derjaha had imitated Mr Strugnell’s limp. According to Mr Houareau, Mr Strugnell was upset and wanted the matter investigated. Mention was made by Mr Strugnell of bullying. He was asked to put the complaint in writing which he did by email later that morning.
- 10 Formal parts omitted, Mr Strugnell’s email of 7 March 2014 is as follows:
- I would like to bring to your attention an extremely disturbing demoralising incident that occurred at naval base this morning between myself and Andy Derjaha
- There appears to be some ' bad blood" on Andy's behalf towards me which I am guessing came from an earlier situation at Bgc hazelmere this was some time ago probably 8 months I think. Since that time I have not spoken to Andy but have received feedback from numerous other subcontractors as to what Andy thinks of me , so this morning at naval base I asked Andy what the problem was and received a verbal barrage of vile abuse like never before .
- This i find hard to understand given the trivial aforementioned matter
- The thing that has totally destroyed nearly every bit of confidence and strength I have built up was when Andy walked towards me and pretended he had something wrong with his leg , given that i have a prosthetic leg (due to osteosarcoma high grade my left leg has been amputated thru the knee) first I could not believe what I was seeing then I became extremely emotional about the whole thing (I am having trouble even writing this email)
- I thought that nothing would worry me what anyone said or did about my disability but I now find I was sorely mistaken one action has pretty much destroyed all my faith in some people showing any sort of humanity I would like your thoughts on this and what if Bgc have anything in place to deal with something of this nature I would prefer if you email at the moment as I probably won't be able to talk on the phone
- 11 Mr Derjaha’s version of the events as to this incident was in stark contrast to Mr Strugnell. Mr Derjaha testified that he drove his truck into the Naval Base yard to the weighbridges. He saw Mr Strugnell at one of the weighbridges but ignored him. Mr Derjaha moved to the next available weighbridge and walked up the stairs towards the platform. Just before reaching the top, Mr Derjaha said he saw Mr Strugnell who was standing on the platform. Mr Strugnell confronted Mr Derjaha and asked what the problem was between them. Mr Derjaha testified that he told Mr Strugnell words to the effect “I had no problem, and that he was an arrogant p..., and that I had no time for him”. Mr Strugnell was said to have then said words to the effect “if you keep talking about me I’ll get you sacked”. Mr Derjaha replied to the effect “who said I’m talking about you”. Mr Derjaha said that Mr Strugnell hesitated and said it was “Ray”. Mr Derjaha then told Mr Strugnell “you’re full of shit” and Mr Strugnell moved back on the platform so Mr Derjaha could climb the stairs onto it, following which he loaded his truck. It was common ground that “Ray” is Mr Karafilis.
- 12 Mr Derjaha denied that he initiated the confrontation with Mr Strugnell, swore at him or imitated his limp. Mr Derjaha also later telephoned Mr Karafilis who said that he had never told Mr Strugnell that Mr Derjaha was talking about him. Mr Strugnell denied he told Mr Derjaha that he would “get him the sack”. He also denied that he told Mr Derjaha that it was Mr Karafilis who had informed him that Mr Derjaha was talking behind Mr Strugnell’s back. As to the limping imitation, given that Mr Strugnell had lost his lower leg from cancer, he said that since this incident, it had “burned in my memory for life, I’m afraid”: T82 & T88.
- 13 Towards the end of the day on 7 March, Mr Derjaha testified that he received a telephone call from BGC’s Operations Manager, Mr Bouwhuis, who asked about an incident with Mr Strugnell at the Naval Base yard earlier in the day. Mr Bouwhuis told Mr Derjaha that some serious allegations had been made and he was to attend a meeting with Mr Bouwhuis the following Monday at 7:30am. Prior to this meeting, Mr Strugnell had met with Mr Bouwhuis and explained to him in detail the incident at the Naval Base yard.

Meeting – 10 March 2014

- 14 At the meeting Mr Bouwhuis asked Mr Derjaha what the difficulty was with Mr Strugnell. Mr Derjaha referred to the incident with the tankers at the Hazelmere yard in November 2013. Mr Bouwhuis put it to Mr Derjaha that he had imitated Mr Strugnell’s limp. Mr Derjaha again denied it. Mr Derjaha testified that Mr Bouwhuis told him that there were witnesses to this incident. On Mr Bouwhuis’ version of the meeting, he said that Mr Derjaha, whilst initially denying that he imitated Mr Strugnell’s limp, he became somewhat evasive in response to the allegation. When it was put to him a second time,

Mr Bouwhuis testified that Mr Derjaha said words to the effect “alright then ...” but suggested that Mr Strugnell also imitates others. However in cross-examination, Mr Bouwhuis said that whilst Mr Derjaha did not expressly admit the allegation by Mr Strugnell, based on Mr Derjaha’s “gestures” in the meeting, he took it that Mr Derjaha was involved: T60.

- 15 According to Mr Derjaha, he told Mr Bouwhuis in the meeting that he should either give him a “non-conformance letter” or sack him if he believed that the allegations by Mr Strugnell were true. Mr Bouwhuis responded to the effect that he did not consider it necessary to take the matter this far, but warned Mr Derjaha to stay away from Mr Strugnell. Mr Bouwhuis also indicated that he told Mr Derjaha if there was any repeat of this sort of conduct that it would be “final”: T60.

The drawings

- 16 A little later in April 2014, two drawings appeared on the noticeboard at the Naval Base yard. Photographs of the drawings were annexures AS2 and AS3 to Mr Strugnell’s witness statement. Mr Strugnell testified that he saw the drawings. The first one, under cover of an email of 5 April 2014 from Mr Strugnell to BGC management, was referred to being posted on the maintenance board at silo 2 at the Naval Base. It contained two photographs of writing, including reference to “Andrew is watching you” along with other derogatory comments.
- 17 The second was attached to an email of 12 April from Mr Strugnell to BGC management and depicted a person with a prosthetic leg reading a newspaper containing a caption “I’m telling Paul”. Mr Strugnell testified that the drawings were clearly directed towards him and in particular, at the time of the second drawing, he was in an emotionally low state. He testified that he was contemplating making a complaint to an external body in relation to bullying and harassment in the workplace. Mr Strugnell, because of the previous incidents with Mr Derjaha, assumed that he was involved in “driving them”: T85.
- 18 Mr Derjaha testified that it was not long after his meeting with Mr Bouwhuis that the drawings appeared. He denied that he had anything to do with them and said that he in fact tried to rub some of them off the notice board. However they came back again.
- 19 On receiving the emails from Mr Strugnell with the attached photographs of the whiteboard drawings, Mr Houareau said that he became concerned about the conduct involving Mr Strugnell in the workplace, which involved a clear breach of BGC’s policies and procedures and was highly inappropriate behaviour. He decided to investigate the matter further. Mr Houareau testified that he examined the BGC computer system, to identify who had been loading at the Naval Base yard at around the relevant dates and times that the drawings appeared. According to this information, Mr Houareau identified four drivers who had been present at the Naval Base yard, one of whom was Mr Derjaha. Mr Houareau decided to speak with Mr Derjaha first because of the history of difficulties between him and Mr Strugnell. Accordingly, a meeting was arranged for 16 April at 2pm at the Canning Vale depot. Mr Houareau also invited Mr Sefton, the Bulk Distribution Manager for BGC Transport. Mr Sefton also received a copy of the emails attaching the photographs of the drawings sent by Mr Strugnell.
- 20 On any view, the drawings were highly inappropriate and offensive.
- 21 Mr Derjaha confirmed that he received a telephone call from Mr Houareau to meet with him. When asked, Mr Houareau did not say what it was about. Mr Derjaha testified that he did not realise that the matter was serious or that he should have taken somebody with him to the meeting.

Meeting – 16 April 2014

- 22 The meeting took place at the Canning Vale depot. Mr Derjaha confirmed that Mr Sefton was also present. Mr Derjaha testified that Mr Sefton asked him what was going on with the drawings and whether he knew who drew them. Mr Derjaha told Mr Sefton that he did not know who was responsible. I pause to observe however, that in cross-examination, Mr Derjaha said that after stating that he rubbed off some of the drawings, he then testified that “I said to one of the fellows that was drawing it, ‘Don’t do that, you’re going to get someone in trouble’”: T25. This was inconsistent with Mr Derjaha’s evidence in chief as to what he told Mr Houareau and Mr Sefton in the meeting on 16 April.
- 23 Mr Derjaha said that Mr Houareau then told him that he was inciting other drivers against Mr Strugnell and bullying him. Mr Houareau alleged that Mr Derjaha was talking about Mr Strugnell. According to Mr Derjaha, he told both Mr Houareau and Mr Sefton to get Mr Strugnell into the office and to tell them what he is alleged to have said. Mr Houareau then responded to the effect that “that won’t be necessary as your services are no longer required”. Mr Derjaha testified that he was at that point dumbfounded. He could not believe what he was being told. Mr Derjaha asked Mr Houareau “if he was for real” and was told that he was.
- 24 At that point Mr Derjaha said he pushed his chair out, stood up and pushed the chair back in again. As the room has a tiled floor, this made some noise. The circumstances surrounding this part of the meeting were controversial. The evidence of Mr Houareau and Mr Sefton was quite at odds with that of Mr Derjaha. According to Mr Houareau as soon as he told Mr Derjaha that he had concerns about what was occurring in the workplace, in particular on 7 March leading up to the drawings, he noticed that Mr Derjaha became defensive and aggressive. He described him as “huffing and puffing”. Mr Houareau gave evidence that “he looked like he was getting ready to get into the ring and have a fight.” Mr Houareau then said he referred to the previous meeting between Mr Derjaha and Mr Bouwhuis, where Mr Derjaha was cautioned and told to get on with the job and keep his mouth shut. Mr Houareau then said that Mr Derjaha replied in words to the effect that that is what he had done.
- 25 Mr Sefton then referred to the drawings. According to Mr Sefton in his evidence, at that point he also noticed that Mr Derjaha became quite angry and defensive. When asked what he knew about the drawings, both Mr Houareau and Mr Sefton gave similar evidence that Mr Derjaha replied in words to the effect “do you reckon I drew those things? ... That is not my style, to draw things. If I have a problem with someone, I’ll break their f... jaw.” Both Mr Houareau and Mr Sefton testified that at this point, Mr Derjaha’s tone was very aggressive and threatening. Mr Houareau said that Mr Derjaha was “staring him down”,

and he felt that Mr Derjaha at any moment was “going to jump over the boardroom table and take the matter into his own hands”.

- 26 It was Mr Sefton’s evidence that Mr Derjaha was so visibly angry that “I thought he was going to lunge over the desk and have a go at Mr Houareau.” Mr Sefton described the situation as quite unsafe and explosive. Mr Derjaha denied that he said anything like this and whilst he may have spoken loudly, he was not aggressive. He admitted that he became upset with both Mr Houareau and Mr Sefton in the meeting, because they accused him of something he did not do. He maintained his denial of imitating Mr Strugnell’s limp.
- 27 At this point in the meeting, Mr Houareau testified that he said to Mr Derjaha that he was not accusing Mr Derjaha of drawing the pictures, but told him he was a participant in what was occurring with Mr Strugnell, who did not feel safe in the workplace. In view of Mr Derjaha’s reaction to Mr Houareau and Mr Sefton, Mr Houareau testified that he did not feel he could permit Mr Derjaha to return to the workplace under any circumstances. He formed the view that this would pose a risk to the health and safety of others. Mr Houareau said that he also considered that Mr Derjaha’s reaction in the meeting to both himself and Mr Sefton, amounted to serious misconduct. He then told Mr Derjaha, in light of all of this, that his services were no longer required. At that point, Mr Houareau testified that Mr Derjaha stared at him for a lengthy time and said words to the effect “so, that’s it is it?” and Mr Houareau replied that “yes it was”. Mr Houareau said that Mr Derjaha then got up from his chair, hurled it away from the table and stormed out of the room.
- 28 Ms Baldock, who was then the BGC Transport Coordinator, testified that Mr Derjaha spoke to her immediately after the meeting with Mr Houareau and Mr Sefton. She said that he was upset but not angry and denied that he used colourful language to her when he told her that he had just been sacked.

The contract - was it breached?

- 29 As noted above, it was not in contest in this matter that Mr Derjaha and BGC were in an owner-driver and hirer relationship and that the contract entered into in March 2011 which came to an end in April 2014, was an owner-driver contract for the purposes of the OD Act. Based on the evidence led in these proceedings, I am so satisfied and I find accordingly. A copy of the written owner-driver contract was annexure A to Mr Derjaha’s witness statement. The contract was silent as to notice of termination.
- 30 I am also persuaded on the evidence that the contract between Mr Derjaha and BGC was an ongoing one, under which Mr Derjaha rendered continuous services until the contract was terminated for breach in April 2014. Accordingly, I reject BGC’s submissions to the contrary on this issue.
- 31 I also accept that the contract between Mr Derjaha and BGC was subject to the operation of the relevant BGC policies and procedures. In particular I accept on the evidence that Mr Derjaha, on at least two occasions, was subject to BGC’s formal induction process. As a part of this, Mr Derjaha was aware of and agreed to comply with BGC’s policies and procedures in relation to appropriate workplace behaviour; occupational health and safety; and other general matters. Extracts of the various BGC policies were set out at annexures PB-1 to Mr Bouwhuis’ witness statement; a copy of the induction declaration signed by Mr Derjaha was annexure PB-2; and the discipline and grievance, and the termination of employment policies were exhibits R4 and R5 respectively. Whilst obviously the former refers to the engagement of employees, it was common ground that these policies also extended to owner-drivers under owner-driver contracts.
- 32 The Tribunal also accepts the submission of both Mr Derjaha and BGC, that to the extent that the contract was silent as to notice of termination, the law implies a period of reasonable notice. What is reasonable notice will be an issue of fact in each case: *Transport Workers’ Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd* (2012) 92 WAIG 709. The law also implies a term giving rise to the right by either party to terminate the contract without notice, for fundamental breach: *Shacam Transport Pty Ltd v Damien Cole Pty Ltd* (2013) 93 WAIG 1628. Further, a contract may be terminated in circumstances where one party repudiates their obligations under the contract, by an unwillingness or inability to perform: *Koompahtoo Local Aboriginal Land Council v Sampire Pty Limited* (2007) 233 CLR 115.
- 33 Whether, and to what extent, such conclusions should be reached in this case, requires an assessment of the evidence. Given, in important respects, the evidence of Mr Derjaha and BGC conflicted, the Tribunal must determine whose version of the relevant events is to be preferred.
- 34 I have carefully considered the oral and documentary evidence in this matter. I have also had the benefit of carefully observing the witnesses as they gave their oral evidence in these proceedings, in terms of their demeanour and response to the questions put to them by counsel. I found Mr Derjaha to be a robust individual who, as the evidence of his character given by others disclosed, is a person who speaks his mind. As was put by some in their evidence, Mr Derjaha calls “a spade a spade”. I have no doubt on occasions Mr Derjaha may also have done so in robust language. I also have no doubt on the evidence, as was put by some witnesses, that Mr Derjaha has a tendency to confront people and tell them what he may think of them, and to some extent, this may be in blunt terms.
- 35 On the other hand, I considered from my observations of Mr Strugnell’s demeanour in the witness box, and the evidence of others, that he is a more reserved individual and less inclined to confrontation in the workplace. The impression I formed was that Mr Strugnell preferred to resolve matters in other ways, such as raising concerns with management, rather than directly confronting other contractors or employees in the workplace. In making this observation I do not suggest that this approach to issue resolution is inappropriate or wrong. I have also taken into account the apparent conflict between the evidence of Mr Strugnell and Mr Karafilis, as to whether Mr Strugnell mentioned Mr Karafilis’ name to Mr Derjaha, when Mr Derjaha asked Mr Strugnell who had told him Mr Derjaha was talking about him behind his back. Even if I were to accept Mr Karafilis’ evidence on this point, that does not mean the Tribunal must reject the remainder of Mr Strugnell’s testimony.

- 36 I also find that the other witnesses called by BGC, in particular Mr Houareau, to be credible witnesses. Having regard to all of these matters, where the evidence of Mr Derjaha and witnesses called by BGC was materially in conflict, I prefer the evidence of the BGC witnesses. I expand on my reasons for so concluding when considering my findings on the various incidents outlined above.
- 37 I accept that in November 2013, when Mr Derjaha requested assistance from Mr Strugnell to move tankers at the Hazelmere yard, Mr Derjaha did so in an abrupt manner. I do not regard this as an altercation of any real kind. However, I am prepared to accept that Mr Strugnell's refusal to assist Mr Derjaha resulted in Mr Derjaha may well levelling some abuse at him. On Mr Derjaha's own admission, he formed a dislike of Mr Strugnell after this encounter. Given Mr Derjaha's natural inclination to speak his mind, I am also satisfied that Mr Derjaha would not have hesitated to express his opinion of Mr Strugnell to others, as and when the occasion to do so arose.
- 38 As to the Naval Base incident, this matter raised two interactions. The first was the allegation of abuse on the steps and platform above the weighbridge. The second was the allegation that Mr Derjaha imitated Mr Strugnell's limp, due to his prosthetic leg. As to the first, I accept that Mr Strugnell spoke with Mr Derjaha when he saw him, about what the difficulties were between them, in light of the previous encounter. I accept this was met with a response from Mr Derjaha as alleged by Mr Strugnell. In particular, by this time, Mr Derjaha had formed a positive dislike for Mr Strugnell and considered that Mr Strugnell had been "badmouthing" Mr Derjaha behind his back. Secondly, Mr Derjaha's response to Mr Strugnell was more consistent with his accepted tendency to be blunt and confrontational in his communication style. Thirdly, and importantly, shortly after the incident on 7 March, the evidence was that Mr Strugnell spoke to Mr Houareau and told him what occurred. This was confirmed by Mr Houareau. Also, Mr Strugnell put his allegations in writing following his conversation with Mr Houareau, by an email to him of 7 March, which was annexure AS-1 to Mr Strugnell's witness statement, as set out above. Both the telephone call to Mr Houareau and the email to BGC management were consistent and contemporaneous with the incident, as narrated by Mr Strugnell in his testimony.
- 39 For the same reasons, I also find Mr Derjaha did imitate Mr Strugnell's limp after the initial verbal confrontation. The description of the event, in the email of 7 March from Mr Strugnell to BGC management, was detailed and specific. Additionally, I carefully observed Mr Strugnell in the witness box when he gave his evidence about the incident and the impact of the imitation of the limp on him, given the loss of his lower leg to cancer previously. I consider that this conduct of Mr Derjaha was thoughtless and callous. I do not consider that it was done in any frivolous or jesting fashion. I accept Mr Strugnell's evidence at pars 41-46 of his witness statement, as to the impact of this incident on him.
- 40 As to the meeting of 16 April, I accept the testimony of Mr Houareau and Mr Sefton regarding Mr Derjaha's response to matters raised with him during the course of the meeting. I accept that Mr Derjaha may have been upset at the issue of drawings being raised with him. This would be consistent with his overall demeanour. In particular, I found Mr Houareau to be an impressive witness and I accept his account of Mr Derjaha's response when Mr Sefton raised the drawings with him. Mr Houareau's testimony on this issue was supported by Mr Sefton, who was also present. Both gave evidence on the reaction of Mr Derjaha to the issues put to him, in a forthright and compelling manner.
- 41 As noted above, there was also some inconsistency in Mr Derjaha's testimony in relation to his knowledge of the drawings. Mr Derjaha told Mr Sefton in the 16 April meeting, that he did not know who was responsible for them. However, in cross-examination, Mr Derjaha admitted to telling one of the "artists" to stop because he would get people into trouble. Therefore Mr Derjaha clearly had some knowledge of these matters, which he did not disclose in the 16 April meeting.
- 42 Therefore overall, I am satisfied on balance that Mr Derjaha did engage in the conduct complained of by BGC. On the basis of the policies of BGC, and general standards of acceptable conduct in the workplace, I am satisfied that the conduct of Mr Derjaha was a breach of his obligations to BGC, which went to the root of the contract. In particular, Mr Derjaha's conduct toward BGC management in the meeting of 16 April was inconsistent with his obligations to BGC and a repudiation of them. Whilst I accept the submission from counsel for Mr Derjaha that it would have been better for BGC to have informed Mr Derjaha of the purpose of the meeting prior to it, and perhaps also, suggested that Mr Derjaha may wish to have someone present at the meeting, this does not fundamentally alter the position. These proceedings, as counsel for Mr Derjaha properly conceded, are concerned with the parties' contractual rights, and not whether the termination of the contract was industrially unfair.
- 43 Having regard to all of the circumstances of this case, I am not persuaded that it has been demonstrated by Mr Derjaha, that in the termination of the contract with Mr Derjaha, BGC was in breach of its contractual obligations.

Jones v Dunkel

- 44 There was a submission from Mr Derjaha that the failure by BGC to call Mr Anton, said to have been present at the Naval Base yard on 7 March, leads to a *Jones v Dunkel* (1959) 101 CLR 298 inference being drawn adverse to BGC. The "rule in *Jones v Dunkel*" is an evidentiary principle which, in broad terms, provides that an unexplained failure by one party to a proceeding to call a witness that they would be expected to call, may lead to an inference that the witness' evidence would not have assisted that party's case (see generally Heydon JD, *Cross on Evidence* (10th ed, 2015) par 1215). The rule is not an absolute one and there are many qualifications. Importantly for present purposes, where the case of a party not calling the witness is otherwise proved, any adverse inference does not detract from the established case: *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205. Furthermore, the rule will not have application unless it would be natural for one party, rather than the other, to call a particular witness: *Payne v Parker* [1976] 1 NSWLR 191.
- 45 In this case I have found on the evidence that the events as outlined by Mr Strugnell did occur, based on a preference for his evidence over that of Mr Derjaha. My reasons for reaching this conclusion have been set out above. In particular, I have found the contemporaneous events of 7 March, of the telephone call and email from Mr Strugnell, the latter setting out the incident in some detail, as being persuasive in my findings. Given that state of affairs, even if an inference could be drawn from the failure by BGC to explain Mr Anton's absence, it would not displace the other evidence, supportive of the version as outlined by Mr

Strugnell. Additionally, had Mr Anton's presence been known to both parties, it would not necessarily follow, that only BGC would be expected to call him. He could equally have been called by Mr Derjaha.

46 I therefore do not draw any adverse inference in these circumstances.

Conclusion

47 In this case the Tribunal has concluded that Mr Derjaha and BGC were in an ongoing owner-driver contract from March 2011 to April 2014. I am satisfied that Mr Derjaha was aware of and agreed to be bound by BGC's policies in relation to appropriate conduct in the workplace. Consistent with the Tribunal's findings, set out above, the Tribunal accepts that Mr Derjaha was in breach of fundamental obligations under the contract, which entitled BGC to terminate the contract without notice. Accordingly, the application must be dismissed.

2015 WAIRC 00251

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

A & JA DERJAHA

APPLICANT

-v-

BGC (AUSTRALIA) PTY LTD T/AS BGC TRANSPORT

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

THURSDAY, 26 MARCH 2015

FILE NO/S

RFT 11 OF 2014

CITATION NO.

2015 WAIRC 00251

Result

Application dismissed

Representation

Applicant

Mr A Dzieciol of counsel

Respondent

Mr D Fletcher of counsel and with him Ms C Vinciullo of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr D Fletcher of counsel and with him Ms C Vinciullo of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 01068

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RED EXPRESS CONTRACTING PTY LTD

APPLICANT

-v-

TOLL TRANSPORT PTY LTD T/AS TOLL GLOBAL LOGISTICS – CONTRACT LOGISTICS
(COCA-COLA AMATIL)

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

THURSDAY, 25 SEPTEMBER 2014

FILE NO/S

RFT 3 OF 2014

CITATION NO.

2014 WAIRC 01068

Result	Orders issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr D Sloan of counsel

Orders

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr D Sloan of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders –

- (1) THAT the hearing of the application be and is hereby adjourned to a date to be fixed.
- (2) THAT the respondent pay to the applicant costs thrown away by the adjournment in the sum of \$300 to be paid within 14 days.
- (3) THAT the respondent file and serve an amended notice of answer and counter proposal in answer to the amended particulars of claim by 9 October 2014.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00052

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RED EXPRESS CONTRACTING PTY LTD

APPLICANT

-v-

TOLL TRANSPORT PTY LTD T/AS TOLL GLOBAL LOGISTICS – CONTRACT LOGISTICS
(COCA-COLA AMATIL)

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 28 JANUARY 2015
FILE NO/S RFT 3 OF 2014
CITATION NO. 2015 WAIRC 00052

Result	Directions issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr D Fletcher of counsel

Directions

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr D Fletcher of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007, and by consent, hereby directs –

- (1) THAT the applicant file and serve an outline of submissions, including the facts upon which the applicant intends to rely by no later than 4pm on 29 January 2015.
- (2) THAT the respondent file and serve an outline of submissions, which responds to the facts asserted by the applicant and includes the facts upon which the respondent intends to rely by no later than 4pm on 12 February 2015.
- (3) THAT the applicant file and serve upon the respondent any signed witness statements upon which the applicant intends to rely by no later than 4pm on 29 January 2015.
- (4) THAT the respondent file and serve upon the applicant any signed witness statements upon which the respondent intends to rely by no later than 4pm on 12 February 2015.
- (5) THAT the applicant file and serve upon the respondent any other documentary material which the applicant intends to rely by no later than 4pm on 29 January 2015.

- (6) THAT the respondent file and serve upon the applicant any other documentary material which the respondent intends to rely by no later than 4pm on 12 February 2015.
- (7) THAT the applicant and respondent file and serve any list of authorities upon which they intend to rely no later than 4pm on 16 February 2015.
- (8) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00330

DISPUTE RE ALLEGED BREACH OF CONTRACT
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION : 2015 WAIRC 00330
CORAM : COMMISSIONER S J KENNER
HEARD : THURSDAY, 25 SEPTEMBER 2014, WEDNESDAY, 18 FEBRUARY 2015
DELIVERED : THURSDAY, 23 APRIL 2015
FILE NO. : RFT 3 OF 2014
BETWEEN : RED EXPRESS CONTRACTING PTY LTD
 Applicant
 AND
 TOLL TRANSPORT PTY LTD T/AS TOLL GLOBAL LOGISTICS – CONTRACT LOGISTICS (COCA-COLA AMATIL)
 Respondent

Catchwords : Owner-driver contract – Referral of dispute – Alleged variation of the contract regarding minimum volume of cartons to be transported and fuel levies – Standard contract carrier agreement – No variation clause – No guarantee of minimum income clause – Principles applied – Mere negotiations – Documentary evidence – No agreement reached – Mutual assent could not be inferred from the circumstances – Subsequent conduct – Uncertainty of terms – Contract was not varied to include a term for minimum carton volumes and fuel levies – Application dismissed – Order issued

Legislation : *Owner-Drivers (Contracts and Disputes) Act 2007* (WA)

Result : Application dismissed

Representation:

Counsel:

Applicant : Mr A Dzieciol of counsel

Respondent : Mr D Fletcher of counsel and with him Mr J Parkinson of counsel

Solicitors:

Applicant : Transport Workers Union of Australia WA Branch

Respondent : K&L Gates

Case(s) referred to in reasons:*Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567*Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15*GB Energy Ltd v Protean Power Pty Ltd* [2009] WASC 333*GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1*Liebe v Molloy* (1906) 4 CLR 347*Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd* (2012) 92 WAIG 709

Reasons for Decision

- 1 Since 2005 Red Express Contracting Pty Limited had contracted to Toll Transport Pty Limited to deliver Coca-Cola products by truck in the Southwest of the State. This work was predominantly in the Bunbury region. There was no written contract in place at that time. Neither was any arrangement in place at that time for Toll to provide any guarantee of a certain minimum volume of Coca-Cola work to Red Express. In 2009, a formal written contract was entered into between the parties. In late 2010, an opportunity arose for Red Express to expand its work for Toll, by the distribution of Coca-Cola products in the Katanning region, further south. Toll invited Red Express to express an interest in this work, which it did. There were a number of oral and written communications between the director of Red Express, Mr Barron and the responsible manager for Toll, Mr Kee. The upshot of these discussions was an agreement for Red Express to undertake the distribution work in Katanning.
- 2 However, despite the performance of the work for some years from January 2011 to July 2014, a dispute has arisen between Red Express and Toll as to the basis of the agreement reached in 2010. It was common ground that there was an agreed per carton rate of \$2.82, which was subsequently increased by Toll to \$2.91 per carton, from September 2012. Red Express maintained that it was also part of the bargain reached in 2010, that it be provided with a minimum of 86,261 cartons per annum, as this was the basis of a quote provided to and accepted by Toll in late 2010. Also, Red Express alleged that it was agreed that Toll would pay to Red Express, fuel levies based on any increase to fuel prices, from the prices as at November 2010.
- 3 As Toll has not met these conditions, despite requests that it do so, Red Express claims damages for breach of contract for a shortfall in carton volumes, in the sum of \$111,948.40. Additionally, Red Express has claimed \$27,462.60 for Toll's failure to pay fuel levies.
- 4 Toll disagreed with Red Express' claim. It contended that the written contract for cartage that the parties entered into in 2009 did not extend to the provision of annual minimum numbers of cartons for delivery, as contended by Red Express. There was also no agreement reached for payment of fuel levies. Further, Toll said that it offered a reasonable compromise to Red Express to assist it in resolving its grievances, by an increase in the rate per carton, which, Red Express unreasonably refused. Accordingly, Toll denies that it has any liability to Red Express as claimed or at all.

The 2009 Agreement

- 5 It was not in dispute between the parties that they entered into a written owner-driver contract on 1 October 2009. A copy of the "Contract Carrier Agreement" was at tab A to exhibit A1. I am satisfied from the terms of that document, and the evidence of Mr Barron in relation to the vehicles operated by Red Express and that Mr Barron, as a sole shareholder and director of Red Express, was driving one of the vehicles, that he was at all material times an owner-driver and the contract was an owner-driver contract for the purposes of the Owner-Drivers (Contracts and Disputes) Act 2007. The 2009 Agreement provided that it was between Red Express and Toll. The "Designated Client" was specified as Coca-Cola Amatil. The term of the 2009 Agreement was from 1 October 2009 to 1 September 2013. It referred to minimum hours of work and income in the following terms:

Toll may request the Carrier to perform the Services (as set out in Schedule 1) from time to time during the term of the Agreement. The Carrier may accept or decline any request by Toll to perform the Services.

Each occasion that Toll requests the Carrier to perform the services and the Carrier agrees to provide the Services shall represent a separate engagement under the Agreement. Where Toll requests the Carrier to perform the Services and the Carrier agrees to perform the Services, the terms of the agreement shall apply.

The Agreement is no guarantee of the frequency or duration of any work that may be requested by Toll over the term of the Agreement. The Carrier has not (sic) right or expectation of the frequency or duration of requests by Toll to provide the Services. On completion of the Services on any day, Toll is under no obligation to guarantee further work.

- 6 The 2009 Agreement incorporated a number of standard terms, at cls 1-12. Clause 1 – Definitions provided for a number of defined terms. "Rates" were those specified in Schedule 2. Schedule 2 set out rates on the basis of "Case Rates inclusive: Truck & Driver" and specified a rate of \$1.12 per case for "Bunbury Route Delivery". "Services" were defined as those set out in Schedule 1 and provided, in part:

To load, transport, unload and deliver Goods that are the property of the Toll customer or Designated Client to customers of the Toll Customer or the Designated Client, from any location to any other location(s) according to delivery runs as directed by Toll;

- 7 Clause 2 of the standard terms was as follows:

2. Appointment of Carrier

2.1 Appointment of Carrier

- (a) Toll may request the Carrier to perform the Services from time to time during the Term.
- (b) The Carrier may accept or decline any request by Toll to perform the Services.
- (c) On each separate engagement for Services that Toll requests and the Carrier accepts, the terms of this Agreement apply.

2.2 No guarantee of work or income

Toll does not guarantee to provide the Carrier with any minimum number of hours of work or any minimum income level during the Term unless set out on page 1.

8 Further, cl 12.2(a), stated that:

12.2 Variation and Waiver

- (a) Toll is not bound by any waiver, discharge or release of any condition or any agreement which varies this Agreement unless it is in writing and signed for Toll by an authorised officer.
- 9 Mr Kee, Toll's Senior Business Manager, testified that the standard terms and conditions in the Contract Carrier Agreement applied to most contractors engaged by Toll. Whilst stating that the specific day to day work allocations are based on the needs of Toll's customers, generally, two types of work allocation exist. The first is an "ad hoc allocation", where work is allocated to a contractor as and when the need arises, on any particular day. The second, which applied in the case of Red Express, is a "fixed term, fixed contract and full rig contracting". Under this type of work allocation, a contractor is engaged for a specified period, servicing a specified client(s) and works to an agreed delivery schedule and route. The route under the 2009 Agreement was the Bunbury region.
- 10 Mr Kee testified that consistent with the terms of the 2009 Agreement, Toll does not provide or agree to minimum volumes of product to be transported by contractors. In relation to Coca-Cola work specifically, Mr Kee said that no such guarantee of minimum volumes could be provided, as demand for product is subject to consumers and is affected by seasonal peaks and troughs. Toll is not able to anticipate, with any certainty, what the requirements for Coca-Cola may be at any given time. It was for these reasons that Mr Kee said that no such commitments could be made to Red Express. The only commitment that Toll could give to Red Express was a set route of deliveries in a specified region of the State. Mr Kee also said that this business model was consistent with the transport logistics industry generally.
- 11 Insofar as Mr Kee's testimony referred to the 2009 Agreement, and the Bunbury route work, none of this was disputed by Red Express. What was in dispute however was what occurred from late 2010, in relation to new delivery work for Coca-Cola on the Katanning route. I turn to consider that issue now.

The Katanning work

- 12 Mr Barron testified that in October 2010 he was contacted by Mr Kee to see if Red Express may be interested to take on some additional work, to do deliveries for Coca-Cola to Katanning. It was common ground that this work had been done by another company previously, not Toll. Mr Barron indicated that he would be interested and asked Mr Kee to provide information about the work involved. This included the route, carton volumes delivered and some indication of hours of work to service the contract. Mr Barron required this so that Red Express could provide a price to Mr Kee on a per carton basis.
- 13 Mr Barron testified that the Katanning work involved long distance runs of up to 820 kilometres, round trip. It took in quite a broad area including deliveries to Williams, Boddington, Kojonup, Narrogin, Wagin, Katanning, Tambellup, Gnowangerup, Dumbleyung, Newdegate, Lake Grace, Lake King, Cuballing, Pingelly, Wickepin and Yealering.
- 14 In response to Red Express' request for information, Mr Barron testified that Mr Kee sent to him by email of 29 October 2010, a spreadsheet containing information on the Katanning run. On 1 November 2010, Mr Kee sent an email to Mr Barron to the effect "... If possible could I please get these rates asap." On the same day, Mr Barron replied to Mr Kee and said "... Thanks for info, however i will need further data. Could you download delivery timeline data from the handheld unit to allow me to estimate manhours fot theses (sic) runs." Mr Barron testified that following this he had some telephone conversations with Mr Kee about the information provided.
- 15 On 10 November 2010, Mr Kee again sent an email to Mr Barron, requesting that he provide the proposed rate for the Katanning run. Mr Barron replied on the same day, and formal parts omitted, his email said:
- Based on the information at hand I have arrived at a rate of \$2.82 per carton.
- This is based on the carton quantaties [sic] provided and current fuel prices. As discussed, Coke would have to understand that minimum quantities would need to be specified and fuel levies would need to apply to variations from [sic] current price.
- 16 Following the email of 10 November 2010 to Mr Kee, Mr Barron said that he had further telephone discussions with Mr Kee about the Katanning work. In these, Mr Barron testified that he discussed the option of working on the Katanning run at an hourly rate of \$92 per hour. However, after discussion, the per carton rate seemed to be the preferred option. A table of monthly carton volumes for the Katanning work were sent by email from Mr Kee to Mr Barron on 11 November 2010. Subsequently, there was a further exchange of emails on 15 November between Mr Kee and Mr Barron. In referring to the table of carton volumes provided by Mr Kee, Mr Barron sent an email at 5:16am on 15 November in the following terms:
- The monthly averages are sufficient for the price to remain at \$2.82 / ctn as quoted.
- 17 Mr Kee then responded to Mr Barron on the same day as follows:
- So would this mean you won't need to set minimum quantities if the data is correct?
- 18 Mr Barron testified that following these email exchanges, copies of which are contained in tab B to exhibit A1, he had further telephone discussions with Mr Kee, in which Mr Barron said he reiterated the need for minimum quantities and if there was any shortfall Toll would have to make it up. Mr Kee said no such minimum quantities were ever agreed. Mr Kee maintained in his testimony, that there was never an agreement on minimum carton numbers or on the payment of fuel levies.
- 19 Shortly after these negotiations, Red Express employed a driver and commenced the Katanning work in January 2011. It was not long after however, in about June 2011 that Red Express started to raise with Toll concerns that the carton volumes for the Katanning run were not what Red Express claimed was agreed. This led to ongoing dialogue between Mr Barron and Mr Kee, and an exchange of information, much of which is set out in tabs C to G in exhibit A1. It is not necessary for present purposes, for me to consider in detail the content of that correspondence and information. Suffice to say that Mr Barron was providing to Mr Kee, on a reasonably regular basis, information on what he considered shortfalls in carton volumes, from that allegedly

agreed. In relation to these matters, at one point, Mr Kee proposed an increase to the per carton rate to allay Mr Barron's concerns. However, this was not considered by Mr Barron to be an appropriate solution to the issues raised by Red Express.

Consideration

Variation of the 2009 Agreement

- 20 Red Express submitted that a variation to the 2009 Agreement to provide for the Katanning work was the result of the various email and oral exchanges to which I have referred above. The submission was that the Katanning work itself was a different kind of work to the general Bunbury route work, as evidenced by the separate negotiations between Mr Barron and Mr Kee.
- 21 For the purposes of the variation, Red Express contended that the email from Mr Barron to Mr Kee of 10 November 2010, set out above, containing Red Express' "quote" was in effect an offer by Red Express to perform the Katanning work. As a result of subsequent email exchanges and oral discussions between Mr Barron and Mr Kee, Red Express contended that Red Express' offer was accepted by Toll. Red Express then commenced to perform the services for the Katanning work, as agreed. Most importantly, Red Express submitted that the minimum carton volume of 86,261 cartons per annum, when the correspondence was properly construed, was an express term of the 2009 Agreement, as varied. So too, was the payment of a fuel levy, based on fuel prices as at November 2010.
- 22 For Toll, a number of submissions were made in relation to Red Express' variation claims. First and foremost, Toll submitted that the "no variation clause", in the 2009 Agreement, at cl 12.2(a), defeated Red Express' claim. It was contended that there was no evidence of a written agreement that complied with cl 12.2(a), in relation to minimum carton volumes and fuel levies, for the Katanning work. There was no basis, Toll contended, to set aside or otherwise not give effect to cl 12.2(a).
- 23 Further, and in any event, Toll submitted that on the evidence, and despite non-compliance with cl 12.2(a), the written and oral communications between Mr Barron and Mr Kee, did not give rise to a binding legal obligation on Toll to provide a minimum number of cartons to Red Express or to pay fuel levies.
- 24 In developing this contention further, Toll submitted that such an assertion by Red Express, as to minimum carton volumes per annum, was at odds with the express terms of the 2009 Agreement, in that by cl 2.2, also set out above, no minimum levels of income or hours of work are guaranteed. Thus, any inconsistency between the alleged partly oral and partly written term as to carton volumes, must be resolved in favour of the express written terms of the 2009 Agreement. According to the Toll submissions, the effect of cl 2.2 was supported by similar "no guarantee" language on the first two pages of the 2009 Agreement, also referred to above.
- 25 Additionally, whilst Red Express did not set up its claim on the basis of the implication of a term, Toll contended nonetheless, that there was no foundation, either in law or fact, to imply a term in relation to minimum carton volumes and fuel levies, applying long standing authority in relation to the implication of terms into contracts.
- 26 As a matter of general principle, it is open to parties to a contract to vary its terms. A variation requires an intention to create a legally binding agreement, as well as terms which are sufficiently certain: Seddon N, Bigwood R and Ellinghaus M, *Cheshire & Fifoot Law of Contract* (10th ed, 2012) at 1109. In terms of how this can occur, contracts may be varied orally, by writing, or a combination of both, or as a consequence of the conduct of the parties (see for example *Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567). For a court to find a variation to a contract has occurred, the parties to it must move beyond mere discussion and negotiation. Inferences may be drawn from the conduct of the parties: Seddon et al at 1108.
- 27 In the context of commercial contracts, such as in the present case, whether a contract is formed or varied does not always neatly fit within the traditional approach of offer and acceptance. In many cases, acceptance and the existence of mutual assent, may be inferred from the circumstances: *GB Energy Ltd v Protean Power Pty Ltd* [2009] WASC 333 per Le Miere J at par 73 (citing *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 with approval); *Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Sims Metal Management Ltd* (2012) 92 WAIG 709 per Kenner C at par 12. All of the surrounding circumstances of the case must be considered.
- 28 In relation to the Katanning work generally, there is no doubt in my mind that the 2009 Agreement was varied to accommodate this work. Red Express and Toll entered discussions, conducted negotiations both orally and in writing, and reached an agreement on price at \$2.82 per carton. Red Express then employed a new driver and the work commenced January 2011. This was a substantial addition to the work then undertaken by Red Express for Toll under the existing 2009 Agreement. Whilst in contractual parlance a variation may be effected either by the termination of one contract and the formation of a new one, or an alteration of an existing contract, I consider that the latter applied in this case. I consider on the evidence, that the parties intended the remainder of the 2009 Agreement to govern the conduct of the Katanning work. To an extent, this was confirmed by the signing of a later Agreement in 2013, which was in identical terms to the 2009 Agreement, except for the addition of the "Katanning Route Delivery" to Schedule 2 – Rates and Deductions on p 16 of the 2013 Agreement (see Seddon et al at 1110).
- 29 The fact of the existence of cl 12.2(a), cited above, regarding variations only to be in writing, will not defeat an oral variation, but its existence may be evidence relevant to whether, in fact, a variation was agreed: Seddon et al at 1109; *GEC Marconi Systems; GB Energy Ltd; Liebe v Molloy* (1906) 4 CLR 347 at 355. In this case, I am positively satisfied that there was a variation to accommodate the Katanning work, at the agreed per carton rate. The crucial issue is however, whether the variation to the 2009 Agreement for the Katanning work, also included a term for minimum carton volumes, and fuel levies, as contended by Red Express. For the following reasons I do not consider that it did.
- 30 I have set out above extracts of the exchange of emails and references to the oral discussions between Mr Barron and Mr Kee. There can be no doubt that Mr Kee asked Mr Barron to express an interest in the Katanning work and to come up with a rate for it. This was consistent with all of the other work then done by Red Express for Toll, and presumably also, work done by other contractors too, being based on a per carton or unit rate. It is, objectively considered, quite understandable for Red

Express, as part of its due diligence in providing a rate to Toll for the Katanning work, to obtain information on the Katanning workload and time taken to perform the services. Hence, one would expect Red Express to ask for some information about the volume of product delivered on the Katanning run. As the evidence showed, the volume of product on the Katanning route over the period 2008 to 2010 was declining.

- 31 From the email exchanges commencing on 10 November and concluding on 15 November 2010, I can only be satisfied that Red Express and Toll reached a firm agreement on the rate per carton of \$2.82. As to minimum carton volumes and a fuel levy, whilst these were mentioned in Mr Barron's email of 10 November to Mr Kee, it is clear that the focus of the proposal was the rate to be specified. Mr Barron, by his consideration of the information, stated that he had "arrived at a rate of \$2.82 per carton". Subsequent correspondence and discussions centred on that issue.
- 32 Whilst it is correct to say, as Red Express maintained, that the email from Mr Barron of 10 November also referred to "minimum quantities" and fuel levies, there was no evidence that those two issues were finally agreed to by Mr Kee, on behalf of Toll. I consider, that viewed objectively, the parties did not get past the negotiation stage on these issues. There was no evidence of mutual assent. In particular, the email exchanges on 15 November revealed this. Whilst Mr Barron suggested that his email of 15 November sent at 5:16am, was in response to Mr Kee's of the same date, I do not consider that this was likely. Mr Barron's email was sent to Mr Kee at a very early hour in the morning. That is entirely consistent with the evidence that Mr Barron started work very early each day. It is also inconsistent with the other documentary evidence before the Tribunal, in that all Mr Kee's other email correspondence to Red Express was sent by him during usual business hours. In my view, it is far more likely that the sequence of correspondence was as set out in exhibit A2.
- 33 Furthermore, as to the status of this email, it says that the "monthly averages are sufficient for the *price to remain at \$2.82 / ctn as quoted*" (my emphasis). Thus, the focus, even at the end point of the negotiations, was still on price.
- 34 Mr Kee's response, which I have set out above in the copy of the email chain, illustrates that no agreement on minimum carton volumes was reached. Mr Kee's email is expressed in the form of a question, to which on the evidence, there was no response on the documents before me. The matter was left hanging. Mr Barron did say in his testimony that he subsequently spoke to Mr Kee and told him that the minimum volumes would have to apply but Mr Kee did not agree with this. It is not consistent with the documentary evidence. Moreover, and of some importance, such a proposition is also quite inconsistent with Toll's modus operandi, and the express terms of the 2009 Agreement, that no guarantees can be given as to minimum earnings and hours of work. Whilst the latter proposition would not preclude an oral variation to the 2009 Agreement, it is entirely consistent with Toll's evidence that no such arrangements are entered into with its contractors, as a matter of general commercial practice.
- 35 Further, whilst subsequent conduct cannot generally be taken into account in the construction of the terms of a written agreement, some regard may be had to it to ascertain what were the complete terms of a contract or whether, a contract was formed at all (see generally Lewison K and Hughes D, *The Interpretation of Contracts in Australia* (2012) at par [3.15]). In this case there was no evidence that Toll ever considered it was obliged to make available to Red Express minimum carton volumes for delivery. From an early stage, in about mid-2011, Red Express began to express concerns to Toll about declining carton volumes. This continued through to about mid-2013. Over this period, the evidence was that Toll did try to address Red Express' concerns about falling revenue, by some adjustment to Red Express' per carton rate.
- 36 Even if, contrary to my conclusions, it could be said that Red Express' "quote" in the email from Mr Barron to Mr Kee of 10 November 2010, did form the basis for a contractual term in relation to minimum carton volumes, there is a further problem for Red Express. As I have already mentioned in the earlier discussion, principles relevant to the formation of a contract also apply to the variation of a contract. One of those principles is certainty of terms. Whilst courts will, especially in relation to commercial contracts, attempt where possible to uphold a bargain, and give a business-like meaning to contractual terms, some terms of contracts will, nonetheless, be too vague or uncertain to be enforceable: *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15.
- 37 In this regard, Mr Barron's emails to Mr Kee referred variously to "minimum quantities" and "monthly averages". However, nowhere in the correspondence, is reference to the minimum carton volume rate of 86,261 per annum, as specified in the Red Express particulars of claim. It is also not clear what, in context, these phrases mean. For example, in the final email exchanges on 15 November 2010, did Mr Barron's reference to "monthly averages are sufficient" mean that the price quoted can be confirmed at \$2.82 per carton? Or, did it mean that no minimum quantities were necessary because, based on the data provided by Toll to Red Express, the monthly averages for carton volumes, provided by Toll to Red Express, were sufficient for Red Express' price of \$2.82 per carton to be sustainable?
- 38 In this case it is very unfortunate that Mr Barron seems to have assumed that a minimum carton volume formed the basis of his agreement with Toll. It is also unfortunate that the level of demand was not as Red Express anticipated when providing its pricing information to Toll. However, it cannot be said that Red Express was not aware of the overall decline in delivery volumes of product, when this was apparent in the information given to Red Express by Toll. Toll also did endeavour to propose some assistance to Red Express to overcome some of the shortfall in Red Express' revenue, which Red Express did not consider an acceptable solution.

Conclusion

- 39 In this case on the evidence, whilst the Tribunal is satisfied that the 2009 Agreement was varied to incorporate the Katanning work, I am not satisfied that this included terms as to minimum carton volumes or fuel levies as claimed. Therefore the application must be dismissed.
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2015 WAIRC 00331

DISPUTE RE ALLEGED BREACH OF CONTRACT
 IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 SITTING AS
 THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RED EXPRESS CONTRACTING PTY LTD

APPLICANT**-v-**TOLL TRANSPORT PTY LTD T/AS TOLL GLOBAL LOGISTICS – CONTRACT LOGISTICS
(COCA-COLA AMATIL)**RESPONDENT****CORAM** COMMISSIONER S J KENNER**DATE** THURSDAY, 23 APRIL 2015**FILE NO/S** RFT 3 OF 2014**CITATION NO.** 2015 WAIRC 00331**Result** Application dismissed**Representation****Applicant** Mr A Dzieciol of counsel**Respondent** Mr D Fletcher of counsel and with him Mr J Parkinson of counsel*Order*

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr D Fletcher of counsel and with him Mr J Parkinson of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00226

DISPUTE RE OUTSTANDING PAYMENTS
 IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

RISMORE HOLDINGS PTY LTD

APPLICANT**-v-**

MALUJO HOLDINGS PTY LTD T/AS MALUJO RESOURCES

RESPONDENT**CORAM** COMMISSIONER S J KENNER**DATE** TUESDAY, 10 MARCH 2015**FILE NO/S** RFT 1 OF 2015**CITATION NO.** 2015 WAIRC 00226**Result** Application discontinued**Representation****Applicant** Mr A Dzieciol of counsel**Respondent** No appearance required

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00246

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

SUPAWORLD PTY LTD (TRADING AS COUSINS TRANSPORT)

APPLICANT**-v-**

LN PRICE PARTNERS PTY LTD (ACN 053 962 299) (TRADING AS BUSSELTON FREIGHT)

RESPONDENT**CORAM** COMMISSIONER S J KENNER**DATE** TUESDAY, 1 APRIL 2014**FILE NO/S** RFT 2 OF 2014**CITATION NO.** 2014 WAIRC 00246**Result** Order issued**Representation****Applicant** Mr T Retallack of counsel**Respondent** Mr D Beere of counsel*Order*

HAVING heard Mr T Retallack of counsel on behalf of the applicant and Mr D Beere of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 31 March 2014.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00490

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

SUPAWORLD PTY LTD (TRADING AS COUSINS TRANSPORT)

APPLICANT**-v-**

LN PRICE PARTNERS PTY LTD (ACN 053 962 299) (TRADING AS BUSSELTON FREIGHT)

RESPONDENT**CORAM** COMMISSIONER S J KENNER**DATE** MONDAY, 16 JUNE 2014**FILE NO/S** RFT 2 OF 2014**CITATION NO.** 2014 WAIRC 00490

Result	Directions issued
Representation	
Applicant	Mr T Retallack of counsel
Respondent	Mr D Beere of counsel

Directions

HAVING heard Mr T Retallack of counsel on behalf of the applicant and Mr D Beere of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby directs –

- (1) THAT the applicant and respondent file and serve an outline of submissions upon which they intend to rely no later than 3 days prior to the date of the hearing.
- (2) THAT the applicant and respondent file an agreed statement of facts (if any) no later than 5 days prior to the date of the hearing.
- (3) THAT the matter be listed for hearing for 5 days.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00759

DISPUTE RE ALLEGED BREACH OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SUPAWORLD PTY LTD (TRADING AS COUSINS TRANSPORT)

PARTIES

APPLICANT

-v-

LN PRICE PARTNERS PTY LTD (ACN 053 962 299) (TRADING AS BUSSELTON FREIGHT)

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 JULY 2014
FILE NO/S	RFT 2 OF 2014
CITATION NO.	2014 WAIRC 00759

Result	Order issued
Representation	
Applicant	Mr T Retallack of counsel
Respondent	Mr D Beere of counsel

Order

HAVING heard Mr T Retallack of counsel on behalf of the applicant and Mr D Beere of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

The respondent be granted leave to appear by video link subject to the venue being approved by the Commission.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00203

DISPUTE RE ALLEGED BREACH OF CONTRACT
 IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION : 2015 WAIRC 00203
CORAM : COMMISSIONER S J KENNER
HEARD : MONDAY, 16 JUNE 2014, MONDAY, 8 SEPTEMBER 2014, TUESDAY, 9
 SEPTEMBER 2014, WEDNESDAY, 10 SEPTEMBER 2014, THURSDAY,
 11 SEPTEMBER 2014
DELIVERED : WEDNESDAY, 25 FEBRUARY 2015
FILE NO. : RFT 2 OF 2014
BETWEEN : SUPAWORLD PTY LTD (TRADING AS COUSINS TRANSPORT)
 Applicant
 AND
 LN PRICE PARTNERS PTY LTD (ACN 053 962 299) (TRADING AS BUSSELTON
 FREIGHT)
 Respondent

Catchwords : Owner-driver contract – Referral of dispute regarding breach of contract and unconscionable
 conduct – Construction of the contract – Principles applied – Express and implied terms of
 the contract – Ambiguity – Surrounding circumstances – Object and purpose – Intention
 objectively assessed – Breach of contract – Unconscionable conduct claim not made out –
 Assessment of damages – Mitigation of loss – Application granted in part – Order issued

Legislation : *Competition and Consumer Act 2010* (Cth) Pt 2-2, Sch 2
Owner-Drivers (Contracts and Disputes) Act 2007 (WA) ss 30, 30(1), 30(2), 43(1)(b),
 47(4)
Trade Practices Act 1974 (Cth) Pt IVA

Result : Application upheld in part

Representation:

Counsel:

Applicant : Mr T M Retallack
 Respondent : Mr D Beere

Solicitors:

Applicant : Culshaw Miller Lawyers
 Respondent : Lane Buck & Higgins

Case(s) referred to in reasons:

Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Limited (2003) 214 CLR 51
BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266
Blomley v Ryan (1956) 99 CLR 362
Chaplin v Hicks [1911] 2 KB 786
Davies v Taylor [1974] AC 207
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640
Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323
Shacam Transport Pty Ltd v Damien Cole Pty Ltd (2014) 94 WAIG 1835
Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] AC 91
The Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447

*Reasons for Decision***The claim and brief background**

- 1 For a number of years up to about October 2009, Supaworld Pty Ltd trading as Cousins Transport contracted its services to Foodland Association Limited, a large grocery industry company, to transport foodstuffs to IGA stores in the Perth metropolitan area. Cousins Transport conducted deliveries from the IGA cold store division. Mr Cousins is a director of Supaworld Pty Ltd and was the principal driver engaged on the IGA cold store work. It became known to Mr Cousins, and other contractors then engaged by IGA, in about early 2009, that IGA was not going to continue the contracts for transport services then on foot. There was about two years left to run on Cousins Transport's contract with IGA.
- 2 The respondent, LN Price Partners Pty Ltd trading as Busselton Freight Services, had since about 2007, also provided transport services to IGA. This was mainly in the dry stores area, but this began to expand into the cold store area over time. Because of the decision taken by IGA not to renew the then cold store contracts with the contractors then providing those services, including Cousins Transport, Mr Cousins raised with the General Manager of BFS, Mr Alan Price, the possibility of Cousins Transport joining the BFS fleet. These discussions ultimately led to an agreement reached in about October 2009, for Cousins Transport to assign its FAL cold store contract to BFS. The arrangement entered into was for Cousins Transport to continue to be paid the same rates as paid by IGA, on a per tonne basis. The agreement was reflected in a letter from Mr Price to Mr Cousins dated 14 October 2009. The content of that letter is controversial in these proceedings and I will return to it later in these reasons.
- 3 After commencing with BFS, Cousins Transport assigned a second cold store contract to BFS in December 2009. As set out in a letter from Mr Price to Mr Cousins dated 18 December 2009, this transaction involved Mr Cousins acquiring an IGA cold store contract from another contractor, and assigning it to BFS. On Cousins Transport's contentions, the general arrangements to apply to the second contract were to be largely the same as in the first contract entered into in October 2009. As a consequence of various events, not all of which are material for present purposes, the contracts between Cousins Transport and BFS came to an end in September and November respectively, 2011.
- 4 The parties are now in dispute before the Tribunal as to the operation of the contracts. Cousins Transport contended that it was an express, or alternatively an implied term of both contracts, that it be allocated predominantly cold store work, because it was this work that Cousins Transport had solely performed under the prior IGA contract and it expected this to continue. Other work, in the dry store, was contended by Cousins Transport to be available only after Cousins Transport had performed available cold store deliveries. Further, Cousins Transport contended that BFS, in the course of the performance of the contracts, engaged in unconscionable conduct for the purposes of s 30 of the Owner-Divers (Contracts and Disputes) Act 2007, in connection with the acquisition by BFS of services from Cousins Transport. This was said to arise from changes made by BFS to the method of allocation of work for its contractors in March and June 2010, to the alleged detriment of Cousins Transport.
- 5 As a result of these matters, Cousins Transport alleges that it has suffered loss and damage. The loss and damage claimed by Cousins Transport, relates to what it says was its expected earnings, if it was working predominantly in cold store delivery work, compared to what its actual earnings were in the course of the work performed for BFS under the contracts. Cousins Transport initially claimed some \$282,720 in damages. However, it substantially revised its damages claim to \$82,452.19, shortly prior to the commencement of the hearing.
- 6 BFS wholly denies the claims made by Cousins Transport. In a nutshell, it contended that there was no binding agreement in the terms alleged by Cousins Transport. There was, on the contracts properly construed, no guarantee that Cousins Transport would predominantly receive cold store work. BFS did not, in making changes to the work allocation from June 2010, engage in unconscionable conduct. The changes made by BFS were to prevent damage being done to the relationship BFS had with its client, Metcash, by reason of the disruptive influence of Mr Cousins in the workplace. Further, in any event, BFS also contended that the failure of Cousins Transport to achieve the earnings it said it should have achieved under the contracts was in large part due to the poor performance of Cousins Transport's vehicles. This was said to be due to excessive driver turnover, slowness in performance and a disproportionate number of accidents.
- 7 A number of issues arise for consideration in this case. They include what were the express terms of the contracts and did they oblige BFS, as a contractual entitlement, to allocate predominantly cold store work to Cousins Transport? Alternatively, if such an obligation was not an express term of the contract, could a term to this effect be implied? Further, was the conduct of BFS, in making changes to the allocation of work to contractors effective from about mid-2010, unconscionable conduct for the purposes of s 30 of OD Act? Another question arises as to whether, if the contractual and unconscionability claims are made out by Cousins Transport, to what extent the evidence before the Tribunal establishes a sound basis for an award of damages.
- 8 Before dealing with each of these issues, and about which the Tribunal observes at this stage, there was much conflicting evidence, to put the claims into context, some understanding of the operations of BFS, the IGA stores and Cousins Transport is necessary. In particular, the rostering arrangements for the allocation of both cold store and dry store work to contractors, the changes made by BFS in about mid-2010, and the environment in which these various events took place.

The delivery work and its allocation prior to October 2009

- 9 Cousins Transport presently contracts to two companies and employs eight drivers. The business has five trucks in its fleet and the business has a turnover of \$1,300,000 per annum. At the time of the entry into the contracts with BFS, the Cousins Transport business had a turnover of approximately \$750,000 per annum. Mr Cousins has had some 25 years' experience in the transport industry. At the time of the 2009 contracts with BFS, Cousins Transport also had a contract with another major food operator. At that point, Cousins Transport operated three trucks and employed five drivers.

- 10 Prior to the contracts with BFS, Cousins Transport was one of eight contractors providing services to FAL for delivery to IGA stores, at its cold store division in Canning Vale, Western Australia. The cold store or the “perishable warehouse” as it was otherwise known, stores and distributes frozen and other perishable foods to IGA grocery stores. The dry store stores and distributes non-perishable items. Refrigerated vehicles are required for cold store delivery work. Cousins Transport performed cold store deliveries for IGA under contract, for about eight years prior to contracting with BFS. To that point, Cousins Transport only performed cold store work.
- 11 The eight contractors working for FAL worked under a roster system, administered by IGA. The roster was broken into four sections; a top shift (earlier start time), a second top shift, a second bottom shift and bottom shift (later start times). The significance of the place on the roster, top or bottom, was that the truck on top of the roster would normally be the first to return to the distribution centre, and therefore would be the first to obtain a second or successive load. Drivers were paid on a per tonne rate. They were rotated through the roster starting times, top to bottom, to provide an even spread of early starts and thus, some equalisation of revenue. I note also from the terms of the FAL contract in evidence (exhibit A3), in existence at the time, that it was an express term of the contract, that FAL would endeavour to equalise annual income for the drivers. It was common ground, that no such term was incorporated into the contracts between Cousins Transport and BFS.
- 12 In accordance with this system, Mr Cousins testified that most days drivers would get at least two cold store runs per day. Sometimes this could be three or even four. Reference was made by Mr Cousins to records kept by his business in this regard, contained at tab 1 in exhibit A1. This was generally working on a five day week basis, Monday to Friday. Some Saturdays were worked if requested by BFS. The work to be allocated to each truck on the roster for each day was the responsibility of the IGA dispatcher. According to Mr Cousins, as at about October 2009, he would do, on average, between 12 and 15 cold store runs per week. This resulted in an average weekly income of approximately \$3,500 per week, which was supported from the materials tendered in evidence by Cousins Transport.
- 13 BFS has operated in the transport industry for about 35 years. Mr Alan Price has been a director of the company for much of this time. Mr Price testified as to the involvement of BFS with IGA work. He said that this led to a significant capital investment by BFS to modernise its operations, to meet the requirements of IGA. BFS commenced work in the dry store delivery from about 2007. It gradually extended to some cold store work. As at the time of the contracts with Cousins Transport, BFS engaged some 25 drivers on work for IGA.

The contracts and their construction

- 14 As noted earlier, the contracts held by Cousins Transport with IGA were to come to an end by November 2011. Mr Cousins testified that he became aware that BFS had recently obtained contracts with IGA for dry store work. He was aware that Mr Price was the general manager of BFS. Mr Cousins said that because of the winding down of his contract with IGA, he introduced himself to Mr Price, for the purpose of looking to continue work at the site. Mr Cousins testified that he met with Mr Price in the tea room at the cold store to discuss the possibility of joining the BFS fleet. They discussed a number of matters. The payment structure, based on a rate per tonne, was suggested to remain the same and was what was paid to Mr Cousins by IGA at the time. It was proposed that Mr Cousins would move to a larger truck with a semi-trailer as opposed to his then rigid vehicle. This would lead to potentially an increase in revenue, with the larger capacity. Mr Cousins also testified that he discussed with Mr Price that as he would normally finish work in the cold store at between 2:30 and 4:30pm each day, that would give time for some dry store work to be performed also. Part of any arrangement, according to Mr Cousins, would also involve the purchase by Cousins Transport of a new prime mover.
- 15 After these initial discussions, Mr Cousins said he received an email from Mr Price on 1 October 2009 (doc 1 exhibit R1). Formal parts omitted, it provides as follows:

Subject: Letter of Offer

Hi Darryl, as per our recent meetings, please find attached the letter of offer relating to the purchase of a Prime Mover (under vendor finance conditions).

Also in this document are the formal steps required to enact the contract transfer between yourself & BFS, subject to IGA approval. The time frame for this is likely to be approx 2 weeks from today's date. A commencement of work date also needs to be finalised - that suits your operation primarily and BFS secondary. I suggest that the likely change is to coincide with the 'holiday leave period your current driver has booked.

I suggest that the current rigid vehicle departs to the Dry WH on the change over date for the relief period, with the tri temp trailer - PM combination commencing work at the Cold Store on the same day.

This does several things: it makes the break a clean one, separates the parties (united we stand & divided we beg - which is what we want), and also provides your operations with the increased revenue this deal allows for.

What you must do is select a driver for the job; I have supplied details of a ready trained driver you may choose to employ.

The equipment supplied is inclusive of a PDA & electric pallet trolley, the latter of which remains under BFS ownership.

Copy of policies will be available for your perusal next week. Suggest we meet again on Tues or Wed to finalise the process and view these documents (all current BFS subbies are signed up on these).

- 16 Some handwritten notes appear on the email. It was common ground that these were notes made by Mr Price in a subsequent discussion between Mr Price and Mr Cousins. Mr Cousins testified that part of the arrangement would be an assignment of his contract with IGA to BFS. Mr Price testified that the reason for the need for a change of vehicle was that Mr Cousins' then truck was not suitable for BFS's needs. The notes on document 1 refer to “start date at cold stores 16 Nov” and also “rigid vehicle starts dry on same date”. Some reference is also made to a “relief driver”. It was not entirely clear on the evidence as

to what this meant, although Cousins Transport's then permanent driver was on leave at around that time, thus, either Cousins Transport or BFS would need to provide cover.

- 17 Cousins Transport then wrote to IGA on 5 October 2009 to inform it of an assignment of its contract to BFS. The next step which occurred was a letter from BFS to Cousins Transport of 14 October 2009, setting out the basis of the agreement for Cousins Transport to move over to BFS. The first part of the letter refers to the acquisition of a new vehicle by Cousins Transport, and is not controversial. It is the second part, on p 2, which is controversial. Relevantly, it provides as follows:

Daryl, the steps to move forward are:

- Sign over to BFS your cold store contract in letter format
- Put into writing to IGA>D of your intentions, attn Phil Wells - Perishable WH Manager
- Wait for the return approval from IGA>D
- Then sign up to the offer to purchase under vendor finance from BFS - one of the units as listed above. All parties sign & date this letter of offer, with copies given to both signatories.
- Employ a driver; possible contact: Nick Mannix [mobile telephone number omitted] . Nick has previous experience in the distribution environment and would need minimal training.
- Read & sign the equipment policies BFS has for the use of: I will supply an electric pallet trolley & PDA under these policies. Not all operators are granted this level of equipment at no up front cost.

The Payment for work performed expectations is:

- Current charge for work profile remains unchanged at \$41.75 per tonne. This currently shows an approx weekly income of \$3500 for the work performed.
- The increased trailer capacity - by your estimates will provide approx \$1000 per week increase in revenue to your operation.
- The opportunity to perform work at the dry WH after completion of duties at the Cold Store. This estimate shows an approx payment per load of \$200 @ one load per day = \$1000 / week. I would expect that the ratio of dry loads is approx 1.5 per day
- You can also request to be put on the Saturday roster for dry deliveries.
- BFS will be paying all trailer fuel & normal running costs associated with the work.
- The provision of extra work at the Dry WH over the summer months will allow your current 12 pallet rigid to generate revenue in addition to the above. The work is overflow type work, however the summer cycle shows approx 3 months of high demand and in the peak period approx 3-5 loads per day will be required.

- 18 Mr Cousins testified that both he and Mr Price were once again in the cold store tea room when the letter was signed by both of them. Mr Cousins said that the agreed rate of \$41.75 per tonne was the same as his then rate with IGA. Mr Cousins, in his evidence, accepted that the income figure of approximately \$3,500 per week, set out in the letter, was based upon his own figures provided to Mr Price, and based on his then IGA contract and Mr Price accepted them on this basis. The reference to "increased trailer capacity" was based upon the prior discussion between Mr Cousins and Mr Price that with Cousins Transport's acquisition of a 16 pallet capacity vehicle, then there was, on Cousins Transport's estimate, the capacity for an increase in revenue of \$1000 per week. As to the crucial point about cold store work, at point 3 in the second paragraph of the letter, Mr Cousins testified that this was consistent with the discussions he had with Mr Price prior to the letter, that as he would normally finish in the cold store in the early afternoon, there was the opportunity to pick up additional dry store work, Mr Cousins said that "I vividly recall discussing that with the extra - extra load at the end of the day": T36. As to the final point in paragraph 2, Mr Cousins testified that this referred to the use of his old rigid truck over the summer months, to do dry store deliveries. It was common ground that this period represented the busiest time for this type of work.

- 19 Mr Price's testimony was to the effect that there were no further discussions between himself and Mr Cousins, after the initial conversations, prior to this letter of 14 October 2009. Mr Price confirmed that the approximate income figure of \$3,500 dollars per week, was supplied by Mr Cousins in their earlier conversations and he accepted it on face value. He also agreed that this was Cousins Transport's income from cold store work under the IGA contract. In relation to the reference to the type of work at point 3 in paragraph 2 of the letter, Mr Price testified that there was never any discussion between him and Mr Cousins, about a guarantee as to which sort of work Cousins Transport would be given under the contract: T159.

- 20 On the general issue of the cessation of the prior IGA contracts with the then eight drivers, Mr Price testified that he was aware that discussions between the successor of FAL, Metcash, and the cold store drivers, had not led to an agreement for future delivery arrangements. BFS had not, at that stage, been formally invited to tender for that work. By the end of 2009 to early 2010, Mr Price testified that the opportunity for BFS to become involved in the cold store distribution work emerged. The Cousins Transport contracts were the first opportunity for BFS to discuss future options with an existing IGA contractor.

- 21 In relation to the discussions between himself and Mr Cousins leading up to the signing of the 14 October letter, Mr Price testified that whilst he was aware that Cousins Transport, as a part of the "group of eight" IGA contractors, had only worked in the cold store, "Mr Cousins wanted to improve himself and further himself and - and grow his business. So - and that's what we were talking about and, um, that was the general thrust of the conversation": T221. Mr Price agreed that from Cousins Transport's position, the two parts of the transaction were first, to assign its contract with IGA to BFS, and second, to pursue the additional opportunity to improve his business: T222.

- 22 In the further course of cross-examination, Mr Price took issue with the proposition advanced by counsel for Cousins Transport, that any guarantee for work in either the cold store or dry store was agreed. Mr Price expressed the meaning of point 3 of paragraph 2 of his letter, as Cousins Transport presenting for work to earn revenue from whatever source of work was then available. In terms of the word “opportunity” in this point, Mr Price said that it was more than a chance, given the volume of work in the dry store at the time, he testified that there was work there for those who present for it: T222-223.
- 23 Specifically on the critical issue of the intentions of the parties in relation to cold store work, Mr Price was pressed on this issue in cross-examination. After some questioning around the point, the following exchange took place at T223-224:
- RETALLACK, MR:** Okay. So in terms of work that Mr Cousins could expect as a result of - or following the assignment of his contract to BFS, you’re saying that he - in your understanding, he didn’t have an entitlement to expect cold warehouse work?---I understood that he had an entitlement to have - be presented with enough work of what - whether - excuse me, whatever entity it’s derived from to maintain a - a viable operation, just like every other driver.
- And what - why - if that was your intention, why doesn’t the letter say that?---Because the letter says what the letter says and, um, the intention was to give Darryl the opportunity to move forward and improve himself, however shape or form that took, over a period of time.
- That - that - but - - -?---Business is in a highly dynamic environment and it’s - what’s changed or said - said one day, can change days afterward because of the business environment changes.
- But the - the part of the letter that I took you to, the opportunity to perform work et cetera - - -?---Mm hm.
- - - it doesn’t say, “You will perform either dry or cold work according to where you’re allocated”?---No, it doesn’t say that specifically.
- It doesn’t say it non-specifically. It says, “You’ll have the opportunity to do dry work after completing duties at the” - - -?---Mm.
- - - “cold store”?---So we’re reliant on the cold store despatcher. He could give us one load in the day and say, “That’s it.” And then - then what? We don’t control him, we don’t control the loads.
- But the - the clear intention of that part of the contract is to indicate to Mr Cousins that he will initially, in a day, complete duties at the cold store - - -?---Mm hm.
- - - and then, after that, he will have the opportunity to do dry warehouse work?---Yep, depending on what the cold store man told us to do on the days.
- Well, the intention would be that you would send Mr Cousins to the cold store roster and then he would be allocated work by the IGA despatcher who controls the cold store roster?---Mm hm.
- But what this part of the contract means is that he would firstly be sent by you to the cold store section and then, after that, he would have the opportunity to do dry store work?---Pretty much that’s what the intentions were at the time we discussed.
- Thank you. Now, you mentioned yesterday that, at some time after Mr Cousins had commenced performance of the contracts, you and your brother, Denis, sat down and worked out some assessment of Mr Cousins’ position, and I think you said words to the effect of you worked out that dry work would be more beneficial for Mr Cousins?---I can’t exactly recall describing it that way.
- 24 The key issue in this case, is the meaning to be given to the letter of 14 October 2009 and in particular, whether on its proper construction, the contract obliged BFS to engage Cousins Transport predominantly on cold store work, as Cousins Transport had performed in the past. Whilst it was common ground that BFS did not control the allocation of work by the IGA dispatcher, BFS had its own dispatcher. It was the case for Cousins Transport that it was within the control of the BFS dispatcher to allocate Cousins Transport to a “slot” on the cold store roster including the first start time therefore ensuring that Cousins Transport would at least receive cold store work. The effect of the roster change in mid-2010 was to exclude one contract completely from the cold store roster, which was contended by Cousins Transport to be in breach of its contract with BFS.
- 25 Cousins Transport submitted that it is open, in the construction of the contract, to conclude that the words used by the parties in the letter of 14 October 2009 are clear and unambiguous. The contract is specific as to rates of pay (i.e. \$41.75 per tonne) and the words “after” in point 3 of paragraph 2 refers to the completion of cold store work prior to the opportunity to perform dry store runs. It was contended by Cousins Transport that the use of the word “expectations” is consistent with the evidence that the parties discussed estimates of performance, such as Cousins Transport’s projected income for example.
- 26 As to the use of extrinsic evidence in the construction of the contract, Cousins Transport referred to and relied upon a judgement of Beech J in *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323. It was put in these proceedings that extrinsic evidence such as the surrounding circumstances of the transaction and the objective intention of the parties, may assist in ascertaining the meaning of the contract of 14 October, but it may not contradict the meaning if the meaning is clear. In particular, having regard to the fact that Cousins Transport assigned the cold store contracts to BFS, to its advantage to access cold store work from IGA, this was contended by Cousins Transport as a surrounding circumstance in favour of the construction that it contended.
- 27 For BFS, it was submitted that the terms of the letter of 14 October 2009 fall far short of a guarantee that Cousins Transport would be allocated to predominantly cold store work. It was submitted that Mr Cousins accepted that this was the case in his evidence, and that Mr Price had never made any such commitment to him prior to the letter. At its highest, BFS contended that Cousins Transport made an assumption that this was the effect of the agreement, because that was what Cousins Transport was doing in its prior work with IGA for many years. In the alternative, BFS submitted that there is no basis to imply a term into

the contract that Cousins Transport be allocated predominantly cold store work. In reliance upon *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266, it was contended that five criteria must be met and that Cousins Transport has not been able to meet them all on this occasion.

28 In terms of the relevant legal principles to apply in the interpretation of contracts, Beech J in *Red Hill* at pars 106-123 summarised the principles in some detail. Whilst the quote is quite lengthy, I reproduce those principles from his Honour's judgement, as they have direct application in this case. Beech J observed:

106 The primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109 - 110; *Permanent Building Society (in liq) v Wheeler* (1992) 10 WAR 109, 118 - 119.

107 It is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters, not the parties' subjective intentions. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood the terms to mean: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253 [98].

108 An instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience: *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; (2004) 218 CLR 530 [82]; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 [43]. However, as Gleeson CJ, Gummow and Hayne JJ observed in *Maggbury* [43], what comprises 'business commonsense' in respect of a particular contract, as an apparently objectively ascertained matter, may itself be a topic upon which minds may differ and in respect of which an imputed consensus is impossible.

109 In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 350, Mason J set out with evident approval what Lord Wilberforce said in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989:

In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating (995 - 996).

110 That passage has been cited with approval in many cases since, including in the High Court. See, for example, *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 [10]; *Pacific Carriers Ltd v BNP Paribas* [22].

111 Thus it is clear from these cases, that the objectively ascertained purpose and objective of the transaction may be taken into account in construing the instrument. See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151 [8], [53].

112 The apparent purpose or object can be inferred from the express and implied terms of the contract, and from any admissible evidence of surrounding circumstances: *Olympic Holdings Pty Ltd v Windslow Corporation Pty Ltd (in liq)* [2008] WASCA 80; (2008) 36 WAR 342 [41].

113 There has been, and may remain, some uncertainty about the circumstances in which evidence of surrounding circumstances is admissible in the process of construction of a written contract.

114 It has been said in a number of cases in the High Court that the ascertainment of what a reasonable person would have understood the terms of a contractual document to mean normally requires consideration not only of the text of the document, but also of the surrounding circumstances known to the parties, and of the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* [8], [53].

115 In *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 [3] - [5], Gummow, Heydon and Bell JJ stated that trial judges (and intermediate appellate courts) are bound to apply what was said by Mason J in *Codelfa* (352) about the admission of surrounding circumstances in construing contracts, unless and until the High Court says otherwise. In *Codelfa*, Mason J said that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one interpretation. But it is not admissible to contradict the language of the contract when it has a plain meaning.

116 API submits, and Red Hill accepts, that, read as a whole, the reasons of Mason J in *Codelfa* say no more than that extrinsic evidence may inform meaning, but cannot contradict meaning when the meaning is clear. There seems to me to be merit in that submission.

117 The topic of admissibility of extrinsic circumstances has recently been considered by the Court of Appeal in *McCourt v Cranston* [2012] WASCA 60 [14] - [26]. Pullin JA (with whom Newnes JA agreed) suggested at [22] there was a question arising about how a court should treat what was said by Gummow, Heydon and Bell JJ in *Western Export Services v Jireh* [5], given that case concerned an application for special leave. Pullin JA said that he did not need to decide that question.

118 Nevertheless, his Honour stated at [23] that, in view of the pronouncements in *Western Export Services v Jireh*, when an issue arises about the proper construction of a contract and there is evidence of surrounding circumstances known to the parties or evidence of the purpose or object of the transaction, that evidence will not be admissible

unless the court determines that the contract is ambiguous or susceptible of more than one meaning. I propose to adopt that approach.

- 119 It should be noticed that a broad concept of ambiguity may apply in this context. See, for example *South Sydney Council v Royal Botanic Gardens* [35]; *Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd* [1999] WASC 218; (1999) 21 WAR 425 [43] - [45]; *Manufacturers' Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Case 60-853, 75, 343. Moreover, as Pullin JA pointed out in *McCourt v Cranston* [23], it is enough if the instrument is 'susceptible of more than one meaning'. See in this regard Spigelman JJ, 'From text to context: Contemporary contractual interpretation' (2007) 81 *Australian Law Journal* 322 - 337.
- 120 In this case, as I have said, I consider that the language of the Farm-in Agreement and the Joint Venture Agreement, when read together as they must be, is ambiguous or susceptible of more than one meaning, at least as regards the relationship between cl 10.4 of the Farm-in Agreement and cl 7.2 of the Joint Venture Agreement.
- 121 It is, in my view, important to bear in mind the significant limits on the work that can be done by background facts in the process of construction of an instrument. It remains the instrument that is to be construed. The search is for the meaning of what the parties said in the instrument, not what the parties meant to say: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (109 - 110); *Byrnes v Kendle* [53], [98] - [99]. The reference to context is not a licence to ignore the text, or to rewrite the contract to include provisions reflecting what the court infers from the background facts to have been intended by the parties: *Euphoric Pty Ltd v Ryledar Pty Ltd* [2006] NSWSC 2 [31] - [33], approved on appeal *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; (2007) 69 NSWLR 603 [108] - [109]. See also *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [2012] WASC 28 [43]. As is said in Lewison & Hughes, *The Interpretation of Contracts in Australia* (2012) [3.14.5] 'reliance on background must be tempered by loyalty to the contractual text'.
- 122 Further, there are important limits on the kind of evidence which may be admissible, and the purposes for which it is admissible. These principles are relevant to the determination of numerous objections made by API to evidence, sought to be adduced by Red Hill, of communications prior to the execution of the Farm-in Agreement.
- 123 Evidence of prior negotiations is, in the context of construction of an instrument, admissible for some purposes, but not for others. The position was explained by Mason J in *Codelfa* (352), in a passage applied by McLure JA (with whom Wheeler JA agreed) in *Chemeq Ltd v Shepherd Investments International Ltd* [2007] WASCA 117 [155] - [156]. Insofar as such evidence establishes objective background facts known to the parties, or the genesis, purpose or object of the transaction, it is admissible. Insofar as the evidence consists of statements and actions of the parties reflective of their actual intentions and expectations, such evidence is inadmissible. Such statements reveal the terms of the contracts which the parties intended or hoped to make. They are superseded by, or merged in, the contract.
- 29 Since the judgement in *Red Hill*, the High Court in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, has further dealt with the issue of consideration of surrounding circumstances in the construction of contracts. In this case, French CJ, Hayne, Crennan and Kiefel JJ said at par 35:
- Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".
- 30 The letter of 14 October 2009 in relation to the scope of work, whether it is cold store or dry store, is in my opinion, ambiguous. Extrinsic evidence of the surrounding circumstances and the object and purpose of the transaction may be referred to in objectively determining the parties' intentions. It is common ground that the Cousins Transport contracts were to end in November 2011 and for Cousins Transport to remain in work on the site, BFS seemed the best prospect for this to occur. To facilitate this, Cousins Transport agreed to assign two contracts to BFS. One of them was purchased from another contractor on the evidence, for some \$50,000. Had Cousins Transport not assigned its own contract to BFS under the terms of its contract with FAL, Cousins Transport was entitled to continue working exclusively in the cold store until November 2011. It is also clear that BFS wish to expand its operations with IGA. It already had the dry store contracts and logically, the performance of cold store work would complete its profile to provide transport services to IGA, across the full range of its operations.
- 31 The Cousins Transport contracts, as was common ground, were BFS's first opportunity to expand into cold store work. It was to BFS's advantage to gain access to this line of work. It also, subject to what I say further below, was intended to provide some continuity to Cousins Transport on the site.
- 32 There is also the evidence of both Mr Cousins and Mr Price from the discussions in the days immediately prior to signing the 14 October 2009 letter. These discussions, on the evidence, focussed on Cousins Transport working initially in the cold store operations, prior to being allocated any work in the dry store. This is entirely consistent with Cousins Transport's work prior to the contract save that cold store work only was performed. The evidence is that this was the work that Cousins Transport was familiar with performing, having done it over many years prior. Both Mr Cousins and Mr Price in their testimony, the latter somewhat reluctantly in the course of his cross-examination, accepted that it was their mutual intention, that Cousins Transport would be allocated to the cold store roster by BFS in the first instance, following which, Cousins Transport could

participate in dry store delivery work. This evidence is not the subjective intentions of one party or the other. This is evidence of a common intention of both Cousins Transport and BFS at the time. It is part of the circumstantial background known to both parties.

- 33 One then considers the words used in the letter of 14 October 2009 to record their agreement. The initial part of paragraph 2 on page 2 says "The Payment for work performed expectations is:". It is not entirely clear what these words mean. It is plain however from the words used in the points that follow, that the paragraph does not just deal with estimates, as the reference to the "per tonne" rate is quite specific. Further, the language of the first line of point 3 is specific. The words "after completion of duties at the Cold Store." can only sensibly be understood to mean that Cousins Transport would first perform work in the cold store each day, followed by any available work in the dry store.
- 34 The meaning to be given to these words is fortified by the last line in the same point, which refers to "I would expect that the ratio of dry loads is approx 1.5 per day". The reference by Mr Price to dry store loads of 1.5 per day, is entirely consistent with the first line in point 3, that Cousins Transport work in the cold store first. That is, dry store work is anticipated to be a minority of the work performed by Cousins Transport each day, and is a supplement to the cold store work. If this were not the case, one would expect to see an estimate of dry store loads each day at a higher level. Similarly, the reference to Cousins Transport requesting to go on the dry store roster for Saturdays and overflow work in the summer months is consistent with this overall construction.
- 35 Having regard to the language used in the letter of 14 October 2009, in the context of the surrounding circumstances known to the parties, and the object and purpose of the transaction, I consider that a reasonable business person in the position of the parties at the time, would consider, looking at the arrangement commercially, that the agreement between Cousins Transport and BFS obliged BFS to allocate Cousins Transport to the cold store roster in the first instance, in order to obtain cold store work. After completion of the cold store work, Cousins Transport was able to participate in dry store deliveries. This is consistent with the ordinary and natural meaning of the words used in the letter.
- 36 Whilst the second contract assigned by Cousins Transport to BFS in October 2009 as reflected in the letter of 18 December 2009 (doc 12 exhibit R1) did not specifically refer to the same conditions as the first contract, except for the rate of pay per tonne, I would, given the terms of the October 2009 contract, and the working arrangement contemplated by it, imply the same terms as to work allocation and opportunities for dry store work for Cousins Transport, in the October 2009 contract. Such an implication is consistent with the requirements of *BP Refinery*. First, in the context of the first contract, it is plainly reasonable and equitable. Secondly, given the way in which I have concluded the working arrangement was to occur, it would be necessary to imply such a term in order to give business efficacy to the contract and to make it effective. Thirdly, given the context in which the first contract was negotiated, and its terms, such a term would in my view, be so obvious that it went without saying. Fourthly, it can be, in accordance with the provisions in the first contract, clearly expressed. Finally, it would not contradict any express term of the contract, as set out in the letter of 18 December 2009. In my view, such an arrangement would be entirely consistent with the intended operation of the first contract.

Was there a breach of contract?

- 37 Having concluded that the contracts obliged BFS to direct Cousins Transport to the cold store for its first work of the day, did BFS breach the contract? Following the commencement of the second contract in January 2010, Mr Cousins testified that he became concerned at the level of income he was receiving, was not in accordance with the agreement that Cousins Transport had with BFS. Mr Cousins testified that as at March 2010 with two trucks on the road for BFS, Cousins Transport had had little or no dry store work. There was also some dispute on the evidence as to Cousins Transport's level of cold store work performed in the first few months of the contract. According to the BFS income figures (doc 55 exhibit R1), very little was performed. This was disputed by Mr Cousins and subsequently, BFS accepted that its information was not accurate.
- 38 Tab 2 of exhibit A1 is a copy of Cousins Transport's income records for 2009-10 and 2010-11. The records show income received from both cold store and dry store work for BFS for both of Cousins Transport's vehicles. The figures show very little income for February 2010 and no dry store income at all for April and May 2010. BFS's records for the same period (doc 55 exhibit R1), while somewhat at variance, show the same overall picture.
- 39 Mr Cousins testified that at some point around this time, he spoke to Mr Price on the telephone to inform him that he was concerned about his income not being in line with the agreement with BFS. According to Mr Cousins, Mr Price told him in that conversation in words to the effect that Mr Cousins had a loan and that he had to do the work: T40. Mr Cousins testified that he took this as a threat from Mr Price. Mr Price recollected that he did have a discussion with Mr Cousins along these lines, but denied his response to Mr Cousins constituted a threat of any kind.
- 40 Mr Cousins then received a note from BFS dated 30 March 2010 (tab 11 exhibit A1) which informed all "Cold Store Drivers", of a change in the criteria for daily loads. Mr Cousins said that no one from BFS spoke to him about the matter. The document sets out steps required for each driver to complete their first two runs and to hand their paperwork to "Ritchy" (Mr Husband). The major point on Cousins Transport's contentions was that any further cold store runs after the first two (and Cousins Transport's evidence from tab 1 exhibit A1 was that quite often three cold store runs could be performed) would involve all of BFS's drivers, including dry store fleet trucks. It was therefore contended that this diluted the capacity of Cousins Transport to perform three runs in the cold store, thereby impacting on its income. The BFS dispatcher, Mr Husband, confirmed in his testimony that when Mr Cousins was allocated the first run in the cold store, he could achieve two or more cold store runs and then be available for additional cold store runs on the same day.
- 41 The next substantial event for Cousins Transport was a note from Mr Taylor on behalf of Mr Price, undated, advising of a change of roster, effective 14 June 2010 (doc 20 exhibit R1). This note advised Cousins Transport that "We are giving you the option of which truck to assign to the grocery division. We would like this information by C.O.B. 4th June 2010 so all is in order." A new roster was attached to the note, a copy of which was not in evidence. Mr Cousins testified that he had no prior notice of this and he complained to Mr Price about it. He was told he had no choice. From that time on, Mr Cousins testified

- that he suffered a sudden loss in cold store income. However, I note that on the documents, Cousins Transport's cold store income did not decline immediately, but rather, trended down over time.
- 42 It was the contention of BFS that the reason for the shift of one of Cousins Transport's contracts to the dry store, was because of Mr Cousins' disruptive influence in raising complaints about the allocation of cold store work. Mr Price testified that Mr Cousins raised with him many times complaints about being "ripped off" by the dispatch system in the IGA cold store, and that he considered some drivers were getting favourable treatment. Mr Price said that he understood Mr Cousins' complaint was that some of these favoured drivers were being allocated runs near to the distribution centre, so they could return to the distribution centre sooner, and take on additional work. Mr Price was concerned about the "noise" being created by Mr Cousins about this issue.
- 43 This issue was also the subject of evidence from Mr Wells, who was the former perishable warehouse manager for Metcash. He was in this position for some three and a half years and started in the cold store in 2008. Mr Wells gave evidence as to the general operation of the cold store roster arrangements, both prior to and after BFS became involved. As to complaints, Mr Wells testified that he did recall Mr Cousins making complaints about the working of the roster system, as did all other drivers. Mr Wells said that each owner-driver always thought that the other owner-driver was getting better or worse and that was never the case": T97. Mr Wells said he recalled at least three occasions when Mr Cousins complained about the dispatcher favouring some drivers over others. This was both prior to and after BFS became involved. As a result of these complaints, Mr Wells said he investigated the matter and spoke to Mr Price. Mr Wells found no substance to Mr Cousins' complaints and informed Mr Price of this. Mr Wells understood that Mr Price then spoke to Mr Cousins about his investigation and that there were no more complaints to Mr Wells after this time.
- 44 Mr Wells also gave evidence about the 30 March 2010 note to the effect that after two runs in the cold store, Mr Husband would coordinate additional runs and involve all BFS drivers, including those from the dry store. In Mr Wells' view, this was in essence a service issue, and if the cold store dispatcher could not source a driver for a run, either because he would not be back at the distribution centre in time, or for any other reason, BFS would be requested to find someone to do the work. Additionally, whilst initially saying he doubted whether a driver on the cold store roster could regularly achieve more than two runs each day, when the content of tab 1 exhibit A1, that being Cousins Transport's run sheets for each day, were put to him, he accepted that a cold store driver on the top shift on the roster could achieve three runs per day. However, he still considered that two cold store runs per day would be the average.
- 45 A substantial focus of the BFS defence to Cousins Transport's claim was the alleged poor performance of Cousins Transport's drivers, through higher levels of driver turnover, absences from work and accidents, relative to other drivers. Mr Wells said in his testimony that Cousins Transport did have an unfortunate run during a period where some drivers let Mr Cousins down and Mr Cousins also experienced truck breakdowns. Mr Wells however qualified this evidence, by saying that this was nothing more than what occurred with other drivers also. He accepted that when Mr Cousins was driving, his performance was generally quicker and more reliable than when his other employed drivers also did the work.
- 46 For BFS, the driver performance issue was largely the subject of evidence from Mr Denis Price, BFS's business analyst, and Mr Husband. Mr Husband testified that as a dispatcher, Mr Cousins complained to him about not getting the level of income he believed he should be receiving. When Mr Husband received this complaint, he said he did a comparison between Cousins Transport's trucks' performance and other trucks of a comparable specification. The performance data was taken from the BFS system called "Translogics". This system records a driver's average hours from fatigue sheets. Mr Husband prepared a comparison (doc 81 exhibit R1) in which he calculated over the period 28 February 2011 to 12 March 2011, Cousins Transport's actual hours, the hours expected to perform the work, from his experience as a driver, and total income per day and per hour. The latter was compared to an average income per hour for all drivers.
- 47 Mr Husband concluded from his analysis, that Cousins Transport drivers were "not up to speed": T259. He testified that this would affect the level of income that Cousins Transport generated. Mr Husband said that from his experience as the BFS dispatcher, Cousins Transport drivers were, on average, slower than the others. They had longer turnaround times than other drivers, which he said possibly resulted from a lack of training. Cousins Transport also had a high level of turnover, which impacted on performance, because according to Mr Husband, it takes at least six weeks or thereabouts, to train up a driver on the various runs.
- 48 Mr Denis Price prepared material contained in documents 55 and 56 in exhibit R1, which dealt with BFS's revenue records and days worked for the two Cousins Transport trucks. In terms of document 56, dealing with days worked, for the period October 2009 to March 2010 Mr Price conceded that the records of BFS were not accurate. He also accepted that for the period September 2011 to November 2011 that the lease on one of Cousins Transport's trucks was assigned and the second contract was terminated. Mr Price accepted that the BFS figures, recorded not working on a Saturday or a public holiday as an "absence", even though there was no obligation on drivers to work these days. It was common ground that Cousins Transport did not always work on Saturdays or public holidays. It was contended by BFS that for the period June 2010 to August 2011, the period over which Cousins Transport bases most of its claim, vehicle FP 16 was absent for 60 days and FP 8 for 29 days.
- 49 Mr Price also performed an analysis of the impact of the change of the rate calculation method in the cold store from the former rate per tonne to the matrix based on zones. According to the analysis, (doc 54 exhibit R1), on a converted dollar per tonne basis, over the period December 2009 to September 2011, the rate received by Cousins Transport averaged at \$42.11, slightly above the contracted rate of \$41.75 per tonne. The contention of BFS was therefore, that this change in payment methodology was not to the detriment of Cousins Transport. Mr Cousins complained that this change was also made without any consultation with him.
- 50 Document 55 in exhibit R1 was prepared by Mr Price to show revenue, based on BFS's records, for both of Cousins Transport's vehicles, FP 16 and FP 8, for both cold store and dry store work, over the period October 2009 to November 2011. This analysis reflected the fact that from June 2010, after the change of roster, and the withdrawal of one Cousins Transport

contract from the cold store, Cousins Transport allocated both of its trucks to service the one cold store contract. It was also Mr Price's testimony that in the dry store, drivers should be able to achieve four runs per day and in the cold store, 2.2 runs per day on his analysis.

- 51 The evidence of Mr Price also highlighted one of the many conflicting pieces of evidence in this case. When examining document 56 in exhibit R1 it is apparent that the records kept by BFS do not reconcile with the records kept by Cousins Transport, in tab 3 of exhibit A1, regarding days worked. Despite this, Mr Price contended that the BFS data was accurate. He noted that the Cousins Transport records, for example for April 2011, contain an overlap with entries for March of 2011 also, therefore the work attendances between the two sets of figures would never reconcile. I also note, adding an additional layer of difficulty by way of comparison, that the BFS data is expressed in terms of days of work, as opposed to weeks of work in the Cousins Transport records.
- 52 For BFS, Mr Price also prepared an analysis of comparative performance of all the drivers, for the period 11 April 2010 to 5 February 2012. This covered a number of indicators, including one of BFS's own key performance indicators, that being pallets per hour, and also overall income per hour per driver. The drivers were ranked, worse to best, from left to right on the schedule. For BFS's purposes, Mr Price attempted to demonstrate that in terms of its own measure of performance, that being pallets per hour, both of Cousins Transport's vehicles were not good performers. However, in cross-examination, when taken to the income per hour measure, and when looked at across "all areas", not just in cold store work, Mr Price accepted that "slow Joe", as he was described, the driver of FP 8, with an hourly rate of \$83.52, was in the top half of the BFS fleet. Similarly, vehicle FP 16, while not as high as FP 8, had \$65.76 per hour on average, and was clustered in a group of 10 or so drivers in the \$65 to \$70 per hour range.
- 53 What then, does all of this evidence establish? I have already found that the contracts between Cousins Transport and BFS required Cousins Transport to be allocated cold store work in the first instance, and dry store work after completion. The effect of the June 2010 roster change in particular, requiring a shift of one of Cousins Transport's contracts to the dry store, was in my view, a breach of contract by BFS. It was not open for BFS, to unilaterally vary the contract it had with Cousins Transport. I am far from persuaded on the evidence, that any issues raised by Mr Cousins with Mr Price as to income expectations, constituted the basis for such a change. The matter of Mr Cousins' complaints about his income was never raised by Mr Price with Mr Cousins prior to the roster change, as being a matter of such magnitude, so as to place BFS's arrangements with Metcash in jeopardy.
- 54 A key witness in this respect and who was independent of both Mr Price and Mr Cousins was Mr Wells. Mr Wells was the senior person at Metcash, responsible for the cold store operations. Whilst, as I have already set out earlier in these reasons, Mr Wells had some contact with Mr Cousins on a few occasions, Mr Wells investigated the complaints made by Mr Cousins and spoke to Mr Price. Thereafter Mr Wells seems to have considered the matter closed and did not have further complaints from Mr Cousins, on Mr Wells' own testimony. Once Mr Price spoke to Mr Cousins and told him the matter had been examined by Mr Wells and found to be unsubstantiated, there was no basis in my view, for BFS to take any precipitous action against Cousins Transport.
- 55 Mr Price's letter to Mr Cousins of 7 July 2010 (doc 19 exhibit R1) on page 2 at the first dot point, refers to Mr Price resisting calls from contractors, BFS and IGA management to "discipline" Mr Cousins. However, there was no evidence of this and certainly none from Mr Wells, who one would expect, to be the best person to have established this, on the case of BFS. I accept the submission of Cousins Transport that in terms of the timing of these events, given the content of tabs 10, 11 and 13 of exhibit R1, that this issue was largely raised and investigated, by early 2010.
- 56 It was the case on the evidence, that despite this, Mr Cousins did continue to express concern to Mr Price that Cousins Transport's income was not as agreed with BFS. As I have already referred to it earlier, Cousins Transport's income figures (tab 2 exhibit A1), reflect the concerns expressed by Mr Cousins to Mr Price at around these times. This was also at about the time of the commencement of Cousins Transport's new leased truck from BFS that was intended to bolster Cousins Transport's income, with a greater carrying capacity. In my opinion, having regard to the terms of the agreement between Cousins Transport and BFS, Mr Cousins had a legitimate basis to express concerns about the then income being generated, by his business.
- 57 The fact that Mr Husband, as the dispatcher for BFS, and one who had the capacity to control the allocation of BFS drivers to the cold store in the first instance, was not aware of the terms of the agreement between BFS and Cousins Transport, exacerbated the problem. On the evidence, Mr Husband had no direction from Mr Price as to Cousins Transport's allocation to the cold store roster. Seemingly also on the evidence, no one else from BFS, who Mr Cousins dealt with on a regular basis, seemed to know of the agreement between Cousins Transport and BFS either. I therefore agree with the Cousins Transport submissions that it was perhaps not surprising that some saw Mr Cousins as a source of aggravation, which no doubt contributed to a souring of the relationship between both parties as the 2010 year progressed. Also, the fact that Cousins Transport continued, after the June 2010 roster change, to operate both trucks in the cold store servicing one contract, undermines the assertion of BFS that Cousins Transport was so disruptive as to be damaging to the BFS relationship with its client.
- 58 The overwhelming impression I have from all of the evidence is that once Cousins Transport assigned the cold store contracts to BFS, BFS generally regarded Cousins Transport as one of its 25 or so drivers, without specific regard to the terms of the arrangement it had entered into with Cousins Transport, as expressed, in particular, in the letter of 14 October 2009. I also have no doubt, again from an assessment of all of the evidence, that Mr Cousins became a source of irritation for Mr Price, in particular when BFS was attempting to cement its relationship with Metcash and introduce changes and improvements, laudable though they may have been. However, as against this, it should be borne in mind that it was Cousins Transport's agreement to assign the cold store contracts that was BFS's introduction to this side of the IGA distribution business.

- 59 I accept also, that this assignment and the agreement with BFS, was intended to give Cousins Transport some ongoing longevity. However, and perhaps ironically, as events transpired, Cousins Transport had no greater lifespan on the IGA site, than it otherwise would have had had it just continued on with the FAL contract, working exclusively in the cold store, until about November 2011 when that contract was due to come to an end. Had that occurred, all of the present dispute may have been avoided.
- 60 As I have already mentioned earlier, there was much evidence led by BFS, in relation to the alleged slow performance of Cousins Transport drivers, absences from the workplace and accident rates, in order to deflect Cousins Transport's claim. In my view, these issues go to the question of loss and damages and not to the issue of breach of contract in the first instance. That is, but for the breach, how would Cousins Transport have performed under its contracts had the contracts been fully complied with by BFS? Some of the evidence led, in particular that relating to the availability of dry store work, also raises questions of mitigation of loss. I will consider these issues shortly. Before doing so however, I will first turn to consider the Cousins Transport claim in relation to unconscionable conduct.

Unconscionable conduct

- 61 It was contended by Cousins Transport that in conjunction with the breach of contract by BFS, BFS engaged in unconscionable conduct for the purposes of s 30 of the OD Act. This was said to arise, in short, based on BFS's superior bargaining position, by controlling the cold store roster, to the detriment of Cousins Transport. Given the contractual arrangement in place, it was submitted that Cousins Transport was in a vulnerable position and BFS, knowingly took advantage of this.
- 62 For the following reasons, I am not persuaded that any degree of unconscionability arises from the conduct of BFS towards Cousins Transport. I agree with the submissions of BFS on the application of the general principles in relation to unconscionable conduct, the relevant authorities cited, and the absence of any such conduct on the facts of this case.
- 63 Section 30 of the OD Act deals with unconscionable conduct by hirers and provides as follows:

30. Unconscionable conduct by hirers

- (1) A hirer must not engage in conduct that is, in all the circumstances, unconscionable with respect to an owner-driver in relation to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract.
 - (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a hirer has contravened subsection (1), the Tribunal may have regard to the following —
 - (a) the relative strengths of the negotiating positions of the hirer and owner-driver;
 - (b) whether, as a result of conduct engaged in by the hirer, the owner-driver was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the hirer;
 - (c) whether the owner-driver was able to understand any documents relating to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the owner-driver (or a person acting on behalf of the owner-driver) by the hirer or a person acting on behalf of the hirer in relation to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract;
 - (e) the amount for which, and the circumstances under which, the owner-driver could have provided identical or equivalent services to a person other than the hirer, including as an employee;
 - (f) the extent to which the hirer's conduct towards the owner-driver was consistent with the hirer's conduct in similar transactions between the hirer and other similar owner-drivers;
 - (g) the requirements of the code of conduct;
 - (h) the extent to which the hirer unreasonably failed to disclose to the owner-driver —
 - (i) any intended conduct of the hirer that might affect the interests of the owner-driver; and
 - (ii) any risks to the owner-driver arising from the hirer's intended conduct that are risks that the hirer should have foreseen would not be apparent to the owner-driver;
 - (i) the extent to which the hirer was willing to negotiate the terms and conditions of the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract;
 - (j) the extent to which the hirer acted in good faith;
 - (k) whether or not the owner-driver contract provides for the payment of any increases in the owner-driver's fixed and variable overhead costs (as defined in section 27(4)).
- 64 It is not immediately apparent that any of the specific categories of s 30(2) have application in this case rather it is to the general prohibition on unconscionable conduct, that attention should be paid. In terms of the general provision in s 30(1), some guidance as to the meaning of "unconscionable conduct", can be obtained under the comparable provisions of the former Trade Practices Act 1974 (Cth) Part IVA and now Part 2-2 of Schedule 2 – The Australian Consumer Law, of the Competition and Consumer Act 2010 (Cth). Also, as BFS observed in its written submissions, one of the leading cases in equity in relation to unconscionable conduct is *The Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447. In that case, Mason J said at 462, that equitable relief based on unconscionability can be granted:

...whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.

65 Further, in *Blomley v Ryan* (1956) 99 CLR 362, Kitto J said at 415:

[the court has power to set aside a transaction] ... whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

66 For there to be unconscionable conduct, there needs to be more than just unfairness or even hard commercial bargaining, in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Limited* (2003) 214 CLR 51, Gleeson CJ said:

Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. It is neither the purpose nor the effect of s 51AA to treat people generally, when they deal with others in a stronger position, as though they were all expectant heirs in the nineteenth century, dealing with a usurer [footnote 41 omitted].

67 On the facts of this case, the circumstances of Mr Cousins are a far cry from the circumstances of the elderly migrants who had a poor command of English, required to sign a bank guarantee, as in *Amadio*. Mr Cousins is a very experienced transport contractor, with 25 years in the industry. At the time of the events related to this case, he had quite a substantial business, and employed several drivers. He had contracted with FAL for some eight years prior to BFS. He knew the system well. There was no evidence that Mr Cousins suffered any personal illness or disability at any time that BFS was aware of and took unfair advantage of. On the contrary. Mr Cousins seemed to have been able to quite robustly raise his concerns with both BFS and Mr Wells of Metcash to look after his own interests.

68 There was no evidence of any other particular vulnerability of Cousins Transport on the facts. Simply because BFS had control of its roster, does not, of itself point to any potential unconscionable conduct. All the other drivers were subject to the same roster. Arguably too, as BFS points out, it is not apparent that BFS had any material financial advantage from the removal of one of Cousins Transport's contracts, because another contractor was required to take up the position to service the demand, and be paid accordingly. As BFS also observed in its submissions, Cousins Transport could have, but chose not to, take up extra dry store work, despite the apparent breach of contract by BFS.

Loss and damages

69 By s 47(4) of the OD Act, the Tribunal has the power to order the payment of a sum of money by way of damages, in the determination of a dispute before it. The approach of the Tribunal to the assessment of damages is to apply the established common law contractual principles. In this respect, the Full Bench of the Commission on an appeal from a decision of the Tribunal in *Shacam Transport Pty Ltd v Damien Cole Pty Ltd* (2014) 94 WAIG 1835, recently observed at par 22:

22 The relevant legal principles governing an assessment of damages were summarised by Buss JA in *Australian Goldfields NL (In liq) v North Australian Diamonds NL* [2009] WASCA 98; (2009) 40 WAR 191. At [276] his Honour observed:

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

70 As to the level of precision required in assessing a head of damage, the Full Bench in *Shacam* further said at par 29(a):

(a) We do not agree that there was no evidence before the Tribunal upon which an assessment of a profit margin could be assessed. An assessment of a head of damage need not be calculated in a way that is precise. In *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; (1991) 174 CLR 64 Toohey J observed (138):

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

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

71 Mere difficulty in assessment should not deprive a party who has established a breach of a contractual right, a remedy in damages. Where it is clear that loss has been suffered, but precise quantification is not possible, it falls to the court to assess

damages as best it can: *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91 at 106; *Chaplin v Hicks* [1911] 2 KB 786.

- 72 In this case, Cousins Transport submits that the assessment of damages is not an exact science and there is a basis for assessing them in this case. The approach adopted by Cousins Transport is to make a reasoned analysis of loss, based on a comparison of Cousins Transport's actual earnings with an estimate, as best one can be arrived at, on the evidence, of what Cousins Transport's earnings should have been had BFS performed the contract. In particular, it was submitted that this course is open to the Tribunal when examining the driver fatigue sheets completed by Cousins Transport (tab 4 exhibit A1), in conjunction with the oral testimony of Mr Cousins, and also as confirmed by Mr Husband and Mr Denis Price, that performance of more than two cold store runs was quite feasible. An analysis of Cousins Transport's daily invoices to BFS in the period August 2009 to December 2009 (tab 1 exhibit A1) also demonstrates this. This particular evidence covered the period prior to and after Cousins Transport contracted to BFS. Based on in particular tab 1 of exhibit A1, Cousins Transport submitted that a calculation of loss, based on Cousins Transport performing an average of twelve cold store and five dry store runs per week was reasonable and open on the evidence.
- 73 Further, given the fluctuations in the income per cold store run for Cousins Transport, which ranged from about \$250 to \$350, an average figure is proposed to be used. In terms of dry store runs, Cousins Transport proposed to use the \$200 per load figure as contained in the letter of contract of 14 October 2009, despite the income for dry stores ranging from \$195 to \$275 per load. Because of the impact of the change of roster, Cousins Transport, shortly before the commencement of the hearing, confined its claim for damages from June 2010 to the termination of the contracts. Additionally, too, Cousins Transport accepted that due to driver absences for four weeks in September 2010 and two weeks in February 2011, an adjustment should be made to take this into account. So too, an adjustment needs to be made for the termination of one vehicle contract in mid-September 2011, and the other in early November 2011.
- 74 Whilst it was the subject of criticism by BFS, the methodology of Cousins Transport to the assessment of damages was set out in an affidavit from Ms Lester, a solicitor employed by Cousins Transport's solicitors. The affidavit, tendered as exhibit A2, contained an analysis of the documentary evidence filed by both Cousins Transport and BFS in exhibits A1 and R1 respectively. In summary, Ms Lester's affidavit makes a calculation in the period June 2010 to August 2011, a total of fifteen months during which time the Cousins Transport contracts were on foot. Table B of Ms Lester's affidavit, provides that based on the expected number of cold store jobs per month, and twelve cold store deliveries per truck per week and five dry store deliveries per truck per week, total expected monthly revenue was \$40,296 per month. This is derived from dividing the total revenue for the period of \$604,445, by way of gross income, by 15 months.
- 75 Next, Cousins Transport's actual monthly income figures from Table B in Ms Lester's affidavit, provides a total gross income of \$521,562 averaging at \$34,770 per month. Based on Mr Cousins' evidence in relation to his estimated weekly running costs for his trucks at \$7,800 per week, totalling \$405,600 per year, leads to an average running cost figure of \$33,800 per month. Deducting the estimated weekly running costs, from his actual monthly income, Cousins Transport contended that its average actual monthly profit was approximately \$970. As opposed to this, based on Ms Lester's analysis, Cousins Transport's expected monthly income, if performing 12 cold store and 5 dry store runs per week, less its estimated weekly running costs, should have led to an average monthly profit of \$6,496. Accordingly, Cousins Transport contended that the comparison of the two sets of figures provides an average monthly loss of \$5,526 per month, being a total of \$82,890 for the 15 month period June 2010 to August 2011.
- 76 As noted above, Cousins Transport accepted that its loss figure should be adjusted for driver absences. The figure for September 2010 is reduced by 50% to take into account the absence of one driver for four weeks. The resulting loss figure is reduced to \$80,127. Secondly, for February 2011, there is a reduction of 25% to take into account the absence of a driver for two weeks, therefore further reducing the loss figure to \$78,745.50. To be added to this figure, should be adjustments reflecting the termination of the contract. An amount of \$4,144.50 should be added for September 2011, a reduction on the average monthly figure of \$5,526, to take into account the termination of the first vehicle mid-month. Furthermore, an amount of \$2,763 for October 2011 should be added in, being a 50% reduction on the monthly figure to also take account of the termination of the first vehicle. Finally, added in is a further amount of \$1,381.50 for November 2011, being a reduction of 75% on the average monthly figure, to take into account the termination of the second vehicle mid-month. On this basis, Cousins Transport assesses its total net loss at \$87,034.50.
- 77 For BFS, it was contended that the evidence does not establish a basis for the Tribunal to assess damages properly. A criticism is made of the Cousins Transport methodology in calculating its loss. In summary, BFS submitted that Mr Cousins has not established on his evidence, the loss suffered by Cousins Transport. It was contended by BFS that Mr Cousins did not give any direct evidence as to the quantum of his loss. Rather, reliance has been placed upon the analysis contained in Ms Lester's affidavit firstly, and secondly, exhibit A4, being the handwritten estimates of weekly operating expenses for both of Cousins Transport's trucks. These estimates cover wages, superannuation, maintenance, insurance, fuel, lease payments and miscellaneous expenses. The total expenses are \$3,650 per week for FP 16 and \$4,150 per week for FP 8.
- 78 BFS submitted that the estimates of vehicle operating expenses, can only be regarded at their highest, as a rough guide as to the operating costs of the two vehicles. The vehicles are not identical and furthermore, there is no evidentiary support for the estimates provided. A further difficulty according to BFS is that the estimates of operating costs for the vehicles are based on the work actually undertaken by Cousins Transport for BFS, and not the estimated operating costs based on what Cousins Transport contends that BFS should have provided to it, based on the claimed income as contained in Ms Lester's affidavit. BFS submitted that this is significant, because additional costs would have been incurred, in servicing that additional work. BFS contended that an obvious indicator of this would be the additional hours of work performed by Cousins Transport's drivers, paid on an hourly basis. Such additional work would also flow through into superannuation calculations, and maintenance costs given the increased utilisation of the vehicles.

- 79 Accordingly, BFS contended that the calculations relied upon by Cousins Transport make it almost impossible for the Tribunal to make an informed estimate of loss for the purposes of assessing damages.
- 80 In any event, BFS contended that the methodology set out in Ms Lester's affidavit is problematic. Firstly, the calculations do not adequately take into account the driver absences established on the evidence. Even having regard to Cousins Transport's closing submissions, which refer to an adjustment for driver absences, BFS submitted that according to its figures, Cousins Transport's drivers were absent for longer periods, being 60 days in the case of vehicle FP 16, and 29 days for vehicle FP 8. Whilst it may be problematic for the Tribunal to determine, based on the conflicting evidence, the actual quantum of absences, BFS submits that what this does establish is that the Lester affidavit calculations are flawed.
- 81 Furthermore, other matters about which BFS was critical in the methodology set out in Ms Lester's affidavit, include the failure to take into account inexperienced drivers employed by Cousins Transport and the very high level of driver turnover; the level of accidents involving Cousins Transport's trucks, representing some 38% of all accidents reported over the contract period. As mentioned also, there is the inevitable need to take into account high levels of driver absence.
- 82 Additionally, BFS submitted that on Mr Cousins' own evidence, he testified he could have completed three to six dry store deliveries compared to some two to three cold store deliveries, per day. BFS therefore maintained that had Cousins Transport's two vehicles performed exclusively dry store work and assuming an average of 4.5 deliveries per day and the opportunity of a further two deliveries on a Saturday, a reasonable assessment on the evidence, leads to a total potential of 24.5 deliveries per week. Based on the averages set out in Ms Lester's affidavit that leads to an average income of \$5,597.27 per week, which is almost about \$1,000 more than that claimed on Cousins Transport's own case. BFS contended that this is significant, as there was no evidence that Cousins Transport was prevented from doing such work as an alternative to the work that it actually performed.
- 83 In an overall sense, BFS was critical of the nature of the evidence led as to net losses, and submitted that it would be expected that there would be tendered in evidence, Cousins Transport's profit and loss statements for the periods in question. This could be accompanied by an analysis either from Mr Cousins or his accountant, as to how the net profit was derived, over the relevant period.
- 84 There are difficulties confronting the Tribunal in making findings in respect of loss and assessing damages in this case. A considerable body of the evidence conflicts. Some of it has been accepted as being inaccurate, in particular, some of the BFS schedules produced by Mr Denis Price. Other evidence, such as the driver absences records are recorded differently by both Cousins Transport and BFS. I note however, that Ms Lester's affidavit, at least in terms of revenue, uses and relies upon Cousins Transport revenue figures, which are on average, lower than those contained in the BFS material. To that extent at least, such an assessment could be regarded as in BFS's favour. It is also to be accepted, as BFS submitted, that the revenue and operating expense estimates, relied upon by Cousins Transport, relate to the work actually performed by Cousins Transport, not work that it says it should have been allocated, if BFS had performed the contract according to its terms. Inevitably however, in cases such as this, that to an extent will be the case. That is, in this matter, the claim is based upon an expectation interest as to what Cousins Transport should have earned, had the contract not been breached by BFS.
- 85 As mentioned earlier in these reasons, the authorities make it plain, that the Tribunal should undertake an assessment of damages, based upon the state of the evidence, as best it can be achieved. If there is a foundation on the evidence, for findings of loss to be made, and an assessment of damages, then the Tribunal must do its best to arrive at a result consistent with equity, good conscience and the substantial merits of the case, in accordance with s 43(1)(b) of the OD Act, regardless of the fact that it may be difficult. That does not require the Tribunal making assessments with mathematical or scientific precision, but rather, informed estimates, doing the best it can on the material before it.
- 86 In the case of damages assessable based on contingencies, such as a chance of a plaintiff acquiring a particular benefit or achieving a particular result, consequent on a defendant's breach, there must be a substantial chance of the result being achieved: *Davies v Taylor* [1974] AC 207 at 212. In loss of profit cases, often concerning sale of goods or property, whilst the determination of loss of profits may depend on speculative factors, an attempt will be made by a court to assess losses (see generally Harris DR, 'Damages' in Guest AG et al (eds) *Chitty on Contracts – General Principles* (27th ed, 1994) pars 26-0003, 26-030 to 26-031).
- 87 I accept the broad calculation methodology used in the Lester affidavit, as a sensible approach in this matter. A starting point, all other things being equal, of Cousins Transport performing twelve cold store and five dry store runs per week, is generally consistent with the evidence. I note that Mr Denis Price calculated, based on BFS data, an average of 2.2 cold store deliveries per week, would be an average. Also having regard to exhibit A1 tab 1, and Cousins Transport's evidence of actual performance, and the evidence of Mr Wells as the IGA cold store manager, and Mr Husband, twelve cold store runs per week is reasonable for assessment purposes. Similarly, five dry store runs per week is also reasonable, based on the contractual provisions and the level of average performance, accepted on the evidence.
- 88 As I have already mentioned, the calculations in table B of the Lester affidavit, as to actual income figures, represent, by relying on Cousins Transport's income figures, are in some months, to the benefit of BFS. The difference, expressed as a total at the bottom of table B, for BFS and Cousins Transport respectively, is \$44,985.26. If one were, for the purposes of reconciling this differential, to take an average of the two loss figures, this leads to the amount of \$104,944.82. Either way, Cousins Transport's reliance solely on its own figures, is advantageous to BFS, in reducing the estimated losses claimed.
- 89 Whilst it was not expressed as such by BFS, the contentions set out at pars 21-24 of its written submissions, in essence, raise the issue of mitigation of loss. That is, steps that Cousins Transport could have taken, but did not take, to offset or at least reduce its losses, flowing from the breach of contract by BFS. Those steps, according to BFS, involve the performance of additional dry store work, either by assigning one truck to it, or by Cousins Transport performing this work exclusively.
- 90 There are three generally accepted rules in relation to mitigation of loss. The first one is that a plaintiff, as a consequence of a defendant's breach, should take reasonable steps to avoid its losses. If it fails to do so, then it cannot recover damages for that

loss which could have been reasonably avoided. Second, if those reasonable steps are taken, and if in fact they are more than reasonable steps, damages for those avoided losses cannot be recovered. Finally, expenditure incurred in taking reasonable steps to avoid losses, may be recovered by a plaintiff (see *Chitty* par 26-050). The cases often refer to a “duty” to mitigate. However, this is somewhat of a misnomer and it is, rather, a restriction on damages recoverable, and thus it is in a plaintiff’s favour to take reasonable steps to avoid loss. The onus of establishing a failure to mitigate is on a defendant.

- 91 In this case, Cousins Transport’s reasons for not wanting to do other than predominantly cold store work were in effect three fold. First, Mr Cousins said he had always done this sort of work and it was work that he preferred to do. Second, as a sportsman, Mr Cousins’ preference was to finish work earlier each day. Third, cold store work was preferred because it was said to be more profitable. I am not persuaded that it would have been unreasonable, in terms of mitigation of loss, at least from June 2010 when the contract breach became apparent, for Cousins Transport to have endeavoured to have performed some additional dry store work, to offset the reduction in cold store revenue. Whilst, it may be difficult for me to assess the impact of what the effect of this failure may have been, given the speculative nature of the submissions of BFS on the point, nonetheless, I need to take this into account.
- 92 I also need to consider, as BFS observed, the undisputed evidence of a high level of driver turnover of Cousins Transport drivers, and the lead time taken to train up a new driver on the cold store and dry store runs. Whether Cousins Transport was performing predominantly cold store or dry store work, as a matter of logic and common sense, excessive driver turnover, relative to others, might ordinarily impact on overall performance. On the evidence, Cousins Transport had some eight or so drivers over the period of the claim. I am satisfied on the evidence that it takes up to six weeks for a driver to “get up to speed” with the runs to be done, whether it be on the cold store or dry store side of the business. However, the impact of this, if any, is to be assessed by reference to the overall performance figures, tendered by BFS (doc 50 exhibit R1), that I turn to now.
- 93 Whilst as I have already mentioned, BFS placed considerable weight on relative performance figures for Cousins Transport drivers and other BFS drivers set out in doc 50, I am not persuaded by this contention, as having a material impact on performance. In the main, the Cousins Transport drivers, based on an income per hour measure, were somewhere in the middle, in terms of overall performance. For the “All Areas” of performance, vehicle FP 8 was in the top third. It was not the case that Cousins Transport drivers were glaringly the worst performers financially, so as to cause the Tribunal to discount any assessment of damages, on this basis. Logically too, if relative driver turnover rates had such a significant impact on overall performance, one would expect to see it reflected in doc 50 also.
- 94 Having regard to all of these matters, I accept the estimated loss figure of \$87,000 in round terms, as claimed by Cousins Transport. However, I propose to discount damages to be awarded by 20%. This recognises Cousins Transport’s failure to mitigate its loss by taking on some additional dry store work which, in my view, would have been a reasonable course in all of the circumstances. Furthermore, I also take into account that Cousins Transport’s truck operating costs would, logically, as an estimate, be higher than those set out in exhibit A4, if actually performing the work claimed.
- 95 As to the issue of driver absences raised by BFS, there was a conflict on the evidence between Cousins Transport’s figures and those of BFS. As mentioned BFS regarded not working on a Saturday or a public holiday as an absence, even though there was no obligation on a driver to perform work on these days. Cousins Transport did perform some work on Saturdays. Without being amenable to precise calculation, I take into account the fact that Cousins Transport’s absences may have been somewhat higher than recorded in its records and I include some consideration of this in the discounting of damages also.

Conclusions

- 96 Therefore there will be an order for BFS to pay Cousins Transport the sum of \$69,600 by way of damages.

2015 WAIRC 00228

DISPUTE RE ALLEGED BREACH OF CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

SUPAWORLD PTY LTD (TRADING AS COUSINS TRANSPORT)

APPLICANT

-v-

LN PRICE PARTNERS PTY LTD (ACN 053 962 299) (TRADING AS BUSSELTON FREIGHT)

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

WEDNESDAY, 11 MARCH 2015

FILE NO/S

RFT 2 OF 2014

CITATION NO.

2015 WAIRC 00228

Result	Application upheld in part
Representation	
Applicant	Mr T M Retallack of counsel
Respondent	Mr D Beere of counsel

Order

HAVING heard Mr T M Retallack of counsel on behalf of the applicant and Mr D Beere of counsel on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the respondent pay to the applicant the sum of \$69,600 by way of damages within 21 days.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00288

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,
WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

TWENTIETH SUPERPACE NOMINEES PTY LTD ATF BYRNS SMITH UNIT TRUST T/A SCT
LOGISTICS

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 8 APRIL 2014
FILE NO/S	RFT 6 OF 2014
CITATION NO.	2014 WAIRC 00288

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Not applicable

Order

WHEREAS on 7 April 2014 the applicant filed a notice of referral to the Road Freight Transport Industry Tribunal;

AND WHEREAS on 7 April 2014 the applicant applied to the Tribunal for an order abridging the time for the filing of a notice of answer and counter proposal in respect of the herein application pursuant to Regulation 99D(4) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Tribunal has considered the application for an abridgement of time for filing a notice of answer and counter proposal ex parte in Chambers;

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007, hereby orders –

THAT the respondent do file a notice of answer and counter proposal in answer to the herein application by no later than 18 April 2014.

(Sgd.) S J KENNER,
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
Keynet Holdings Pty Ltd t/as TL&N Transport	Santina Carranna-Paratore T/as Westend Transport and Logistics	Kenner C	RFT 3/2015	N/A	Dispute re outstanding payments	Discontinued
Peter Kruta	Toll Transport Pty Ltd trading as Toll Express	Kenner C	RFT 30/2014	N/A	Dispute re alleged breach of contract	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Logiwest Pty Ltd T/as Logiwest Express Transport and Logistics	Beech CC	RFT 34/2014	N/A	Referral of dispute	Discontinued
Transport Workers' Union of Australia, Western Australian Branch	Twentieth Superpace Nominees Pty Ltd ATF Byrns Smith Unit Trust T/A SCT Logistics	Kenner C	RFT 6/2014	30/04/2014	Referral of dispute	Discontinued

