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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

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

2015 WAIRC 00796

DELETION OF RESPONDENT TO BAG, SACK AND TEXTILE AWARD NO. 3 OF 1960

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ON THE COMMISSION'S OWN MOTION

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

TUESDAY, 11 AUGUST 2015

FILE NO/S

APPL 959 OF 2005

CITATION NO.

2015 WAIRC 00796

Result

Application on the Commission's own motion discontinued

Representation

No appearances

Order

I, the undersigned, pursuant to the powers conferred on me by s 27(1)(a)(iv) of the Act, do hereby order –

THAT this application be discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00800

DRIED VINE FRUITS INDUSTRY AWARD, 1951 - THE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL
UNION OF WORKERS

APPLICANT

-v-

SWAN SETTLERS LTD

RESPONDENT

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

THURSDAY, 13 AUGUST 2015

FILE NO/S

APPL 82 OF 2003

CITATION NO.

2015 WAIRC 00800

Result Application discontinued

Order

WHEREAS this is an application filed on 23 January 2003 for variations to the *Dried Vine Fruits Industry Award, 1951*;

AND WHEREAS by letter dated 23 June 2015, the Commission noted that the matter had not been brought on for hearing, and advised that the Chief Commissioner intended to discontinue the application pursuant to s 27(1) of the *Industrial Relations Act 1979* on the basis that further proceedings are not necessary or desirable in the public interest due to the length of time which has passed since the applications were filed;

AND WHEREAS by email dated 12 August 2015, the applicant informed the Commission that it did not object to the matter being discontinued.

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

THAT the application be, and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00799

FARM EMPLOYEES' AWARD, 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL
UNION OF WORKERS

APPLICANT

-v-

DAVID BLAIR, GARTH BUTCHER, NOEL FALLOW

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE THURSDAY, 13 AUGUST 2015

FILE NO/S APPL 21 OF 2003

CITATION NO. 2015 WAIRC 00799

Result Application discontinued

Order

WHEREAS this is an application filed on 7 January 2003 for variations to the *Farm Employees' Award, 1985*;

AND WHEREAS by letter dated 23 June 2015, the Commission noted that the matter had not been brought on for hearing, and advised that the Chief Commissioner intended to discontinue the application pursuant to s 27(1) of the *Industrial Relations Act 1979* on the basis that further proceedings are not necessary or desirable in the public interest due to the length of time which has passed since the applications were filed;

AND WHEREAS by email dated 12 August 2015, the applicant informed the Commission that it did not object to the matter being discontinued.

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

THAT the application be, and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00801

TIMBER WORKERS AWARD NO. 36 OF 1950

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESTHE FOREST PRODUCTS, FURNISHING AND ALLIED INDUSTRIES INDUSTRIAL UNION
OF WORKERS, WA**APPLICANT**

-v-

A.G & A.M. BROOKS, MONIER ROOFING LTD, PICKERING BROOK SAWMILLS

RESPONDENT**CORAM** CHIEF COMMISSIONER A R BEECH**DATE** THURSDAY, 13 AUGUST 2015**FILE NO/S** APPL 126 OF 2008**CITATION NO.** 2015 WAIRC 00801**Result** Application discontinued*Order*WHEREAS this is an application filed on 6 November 2008 for variations to the *Timber Industry Award No. 36 of 1950*;AND WHEREAS by letter dated 23 June 2015, the Commission noted that the matter had not been brought on for hearing, and advised that the Chief Commissioner intended to discontinue the application pursuant to s 27(1) of the *Industrial Relations Act 1979* on the basis that further proceedings are not necessary or desirable in the public interest due to the length of time which has passed since the applications were filed;

AND WHEREAS by email dated 12 August 2015, the applicant informed the Commission that it did not object to the matter being discontinued.

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

THAT the application be, and is hereby discontinued.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

2015 WAIRC 00804

TIMBER WORKERS AWARD NO. 36 OF 1950

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESTHE FOREST PRODUCTS, FURNISHING AND ALLIED INDUSTRIES INDUSTRIAL UNION
OF WORKERS, WA**APPLICANT**

-v-

A.G. & A.M. BROOKES, ADELAIDE TIMBER COMPANY PTY LTD, AUSWEST TIMBERS

RESPONDENT**CORAM** CHIEF COMMISSIONER A R BEECH**DATE** FRIDAY, 14 AUGUST 2015**FILE NO/S** APPL 132 OF 2008**CITATION NO.** 2015 WAIRC 00804**Result** Application discontinued*Order*WHEREAS this is an application filed on 9 December 2008 for variations to the *Timber Workers Award No. 36 of 1950*;AND WHEREAS by letter dated 23 June 2015, the Commission noted that the matter had not been brought on for hearing, and advised that the Chief Commissioner intended to discontinue the application pursuant to s 27(1) of the *Industrial Relations Act*

1979 on the basis that further proceedings are not necessary or desirable in the public interest due to the length of time which has passed since the applications were filed;

AND WHEREAS by email dated 12 August 2015, the applicant informed the Commission that it did not object to the matter being discontinued.

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

THAT the application be, and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00529

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2015 WAIRC 00529
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 17 JUNE 2015 AND THURSDAY, 2 JULY 2015
DELIVERED : THURSDAY, 23 JULY 2015
FILE NO. : M 147 OF 2014
BETWEEN : GUNJAN RAJESHKUMAR SHAH

CLAIMANT

AND

GOGO'S FOOD SERVICE PTY LTD

RESPONDENT

Catchwords : Alleged breach of the Restaurant Industry Award 2010 (MA000119) by failing to pay wages and annual leave entitlements

Legislation : *Fair Work Act 2009*

Instruments : Restaurant Industry Award 2010 (MA000119)

Result : Claim proven in part

Representation:

Claimant : Mr P. Mullally of Workclaims Australia as agent for the Claimant

Respondent : Mr G. Govardhan (Director) for the Respondent

REASONS FOR DECISION

Overview

The Respondent

- 1 Gogo's Food Service Pty Ltd (the Respondent) operates within the restaurant industry, supplying food to associated businesses through Gogo's Bulk Kitchen and in running its own restaurants. The Respondent's primary restaurant is known as Gogo's Madras Curry House, situated in Beaufort Street, Mount Lawley.
- 2 The Respondent has interests in other similar businesses under the banner "Gogo's". At the material time, it had an interest in Gogo's Masala Craft at Booragoon and Gogo's Masala Zone at Willetton. I have not been able to ascertain the quantum of the Respondent's interest in Gogo's Masala Craft. It is clear however that it had a fifty per cent stake in Gogo's Masala Zone. The other fifty per cent is held by Dreamz Infinite Pty Ltd (Dreamz).
- 3 Gogo's Masala Zone opened its trading to the public in late 2013. Its operation entailed selling Indian food products and running a café/restaurant. Its food provisions were sourced from Gogo's Bulk Kitchen.
- 4 The operation of Gogo's Masala Zone was primarily conducted by the directors of Dreamz. One of them, namely Mr Mithun Chaitanya Gandu (Mr Gandu), ran the business day-to-day. His involvement in the business was in a full-time capacity. The other Director, Mr Saket Podisetty (Mr Podisetty) managed the financial and regulatory affairs of the business, including its employment obligations. Mr Podisetty's involvement in the business was in a part-time capacity. The Respondent's Director Mr Govindha Rajalu Govardhan (Mr Govardhan), did not have any significant hands on involvement in running the business. He simply monitored its progress and gave advice when required.

The Employment Relationship

- 5 The Respondent employed Mr Gunjan Rajeshkumar Shah (the Claimant) to work as a cook at Gogo's Masala Zone. It is not in issue that the Claimant possessed the necessary qualifications to do that work.
- 6 On 28 June 2013 the Claimant applied for a *Temporary Work (Skilled) (subclass 457) Visa* (457 Visa) to work as a qualified cook under the sponsorship of the Respondent. The reason why the Respondent sponsored the Claimant was because Dreamz was unable to meet the necessary criteria for sponsorship. The Respondent guaranteed the Claimant a salary of \$53,900.00 per annum.
- 7 The Claimant asserts that he commenced his employment with the Respondent on 17 October 2013, when his 457 Visa was granted. The Respondent denies that and says that the Claimant commenced working for Gogo's Masala Zone on or about 1 December 2013 when it first started trading.
- 8 It is common ground that the Claimant then worked continuously for Gogo's Masala Zone from his commencement date until he resigned on 6 September 2014. Further, it is not in dispute that the *Restaurant Industry Award 2010* (MA000119) (the Award) applied to the Claimant in his employment.
- 9 The history of the relationship between the parties stems back to 2011 when the Claimant and Mr Govardhan first met in Melbourne. The Claimant asserts that in 2012, Mr Govardhan persuaded him to leave Melbourne and come to Perth with the promise of employment on a 457 Visa. When in Perth in 2012, he worked for the Respondent's businesses over several months but returned to Melbourne because Mr Govardhan failed to "make good" on his promise to employ him on a 457 Visa.
- 10 A few months later, the parties re-established contact. There is a dispute as to who initiated that contact but nothing turns on that. It suffices to say that as a result of that contact, the parties agreed that the Claimant would be employed by the Respondent to work at Gogo's Masala Zone in Willetton. To facilitate that, the Respondent sponsored the Claimant in making his 457 Visa application.
- 11 The Claimant says that, pending the granting of his 457 Visa, he worked for the Respondent at Gogo's Masala Craft in Booragoon. The Respondent denies employing the Claimant at that time and says that the Claimant was independently employed by Gogo's Masala Craft.
- 12 Upon the granting of his 457 Visa, the Claimant commenced working at Gogo's Masala Zone. His work hours were from 10:00am to 9:00pm each day except Tuesdays. He was paid an annualised salary of \$53,900.00 which converted to a weekly wage of \$1,036.53. His wages were payable fortnightly. The Claimant was therefore entitled to \$2,073.06 (gross) for a fortnight's work. This payment, as permitted by the Award, was inclusive of overtime, penalties, allowances and leave loading.
- 13 During the course of the Claimant's employment the Respondent did not pay the Claimant his wages as they fell due. The Claimant contends that he is owed \$33,385.44 in unpaid wages. He says he is also owed \$3,681.65 in unpaid annual leave entitlements.

Termination of Employment

- 14 It was the non-payment of wages that led the Claimant to resign from his employment. In his letter of resignation (Exhibit 3), dated 6 September 2014, the Claimant said:

"...Over the past year I have aired my grievances to no avail. I was employed on a 457 visa from the 17th of October 2013 and was not paid for the first two months as per my salary package. Thereafter, paid employment commenced, which was not frequent (sic). However, I have received no superannuation, no annual leave and no sick leave allowance; even when I was deemed to be medically unfit throughout my employment. Since the 15th of May 2014 my pay has been withheld leaving myself and my dependent in financial, mental, physical strife and unable to sustain ourselves and therefor (sic), I am resigning and will be taking the matter to the Fairwork Ombudsman."
- 15 The Respondent (and Dreamz) did not respond to the Claimant's allegations concerning the non-payment of wages and his commencement date.
- 16 Subsequent to his employment ending, the Claimant made an application to the Fair Work Commission, seeking compensation for unfair dismissal. That matter was settled by the parties entering into a Deed of Settlement. It unnecessary to set out the terms of settlement, save to say that the Claimant's ability to pursue his entitlements under the Award was preserved.

The Claim and Response

- 17 The Claimant contends that between 17 October 2013 and 6 September 2014 he should have been paid the gross sum of \$49,970.00, but was only paid the gross sum of \$16,584.56. He identifies the payments made to him as follows:

Date	Amount (Gross)	Amount (Net)
06/01/2014	\$ 2,073.07	\$ 1,693.07
21/01/2014	\$ 2,073.07	\$ 1,693.07
29/01/2014	\$ 2,073.07	\$ 1,693.07
12/02/2014	\$ 2,073.07	\$ 1,693.07
11/03/2014	\$ 2,073.07	\$ 1,693.07
24/04/2014	\$ 2,073.07	\$ 1,693.07
12/05/2014	\$ 2,073.07	\$ 1,693.07
10/10/2014	\$ 2,073.07	\$ 1,693.07
Total Amounts	\$16,584.56	\$13,544.56

18 The Respondent concedes that it has not paid the Claimant all of his wages and annual leave entitlements. It says that it has paid most of what was due to the Claimant and that the payments were made to him either by direct deposit or by cash payments.

19 Mr Podisetty, who was responsible for Gogo's Masala Zone's payroll accounts, made a statement dated 2 July 2015 subsequently adopted in his evidence in which he said that Gogo's Masala Zone had paid the Claimant wages totalling \$33,169.12. He said at least four fortnightly payments referred were made in cash. It suffices to say that the Claimant denies that his employer paid him in cash.

20 I reproduce the table set out in paragraph 20 of Mr Podisetty's statement showing the alleged payments :

S.No	Pay Period	Gross Pay	Tax Withheld	Net Pay
1	02/12/2013 to 15/12/2013	\$2,073.07	\$380.00	\$1,693.07
2	16/12/2013 to 29/12/2013	\$2,073.07	\$380.00	\$1,693.07
3	30/12/2013 to 12/01/2014	\$2,073.07	\$380.00	\$1,693.07
4	13/01/2014 to 26/01/2014	\$2,073.07	\$380.00	\$1,693.07
5	27/01/2014 to 09/02/2014	\$2,073.07	\$380.00	\$1,693.07
6	10/02/2014 to 23/02/2014	\$2,073.07	\$380.00	\$1,693.07
7	24/02/2014 to 09/03/2014	\$2,073.07	\$380.00	\$1,693.07
8	10/03/2014 to 23/03/2014	\$2,073.07	\$380.00	\$1,693.07
9	24/03/2014 to 06/04/2014	\$2,073.07	\$380.00	\$1,693.07
10	07/04/2014 to 20/04/2014	\$2,073.07	\$380.00	\$1,693.07
11	21/04/2014 to 04/05/2014	\$2,073.07	\$380.00	\$1,693.07
12	05/05/2014 to 18/05/2014	\$2,073.07	\$380.00	\$1,693.07
13	19/05/2014 to 01/06/2014	\$2,073.07	\$380.00	\$1,693.07
14	02/06/2014 to 15/06/2014	\$2,073.07	\$380.00	\$1,693.07
15	16/06/2014 to 29/06/2014	\$2,073.07	\$380.00	\$1,693.07
16	30/06/2014 to 06/07/2014	\$2,073.07	\$380.00	\$1,693.07

21 In so far as the claim for annual leave entitlements are concerned, the Respondent admits that the Claimant has not been paid. It says however that the Claimant has incorrectly calculated what is due to him on account of asserting a starting date of 17 October 2013 rather than 1 December 2013 which was his actual start date.

Issues

22 There are three main issues in dispute; they being:

1. the commencement date of the Claimant's employment; and
2. whether the Claimant received the payment of wages in cash, and other forms, which remain unaccounted; and
3. whether the Claimant received one or two payments subsequent to his resignation.

Determination

Admissions

23 During the course of giving evidence in this matter Mr Govardhan, on behalf of the Respondent, made certain admissions. They were that the Respondent:

1. employed the Claimant; and
2. had not paid all of the Claimant's wage entitlements; and
3. has not paid the Claimant his annual leave entitlements.

24 Save for 10 October 2014 there is no dispute that the Respondent has directly deposited, into the Claimant's bank account, those amounts asserted by the Claimant (see paragraph 17 above). The pivotal issue which remains is whether the Claimant has received other payments in addition to those acknowledged by the Claimant.

25 For the purpose of these proceedings Mr Podisetty, on behalf of the Respondent, created a wages summary table (see Exhibit 10), which is said to reflect the Claimant's entitlements and payments made to him by Gogo's Masala Zone. I replicate that table:

S.No	Pay Period	Gross Pay	Tax Withheld	Net Pay	Pay Date	Comments / PAY DATE
1	02/12/2013 to 15/12/2013	\$2,073.07	\$380.00	\$1,693.07	16/12/2013	6/1/14 PAID ON
2	16/12/2013 to 29/12/2013	\$2,073.07	\$380.00	\$1,693.07	30/12/2013	21/1/14 PAID ON
3	30/12/2013 to 12/01/2014	\$2,073.07	\$380.00	\$1,693.07	13/01/2014	Paid on 29.1.14
4	13/01/2014 to 26/01/2014	\$2,073.07	\$380.00	\$1,693.07	28/01/2014	Paid on 11.2.14
5	27/01/2014 to 09/02/2014	\$2,073.07	\$380.00	\$1,693.07	11/02/2014	Paid 25.2.2014

S.No	Pay Period	Gross Pay	Tax Withheld	Net Pay	Pay Date	Comments / PAY DATE	
6	10/02/2014 to 23/02/2014	\$2,073.07	\$380.00	\$1,693.07	25/02/2014	Paid 11.3.14	
7	24/02/2014 to 09/03/2014	\$2,073.07	\$380.00	\$1,693.07	11/03/2014	Paid 08.4.14 Mithun Paid	
8	10/03/2014 to 23/03/2014	\$2,073.07	\$380.00	\$1,693.07	25/03/2014	Paid 23.4.14	
9	24/03/2014 to 06/04/2014	\$2,073.07	\$380.00	\$1,693.07	8/04/2014	Paid 13.5.14	
10	07/04/2014 to 20/04/2014	\$2,073.07	\$380.00	\$1,693.07	23/04/2014	Paid	cash 28/5/14 and 30/5/14
11	21/04/2014 to 04/05/2014	\$2,073.07	\$380.00	\$1,693.07	6/05/2014	Paid	cash 23.6 and 27.6
12	05/05/2014 to 18/05/2014	\$2,073.07	\$380.00	\$1,693.07	20/05/2014	paid 1693	cash 16.7
13	19/05/2014 to 01/06/2014	\$2,073.07	\$380.00	\$1,693.07	3/06/2014	paid 1693	cash 7.8 and 14.8
14	02/06/2014 to 15/06/2014	\$2,073.07	\$380.00	\$1,693.07	17/06/2014	paid 1693 on 9.9.14	
15	16/06/2014 to 29/06/2014	\$2,073.07	\$380.00	\$1,693.07	1/07/2014		
16	30/06/2014 to 06/07/2014	\$2,073.07	\$380.00	\$1,693.07	8/07/2014		
17	07/07/2014 to 20/07/2014	\$2,073.07	\$380.00	\$1,693.07	22/07/2014		
18	21/07/2014 to 03/08/2014	\$2,073.07	\$380.00	\$1,693.07			
19	04/08/2014 to 17/08/2014	\$2,073.07	\$380.00	\$1,693.07			
20	18/08/2014 to 31/08/2014	\$2,073.07	\$380.00	\$1,693.07			

- 26 The Respondent concedes in its own table (Exhibit 10) that not all wages payments due have been paid. However, it contends that other payments made by Gogo's Masala Zone remain unaccounted. The following unaccounted payments can be distilled from Exhibit 10.

Date	Pay Period Ending	Net Payment	Method of Payment
25/02/2014	11/02/2014	\$1,693.07	Not indicated
08/04/2014	11/03/2014	\$1,693.07	Not indicated
28/05/2014	23/04/2014	\$1,000.00	Cash
30/05/2014	23/04/2014	\$ 695.00	Cash
23/06/2014	06/05/2014	\$1,500.00	Cash
27/06/2014	06/05/2014	\$ 193.00	Cash
16/07/2014	20/05/2014	\$1,693.00	Cash
07/08/2014	03/06/2014	\$1,200.00	Cash
14/08/2014	03/06/2014	\$ 493.00	Cash

Onus of Proof

- 27 Given that the Respondent asserts payments in excess of those asserted by the Claimant, the onus rests with the Respondent to prove, on the balance of probabilities, that it made those extra payments.

Cash Payments

- 28 The Respondent's contention that the Claimant was paid in cash is supported by the evidence of Mr Podisetty and Mr Gandu. Mr Gandu said that he made each of the cash payments and Mr Podisetty said that he witnessed the making of at least some of those payments; however he could not be specific as to the dates.
- 29 Both Mr Podisetty and Mr Gandu testified that they came to an arrangement with the Claimant that he would be paid in cash as and when funds became available. Cash flow difficulties experienced by the business prevented the timely and full payment of wages. They maintain that, with respect to four pay periods, they paid the Claimant his net entitlement in cash, albeit late. Each of them testified that they recorded those payments in the work diary (Exhibit 6) which Gogo's Masala Zone had provided the Claimant. Despite having made that record, they did not ask the Claimant to sign the entry to acknowledge receipt of the money paid in cash. The Claimant has not adopted any of those entries.
- 30 I observe that the diary entries about the alleged cash payments are no more than self-serving notations. As such they carry little weight. It would have been quite easy for Mr Gandu and Mr Podisetty to have had the Claimant acknowledge receipt of such payments. They said that they failed to do that because they trusted the Claimant. Why they would have trusted the Claimant in the circumstances is unclear. It seems that at the time the parties were in conflict about the standard of the Claimant's work and the lateness of the payment of his wages. In the circumstances, given that those issues existed, it is

unlikely that Mr Gandu and Mr Podisetty on the one hand and the Claimant on the other would have retained absolute trust in one another.

- 31 At the time the cash payments were allegedly made, Gogo's Masala Zone was failing. Cash flow difficulties existed and customer complaints about the quality of food produced by the café were significant. The business' operation was in a mess. The Claimant was not paid his wages. On occasions when he was paid, tax was not deducted and remitted to the Australian Taxation Office. The Claimant was generally not provided his payslips. On the one occasion that the Claimant was given a payslip, following a demand made by him, it was wrong (see Exhibit 4). The payslip contains obvious errors on its face. It is said to be a payslip for the period 30 June 2014 to 6 July 2014 which is for one week. However, the number of hours worked and the amount payable reflects a fortnightly payment. Further, the "year to date" details at the bottom of the payslip, is clearly wrong. There are also problems with other employment documents relating to the Claimant which were produced by the Respondent. One such document is the 2014 PAYG Summary (Exhibit 5). The figures therein are inconsistent with the wages summary table (Exhibit 10).
- 32 It appears that the Respondent's record keeping in respect to the Claimant was not only lacking, but also inaccurate. Indeed, some of the documents produced were false and misleading. In the circumstances, no confidence can be placed on the Respondent's employment records. That being the case, the significance of the diary entries concerning the cash payments is completely undermined.
- 33 The Respondent bears the onus of satisfying this Court that, on the balance of probabilities, the cash payments were in fact made. The evidence of Mr Gandu and Mr Podisetty cannot be accepted to prove the cash payments. Their evidence is uncorroborated by documentary evidence and constitutes no more than bare assertions without specificity to time, place and circumstance of each alleged payment.
- 34 The Claimant on the other hand, gave his evidence in a credible fashion. Given that he vehemently denies receiving the cash payments, I am not prepared to find, based on the otherwise uncorroborated evidence of Mr Gandu and Mr Podisetty, that cash payments were made. The Respondent has failed to discharge its evidentiary onus of establishing the making of the cash payments alleged.

Other Payments

- 35 Dealing with payments allegedly made on 25 February 2014 and 8 April 2014, all that needs to be said is that there is no direct evidence, either oral or documentary, which establishes the making of those payments to the Claimant.

Payments Subsequent to Termination

- 36 The Claimant initially asserted that he had received a fortnightly instalment of wages on 10 October 2014. However, he now contends that he did not receive that payment at that time but rather that he received it on 10 September 2014. Mr Podisetty has produced documentary evidence in the form of a bank statement showing a payment on 10 September 2014. The Claimant maintains that he has only received one payment after termination.
- 37 The Respondent says however, that it has made two payments to the Claimant following the cessation of his employment. The first being on 10 September 2014 and the second on 10 October 2014. The second payment was as a consequence of the resolution of the unfair dismissal proceedings. At paragraph 5 of his Statement dated 2 July 2015, Mr Podisetty explained that last payment represented two weeks' annual leave entitlements, as had been agreed.
- 38 Given that the Claimant originally asserted payment on 10 October 2014, and given that it has not been demonstrated that such assertion was in error, I find it more probable than not, that there were in fact two payments made as Mr Podisetty asserts. I find that the first was made on 10 September 2014 and the second was made in October 2014 when the unfair dismissal claim was settled.

Commencement Date

- 39 Mr Govardhan, Mr Podisetty and Mr Gandu have all testified that the Claimant commenced employment with the Respondent at Gogo's Masala Zone on or about 1 December 2013, roughly coinciding with the time that Gogo's Masala Zone started operating. Apart from their direct testimony about that, there is evidence in the form of the PAYG Summary (Exhibit 5) which indicates a commencement date of 1 December 2013.
- 40 The Claimant says that when his 457 Visa was granted, he was working at Gogo's Masala Craft in Booragoon. Upon being informed (on 17 October 2013) that his 457 Visa had been granted, he was instructed to immediately transfer to Gogo's Masala Zone in Willetton, which he did.
- 41 The Claimant has produced copies of purchase orders that he photographed using his mobile telephone in order to establish his presence at Gogo's Masala Craft Booragoon, on or about 17 October 2013 and at Gogo's Masala Zone Willetton thereafter.
- 42 He explained the circumstances of how he came to take photographs of Gogo's Masala Zone purchase orders in November 2013. He said that at the time Gogo's Masala Zone was experiencing difficulties with its Wi-Fi and facsimile communications. Consequently it was impossible to transmit food orders to Gogo's Bulk Kitchen using those facilities. To get around the problem, he took photographs of the purchase orders and sent them to Gogo's Bulk Kitchen. In that way, Gogo's Masala Zone's food requirements were procured. I accept the Claimant's evidence of how he came to be in possession of the photographs. Further there is no reason to suspect the genuineness of the photographs.
- 43 The photographs (Exhibits 8 and 12) are very important because they place the Claimant at Gogo's Masala Zone in November 2013, which corroborates his evidence about having started there from 17 October 2013. Perhaps more importantly, the photographs show regular procurement of food supplies during November 2013. It is unlikely that there would have been ongoing regular procurement of food if the business was not operational at that time. The photographs place the Claimant at the workplace and his explanation for taking the photographs is consistent with him working at that place at that time. The

photographs not only undermine the testimony of Mr Govardhan, Mr Podisetty and Mr Gandu but also draw into question the veracity of the PAYG Summary (Exhibit 5).

- 44 In the end result I accept the Claimant's evidence concerning his commencement date and find that the Claimant started working for the Respondent on 17 October 2013.

Conclusion

Liability of Gogo's Food Services Pty Ltd

- 45 Despite admitting that the Respondent employed the Claimant, Mr Govardhan suggests that Gogo's Food Services Pty Ltd should not be found liable because Gogo's Masala Zone was run by the directors of Dreamz. It is submitted that the Respondent had little to nothing to do with any shortcomings of Gogo's Masala Zone.
- 46 The Respondent and Dreamz are jointly and severally liable for any liabilities incurred by Gogo's Masala Zone. The Respondent cannot now somehow extricate itself from the liabilities incurred by Gogo's Masala Zone. That is particularly so in this matter, in which the Respondent admits employing the Claimant. It cannot be the Claimant's employer in name only without responsibility. It was incumbent upon the Respondent to ensure that it met all of its legal obligations with respect to the Claimant as its employee. The Respondent is clearly liable for any failure in that regard.

Outcome

- 47 In his Further and Better Particulars of Claim lodged 19 January 2015 and his Statement (see Exhibit 1), the Claimant has set out, in Table A, the wages earned and payable during the period of his employment from 17 October 2013 up to and including 6 September 2014. The table is reproduced below:

(A) Wages owed for total period 17/10/2013- 06/09/2014

Transaction Number	Date	Amount
1	17/10/2013	\$1,451.15 <i>Started on a Thursday therefore subtract 3 days (\$621.92) from usual fortnightly payment</i>
2.	28/10/2013	\$2,073.07
3.	11/11/2013	\$2,073.07
4.	25/11/2013	\$2,073.07
5.	09/12/2013	\$2,073.07
6.	23/12/2013	\$2,073.07
7.	06/01/2014	\$2,073.07
8.	20/01/2014	\$2,073.07
9.	03/02/2014	\$2,073.07
10.	17/02/2014	\$2,073.07
11.	03/03/2014	\$2,073.07
12.	17/03/2014	\$2,073.07
13.	31/03/2014	\$2,073.07
14.	14/04/2014	\$2,073.07
15.	28/04/2014	\$2,073.07
16.	12/05/2014	\$2,073.07
17.	26/05/2014	\$2,073.07
18.	09/06/2014	\$2,073.07
19.	23/06/2014	\$2,073.07
20.	07/07/2014	\$2,073.07
21.	21/07/2014	\$2,073.07
22.	04/08/2014	\$2,073.07
23.	18/08/2014	\$2,073.07
24.	01/09/2014	\$2,073.07
25.		\$829.23 Resigned on the 6 th of September 2014 therefore add 4 working days extra pay from the previous payment
Total		\$49,970.00

- 48 The table appears to contain errors. The first pay period has been double-counted because the Claimant started work on 17 October 2013 and therefore no payment was due to him on that day. The first payment due to him was in fact for the period ending 28 October 2013, and that was for a lesser amount than \$2,073.07, because the whole fortnight was not worked.
- 49 The Claimant suggests in the table that \$621.92 ought to be deducted for three days not worked in the first pay period. I observe however, that the daily rate used is incorrect as it is based on a ten day working fortnight, whereas the Claimant worked a 12 day fortnight. Accordingly, his daily rate was \$172.76 and not \$207.30 as suggested.
- 50 Further, a deduction of three days' pay is inappropriate because during that first fortnightly period he only missed one day's work. The Claimant has made deductions for the Tuesdays not worked in that first fortnight but I observe that he was not required to work on those days.

- 51 It follows that for the first pay period, the Claimant should have been paid \$1,900.31 (\$2,073.07 - \$172.76) and not \$1,451.15 as claimed.
- 52 The error of using the wrong daily rate is repeated for the last pay period. The amount payable for that period was \$691.04 (\$172.76 x 4) and not \$829.23.
- 53 I find that the Claimant should have been paid as follows:

Pay Period	Amount Payable
First pay period to 28/10/2013	\$ 1,900.31
Pay period ending 11/11/2013 to 01/09/2014	\$45,607.54
Last pay period (4 x \$172.76)	\$ 691.04
Total Payable	\$48,198.89

- 54 The Claimant asserts that he was paid \$16,584.56 (8 x \$2,073.07). However for reasons previously stated I find that he was, on 10 September 2014, also paid a gross fortnightly entitlement of \$2,073.07 (\$1,693.07 net). Given that amount had not previously been accounted for, I find that amount actually received by the Claimant from the Respondent in satisfaction of his Award entitlements, is \$18,657.63.
- 55 The amount owed to the Claimant is the difference between the wages payable and those received, being \$29,541.26.
- 56 In addition, the Claimant is entitled to receive payment for untaken accrued annual leave which was payable to him upon the termination of his employment but which was not paid. That amount, being \$3,067.08 is calculated as follows:

Employment period	324 days
Proportion of leave (324 ÷ 365 x 20 days)	17.753424
Daily rate (\$2,073.07 ÷ 12 days)	\$ 172.76
Total Payable (\$172.76 x 17.753424)	\$3,067.08

- 57 The Claimant is entitled to recover from the Respondent the total amount of \$32, 608.34.

G. CICCHINI
INDUSTRIAL MAGISTRATE

2015 WAIRC 00760

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2015 WAIRC 00760
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 15 JULY 2015
DELIVERED : THURSDAY, 30 JULY 2015
FILE NO. : M 26 OF 2015
BETWEEN : ALEXANDER JOSEPH WINTER

CLAIMANT

AND
 FOREST PRODUCTS COMMISSION

RESPONDENT

Catchwords : Alleged failure to make correct redundancy payment; Whether Claimant was, for three years of employment, a permanent employee despite being classified as a "casual" employee; Whether for the purposes of calculating his redundancy pay out the period that the Claimant was employed as a "casual" should be regarded as "service".

Legislation : *Industrial Relations Act 1979*
 Public Sector Management (Redeployment and Redundancy) Regulations 1994

Instruments : Wages Employees Long Service Leave General Order No 763 of 1982
 Government Officers, Salaries, Allowances and Conditions Award 1989

Case(s) referred to in Reasons : *Loves Bus and Taxi Service v Zucchiatti* (2006) 86 WAIG 3351
Metals and Engineering Workers Union, Western Australia v Centurion Industries Ltd (1996) 76 WAIG 1287

Result : Claim dismissed

Representation:

Claimant : Mr Alexander Joseph Winter appeared in person

Respondent : Mr Damian Matthews (of Counsel) instructed by the State Solicitor for Western Australia

REASONS FOR DECISION

Undisputed Facts

- 1 In early May 2007, when Mr Alexander Joseph Winter (the Claimant) was working for the Commonwealth Scientific and Industrial Research Organisation (CSIRO) he was approached by other scientists asking him to join them in conducting a Hydrological Salinity study throughout Western Australia. The Commonwealth government had allocated funds to the Forest Products Commission (the Respondent) to carry out that study.
- 2 After some consideration, the Claimant decided to leave the CSIRO and join the Respondent in order to work in the salinity study. The Claimant's appointment was relatively informal and he was not asked to participate in any selection process.
- 3 On 11 May 2007, the Claimant completed a *New Employee Details* form (Exhibit 1) which was supplied to the Respondent. That form contained the Claimant's personal, qualification, taxation, and banking details. The Respondent has subsequently used that information to generate the payment of wages to the Claimant.
- 4 The Claimant's appointment was as a casual Research Assistant (see Exhibit 6). Despite that, his work was full time and there was an expectation on his and the Respondent's part that his engagement would be ongoing. In most respects he was treated like a permanent employee except that he was paid a 20 percent casual loading. He generally worked very long hours, well in excess of 90 hours per fortnight. In some instances he worked many more hours than that.
- 5 The Claimant's employment conditions were, throughout his employment with the Respondent, governed by the *Government Officers Salaries, Allowances and Conditions Award 1989* (the Award) and the agreements made thereunder.
- 6 The Claimant was paid at the rate specified in the Award applicable to a Level 3.4 Technical Officer save that in one instance when he was paid at the Level 2 rate, and for a few months very early on when he was paid at the Level 3.1 rate.
- 7 In 2010, the Claimant asked the Respondent to change his employment status from casual to permanent. He argued inter alia, that the hours he worked and the ongoing nature of his engagement was more in keeping with that of a permanent employee than a casual. Consequently, on 25 November 2010, Mr David Hartley (the Respondent's Acting General Manager) wrote to the Claimant as follows:

"Dear Alex

RE EMPLOYMENT STATUS

I have reviewed your employment status as a casual employee and I would like to inform you that you will be converted to a permanent employee.

I was guided in my decision on advice provided from Mr Rumen Grigoroff, Manager Workforce Restructure, People and Development. He has informed me that there is common law precedence on casual employment particularly where that employment has been ongoing rather than employment for short periods which is the appropriate use of casual employment. Based on that precedence, it has been determined that your employment status should be permanent.

As a result of this decision, the following changes to your employment will occur:

- *The 20 percent casual loading will cease from 26 November 2010;*
- *You will accrue long service leave from the date of your initial engagement;*
- *Your classification level will (sic) Level 3 step 4; and*
- *You will accrue Personal Leave and Annual leave entitlements from 26 November 2010.*

Your status will be "officer attached" rather than placement in a position. The Selection and Recruitment Standard in the Public Sector Standards in Human Resource Management requires an officer to undergo merit selection prior to being placed in a position.

You will be registered as a redeployee and assigned Mr Mike Carter as a case manager. Mr Carter will contact you to assist you to identify appropriate position (sic) within the public sector. If you have any questions, please contact Mr Grigoroff by phone on 94758807 or by email at rumen.grigoroff@fpc.wa.gov.au.

Yours sincerely"

(Exhibit 5)

- 8 The Claimant thereafter worked for the Respondent as a permanent employee.
- 9 In about October 2014, the Respondent called for expressions of interest from those employees who might be willing to accept a voluntary severance package. The Claimant expressed his interest in taking up that offer and received an informal proposal.
- 10 The Claimant subsequently engaged in discussions with the Respondent concerning his proposed payout. It suffices to say that, during that process, the Claimant discovered that his casual employment with the Respondent prior to 26 November 2010 would not be treated as "service" for the purposes of calculating aspects of his severance pay.
- 11 The Claimant, as part of his redundancy package, was offered three weeks' pay for every completed year of service, to a maximum of 52 weeks. The Respondent maintained that the Claimant had worked only four completed years entitling him to 12 weeks' pay but the Claimant argued that he had worked in excess of seven years, entitling him to 21 weeks' pay.
- 12 During the discussions which occurred in October 2014, the Claimant was told that future redundancy offers were likely to be less generous. With that in mind, he felt that it was in his best interests to conditionally accept the offer. He was anxious to preserve what he believed to be his entitlement to an additional nine weeks' pay which was based on his three years' service prior to 26 November 2010.

13 The Respondent subsequently informed the Claimant that it would not agree to his conditional acceptance of the voluntary severance offer made to him.

14 Thereafter on 30 October 2014, the Claimant sent the Respondent the following email:

“Good afternoon Catherine,

I accept the voluntary redundancy the FPC is offering me.

I reserve my right to seek clarification and redress elsewhere and independent of this offer, on the matter of my recognized years of service. I believe I have served the FPC for in excess of 7 continuous years.

Regards, Alex”

(Exhibit 8)

15 The aforementioned email led to the Respondent making of a formal voluntary severance offer on 18 November 2014. The offer was made in accordance with the provisions of Regulation 6 of the **Public Sector Management (Redeployment and Redundancy) Regulations 1994** (PSMRR Regulations). It proposed that the Claimant’s position of Level 3 Technical Officer be abolished with effect on Friday, 2 January 2015 and that he receive a severance package comprised as follows:

- a voluntary severance payment;
- a payment in lieu of 12 weeks’ notice;
- the payout of accrued annual leave entitlements; and
- the payout of his long service leave entitlement. (see Exhibit 7)

16 The offer indicated that the Claimant’s voluntary severance payment was calculated on his three years’ completed service as a permanent employee, whereas his long service leave entitlement took into account all of his completed service, including his service as a casual.

17 On 26 November 2014, the Claimant formally accepted the severance offer with the associated severance arrangement conditions. His employment subsequently ended on 2 January 2015. Immediately upon his employment ending the Claimant was paid his wages for the period ending 1 January 2015 and then on 15 January 2015, he received payment for his final day of work (2 January 2015) plus his agreed redundancy pay.

18 On 4 March 2015, the Claimant lodged this claim, alleging that the Respondent had failed to pay him his correct redundancy entitlement, but in doing so, has not indicated the statutory basis that underpins the claim.

19 The Claimant alleges that in calculating his severance pay, the Respondent has failed to account for his three years’ service prior to 26 November 2010. He claims to be entitled to an additional nine weeks’ pay, amounting to \$12,105.18, plus interest thereon. Further he asks that the Respondent be penalised for having failed to pay him his correct redundancy payment.

Determination

20 The basis of Claimant’s claim is somewhat unclear. He seemingly asks that a declaration be made that the Respondent engaged him as a permanent employee from 11 May 2007 until 25 November 2010.

21 He argues that despite being labelled as a casual employee, he was in fact a permanent employee. His permanent status is indicated by his functions, his hours of work and the ongoing nature of his employment. He asserts that during the material period he was engaged continuously and not in a series of separate and distinct contracts. He relies on what was said in *Loves Bus and Taxi Service v Zucchiatti* (2006) 86 WAIG 3351 and *Metals and Engineering Workers Union, Western Australia v Centurion Industries Ltd* (1996) 76 WAIG 1287, to support his contention.

22 What the Claimant seeks is, with respect, misconceived because this Court does not have the power to grant, by way of principal relief, the declaratory order sought. No attempt has been made to identify a particular breach of an instrument or statutory provision which might enliven this Court’s jurisdiction. Accordingly it will not be necessary to review his pre-26 November 2010 employment in order to determine whether he was correctly classified as a casual employee.

23 The Claim lacks merit in any event for the following reasons.

24 On 26 November 2014, the Claimant accepted the voluntary severance offer made to him pursuant to Regulation 6 of the PSMRR Regulations. Although the PSMRR Regulations have since been replaced they remain relevant to my consideration in this matter.

25 Regulation 20(1) of the PSMRR Regulations provided that a severance payment made to an employee under Regulation 6, was the payment of an amount equal to three weeks’ pay for each completed year of “*continuous service*” served by the employee in the public sector.

26 “*Continuous service*” was defined by Regulation 3 of the PSMRR Regulations, as follows:

“continuous service has the same meaning as it has in the Wages Employees Long Service Leave General Order of The Western Australian Industrial Relations Commission”.

27 The relevant General Order was No. 763 of 1982. It provides, at Clause 2(b)(iii):

“(b) The Service of an employee shall be deemed NOT to include:-

...

(iii) any period during which an employee has been paid as a casual”.

28 There is no dispute about the fact that the Claimant was paid as a casual from the date that he commenced his employment, up to and including, 25 November 2010.

- 29 The fact that he was paid as a casual during that period removes the ability to treat that period as continuous service. The statutory construction of those relevant provisions leads to that inevitable conclusion.
- 30 The Claimant's payment as a casual during the material time defeats his contention that he did not receive his correct redundancy entitlement.
- 31 I find that the Claimant was paid in accordance with Regulation 20(1) of the PSMRR Regulations. The Claimant's claim must therefore fail.
- 32 Before concluding, I observe that the Claimant's long service leave entitlement was materially affected by the Respondent's agreement to recognise, for that purpose only, the Claimant's service from the date of his initial employment. Absent that express agreement, the relevant period would have been incapable of being considered to be *continuous service*.

Conclusion

- 33 The claim will be dismissed.

G. CICCHINI
INDUSTRIAL MAGISTRATE

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

2015 WAIRC 00520

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 FRIDAY, 17 JULY 2015
FILE NO/S APPL 18 OF 2014
CITATION NO. 2015 WAIRC 00520

Result Application dismissed
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 28th day of August 2014 the Commission convened a conference for the purpose of scheduling; and
 WHEREAS the conference was adjourned to allow the parties to further investigate the issues; and
 WHEREAS the Commission set the matter down for a Directions hearing on the 25th day of March 2015; and
 WHEREAS on the 15th day of July 2015 the applicant filed a Notice of Discontinuance in respect of the application;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00484

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00484
CORAM	:	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 29 APRIL 2015, MONDAY, 11 MAY 2015, WEDNESDAY, 20 MAY 2015
DELIVERED	:	FRIDAY, 3 JULY 2015
FILE NO.	:	B 234 OF 2014
BETWEEN	:	FIKRET BECIRBASIC Applicant AND BUILDING WEST PTY LTD Respondent
<hr/>		
CatchWords	:	Denied contractual entitlements – Contract of employment – Repudiation of contract – Summary dismissal – Implication of a term in the contract – Misconduct – Termination of employment – Payment for completion or part completion of projects – Annual leave – Pay in lieu of notice – Superannuation
Legislation	:	<i>Fair Work Act 2009</i> s 87(1)(a) <i>Industrial Relations Act 1979</i> s 29(1)(b)(ii) <i>Minimum Conditions of Employment Act 1993</i> s 23(1)
Result	:	Application granted in part
Representation:		
Applicant	:	Mr P Mullally as agent
Respondent	:	Mr B McPherson of counsel and with him Ms K O'Brien of counsel

Reasons for Decision

- 1 The applicant says that he has been denied benefits arising from his contract of employment, of payments for completion or part completion of a number of projects; payment for annual leave; was unjustifiably summarily dismissed so he seeks four weeks' pay in lieu of notice, and he seeks payment of superannuation benefits said to arise from the contract.
- 2 The respondent says, in respect of the particular projects, that they were not completed to the stage that the applicant claims, or that the applicant was not involved in the work on those projects at all, such as to warrant payment to him. In respect of the claim for annual leave, the respondent says that because the applicant was dismissed prior to the completion of 12 months, he was not entitled to a pro rata amount. His employment was justifiably terminated for serious misconduct so he is not entitled to pay in lieu of notice. The respondent says the superannuation claim arises from a statutory scheme not from the contract.

Background

- 3 The applicant was employed by the respondent as a building supervisor to supervise the construction of residential homes and units undertaken by the respondent. The employment commenced on 11 November 2013 and terminated on 4 November 2014. The duties of that position involved supervising and managing the sites; quality control of the work; authorising payments to subcontractors; being responsible for all safety requirements on the site – the supervisor stands in the shoes of the builder, and his licence makes him responsible for the proper management of the site (evidence of Peter John Edmonds (ts 126)).
- 4 The parties signed a written contract of employment on 12 November 2013, which said that it commenced on Monday, 11 November 2013. Its relevant clauses for the purposes of this claim include:

6. Remuneration

Salary Component

The Employee will receive a \$120,000.00 per annum. Remuneration will be paid monthly in arrears and will be paid as outlined in **Clause 7** below. The appropriate PAYG deductions will be applicable. Salaries are reviewed annually and are adjusted at the Employer's discretion to take into account the Company's performance, the Employee's performance and the industry salary movements.

...

8. Superannuation

8.1 Choice of Superannuation

The Employer makes superannuation contribution payments on behalf of the Employee into a superannuation fund nominated by the Employee from time to time. The amount of these superannuation contribution payments are the required minimum rate set by the Superannuation Guarantee Scheme.

8.2

The Employee is at liberty to direct, before the Employee earns any portion of the Salary, to have either some or all of that Salary contributed into Superannuation.

...

10. Responsibilities/Duties

The Employee's Responsibilities and Duties are as follows:

- Will complete the relevant form of statutory declaration relating to his Proposed engagement as Nominated Registered Supervisor
- Carrying out any duties which are within the Employee's skill, competence and expertise as a Licensed Builder and Nominated registered Supervisor whilst liaising with the Employer, and other contractors and sub contractors.
- Will manage and supervise the building works under construction for this employer in such a manner to ensure that the whole of the building work is carried out in proficient and workmanlike manner.

...

12. Employee Conduct

The Employee must:

- Serve the Employer faithfully and diligently and exercise all due care.
- Act in the employer's best interest.
- Refrain from acting or giving the appearance of acting contrary to the Employer's interest.
- Use the Employee's best[sic] endeavours to protect and promote the Employer's good name and reputation.
- Perform such duties to the best of the Employee's ability.

...

14. Terminating without notice

This Contract may be terminated without notice by the Employer if:

- The Employee commits a serious breach of any of the provisions of their Contract.
- The Employee commits any act that amounts to a repudiation of this Contract.
- The Employee engages in serious and wilful misconduct.

15. Annual Leave

The Employee is entitled to Annual Leave that has accrued in the immediate 12 month period. It is taken at a time mutually agreed between the Employee and the Employer having regard to the operational requirements and needs of the Employer. If no mutual agreement then the Employee takes Annual Leave as directed from time to time by the Employer.

The Employee gives the Employer a minimum of 2 weeks written notice of the Employee's intention to take Annual Leave. Leave must be taken in each 12 month period and not later than 15 months from the beginning of each 12 month period.

16. Terminating with notice

At any time either party may terminate this contract by giving the required amount of written notice to the other party which is 4 weeks ("The Notice Period"). The Notice Period is not reduced under any circumstances.

Exhibit R4, QHD-1

- 5 Within a matter of days of the contract being signed, the parties agreed to amend section 6 of the contract in the following terms:

Section 6 is amended by deleting:

"The employee will receive a \$120,000 per annum" and inserting a new way of payment instead:

- Double storey house- \$ 15,000.-
- Single storey house- \$8,000.-
- Town houses- \$10,000.-each unit (up to 3)
\$5,000.-for each unit after 3
- Triplex \$18,000.-(\$ 6,000.- each unit)
- Single Units-\$8,000.-
- Two Units \$15,000.- (\$ 7,500.- each unit)

Any other project not specified on the list will be discussed and payment made accordingly.

Exhibit R4, QHD-2

- 6 The applicant says that it was agreed that he would be paid for each building project the lump sum by progress payments on certain milestones being reached. He says that those milestones fell into eight equal stages of (1) site works, (2) slab finish, (3) brickwork finish, (4) roof cover finish, (5) lock up, (6) cabinets and main floor, (7) painting, brick paving and outdoor, and (8) final payment.
- 7 The applicant's evidence was that he was paid certain amounts relating to each of a number of projects but was not paid the full amount. The applicant's Further and Better Particulars of Claim, filed on 6 March 2015, contains Schedule 2 which sets out the address of each project and the stage of progress of that project at termination; payments due to him according to his calculation in respect of the level of completion; the amount already paid to the applicant on a progress basis, and the amount now claimed, as follows:

Job address	Stage reached at termination of employment	Total payment due to the applicant for this job	Amount already paid to the applicant on progress basis	Amount now claimed from the respondent by the applicant
9 Changton Way WESTMINSTER	Roof cover	\$9000	\$4091.04	\$4908.95
71 Mirrabooka Avenue WESTMINSTER	Lock up	\$11250	\$8609.58	\$2640.42
322A Main St, BALCATT	Brickwork finish	\$11,250	\$9085.81	\$2164.19
1 Raleigh Road, BAYSWATER	-			
64 Nollamara Avenue, NOLLAMARA	Slab finish and 25% brickwork	\$5062.50	\$4109.58	\$952.92
77 Curlington Crescent, BALGA	Lock up	\$11,250	\$6145.83	\$5104.17
207 Ravenswood Drive, WESTMINSTER	Brick work	\$6750	\$4091.04	\$2658.96
207 Mirrabooka, BALGA	Completed	\$18,000	nil	\$18,000
28 Wittering Street	Completed	\$18,000	nil	\$18,000
2 Grime Road, ARDROSS	Completed	\$15,000	nil	\$15,000
IGA Shop MARANGAROO	Completed	\$5,000	nil	\$5000
TOTAL				\$71,789

6 March 2015

- 8 The applicant filed a witness statement on 17 April 2015, signed by him on that day. At the hearing on 29 April 2015, he gave evidence that apart from a correction to his licence number contained at [2], the statement was true and correct, and it was received into evidence. At [9] of the witness statement, he asserted that the particulars contained in Schedule 2 to the further and better particulars he had filed on 6 March 2015 as set out above, were true and correct. He further asserted that he 'provided [his] services as a building supervisor to the building work done on each of those projects'.
- 9 On 20 April 2015, the applicant filed an amended schedule 2. The amendments were that the house number in the claim for '207 Mirrabooka ,BALGA' was amended to '205'; the name 'Grime Road' was amended to 'Grimsay Road'; and the 'IGA Shop MARANGAROO' was amended to 'DIAMOND NAILS SHOP BANKSIA GROVE'. The amounts and stage reached, and all other details, remain unchanged.
- 10 The applicant concedes that his initial claim contained some substantial inaccuracies, including that he was never involved in work on the IGA Shop Marangaroo and he substituted Diamond Nails Shop Banksia Grove.
- 11 The respondent says that payments were due to be made to the applicant under the contract as lump sums at the completion of each project, and not by progress payments. However, the respondent deviated from this and paid certain amounts when the applicant demanded payment. The amounts were not based on particular entitlements but were projected forward, and for accounting purposes, were allocated against particular projects and particular completion stages. In this way, the respondent calculates that there were overpayments in respect of some projects because by the time the applicant's employment terminated, some of those payments already made were not due.

12 The respondent set out its position as to the stages of completion of each of the projects as follows:

ITEM	PARTICULARS	(\$) VALUE	(%) COMPLETE	VALUE(%) COMPLETE	(\$) PAYMENT	(\$) REMAINING / (SURPLUS)
1.	9 Changton Way, Westminster	\$18,000.00	10%	\$1,800.00	\$4,500.00	-\$2,700.00
2.	64 Nollamara Ave Nollamara	\$18,000.00	10%	\$1,800.00	\$4,500.00	-\$2,700.00
3.	71 Mirrabooka Ave Westminster	\$18,000.00	50%	\$9,000.00	\$9,000.00	\$0.00
4.	77 Curlington Cres Balga	\$18,000.00	50%	\$9,000.00	\$6,750.00	\$2,250.00
5.	207 Ravenswood Dr Westminster	\$18,000.00	8%	\$1,440.00	\$4,500.00	-\$3,060.00
6.	322A Main St Balcatta	\$30,000.00	5%	\$1,500.00	\$9,999.99	-\$8,499.99
7.	2A Grimsay Ardross	\$15,000.00	40%	\$6,000.00	\$0.00	\$6,000.00
8.	28 Wittering Balga	\$18,000.00	100%	\$18,000.00	\$11,250.00	\$6,750.00
TOTAL		\$153,000.00		\$48,540.00	\$50,499.99	-\$1,959.99

Response to Applicant's Further and Better Particulars of Claim at [2]

- 13 This assessment was based on information provided by Mr Peter John Edmonds, who was engaged by the respondent, apparently to replace the applicant as its supervisor. Mr Edmonds' assessment was based on his observation of the sites when he inspected them on 13 and 14 October 2014.
- 14 Mr Edmonds clarified that in respect of 322A Main Street, reference to 5% complete meant less than 5% of the bricklaying on the second storey rather than 5% of the total project.
- 15 I also note that reference to a payment of \$11,250 having been made to the applicant for 28 Wittering was in error. It did not recognise that the applicant had repaid the respondent this amount on the basis that the project is said to have been completed under the supervision of the applicant's predecessor in the role, Mr Mikic, and the respondent paid that amount to Mr Mikic.

The dismissal

- 16 I infer from the evidence that sometime before 13 October 2014, the respondent became concerned about the applicant's performance of his duties. As noted earlier, it engaged Mr Edmonds as supervisor and he undertook an assessment of the sites and reported to the respondent's sole director, Mr Quoc Hung Du. On Mr Edmonds' recommendation, work on the sites was stopped for approximately two weeks while the sites were cleaned up of rubbish, excess building materials and other equipment, and for proper signage to be installed.
- 17 On 20 October 2014, the applicant telephoned the respondent's office and the call was answered by Anh-Thi Fiona Hoang, the new receptionist. Ms Hoang said that the applicant was abusive and threatening in this conversation. Mr Gordon Du, brother of Mr Quoc Hung Du and the respondent's accountant or chief financial officer, then spoke to the applicant about this conversation.
- 18 On around 23 October 2014, Mr Quoc Hung Du and Mr Gordon Du are said to have met the applicant and discussed areas of dissatisfaction with his work and attitude.
- 19 Some days later, the respondent wrote to the applicant a letter dated 23 October 2014, headed 'Reasons for Redundancy' in the following terms:

The Company has undertaken a review of our performance with current and future workload to meet the future operational requirements. Based on this review we have made the decision that we cannot justify your contractor fees on our projects as Nominated Supervisor, therefore, I, Mr Quoc Hung Du, the director of the company, has made the decision to terminate your employment with Building West Pty Ltd. We have records proving your poor performance (if not non-performance), poor supervisions[sic] and lack of management, which cost the company lots of money.

Furthermore, I am not happy in recent times with your non-performance in your duty as the companies[sic] Nominated Supervisor in allocating time in overseeing the supervision of our projects as required by the WA Building Commission regulations.

- ▶ Under the Building Services (Regulation) Act 2011 you are to ensure that building services to be carried out by the company will be managed and supervised in a proficient manner unfortunally[sic] this was not happening.
- ▶ Your lack of financial management of our projects has caused a number of financial loses[sic] across all projects due to your lack of onsite supervision.
- ▶ Our[sic] project development and management skills to establish project definition and outcomes, formulate clear objectives and deadlines and to establish project parameters are wanting.
- ▶ Staff development with on-the-job training of Paul Du in supervision, training and mentoring was non-existent.
- ▶ Supervisory Skills to set time lines, monitor progress, ensure best practices are used and be responsible for outcomes.

We are mindful that the change will have a big impact on you. We wish you all the best in the future.

Exhibit R4, QHD-3

20 The letter was subsequently sent to the applicant.

21 The applicant appears to have then come into the office, very angry, and is said to have been banging on the table.

22 There is no dispute that the employment came to an end on 4 November 2014.

Assessment of witnesses

23 I found the applicant's evidence to be unreliable and he was not credible. This is based on a number of aspects of his evidence. There is no explanation of the applicant's inclusion of a claim for a property, IGA Supermarket, Marangaroo, in his Further and Better Particulars of Claim filed on 6 March 2015. He later acknowledged he did not work on that project but instead claimed he worked on a nail shop in a different suburb.

24 Also, the applicant says quite adamantly that he does not swear. He explained that building sites are places where tradespeople do swear but not him, he does not swear. At one stage in his evidence, the applicant appeared to accept Ms Hoang's evidence that he had telephoned the office on 20 October 2014 and that she had answered the call, he asked abruptly 'Where is my money. When am I getting paid'. As the conversation continued, he said 'Tell Paul to watch out. He's in danger. If I don't get paid, he's in fucking danger' (exhibit R6, [3]). Ms Hoang said that later she attended a meeting where Mr Gordon Du spoke to the applicant on the telephone and asked him if it was true that he had said those things to her, and Ms Hoang says that the applicant acknowledged that he had, that he was angry and people say things like that when they get angry.

25 The applicant initially appeared to accept that he had said those things but subsequently appeared to deny them, and his demeanour suggested that he was quite pleased with himself in making the denial. He then became serious and said that he was asking for payment for himself and others, and that he had spoken out of frustration.

26 Further, Mr Quoc Hung Du referred to an SMS message from the applicant dated 4 November 2014 (QHD-7) in which the applicant said, amongst other things, 'Do not pass any responsibility to anybody else for that fucken job anything whats wrong there'. The applicant acknowledged in his evidence that he had sent that SMS, and that 'fucken' is a swear word.

27 While a witness's demeanour is unreliable for the purposes of assessing that witness's credibility, I note that the applicant appeared to be complacent in his attitude to the seriousness of giving sworn evidence. He would shrug and smile as if it did not matter.

28 There were further occasions where his evidence was unreliable, such as where he asserted an entitlement to payment for 31 Mildmay Street, yet there was a Notice of Completion which demonstrates that that project was complete on 15 November 2013, three days after he commenced employment with the respondent. Whilst he asserts that there is a second page to the Notice of Completion under the *Building Act 2011* s 33 which indicated that he also signed off on the completion of that project, he then asserted that he had some influence and helped the company out before the completion of that project (that is, before he commenced employment with the respondent), and therefore he says he is entitled to payment.

29 As to 9 Changton Way, the applicant claimed that he was entitled to payment of \$9,000 because that job had reached the stage of roof cover. However, the evidence of Mr Edmonds and Mr Du, confirmed by an email from Prime Metal Roofing (QHD-13), indicates that roof cover was not to be commenced until after the termination of his employment. The applicant attempted to distinguish between when the roof support structures were complete and when the Colourbond sheets were installed. It is quite clear that at the time of the termination of his employment, while some part of that roof structure had been installed, it was far from a covered roof, and this did not commence until after his employment had ended.

30 When asked whether there was an agreement between him and the respondent for superannuation payments to be on top of salary, he did not answer and appeared to accept that this was not the case.

31 When asked about wearing proper safety equipment including a safety helmet, the applicant indicated that he only works on ground level jobs. However, the evidence was that he was supervising the construction of some two storey buildings which required the construction of a floating floor or slab and supports for those.

32 In those circumstances, I prefer the evidence of witnesses other than the applicant except where other evidence supports his evidence.

33 I found Mr Edmonds to be a credible and impressive witness, and have no hesitation in preferring his evidence to that of the applicant where it conflicts. His evidence was not undermined in any significant way.

34 Ms Hoang's evidence was not challenged in any way. She was a credible witness and I accept that evidence.

35 Mr Quoc Hung Du, the sole director of the respondent, gave evidence. I find that at least some of the inconsistencies in his evidence were due to language and comprehension difficulties. However, other inconsistencies and conflicts within his evidence are not so readily explained. Where his evidence is supported by that of Mr Edmonds, I have no hesitation in accepting it.

Consideration and conclusions

Payments for each project

(i) Progress payments to the applicant

36 I find that initially there was no agreement on the respondent's part to progress payments being made to the applicant in the way he asserts. Rather, the respondent intended to pay the applicant for each project at its completion, as had applied to his predecessor, Mr Mikic. However, the applicant would ask for, and in some cases demand, money at certain points and the respondent made payments to him. Those payments do not always appear to correspond with the proportion of completion of

each of the projects at the relevant times. This helps to explain why payments appear to be both above and below the amounts they would have been if paid according to what the applicant says were the various stages of completion, and why the respondent claims that there were some overpayments if this methodology applied.

- 37 However, I conclude that ultimately the respondent did pay according to the applicant's demands for progress payments. On some occasions, the respondent paid according to the eight stages and at others paid by a percentage of completion (see QHD-10). Exhibit A2, a schedule, which Mr Du says was drawn up by the applicant and provided to the respondent's accountant, which sets out only some of the payments made to the applicant, supports this. Those payments are first and second stage payments for 71 Mirrabooka Avenue, the first stage payment for 322A Main Street and five payments regarding a project the name of which is indecipherable.
- 38 The respondent allocated those payments to particular stages of particular projects (see exhibit R1 – Commonwealth Bank Receipts). According to those receipts, payments were made by the respondent to the applicant. These receipts contain the following details:

Date of payment	Amount	Description
26 August 2014	\$2,054.79	64 nollamara site
26 August 2014	\$2,054.79	64 nollamara slab
5 June 2014	\$2,250.00	71mir1stpaysitewor
5 June 2014	\$2,250.00	71mir2ndpayslabfin
24 October 2014	\$2,054.79	77mir brick finish
24 October 2014	\$2,054.79	71mir roof cover
1 July 2014	\$1,125.00	77Cur1st pmt slabs
17 July 2014	\$911.25	site work 77 curli
24 October 2014	\$2,054.79	77cur brick finish
24 October 2014	\$2,054.79	77cur roof cover
17 July 2014	\$2,036.25	site work 207 rave
8 August 2014	\$2,054.79	207raven2nd pmt
16 May 2014	\$3,333.34	322main1stpayment
17 July 2014	\$2,708.33	brick work 322main
8 August 2014	\$3,044.14	322main3rd pmt
17 July 2014	\$2,036.25	9changto site work
26 August 2014	\$2,054.79	9 chang slap finis

- 39 While there was no direct evidence on the meaning to be attributed to the description section of each invoice, from terms such as '64 nollamara site', '64 nollamara slab', '71mir1stpaysitework', '71mir2ndpayslabfin' etc, I infer that for 64 Nollamara Avenue this means the payment is for the first stage, site works, and for the same project, the second stage of slab finish had been completed; 71 Mirrabooka Avenue had stages one and two, site works and slab, completed. Therefore, the payments made to the applicant were at least allocated according to a progress payments arrangement for accounting purposes even though there was, according to the contract, no term in the contract entitling the applicant to progress payments.
- 40 Given that the respondent appears to have acquiesced in making the progress payments, I conclude that this became part of the agreement between the parties.

(ii) *Levels of completion of projects*

- 41 In assessing the stage of completion of each project, I am assisted by the invoices for progress payments to be made by the respondent's clients according to the next stage of the building process. Exhibit A3 to A9 are the tax invoices sent to the respondent's clients, which bill the clients for progress payments. The clients were provided with an invoice approximately two weeks before each stage commenced. This is to allow the client time to arrange with their finance provider for inspection of the site if necessary and to arrange for payment prior to the respondent commencing work on that stage. A number of the invoices note that payment is required within 10 working days of the date of the invoice. The invoices contain the following information:

Exhibit number	Project	Date of invoice	Progress payment stage
A3	64 Nollamara Avenue	26 November 2014	Fourth (three brick unit finished)
A4	207 Ravenswood Drive	11 November 2014	Fourth 'brick paving finish' (NB: Mr Du says that reference to the fourth payment which is said to relate to 'brick paving finish' is in error and should refer to 'bricklaying')
A5	9 Changton Way	11 November 2014	Fourth (Brick finish)
A6	28 Wittering Crescent	14 July 2014	Ninth (cabinets installed)
A7	71 Mirrabooka Avenue	31 October 2014	Sixth (lockup)
A8	77 Curlington Crescent	28 October 2014	'50% of the fifth deposit for lock up'
A9	322A Main Street	24 October 2014	'Fifth process payment for the deposit to start building'

- 42 A Lump Sum Building Contract (exhibit A11) relating to 2A Grimsay Road provides for progress payments of a deposit and eight progress payments at the stages claimed by the applicant. I note that this contract specified Mr Ivan Mikic as the

builder's representative. Mr Mikic is said to be the applicant's predecessor. This contract provided for a completion date of 31 October 2014, but indicates that it was signed on 23 July 2014.

- 43 Apart from being cross examined as to his assertion about the state of completion of 322A Main Street and Grimsay Street, Mr Edmonds was not challenged about his assessment of the level of progress on the other sites. I accept, without hesitation, Mr Edmonds' evidence as to the state of the various sites in terms of cleanliness and safety, as well as the stages of progress reached when he inspected the sites on 13 and 14 October 2014. He recommended that no further work be undertaken on these sites until they were cleaned up. The respondent accepted this recommendation. Mr Edmonds arranged for bins and Bobcats for the clean-up of the sites, and for them to be brought to a reasonable standard. This took approximately two weeks.
- 44 Therefore, I find that there was no progress in the state of the projects from 13 October 2014 for approximately two weeks, and in any event, I find that there is no evidence that the applicant performed any work for the respondent after 13 October 2014. Therefore, the assessment of payments due to the applicant based on the stages of completion of the various projects ought to be at that date, not the date of termination.

(iii) *The value of each project to the applicant*

- 45 Where the applicant's claim in his Further and Better Particulars of Claim sets out a column headed 'Total payment due to the applicant for this job', I take that to mean the total he would be entitled to, not for the job if it were complete, but for the stage reached according to his assessment.
- 46 In reaching conclusions about what payments were due to the applicant both in total and at various stages, it is necessary to know the total value, to the applicant, of each project. There was only incidental evidence as to the nature of some of the jobs and what the total payment for the completed job would be. For example, the evidence is that 322A Main Street, Balcatta was a two storey construction. As a double storey house, according to the amended contract, this would earn the applicant \$15,000. However, the amended contract also provided for the parties to discuss 'any other project not specified' in the list and agree an amount. In its schedule, the respondent valued this project at \$30,000. If this project is valued at \$30,000 as the respondent's schedule suggests, the completion of stage three of eight stages would entitle the applicant to three eighths of \$30,000, which is \$11,250.
- 47 207 Ravenwood Drive was a three unit project. I infer this would entitle the applicant to \$18,000 in total or \$6,000 per unit when the project was complete.
- 48 Mr Edmonds said that due to rubbish at the sites of 71 Mirrabooka Avenue and 77 Curlington Crescent, he was unable to gain access to the rear units, so I infer they were not single houses. In its response to the applicant's Further and Better Particulars of Claim, the respondent has identified the value of the projects. The only projects listed in the amended contract as being valued at \$18,000 were triplex units. The respondent listed 9 Changton Way, 64 Nollamara Avenue, 71 Mirrabooka Avenue, 77 Curlington Crescent, 207 Ravenswood Drive and 28 Wittering Crescent as being valued at \$18,000, so I will infer that they were each triplex units.
- 49 The respondent listed 2A Grimsay Road as \$15,000 which could be either a double storey house or two units.

(iv) *Assessing the applicant's entitlement*

- 50 For the purposes of determining the stages of completion, as at 13 October 2014, I intend to take account of Mr Edmonds' evidence and also to draw inferences from both the Commonwealth Bank receipts and the respondent's invoices to its clients, noting in respect of the latter that they anticipate a stage of progress by approximately two weeks.
- 51 Therefore, for each project I have drawn inferences as to their total value to the applicant as noted earlier and made calculations as to progress payments based on there being eight such stages.

Diamond Nails – claim \$5,000

- 52 The applicant says an electrician was paid at the end of September 2014 for the work carried on at this site (see exhibit A10 – invoice of KH Signature Electrical). The applicant says that this demonstrates that work was conducted on this site during his tenure as supervisor.
- 53 Mr Du accepted that KH Signature Electrical undertakes work for the respondent. The respondent says that work commenced after the date of the applicant's termination and was supervised by Mr Edmonds. Mr Edmonds says that he was the supervisor for the Diamond Nails project and that it commenced in the second week of November 2014.
- 54 Exhibit A10 is an invoice dated 31 October 2014. The invoice simply says that it is for 'Wiring to Banksia Grove Diamond Nails shop'. It does not set out a date on which the work was done or was to be done.
- 55 There is no evidence that the work done on this site was undertaken under the applicant's supervision. The work may have been done after 13 October 2014 and the invoice is dated the end of October, not September as the applicant asserts.
- 56 It is curious too that the applicant included this claim in substitution for the IGA Marangaroo, reinforcing the suggestion that the applicant was unfamiliar with the project and therefore did not work on it.
- 57 Further, there is no evidence of the type of project this was so as to enable the basis for a \$5,000 claim to be made. It would not appear to be a new construction project as the electrical work was described in the invoice as wiring to what appears to be an existing shop. It does not fit into any of the categories of project set out in the contract and there is no evidence of an agreement as to what the applicant would be paid for this job, if indeed he did it.
- 58 I conclude that there is no entitlement to pay under this claim.

205 Mirrabooka Avenue, Balga – Claim \$18,000

- 59 The respondent says that the applicant intended to refer to 31 Mildmay Street, Balga as no site was under its control at 205 Mirrabooka Avenue, Balga. It says the applicant was not involved in this project and that it had reached practical completion three days after the applicant commenced employment.
- 60 The applicant says he signed the second page of the form regarding its completion, and he was involved with this project in assisting the respondent prior to him commencing employment with the respondent.
- 61 The claim before the Commission is made under s 29(1)(b)(ii) of the *Industrial Relations Act 1979*. It must relate to the applicant's contract of employment and to his work as an employee of the respondent. Therefore, he cannot bring a claim related to work he might have undertaken prior to his employment as an employee of the respondent subject to the contract of employment. This project was completed three days after he commenced employment and there is no evidence that he took any role in its completion during his time as an employee of the respondent.
- 62 This claim is rejected.

28 Wittering Crescent, Balga – Claim \$18,000 – Total value \$18,000

- 63 The respondent says that \$11,250 was paid to the applicant, but the applicant refunded this money because at all times the project was managed and supervised by Mr Ivan Mikic. The amount was then paid to Mr Mikic. The respondent says that the applicant refunded the amount to the respondent because he did not work on the project and he is now estopped from making the claim. The respondent says the remaining amount of \$6,750 is not due to the applicant and there was no overpayment to him as initially claimed.
- 64 Exhibit R3 confirms that the applicant repaid to the respondent the amount of \$11,250, and I am satisfied that this occurred because he was inappropriately paid this amount and it ought to have been paid to Mr Mikic, and it was paid to Mr Mikic.
- 65 The respondent sent an invoice to its client regarding this property, dated 14 July 2014, for what it described as the 'Ninth stage (cabinets installed)'. This suggests that by 28 July 2014, the respondent anticipated this stage being complete. According to the applicant's progress stages, 'cabinets and main floor' is stage six of eight. Mr Edmonds says this project was complete when he took over.
- 66 Therefore, somewhere between when the applicant took over this project, after Mr Mikic finished, and before 13 October 2014, the project progressed from a stage prior to stage six of eight to completion. Therefore, the applicant is due to be paid for at least the last three of eight stages. The total value of the project was \$18,000. Accordingly, the applicant is due \$6,750.

2A Grimsay Road – Claim \$15,000 – Total value \$15,000

- 67 The respondent says the applicant's text message to Mr Du dated the day of termination confirms that there was much work to be done on this project. The respondent also says that at termination this project was 70% complete and the applicant's role in it amounted to around 20%, equal to around \$6,000, which it says it has paid.
- 68 Mr Edmonds gave evidence that the respondent and the client are still in dispute in the Building Commission or the Builders Registration Board and there are two orders pending for the respondent to remedy problems. One of those problems relates to windows which the applicant, through his own company, sold to the respondent for installation on this project, prior to the applicant commencing employment with the respondent. Further, the client had not paid for the lockup stage of the work because of the quality of the work. Mr Edmonds says that the project is 40% complete and the respondent says that it has paid for that portion of the work.
- 69 In any event, the client has not yet paid for lock up stage, that is stage five of eight. Therefore, the project would be no more than 50% complete and is subject to dispute as to work quality. As supervisor, the applicant was responsible for the quality of that work.
- 70 In the circumstances, I am unable to find that the applicant is owed any amount at this stage.

9 Changton Way – Claim \$4,908.95 – Total value \$18,000

- 71 The applicant says that roof cover was complete on this project by the date of the termination of his employment. The respondent says that it was well short of roof cover, that the roof structure, which I take to be the roof trusses, but not the Colourbond had been installed.
- 72 The email from Mr Jay Fox of Prime Metal Roofing and Prime Metal Roofing's invoice demonstrate that the metal roofing had not been installed and was not due to be commenced until after the applicant's employment terminated. Therefore, the project had not reached roof cover. It had completed three of eight stages, entitling the applicant to \$6,750. He was paid \$4,091.04, so he is entitled to \$2,658.96.

64 Nollamara Avenue – Claim \$952.92 – Total value \$18,000

- 73 The applicant says that this was slab finished plus 25% of the brickwork. The respondent says that the project was only 10% complete, that the slab was complete but the brickwork had not yet commenced.
- 74 According to its invoice to its client dated 26 November 2014, the respondent anticipated commencing the fourth stage (which I assume is bricklaying) of this project by mid-December 2014. This means that according to the applicant's stages of completion, the first two stages were complete.
- 75 The applicant was paid for those two stages by 26 August 2014, a total of \$5,119.58. The completion of two stages would entitle the applicant to \$4,500. Therefore, he has been overpaid \$619.58.

207 Ravenswood Drive – Claim \$2,658.96 – Total value \$18,000

- 76 The applicant says that brickwork was complete or 95% complete, yet the respondent says that this was a three unit project, unit three had 75% of the brickwork complete, unit two 25% and unit one had not commenced the brickwork.
- 77 The respondent invoiced its client for brick paving (which Mr Du corrected to mean bricklaying) on 11 November 2014, anticipating commencement of bricklaying on around 25 November 2014, around five to six weeks after the applicant ceased supervising the sites.
- 78 This leads me to conclude that the respondent's assessment is correct and therefore the applicant is due payment for the first two stages of site works and slab, being two eighths of the total, which is \$4,500. The applicant was paid \$4,091.04, and therefore is due \$408.96.

77 Curlington Crescent – Claim \$5,104.17 – Total value \$18,000

- 79 The applicant says that this project was at lockup stage yet he acknowledged that glazing was done on 6 November 2014, two days after his employment ended. The respondent says that it was 50% complete and that the applicant had already been paid \$6,750 and therefore his entitlement is \$2,250. Interestingly, the respondent's invoice to its client dated 28 October 2014 suggests that it would commence the lock up stage in two weeks. This together with Mr Edmonds' evidence allows me to conclude that this project had reached roof cover finish or stage four of eight of the applicant's stages, but not lock up stage. This would entitle the applicant to \$9,000 of which he has already been paid \$6,750, leaving him owed \$2,250, as acknowledged by the respondent.

322A Main Street, Balcatta – Claim \$2,164.19 – Total value \$30,000

- 80 The applicant says that brickwork on this project was complete. The respondent says that only 5% of the project was complete and that the applicant had been overpaid \$8,499.99.
- 81 Mr Edmonds says that this was the second job he visited, the slab floors had been poured on the upper-floor and there was brick loading in progress. The bricklayer was ready to start about a week later. The respondent's calculation in its schedule in the Response to the applicant's Further and Better Particulars of Claim was based on an erroneous assumption that the whole project was only 5% complete. However, Mr Edmonds clarified that the 5% was a reference to less than 5% of the bricklaying on the second floor.
- 82 The respondent sent an invoice dated 24 October 2014, notifying the client to pay within two weeks the fifth progress payment, by which time the brickwork on the second floor was anticipated as being commenced.
- 83 This was a two storey project. The slab floor and brickwork for the ground floor was complete. The slab for the second floor was complete but not the brickwork. Therefore, stage two was complete on both floors, but stage three was only 50% complete and the brickwork on the second storey had not started although the bricks had been placed on the site.
- 84 Given that the project is less than half finished, by my estimation the applicant is entitled to 3.5 of the eight progress payments. I have allocated 0.5 of a stage on the basis of it being a two storey construction of which half of the brickwork was complete because the ground floor brickwork was done. This equals \$13,125. He has already been paid \$9,085.81, leaving the applicant owed \$4,039.19.

71 Mirrabooka Avenue, Westminster – Claim \$2,640.42 – Total value \$18,000

- 85 The applicant says that this project had reached lockup stage, which is stage six. The respondent says that it was 50% complete, there was no glazing, no ceilings and the rendering had just started.
- 86 The respondent invoiced its client on 31 October 2014 for the 'Sixth (lock up)' stage, meaning it would be commencing the lock up stage in approximately two weeks, i.e. mid-November 2014. Therefore, by 13 October 2014, the latest stage of progress would have been roof cover, if that, which is the applicant's stage four of eight. The full payment for this project was \$18,000 and he had been paid \$8,609.58. Fifty percent of the total is \$9,000. The applicant is therefore owed is \$390.42.

Pay in lieu of notice

- 87 The contract of employment provides that the respondent may terminate the employment without notice if the employee commits a serious breach of any provision of the contract; commits any act that amounts to a repudiation of the contract; or engages in serious and wilful misconduct.
- 88 Whilst the heading on the letter of dismissal is 'Reasons for Redundancy', the substance of the letter relates to poor performance '(if not non-performance), poor supervision and lack of management', and the reference to other failings on the applicant's part, that is, he was not dismissed due to redundancy, he was dismissed for failure to perform the contract and related matters.
- 89 I accept Mr Edmonds' evidence that when he inspected the sites on 13 and 14 October 2014, they were, from his 43 years' experience, 'absolutely atrocious. They looked like bomb sites' (ts 130). The company lost a large amount of money due to the lack of supervision on the sites. He said that at the 71 Mirrabooka Avenue and 77 Curlington Crescent sites, due to the extensive amount of rubbish, he was unable to gain access to the rear of the units under construction (witness statement Peter John Edmonds [10]). He says the sites did not have appropriate signage prohibiting unauthorised access or requiring those entering the site to have the necessary safety equipment. They also did not have appropriate signage to identify the builder or the supervisor as required by the *Building Services (Registration) Regulations 2011*. Electrical tools and leads carried out of date tags. Each of these matters is the responsibility of the supervisor.
- 90 The applicant's employment terminated on 4 November 2014, however as noted earlier, I am satisfied that he did no work for the respondent from at least 13 October 2014 when Mr Edmonds commenced work. Mr Edmonds says that he did not see the applicant on any of the sites, which he visited every day from 13 October 2014 and that the applicant did not make himself

available for a handover, nor was the applicant seen in the respondent's offices during this time except when he went in to apparently challenge the letter of dismissal.

- 91 It seems strange to me that the applicant might claim that he was supervising the sites from 13 October until the date of termination of 4 November 2014, when in fact the sites had stopped work other than for clean-up purposes. If the applicant observed that things were happening or not happening on sites which were supposed to be under his control, there is no evidence that he raised that with the respondent after 13 October 2014 except for the SMS sent on 4 November 2014 after he had received the letter of dismissal. It is quite clear to me that the respondent brought Mr Edmonds in to properly undertake the supervision work which the applicant had failed to properly undertake, at least during the last part of his time with the respondent.
- 92 Although there is no conclusive evidence, there is a clear inference to be drawn that during at least some of the time when he ought to have been working for the respondent, and most likely after 13 October, the applicant spent time working on the construction of his own home in Muchea Gardens rather than on the respondent's projects, in contravention of his responsibilities to the respondent. However, what he did with his time is not to the point. The issue is that he did not spend it performing his job for the respondent.
- 93 I am also satisfied that the applicant's confusion about names of the sites of the projects he was engaged in supervising is not surprising given the state of those sites and what can only be his failure to attend and properly supervise those sites.
- 94 In those circumstances, I find that the applicant did not carry out the duties of a licenced builder and nominated supervisor; manage and supervise the building works for his employer so that the whole of the building work was carried out in a proficient and workmanlike manner. This was in breach of the term of the contract set out in clause 10 – Responsibilities/Duties.
- 95 The proper supervision of building sites is not merely a matter of interest between the employer and the employee for efficient business operations. It is a matter of compliance with legislation, which requires the builder to be licensed and to have a registered supervisor in control of the sites and to display specified signage (for example, the *Building Act 2011* and the *Building Regulations 2012*) and for compliance with occupational health and safety law. There are significant penalties for the builder for failure to comply with these requirements and the supervisor also has liability under the legislation. Therefore, the supervisor's responsibility goes beyond looking after the employer's interests in the performance of its work and in its commercial interests. The supervisor is responsible for ensuring that the respondent complies with regulation and avoids penalties.
- 96 In this case, the applicant failed to perform an essential element of the contract in not supervising those sites according to the requirements of the law. Accordingly, he breached that part of his contract that required him to act in his employer's best interests. His lack of performance also caused the work on the sites to be halted for two weeks. This amounts to a repudiation, that is, conduct which evinces an unwillingness or an inability to render substantial performance of the contract, or conduct which evinces an intention to no longer be bound by the contract (*Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44] – [49]). This justifies the respondent's decision to summarily dismiss him (*Adami v Maison de Luxe Ltd* (1924) 35 CLR 143). The failure to maintain the sites in a proper state and according to the requirements of the legislation that govern them was not a single act nor was it trivial. It was a course of negligence of his duties (*Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117).
- 97 In this case, the applicant breached his obligations under cl 12 – Employment Contract in failing or neglecting to properly supervise the building sites. He failed to act in the employer's best interests, and he has acted contrary to the employer's interests in significant ways going to the heart of the respondent's business interests.
- 98 I note that the letter of dismissal does not refer to the serious misconduct in relation to the matters of abuse of staff referred to in the evidence although the respondent relied on it in the hearing. I accept Ms Hoang's evidence as to the applicant's abusive conduct towards her and his threatening statements made to her relating to Mr Du. I also accept that when Mr Gordon Du discussed those matters with the applicant over the telephone in Ms Hoang's presence, the applicant did not deny what it is that she relayed about what he had said. Therefore, I find that the applicant was rude, abusive and threatening to the respondent's director and to a member of the respondent's staff. This conduct constitutes serious and wilful misconduct.
- 99 In the circumstances the applicant is not entitled to pay in lieu of notice as set out in cl 14 – Terminating without notice.

Superannuation

- 100 The applicant appears to concede that the superannuation claim is based upon the statutory scheme, and that the contract itself does not provide an entitlement. In accordance with *Keane v Lomba Pty Ltd* (1998) 78 WAIG 810, where the claim arises from an entitlement based on a statutory scheme then it is not enforceable pursuant to a referral of a denied contractual benefits claim.

Annual leave

- 101 Clause 15 – Annual Leave of the contract does not specify any particular quantum of annual leave or how payment is to be calculated. It merely provides that the '[e]mployee is entitled to Annual Leave that has accrued in the immediate 12 month period', and when it may be taken. The applicant says that it is appropriate to imply a term of four weeks' annual leave per annum.
- 102 The requirements for implication of a term are set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at 282-3. They are that:
- (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract.

See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

- 103 Four weeks' annual leave can be said to be the standard for employees who are employed under awards and agreements, except for those on shift and weekend work. The *Minimum Conditions of Employment Act 1993* s 23(1) and the *Fair Work Act 2009* s 87(1)(a) both provide for four weeks' annual leave for each year of service. Therefore, four weeks is a reasonable and equitable term as is the provision for payment of a pro rata period.
- 104 Without a term specifying the period of leave, the remainder of the clause lacks efficacy. It is so obvious that it goes without saying that four weeks is the period the parties would have agreed, it is capable of clear expression and does not contradict any express term of the contract.
- 105 There is no provision within the contract disentitling the applicant to annual leave in the event that he is dismissed for serious misconduct or where the employment ends due to his repudiation of the contract.
- 106 Where the contract provides that '[t]he Employee is entitled to Annual Leave that has accrued in the immediate 12 month period', I take that to mean the current 12 month period. The contract does not distinguish between entitlements to fully accrued and pro rata annual leave.
- 107 Therefore, I find that the applicant is entitled to nearly four weeks' pay for annual leave for the period of his employment. This should be calculated by reference to his total earnings during the period of employment, not to \$120,000 per annum as the parties altered the contract to remove the salary and replace it with project-based amounts. The applicant's service was short of 12 months by one week, so the calculation should take this into account.
- 108 The parties are to confer with a view to agreeing the applicant's total earnings and the average per week for the purposes of annual leave.

Conclusions

- 109 The applicant is entitled to payment for the projects on which he worked as follows:

28 Wittering Crescent	\$6,750.00
9 Changton Way	\$2,658.96
64 Nollamara Avenue	-\$619.58
207 Ravenswood Drive	\$408.96
77 Curlington Crescent	\$2,250.00
322A Main Street, Balcatta	\$4,039.19
71 Mirrabooka Avenue	\$390.42
TOTAL	\$15,877.95

- 110 No amounts are due on the remaining projects.
- 111 There is no entitlement to pay in lieu of notice or on account of superannuation.
- 112 The parties are to confer regarding the calculation of payment for pro rata annual leave and advise the Commission within 14 days.

2015 WAIRC 00749

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION FIKRET BECIRBASIC	APPLICANT
	-v- BUILDING WEST PTY LTD	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 23 JULY 2015	
FILE NO/S	B 234 OF 2014	
CITATION NO.	2015 WAIRC 00749	
Result	Application granted in part	

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr B McPherson of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the respondent pay to the applicant in respect of:
 - (a) the building projects the sum of \$15,877.95
 - (b) pro rata annual leave the sum of \$4,159.08
 less any amount due to the Australian Taxation Office.
2. Such payment to be made within 7 days.
3. THAT the matter be, and is hereby otherwise dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.**2015 WAIRC 00519**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SIMON ANDREW BREFFIT

APPLICANT

-v-

SAIPEM (PORTUGAL) COMERCIO MARITIMO

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 17 JULY 2015
FILE NO/S B 45 OF 2015
CITATION NO. 2015 WAIRC 00519

Result Application dismissed
Representation
Applicant Mr S Breffit on his own behalf
Respondent Ms J Knoth of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 28th 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 by email on the 18th day of May 2015 the applicant advised he was still considering his position; and
 WHEREAS by email on the 29th day of May 2015 the applicant advised that he did not intend to proceed with the application; and
 WHEREAS by email on the 29th day of May 2015 the Commission requested the applicant file a Notice of Discontinuance in respect of the application; and
 WHEREAS there was no response by the applicant to the Commission's email of the 29th day of May 2015; and
 WHEREAS by letter dated the 7th day of July 2015 the Commission requested the applicant respond to that email by no later than Tuesday the 14th day of July 2015 and if he had not contacted the Commission by that date it would be assumed that he did not wish to pursue the application and an order would issue for its dismissal; and
 WHEREAS by the 14th day of July 2015 the applicant had not contacted the Commission;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2015 WAIRC 00765

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STEVEN CLOUTMAN

APPLICANT

-v-

JOHN DEHRING T/A JAYDEE AIR CONDITIONING + ELECTRICAL

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 31 JULY 2015
FILE NO/S B 68 OF 2015
CITATION NO. 2015 WAIRC 00765

Result Application dismissed
Representation
Applicant Ms L Cloutman as agent
Respondent Mr J Dehring

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
WHEREAS on the 16th day of June 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 27th day of July 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 00771

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STEPHEN DENNIS

APPLICANT

-v-

MEGAN ANDERSON

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE TUESDAY, 4 AUGUST 2015
FILE NO/S U 39 OF 2015
CITATION NO. 2015 WAIRC 00771

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 28th 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 parties reached agreement in principle to settle the applicant's claim, the last step of which required the applicant to file a Notice of Discontinuance; and

WHEREAS by email dated the 7th day of July 2015, the respondent informed the Commission that the parties' agreement was reflected in a deed of settlement executed by the parties, and the respondent had complied with all of its obligations under the deed; and

WHEREAS by email dated the 8th day of July 2015, the Commission asked the applicant to confirm whether or not his claim was settled; and

WHEREAS by a Notice of Hearing dated the 23rd day of July 2015, the Commission advised the parties that a for mention hearing would be convened on the 4th day of August 2015 at 9.00 am; and

WHEREAS by email dated the 27th day of July 2015, the applicant indicated he had posted a Notice of Discontinuance to the Commission's Registry for filing, however, no Notice of Discontinuance has been received by the Commission; and

WHEREAS the Commission listed the matter for mention for the 4th day of August 2015; and

WHEREAS at the hearing on the 4th day of August 2015 there was no appearance for or by the applicant;

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

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 01077

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION EVELINE WIYENKA FOMBASON	APPLICANT
	-v-	
	KIMBERLEY INDIVIDUAL AND FAMILY SUPPORT ASSOCIATION INCORPORATED	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 30 SEPTEMBER 2014	
FILE NO/S	U 184 OF 2014, B 184 OF 2014	
CITATION NO.	2014 WAIRC 01077	

Result	Order issued
Representation	
Applicant	Mr M Bycroft of counsel
Respondent	Mr B Grail

Order

HAVING heard Mr M Bycroft of counsel on behalf of the applicant and Mr B Grail on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders -

- (1) THAT applications U 184 of 2014 and B 184 of 2014 be and are hereby joined and be heard and determined together.
- (2) THAT the name of the respondent on the notices of application be amended by deleting the name "West Kimberley Family Support Association Incorporated" and inserting in lieu thereof the name "Kimberley Individual and Family Support Association Incorporated."

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00208

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
EVELINE WIYENKA FOMBASON

APPLICANT

-v-

RESPONDENT

KIMBERLEY INDIVIDUAL AND FAMILY SUPPORT ASSOCIATION INCORPORATED

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 3 MARCH 2015
FILE NO/S U 184 OF 2014
CITATION NO. 2015 WAIRC 00208

Result Orders issued

Representation

Applicant In person

Respondent Mr B Jackson of counsel

Orders

HAVING heard the applicant on her own behalf and Mr B Jackson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the application to join filed by the applicant on 30 January 2015 be and is hereby dismissed.
- (2) THAT the application to amend the claim filed by the applicant on 12 February 2015 be and is hereby dismissed.
- (3) THAT leave be and is hereby granted for the respondent to amend its notice of answer by way of the amended notice of answer filed on 24 February 2015.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00491

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00491
CORAM : COMMISSIONER S J KENNER
HEARD : THURSDAY, 28 MAY 2015, FRIDAY, 29 MAY 2015
DELIVERED : MONDAY, 6 JULY 2015
FILE NO. : U 184 OF 2014
BETWEEN : EVELINE WIYENKA FOMBASON
Applicant
AND
KIMBERLEY INDIVIDUAL AND FAMILY SUPPORT ASSOCIATION
INCORPORATED
Respondent

Catchwords : Industrial law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Alleged breach of a policy – Duty to obey lawful and reasonable directions – Principles applied – Employee’s deliberate attempts to avoid a meeting to discuss work related matters – Failure and refusal to comply with lawful and reasonable requests to attend a meeting – Application dismissed – Order made

Legislation : *Industrial Relations Act 1979* (WA) s 29(1)(b)(i)

Result : Application dismissed

Representation:

Counsel:

Applicant : Mr S Fombason as agent

Respondent : Mr B Jackson of counsel

Case(s) referred to in reasons:

In re Loty v Holloway v Australian Workers' Union (1971) 71 AR 95

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

Reasons for Decision

1 The applicant, Ms Fombason, was employed as a Disability Support Worker for the respondent, Kimberley Individual and Family Support Association Incorporated, from September 2011 to July 2014. Ms Fombason's employment came to an end on 29 July 2014 in circumstances which are controversial. As a Disability Support Worker Ms Fombason was responsible for providing home and out of home support for people with a disability. Ms Fombason's position as a Disability Support Worker involved her providing those services to a client of KIFSA, resident in Broome. She seeks reinstatement without loss.

Factual background

- 2 Ms Fombason's work for the client started in about October 2011. She provided those services on, she says, a part time basis working at his home on a "live-in" basis from 3.00 pm Fridays to 3.00 pm Sundays each week. Work performed by Ms Fombason for the client included various domestic duties such as cooking and cleaning, providing personal care; taking the client on outings and assisting him with general daily life. The client requires continuous care, 24 hours per day seven days per week. Whilst Ms Fombason was at the client's home, she was able to be assisted by her husband, Mr Fombason.
- 3 Initially, Ms Fombason was paid \$600 per week for the work she performed, based on a written agreement entered into between her and KIFSA in August 2012. This provided for Ms Fombason to be engaged as a "casual" and paid in two blocks of 24 hours each, at \$300 per block. Sometime later, it seems that Ms Fombason entered into a further agreement on 9 August 2013, which provided for a higher rate of pay of \$1059.98 gross per week.
- 4 As a result of Ms Fombason obtaining work during the week on a Monday to Friday basis, in about March 2013, she contended that KIFSA agreed to her starting later on Friday afternoons at 4.30 pm. In the time from 3.00 to 4.30 pm, it was agreed that the client would be cared for either by the client's mother or by Ms Fombason's husband.
- 5 In July 2014, some issues were raised by KIFSA with Ms Fombason. These matters related to allegations by KIFSA that Ms Fombason was engaging in conduct in breach of her contract of employment. Specifically, it was alleged that contrary to her obligations under her contract, Ms Fombason was providing care to two foster children, one of whom has a disability. According to KIFSA, this was a fundamental breach of Ms Fombason's contract as Disability Support Workers in the Kimberley are forbidden to provide disability support services on other than a one-on-one basis.
- 6 Evidence of these matters was given by Ms Fombason and Ms Fombason's husband. In summary, the evidence was as follows. Mr Fombason testified that he assisted his wife with the client after she took up her full time work Monday to Friday with Centrelink. He would look after the client until his wife arrived at about 4.30 pm on Friday afternoon. Mr Fombason testified that this arrangement was agreed with the former Chief Financial Officer of KIFSA.
- 7 Mr Fombason testified that a new CEO, Mr Grail, took over at KIFSA. In about early July 2014, Ms Fombason had a meeting with Mr Grail. Mr Fombason said that Mr Grail had a "tally sheet" in front of him and started talking to Ms Fombason about her working hours. Mr Fombason said that his wife felt bullied by this. Mr Fombason said that he went to a second meeting between his wife and Mr Grail on about 8 July 2014. At the second meeting, Mr Fombason said Mr Grail alleged that Ms Fombason had begun looking after two foster children, in addition to the client, which was contrary to the policies of KIFSA. Mr Fombason said that this breach of policy was denied and mentioned that the former CEO of KIFSA was told of the foster children some time ago. Furthermore, Ms Fombason strongly denied that she had taken the foster children and the client on an outing together, as alleged by KIFSA. However, in the course of cross-examination, Mr Fombason conceded that at no time did his wife inform Mr Grail specifically about the foster children in their care.
- 8 In relation to the allegation by KIFSA that Ms Fombason was seen by a KIFSA employee with both the client and the two foster children together at the town shopping centre, Mr Fombason confirmed that when this was raised, Ms Fombason said to Mr Grail words to the effect "please speak to my husband". She then left the meeting.
- 9 In relation to the two foster children, Ms Fombason testified that when she and her husband were first approached by the Department of Child Protection and Family Support, she told them that she worked for KIFSA. Ms Fombason also said that she informed the then KIFSA senior officers of this. Ms Fombason denied she had ever left the client because of the need to look after the foster children. She also denied she ever went out with both the foster children and the client together, as alleged by KIFSA.
- 10 As to whether KIFSA was informed of the two foster children, Mr Fombason tendered an email, as exhibit A1, from Ms Cole-Manolis from the Department of Child Protection, dated 26 May 2015. Ms Cole-Manolis was not called to give evidence. The email referred to a meeting between Ms Cole-Manolis and KIFSA representatives, where both Ms Caterina Ponzio and another employee, "Josh" were present. It was said in the email that Ms Cole-Manolis told Ms Ponzio and Josh that the Department had approached the Fombasons to care for the two foster children. The Department was aware that Ms Fombason was employed by KIFSA.
- 11 Ms Ponzio was later called by KIFSA. She testified that the meeting referred to by Ms Cole-Manolis was about other matters. It was only at the end of the meeting that mention was made of the approach by the Department to the Fombasons, regarding the care of two boys. Ms Ponzio's recollection was that the Department was waiting for a response from the Fombasons and this was as far as the matter was mentioned. Ms Ponzio testified that at no time later did Ms Fombason go to the KIFSA office to inform her that the two boys had gone into the care of her and her husband.

- 12 While Ms Fombason agreed that the two foster children and the client knew each other, and had been to each other's homes, Ms Fombason implied there was nothing improper about this. She said the Fombasons live close by to the client in Broome and she said that they would stop by each other's houses.
- 13 As to the meetings on 4 July and 8 July, Ms Fombason testified that she met Mr Grail for the first time on 4 July. At that time, he asked her about her time sheets and how she had recorded her time when at the client's house whilst the client was spending time with his family. When the issue of the foster children was raised by Ms Ponzio, Ms Fombason confirmed that she said words to the effect "why ask me about this". Just before Ms Fombason left the meeting she said her husband would come and discuss the matter. Ms Fombason took the view that as the two foster children were formally in the care of her husband for the Department of Child Protection's purposes, then this was not a matter of concern for KIFSA, as her employer.
- 14 At the second meeting on 8 July, between herself, Mr Grail, Ms Ponzio and her husband, Ms Fombason denied that Mr Grail raised with her the fact that she was then working full time during the week for Centrelink as well as caring for the client over the weekend, and also looking after two foster children. Ms Fombason denied telling Mr Grail that the foster children were none of his business but did agree that again, she told him that he would have to speak to her husband about that matter, and then left the meeting.
- 15 From KIFSA's perspective, Mr Grail, who took over as the CEO in May 2014, testified that as an organisation providing support to people with disabilities, it has a duty of care to the client. Mr Grail said he was briefed on some staffing issues that were ongoing at that time. These included proper time recording of hours on time sheets by Disability Support Workers and also that Ms Fombason had taken on full time work Monday to Friday, in addition to her caring responsibilities to the client each weekend. Mr Grail testified that he was concerned about the amount of time Ms Fombason was spending working, as it was over the full seven days of each week. This amount of work may have been a conflict of interest in accordance with KIFSA's policies. Mr Grail said he was also aware, that one of the foster children had very high needs.
- 16 Mr Grail said that he tried to raise these matters with Ms Fombason on 4 July in the presence of Ms Ponzio. In relation to the time sheet issue, Mr Grail described Ms Fombason's response as "resistant". When Ms Ponzio tried to raise the foster children issue, Mr Grail testified that Ms Fombason became very agitated and aggressive. She told him that these were personal matters and not for KIFSA.
- 17 Over the following weekend, Mr Grail testified that it was reported to him by another KIFSA staff member, that Ms Fombason had been seen in the town shopping centre, with both the client and the two foster children together. Mr Grail said that this is not allowed as many clients' families are very sensitive about a client being in the company of other disabled people in public. Mr Grail said that when the client's mother became aware of this allegation, she was horrified and expressed her discontent. Mr Grail then arranged to meet with Ms Fombason on 8 July to discuss this matter.
- 18 Mr Grail testified that he raised the issue of Ms Fombason's long working hours and also that she had been seen with the two foster children and the client together at the shopping centre. Mr Grail said that he told Ms Fombason that this was not permitted and he had concerns about KIFSA's duty of care. According to Mr Grail, Ms Fombason said that her husband would respond and she went to leave the meeting. Mr Grail testified that he told Ms Fombason that he was not prepared to discuss matters with her husband as she was an employee of KIFSA, not her husband.
- 19 Subsequently, between about 11 and 15 July, Mr Grail sent several emails to Ms Fombason attempting to arrange a further discussion about these matters. He made it clear to Ms Fombason that KIFSA was only prepared to discuss work related matters with her, as KIFSA's employee, and not her husband. On each occasion Mr Grail attempted to arrange a meeting, Mr Grail said that Ms Fombason variously said she was too busy to meet; her husband would be authorised to communicate; the issues should be raised in writing (which they subsequently were); and that time outside of her work for KIFSA was "private and personal". The written request from Mr Grail to Ms Fombason on 14 July 2014 raised three issues they being the need for Ms Fombason to take unpaid meal breaks; a request for Ms Fombason to clarify her weekly hours of work with Centrelink because of KIFSA's duty of care to ensure staff do not work excessive hours of work; and clarification of Ms Fombason's work responsibilities when the client was not physically present at his home.
- 20 It was Mr Grail's evidence that by this time, it had become very clear to him that Ms Fombason was attempting to evade discussions with him on these issues. This led to Mr Grail writing a letter to Ms Fombason on 20 July 2014, referring to previous requests that Ms Fombason meet with Mr Grail to discuss work related matters. Mr Grail pointed out in the letter that as an employee of KIFSA, Ms Fombason was required to comply with instructions from the CEO. The letter concluded by directing Ms Fombason to attend the KIFSA office on 21 July or 22 July to meet. Ms Fombason was told she could have someone attend with her for support, but the person could not otherwise participate in the meeting. Two different meeting times were proposed on each of the two days.
- 21 Ms Fombason sent an email to Mr Grail on 21 July saying that she was not comfortable with a "face to face meeting" and requested that Mr Grail explain "what you require and explain why". Ms Fombason also proposed as an alternative a meeting at the client's home in accordance with the terms and conditions of her appointment. I pause to observe that the evident purpose of such meetings is to review operational matters in connection with a client's care and not to discuss the sort of matters that Mr Grail wished to discuss with Ms Fombason.
- 22 As a consequence of Ms Fombason's failure and refusal to attend a meeting with Mr Grail, on 21 July 2014 Mr Grail again wrote to Ms Fombason. Formal parts omitted, the letter was in the following terms:
 - In response to your email which I received on Monday 21 July, I wish to advise the following:
 - a. Despite my repeated lawful directives for you to attend a meeting at the KIFSA offices with your Support Person, you have instead repeatedly advised that you are unavailable to do so and now appear to be dictating to me the circumstances where you will attend - I note that you are referring to a clause in your Contract which is totally

unrelated to the requirement for the meeting which I have requested and you have failed to provide any valid reason for non attendance - particularly as independent parties will be present.

- b. On multiple prior occasions, I have asked you to disclose the details of other paid work you undertake and which may form the basis of a direct conflict of interest with your KIFSA employment and negatively impact on your support of KIFSA service users, you have failed to respond to all such reasonable requests. As explained to you in person during the last two face to face meetings with you, KIFSA has a duty of care to its employees and its clients to never roster staff on when they have just completed a shift with a different employer.
- c. KIFSA is contracted to provide one-on-one support to the client (Peter Moore), however it is alleged that you have been observed by independent witnesses caring for up to three people simultaneously whilst rostered on to work with Peter - if so this would represent a breach of your contract.
- d. It is further alleged that you made an inappropriate approach to a client's mother on the weekend of 12/13 July where you aired your grievance with KIFSA directly with Margaret Moore - this action represents both a breach of faith with KIFSA and a breach of your contract.

As at the date of this letter you are hereby formally advised that you are being placed upon immediate suspension - you will be paid as per your normal shift allocations during this period. You have until close of business (ie 5pm) Thursday the 24th of July to respond to the above matters in writing to me and show 'just cause' as to why you should not be terminated for breach of contract relating to the matters referred to in items b, c and d above.

Alternatively you may choose to attend a meeting here at the KIFSA Offices with myself and Shelley Baker present at 4:30pm on Wednesday 23 July and to which you may bring a 'support Person'. You are reminded that a support person is not an advocate and may not speak on your behalf. If you choose to attend this meeting then you are required to inform me no later than 1pm on Wednesday 23 July.

I would draw your attention that any failure to respond to this directive within the timeframe specified without valid excuse will result in the termination of your employment.

- 23 Ms Fombason retained a solicitor and correspondence passed between Mr Grail and her solicitor on 23, 24 and 25 July 2014. KIFSA contended that despite repeated requests, Ms Fombason failed to respond to its legitimate concerns. As a result, on 28 July 2014, Ms Fombason's employment was terminated by KIFSA. KIFSA also contended that contrary to its policies, Ms Fombason engaged directly with the client's mother, about her concerns regarding her alleged treatment by KIFSA generally, and Mr Grail in particular.

Consideration

- 24 That is a sufficient summary of the issues and evidence led in this case. Before turning to my findings and conclusions, I will briefly consider the relevant legal and industrial principles to apply in matters such as these. Whether a dismissal is harsh, oppressive or unfair involves an objective assessment by the Commission as to whether an employer has abused its lawful right to terminate a contract of employment. The employee is entitled to "a fair go all round": *The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385; *In re Loty v Holloway v Australian Workers' Union* (1971) 71 AR 95. It is also not for the Commission to sit in the managerial chair and to decide for itself if a decision should have been taken. Rather, the Commission's role is to objectively consider the employer's actions, and whether the employer's actions in dismissing the employee, were unfair. In the context of these considerations, I consider the following conclusions are open on the evidence.
- 25 As an employee of KIFSA, Ms Fombason was responsible for the care of the client. Also, as an employee, Ms Fombason had other duties. One such duty, and an important one in the context of the type of services provided by KIFSA, was to ensure that the policies of the organisation were complied with. A key policy of KIFSA is the policy to not cause a conflict of interest between any activities engaged in by an employee and KIFSA's obligations to its clients. Concerns about a conflict of interest plainly may involve matters such as the performance of excessive hours of work in other occupations or activities that may impact on the provision of care to clients.
- 26 Additionally, as an employee of KIFSA, at common law, Ms Fombason was at all times, required to comply with the lawful and reasonable directions of Mr Grail, as the CEO of her employer: Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment* (7th ed, 2011) at par 5.790. In this case, Ms Fombason was clearly in breach of her duty in this respect. On the evidence, Ms Fombason failed to respond to the several lawful and reasonable requests by Mr Grail, on behalf of KIFSA, her employer, to meet and to discuss the various matters raised by him in his correspondence. On the evidence, Mr Grail had raised a number of legitimate issues, that as Ms Fombason's employer, he was entitled to raise with her. Given the policies of KIFSA, Mr Grail was obliged to clarify and resolve these issues. It was simply not for Ms Fombason to dictate to KIFSA where and how these matters were to be progressed. Similarly, it was not for Ms Fombason to appoint her husband as her spokesperson. Mr Fombason was not an employee of KIFSA. He had nothing to do with the employment contract between Ms Fombason and KIFSA.
- 27 Given that I accept that Mr Grail was not made directly aware of Ms Fombason's specific working arrangements during the week, Monday to Friday, nor the specific arrangements for the care of the two foster children, these matters were very properly able to be raised by him. In my view, there was nothing at all unreasonable about KIFSA, as Ms Fombason's employer, wishing to discuss these matters properly with her. Mr Grail also wished to discuss the allegation that Ms Fombason took both the client and the two foster boys on an outing together, contrary to KIFSA's usual practices. Mr Grail also wanted, in my view again quite properly, to discuss with Ms Fombason the allegation that she had inappropriately raised with the client's mother, Mrs Moore, her employment issues involving both Mr Grail and KIFSA.
- 28 I do not accept the assertion of Ms Fombason that she was bullied and intimidated by Mr Grail. There was no cogent evidence before me to support such an allegation. Moreover, on one occasion that Ms Fombason and Mr Grail met prior to the

termination of her employment, Mr Fombason was also present. A person was also invited to be present at the meetings requested by Mr Grail in July 2014. On all of the evidence I consider that Mr Grail's impression that he had formed by at least 21 July, that Ms Fombason was deliberately attempting to avoid any meeting with him, to be quite correct.

- 29 I am well satisfied on the evidence that Ms Fombason failed to comply with several lawful and reasonable requests to meet with Mr Grail, as she was required to do so under her contract of employment. To the extent that it is necessary for me to do so, I am also satisfied on the evidence that Ms Fombason did engage with the client's mother Mrs Moore, about her employment matters with KIFSA. This was not appropriate. It was not however, of itself, a matter that would warrant termination of employment.
- 30 However, ultimately, it is the complete failure and refusal by Ms Fombason, as an employee of KIFSA, to properly engage with her employer on important matters in connection with her employment, that was a proper ground for the termination of her employment.
- 31 Ms Fombason's unreasonable refusal to comply with KIFSA's requests left KIFSA with little option. I do not in this respect consider Ms Fombason's further requests through her solicitors, of more time to respond, as being reasonable. Ms Fombason had ample time to consider the matters raised by Mr Grail, which were well known to her. In my opinion, it is open to conclude, and I do conclude, that such a request was a further attempt to delay and frustrate KIFSA's legitimate request to meet with its employee to discuss some important work related matters. As I have earlier mentioned, the suggestion of a meeting at the client's home, was plainly not appropriate. The matters that Mr Grail wanted to discuss with Ms Fombason, did not relate in any way to the provision of support for her in her role as a carer for the client. They were matters relating to potentially serious breaches of KIFSA's policies. Mr Grail was only attempting to investigate them as he should have done.
- 32 Whilst the Commission raised with KIFSA whether any significance was to be attached to the alleged casual status of Ms Fombason's employment, this was not a matter taken up by KIFSA and therefore it is not necessary for me to consider it further.
- 33 For the foregoing reasons, I am not persuaded that the dismissal of Ms Fombason was harsh, oppressive or unfair. Accordingly, the application is dismissed.

2015 WAIRC 00490

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
EVELINE WIYENKA FOMBASON

PARTIES

APPLICANT

-v-

KIMBERLEY INDIVIDUAL AND FAMILY SUPPORT ASSOCIATION INCORPORATED

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE MONDAY, 6 JULY 2015

FILE NO/S U 184 OF 2014

CITATION NO. 2015 WAIRC 00490

Result Application dismissed

Representation

Applicant Mr S Fombason as agent

Respondent Mr B Jackson of counsel

Order

HAVING heard Mr S Fombason as agent on behalf of the applicant and Mr B Jackson 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 application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00808

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	TROY PATRICK FRANSE	APPLICANT
	-v-	
	ALFRESCO CONCEPTS PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	FRIDAY, 14 AUGUST 2015	
FILE NO/S	B 166 OF 2013	
CITATION NO.	2015 WAIRC 00808	

Result	Application discontinued	
Representation		
Applicant	Mr P Mullally, as agent	
Respondent	Mr G McCorry, as agent	

Order

WHEREAS on 22 September 2014 an order issued declaring that the respondent denied the applicant benefits under his contract of employment and ordering the respondent to pay the applicant \$34,536 (less applicable taxation) within 21 days of that order [2014] WAIRC 01035;

AND WHEREAS on 24 March 2015 the Full Bench suspended the decision made by the Commission and remitted the matter to the Commission for further hearing and determination;

AND WHEREAS on 9 April 2015 the parties met with me to see whether any agreement on the outstanding issues was possible and an agreement was reached;

AND WHEREAS on 22 April 2015 the applicant filed a Notice of withdrawal or discontinuance in this matter;

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00781

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	KENNETH CHARLES MICHAEL GILL	APPLICANT
	-v-	
	CHARLES SERVICE COMPANY	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 7 AUGUST 2015	
FILE NO/S	B 75 OF 2015	
CITATION NO.	2015 WAIRC 00781	

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 on the 1st day of July 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 5th day of August 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 00782

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00782
CORAM : ACTING SENIOR COMMISSIONER P E SCOTT
HEARD : THURSDAY, 6 AUGUST 2015
DELIVERED : MONDAY, 10 AUGUST 2015
FILE NO. : U 59 OF 2015, B 59 OF 2015
BETWEEN : ANDRIES LUCAS HOFFMAN
 Applicant
 AND
 PALADIN ENERGY LTD
 ACN 061 681 098
 Respondent

CatchWords : Unfair dismissal – Denied contractual entitlements – Jurisdiction – Contract of employment – Employment connection to the State of Western Australia – Trading corporation – Industrial instrument – Prescribed salary amount – NAPSA – Employer-Employee Agreement – Common law contract
 Legislation : *Industrial Relations Act 1979* s 3(1), s 7, s 29(1)(b)(ii), s 29AA, s 29AA(3), s 29AA(4), s 29AA(5), s 29AA(5)(b), s 83(1), s 83(2), s 97UA, Part VID, Division 5
Workplace Relations Act 1996 (Cth)
 Result : Applications dismissed
Representation:
 Applicant : Mr A Hoffman on his own behalf
 Respondent : Mr T French of counsel and with him Mr J Cockerell of counsel

Reasons for Decision

1 The applicant claims that he was harshly, oppressively or unfairly dismissed by the respondent. He also claims that he has been denied benefits arising from his contract of employment.

Background

- 2 The respondent is engaged in the mining and sale of uranium. It has a number of tenements in Australia, including Western Australia, but has no active mining operations. Its administrative headquarters are in Western Australia.
- 3 There is no dispute between the parties that the applicant was employed by the respondent to work as Maintenance Manager and subsequently as Engineering Manager at the respondent's Kayelekera Mine in Malawi. The applicant resides in South Africa and the position he originally applied for was initially advertised there and was subsequently advertised internationally. He applied from either South Africa or Malawi. Although the respondent communicated with him from, and signed the contract in, Western Australia, the applicant signed the contract in Africa and undertook the work involved exclusively in Malawi.
- 4 At the time of termination of the applicant's employment, his salary was \$195,000 per annum.

Jurisdictional challenges

- 5 The respondent challenges the Commission's jurisdiction to deal with either of the claims. Its grounds are that:
 1. The employment did not have a real and sufficient connection with the State of Western Australia; or
 2. The respondent is a trading corporation; or
 3. The applicant's employment is not covered by an industrial instrument and his contract of employment provides a salary exceeding the prescribed limit.

Is there a sufficient connection with the State?

- 6 **Section 3 – Application of Act off-shore** of the *Industrial Relations Act 1979* (the Act) sets out the circumstances under which the Act applies to and in relation to an industry carried on partly within the State and partly within an area to which subsection (1) applies, or wholly or partly in that area.
- 7 I have set out the details of the employment arrangements between the parties in terms of the applicant being engaged from South Africa, being resident there and working exclusively in Malawi.
- 8 The evidence before me is insufficient to determine with any certainty the respondent's status for the purposes of deciding whether there is a real and sufficient connection with the State. However, I do not need to reach a conclusion regarding that matter due to other impediments to the applications being determined, and I set those out below.

Is the respondent a trading corporation?

- 9 The Commission does not have jurisdiction to deal with claims of unfair dismissal in respect of an employee of a constitutional corporation (*Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; (2008) 89 WAIG 243).
- 10 A constitutional corporation includes a trading or financial corporation. The principles for determining whether a corporation is a trading corporation are set out by Steytler P in *Aboriginal Legal Service* op cit at [68] as being:
 - (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 categorisation 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]. (footnotes omitted)
- 11 In this case, there seems to be no contention that the respondent is a public company, limited by shares. Its predominant, if not sole, activity is mining and selling uranium. It gives all the appearance of undertaking this activity with a view to earning revenue and making a profit (see Paladin Energy Ltd 30 June 2014 Annual Report). There is no evidence to the contrary.
- 12 In those circumstances, I find that the respondent is a trading corporation. Accordingly, the Commission does not have jurisdiction to deal with the claim of unfair dismissal by an employee or former employee of the respondent. The claim of harsh, oppressive or unfair dismissal must be dismissed.
- 13 However, in accordance with the decision in *Triantopoulos v Shell Company of Australia Ltd* [2011] WAIRC 00004; (2011) 91 WAIG 67, the Commission has jurisdiction to deal with a claim of denied contractual benefits by an employee of a constitutional corporation.

Certain claims not to be determined

- 14 **Section 29AA – Certain claims not to be determined** of the *Industrial Relations Act 1979* provides that certain claims of harsh, oppressive or unfair dismissal and of denied contractual benefits are not to be determined. In respect of both types of claim, the Commission is prohibited from determining a claim if:
 - (a) an industrial instrument does not apply to the employment of the employee; and

- (b) the employee's contract of employment provides for a salary exceeding the prescribed amount.

Section 29AA(3) and (4)
of the Act

15 An 'industrial instrument' is defined as:

- (a) an award; or
 (b) 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
 (c) an industrial agreement; or
 (d) an employer-employee agreement.

Section 29AA(5)
of the Act

The General Order

- 16 The applicant relies on the General Order on Termination, Change and Redundancy of 1 June 2005 ((2005) 85 WAIG 1681) (the General Order) as meeting the test set out in s 29AA(5)(b) of the Act as being an industrial instrument. This contention is supported by the decision in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* [2006] WAIRC 05220.
- 17 However, where the employer is a constitutional corporation, the General Order no longer applies to that employment. This is because the General Order became a Notional Agreement Preserving State Award (NAPSA) under the *Workplace Relations Act 1996* (Cth) and continued to apply until it was cancelled as a NAPSA by Senior Deputy President Harrison on 29 July 2011 (PR 512464). As the General Order was cancelled as a NAPSA for the purpose of the federal jurisdiction it no longer has application to the employment of an employee of a constitutional corporation.
- 18 For the purposes of an employee who may otherwise be able to bring a claim of denied contractual benefits or unfair dismissal but who is an employee of a constitutional corporation, a national system employer, the General Order no longer has application.
- 19 Accordingly, for the purposes of both a claim of unfair dismissal and a claim of denied contractual benefits under s 29AA, the General Order is not an industrial instrument applicable to the employment of the employee (*Eric Stothers v Toll Energy Logistics Pty Ltd* [2013] WAIRC 00725).

Employer-Employee Agreement

- 20 The applicant says that his contract of employment constitutes an employer-employee agreement for the purposes of an industrial instrument applying to his employment.
- 21 **Section 7 – Terms used** of the Act defines an employer-employee agreement as 'an employer-employee agreement provided for by section 97UA' of the Act.
- 22 **Part VID – Employer-Employee agreements** of which s 97UA is part, sets out a regime for a single employer and a single employee to make an agreement that deals with any industrial matter. It provides for the status of that agreement vis-à-vis an award, contract of employment or industrial agreement which otherwise applies to the employment. It sets out the documents the employer must give to the employee and when, the role and arrangements for bargaining agents, and many other provisions.
- 23 Importantly, **Division 5 – Registration of EEAs** provides for the Registrar to register the EEA if satisfied of certain things, and for the refusal to register. An EEA is required to meet a no-disadvantage test. Most significantly, an employer-employee agreement is enforceable in the Industrial Magistrate's Court (see s 83(1) and (2)).
- 24 An examination of the contract between the parties indicates that it is a common law contract of employment, not an EEA. There is no suggestion that it is registered or registerable under Part VID of the Act. Further, if it were an EEA, it would not be enforceable under s 29(1)(b)(ii), which is the nature of this application.
- 25 Therefore, an industrial instrument does not apply to the applicant's employment.

Does the applicant's contract of employment provide for a salary exceeding the prescribed amount?

- 26 The prescribed amount is \$149,400 ([2014] WAIRC 00615; (2014) 94 WAIG 775). There is agreement between the parties that at the time of termination, the applicant's salary was \$195,000 per annum. In those circumstances, it clearly exceeds the prescribed amount.
- 27 Therefore, for the purposes of both the unfair dismissal claim and the claim of denied contractual benefits, 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.
- 28 Accordingly, the Commission must not determine either of those claims.

Conclusion

- 29 In all of those circumstances, there being no jurisdiction to determine the unfair dismissal claim, and, in any event, the Commission being prohibited from dealing with that claim and the denied contractual benefits claim, both applications must be dismissed.

2015 WAIRC 00783

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	ANDRIES LUCAS HOFFMAN	APPLICANT
	-v-	
	PALADIN ENERGY LTD ACN 061 681 098	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 10 AUGUST 2015	
FILE NO/S	U 59 OF 2015, B 59 OF 2015	
CITATION NO.	2015 WAIRC 00783	
Result	Applications dismissed	

Order

HAVING heard Mr A Hoffman on his own behalf and Mr T French of counsel and Mr J Cockerell 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 applications be, and are hereby dismissed.

[L.S.]

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

2015 WAIRC 00770

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
CITATION	: 2015 WAIRC 00770	
CORAM	: COMMISSIONER J L HARRISON	
HEARD	: TUESDAY, 7 JULY 2015	
DELIVERED	: MONDAY, 3 AUGUST 2015	
FILE NO.	: B 237 OF 2014	
BETWEEN	: JENNA JONES	
	Applicant	
	AND	
	ORANGE RECRUITMENT AUSTRALIA PTY LTD	
	Respondent	
Catchwords	: Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment - Claim for payment of outstanding commission and a percentage of the proceeds from the sale price of the business - No entitlement to benefits claimed - Application dismissed	
Legislation	: <i>Industrial Relations Act 1979</i> s 7 and s 29(1)(b)(ii)	
Result	: Dismissed	
Representation:		
Applicant	: In person	
Respondent	: Mr L Smith (of counsel)	

Case(s) referred to in reasons:

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

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Byrne v Macquarie Group Services Australia Pty Ltd [2011] NSWCA 68
Ferguson v TNT Australia Pty Ltd (41 000 495 269) [2014] WAIRComm 20; 94 WAIG 110
Hotcopper Australia Ltd v David Saab (2001) 81 WAIG 2704
Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307
Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

- 1 On 3 December 2014 Jenna Jones (the applicant) lodged this application claiming that she is owed benefits under her contract of employment with Orange Recruitment Australia Pty Ltd (the respondent). The applicant is seeking the payment of commission she claims is owed to her for the period January 2014 to August 2014. The applicant initially claimed she was owed \$9,223.61 in commission under her written contract of employment dated 9 September 2011, but she revised this amount to \$5,738.47 at the hearing as she had erroneously included commission of \$3,485.14 in her original claim based on an extra week of placements in August 2014. There was no dispute that the quantum claimed by the applicant, which was based on documentation provided to the applicant by the respondent prior to the hearing, is the commission she would have been entitled to if the applicant was successful in her claim (see exhibit R5, documents 16 and 17). The applicant is also seeking an unspecified sum of money from proceeds of the future sale of the respondent's business. The applicant claims she is entitled to this payment given the terms of the following letter written by the respondent's Managing Director, Mr James Dossetter. This letter (the Sale letter) is as follows:

In relation to your continued success with Orange Recruitment I am please (sic) to confirm that you have attained the agreed levels of business and as such you will be entitled to a 7.5% share of the proceeds from any potential sale of the business.

In continuing the incentive strategy there is a further 7.5% available should you reach and maintain the following target:

Employing three targeted employees who are reaching and maintaining the agreed targets for a minimum period of 4 months. The Branch Manager sets employee targets after approval by the Directors.

All of the above is subject to you (sic) continued employment with Orange Recruitment.

(Exhibit R5, document 6)

Background

- 2 The applicant was employed by the respondent as its General Manager and Recruitment Consultant between February 2008 and August 2014. She worked full-time and was paid a salary of \$120,000 gross per annum plus commission if she met specified placement targets. The applicant's terms and conditions of employment were set out in written contracts of employment, the last of which was signed by the applicant on or about 9 September 2011 (the 2011 Agreement) (exhibit R5, document 5). The applicant's employment was not covered by an award or industrial agreement.
- 3 The applicant's commission structure contained in the 2011 Agreement is as follows:

BENEFITS AND CONDITIONS

Your individual benefits and conditions constitute confidential information that is the property of Orange Recruitment Trades & Mining Services Pty Ltd. This information is not to be discussed with any individual, apart from the owner of the business. Breaching this policy will result in disciplinary action.

Your salary package is \$120,000 plus Super per annum and is paid on a weekly basis. This will be paid directly into a bank account of your nomination.

Commission is paid at the following rates of your weekly margin sheet and is paid on the first week of the following month earned. To accrue the commission below a monthly target set by your office manager or Director will need to be met.

Up to \$20,000 – 10%
 20,000 to 35,000 – 15%
 Over \$35,000 – 20%

You will be provided with a Mobile Phone for business and personal use, excessive personal use will be charged back to you.

You will be provided with a vehicle for business and personal use. The vehicle remains company property at all times. You will have access to a vehicle after signing a vehicle usage agreement. You will also be reimbursed for business mileage at 0.58 cents per km.

(Exhibit R5, document 5)

- 4 A new commission structure introduced by the respondent applied to the applicant from 1 January 2014. This structure is as follows:

COMMISSION POLICY – RECRUITMENT ONLY

THIS COMMISSION POLICY IS EFFECTIVE 1 JANUARY 2014

MARGIN

Margin is the weeks invoiced amount minus payroll and oncosts.

ANNUAL MARGIN TARGET (AMT)

Annual target is calculated by multiplying the consultants gross salary by three (3).

MONTHLY MARGIN TARGET (MMT)

Monthly target is calculated by dividing the annual target by 52 weeks and multiplying by the number of payroll weeks in the month.

COMMISSION PERCENTAGE

MMT + \$1 – \$10,000 – 15%

MMT + \$10,001 – \$20,000 – 20%

MMT + \$20,001 – \$30,000 – 25%

MMT + \$30,001 ++ – 30%

MARGIN SPLITS

100

100% - CLIENT INTRODUCTION, CLIENT RELATIONSHIP MANAGER, FULL RECRUITMENT & ON-BOARDING

75/25

75% - CLIENT RELATIONSHIP MANAGER, FULL RECRUITMENT & ONBOARDING

25% - CLIENT INTRODUCTION

50/50

50% - FULL RECRUITMENT & ONBOARDING

50% - CLIENT INTRODUCTION, CLIENT RELATIONSHIP MANAGER

VARIATION CAN BE APPROVED BY MANAGEMENT

(Exhibit R5, document 7)

Evidence**Applicant**

- 5 The applicant gave evidence that the respondent's Business Manager Mr Mitchell Collins told her in December 2013 that a new commission structure was to apply to her effective 1 January 2014. At the time the applicant did not protest its implementation nor did she agree to this revised commission structure as she did not sign any document agreeing to this change. The applicant was paid under the new commission structure throughout 2014 until she ceased her employment with the respondent in August 2014. The applicant stated that the new commission structure made it more difficult for her to earn commission.
- 6 The applicant gave evidence that she was claiming proceeds from the future sale of the respondent's business based on what was stated in the Sale letter. The applicant stated that she was offered the entitlements contained in the Sale letter as an incentive to continue working with the respondent as she had worked very hard to build the respondent's business.
- 7 Under cross-examination the applicant conceded that the Sale letter states that no money is to be paid to her until the respondent's business is sold and if she left her employment with the respondent she was not entitled to any payment related to the sale of the respondent's business. The applicant said she expected to continue working with the respondent when she accepted the arrangement set out in the Sale letter.

Respondent

- 8 Mr Collins has been employed by the respondent since January 2011. As Business Manager he oversees the respondent's operations including human resources and information technology. Mr Collins had daily dealings with the applicant when she was employed by the respondent.
- 9 Mr Collins drafted the commission policy which applied to the applicant from 1 January 2014. Mr Collins had a discussion with the applicant in December 2013 about this new structure and at the time she did not protest its introduction nor did she request that the commission policy which previously applied to her should continue after 1 January 2014. Mr Collins stated that the new commission structure, which also applied to another recruitment consultant working with the respondent, delivered higher commissions if employee placements above a certain level were achieved and the revised targets were met. Mr Collins confirmed that the respondent's business has not been sold and the respondent remains trading.
- 10 Mr Dossetter is the respondent's General Manager. He said that the Sale letter was given to the applicant in late 2011. The Sale letter arose because the applicant wanted a higher remuneration and by offering a percentage of the proceeds of the sale of the respondent's operations at a future date this would assist in the respondent retaining her as an employee. Mr Dossetter confirmed that the respondent's business has not been sold, nor is it likely to be sold.

Submissions**Applicant**

- 11 The applicant claims that she is entitled to the commission structure set out in the 2011 Agreement. The applicant believed that she had to accept the new commission structure which commenced on 1 January 2014 as she felt she could not contest its

implementation. The applicant argues that she should be compensated for the future sale of the respondent's business because she worked hard to build the respondent's business.

Respondent

- 12 No commission is owed to the applicant. The respondent lawfully amended the applicant's commission structure and the applicant was paid commission in accordance with this amended structure after 1 January 2014. Notice was given to the applicant of this change, the new structure was discussed with her, the applicant accepted the new commission structure and no issues were raised by the applicant disputing this change. The applicant enjoyed the benefit of the revised commission structure and only complained about it after she was terminated.
- 13 For the applicant to have any entitlement under the terms of the Sale letter she must satisfy all of the prerequisites contained in the letter. The respondent maintains that the terms of the Sale letter are clear. The applicant must be an employee of the respondent when any sale takes place and a sale must take place. These prerequisites have not been met as the applicant no longer remains an employee of the respondent and the respondent's business has not been sold. In support of its position, the respondent relies on the authority of *Ferguson v TNT Australia Pty Ltd (41 000 495 269)* [2014] WAIRComm 20; 94 WAIG 110 where Kenner C stated:

The contemporary approach to the contractual interpretation is to have regard to the meaning of a contractual provision that a reasonable person in the position of the parties at the time the contract was made, would have, in the context of the surrounding circumstances and the purpose and object of the transaction: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165. This involves an objective assessment. The subjective intention of the parties is not relevant: *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451.

The focus is on the text of the contract, which is to be given its ordinary and natural meaning. There is no reason to depart from the ordinary and natural meaning unless the terms in question are unclear or ambiguous, or would lead to an absurdity or inconsistency: *Australian Broadcasting Commission v Australasian Performing Right Association Limited* [1973] HCA 36; (1973) 129 CLR 99. Furthermore, it is not generally permissible to look to extrinsic material, unless there is some ambiguity in the terms of the relevant contract: *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 352 per Mason J [21] – [22].

- 14 The respondent also relies on the authority of *Byrne v Macquarie Group Services Australia Pty Ltd* [2011] NSWCA 68.

Consideration

Witness Credit

- 15 The evidence given by the applicant, Mr Collins and Mr Dossetter with respect to the facts relevant to this case was not in contest and in my view all of the witnesses gave their evidence honestly and in a forthright manner. I therefore accept the evidence they gave.

Are the benefits the applicant is claiming due to be paid to her?

- 16 The claims before the Commission are for an alleged denial of contractual benefits. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to industrial matters contained in s 7 of the Act and the claimant must be an employee. The claimed benefits must be contractual benefits to which there is an entitlement under the applicant's contract of service, the benefits claimed must not arise under an award or order of this Commission and the benefits must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867. The meaning of 'benefit' has been interpreted widely in this jurisdiction: *Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.
- 17 In determining whether a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claim is a benefit to which she is entitled under her contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts*).
- 18 There is no issue in this matter and I find that at all material times the applicant was an employee of the respondent employed under a contract of service. I find that her claims are industrial matters under s 7 of the Act as they relate to payments the applicant claims are due to her arising out of her employment with the respondent. It is also common ground that the benefits the applicant is claiming do not arise under an award or order of this Commission. The issue to be determined therefore is what were the terms of the applicant's contract of employment with the respondent and whether it was a term of the contract of employment that the applicant is entitled to the payments she is seeking.
- 19 I find that the applicant is not due the commission of \$5,738.47 that she is claiming. In my view the commission structure introduced by the respondent as at 1 January 2014, which applied to the applicant until she ceased employment with the respondent in August 2014, constituted a lawful change to the terms of the applicant's contract of employment. I find that the introduction of the new commission structure on 1 January 2014 was lawful as the new terms constituted a consensual variation to the applicant's existing contract of employment contained in the 2011 Agreement. It was not in dispute that Mr Collins and the applicant discussed the foreshadowed change to the applicant's commission structure in December 2013 and that Mr Collins told the applicant that the new commission structure was to apply from January 2014. As the applicant did not object to this change or protest the change to the existing commission structure specified in her contract of employment at the time, I find that the applicant agreed to her existing commission structure being altered. The new commission structure therefore formed part of the applicant's contract of employment from 1 January 2014. In support of reaching this conclusion I have also taken into account that it was common ground that the applicant did not request that the commission structure

contained in the 2011 Agreement continue to apply to her after 1 January 2014 and the applicant was paid commission under the new commission structure without protest from 1 January 2014 until she ceased employment with the respondent.

- 20 I find that the applicant's claim for an unspecified portion of the proceeds of the future sale of the respondent's business fails. The Sale letter states that the applicant is only entitled to a share of the proceeds from the sale of the respondent's business if she is employed by the respondent at the time the respondent's business is sold. There was no dispute that the applicant ceased working with the respondent in August 2014 and that the respondent's business has not been sold. The applicant therefore has no entitlement to the unspecified benefit she is seeking now or in the future with respect to proceeds from the future sale of the respondent's business.
- 21 An order will issue dismissing this application.

2015 WAIRC 00769

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JENNA JONES	APPLICANT
	-v- ORANGE RECRUITMENT AUSTRALIA PTY LTD	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	MONDAY, 3 AUGUST 2015	
FILE NO/S	B 237 OF 2014	
CITATION NO.	2015 WAIRC 00769	

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr L Smith (of counsel)

Order

HAVING HEARD the applicant on her own behalf and Mr L Smith 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 application be and is hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00522

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JEFFREY ALAN LEVER	APPLICANT
	-v- CITY OF WANNEROO	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 17 JULY 2015	
FILE NO/S	U 35 OF 2015	
CITATION NO.	2015 WAIRC 00522	

Result	Application dismissed
Representation	
Applicant	Mr P Nevin of counsel
Respondent	Mr B Taylor as agent

Order

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

WHEREAS on the 1st day of April 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on the 8th day of May 2015 the Commission convened a Directions hearing; and

WHEREAS the Commission set the matter down for hearing on the 10th and 11th days of August 2015; and

WHEREAS on the 14th day of July 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 00511

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CORNELIA MAJOR	APPLICANT
	-v-	
	CHEVRON AUSTRALIA PTY LTD	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	TUESDAY, 14 JULY 2015	
FILE NO/S	B 49 OF 2015	
CITATION NO.	2015 WAIRC 00511	

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 on the 5th day of May 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 her position; and

WHEREAS the Commission set the matter down for a hearing for mention on the 24th day of July 2015; and

WHEREAS by email on the 13th day of July 2015 the applicant advised that she wished to discontinue 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 00492

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2015 WAIRC 00492
CORAM	: COMMISSIONER J L HARRISON
HEARD	: TUESDAY, 26 MAY 2015
DELIVERED	: TUESDAY, 7 JULY 2015
FILE NO.	: U 18 OF 2015, B 18 OF 2015
BETWEEN	: GILLIAN DENISE MILLER
	Applicant
	AND
	MR GRAEME MOUNSEY - PRESIDENT NEWMAN SENIOR HIGH SCHOOL PARENTS & CITIZENS ASSOCIATION INC.
	Respondent

Catchwords	:	Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Whether the applicant resigned or was dismissed - No dismissal at the initiative of the employer - Commission lacks jurisdiction - Application dismissed - Contractual benefits claim - Entitlements under contract of employment - Claim for payment of wages, pay in lieu of notice and severance pay - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> s 26(1)(a), s 27(1), s 29(1)(b)(i) and s 29(1)(b)(ii)
Result	:	Dismissed
Representation:		
Applicant	:	Mr R Miller (as agent)
Respondent	:	Mr G Mounsey

Case(s) referred to in reasons:

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

Byrne v Australian Airlines (1995) 61 IR 32

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Shire of Esperance v Mouritz (1991) 71 WAIG 891

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

Reasons for Decision

- On 14 January 2015 Gillian Denise Miller (the applicant) lodged applications in the Commission under s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* (the Act) against Mr Graeme Mounsey - President Newman Senior High School Parent's & Citizens Association Inc (the respondent). The applicant claims that she was unfairly dismissed by the respondent on 29 December 2014. The benefits the applicant claims she was denied are \$2,972.50 in wages for the period 8 November 2014 to 18 December 2014, three weeks' pay in lieu of notice and severance pay.
- The respondent disputes the applicant's claims. The respondent maintains that the applicant resigned of her own volition on 5 November 2014. She is therefore not owed the benefits she is claiming.

Name of the respondent

- During the hearing 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 Mr Graeme Mounsey - President Newman Senior High School Parent's & Citizens Association Inc be deleted as the named respondent in this application and be substituted with Newman Senior High School Parents and Citizens' Association Incorporated (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 applicant was employed as a part-time permanent canteen assistant at Newman Senior High School (NSHS) on 4 February 2013. The applicant worked 25 hours per week, she was paid \$20.50 per hour and she worked with the NSHS canteen manager, Ms Chrissie Rolfe. The applicant's employment was covered by the *Restaurant, Tearoom and Catering Workers' Award* (the Award). The respondent had no issue with the applicant's performance.
- The applicant was unable to work at the NSHS canteen after 29 October 2014. On this date a fire at the school destroyed a number of buildings. After discussions between staff at NSHS and Newman Primary School (NPS) it was decided that NPS would provide canteen services to NSHS years 8, 9 and 10 students and the applicant and Ms Rolfe would work at the NPS canteen on an interim basis. Ms Rolfe continued to work for the respondent on a permanent part-time basis after the fire until she resigned in March 2015.
- The applicant was aware that the respondent would continue to employ her and pay her normal wages until the end of the 2014 school year even if she could not work at the NSHS canteen.
- The applicant sent the following text message to the respondent's treasurer, Ms Tracee Liebming on 5 November 2014. After receiving this text message Ms Liebming paid the applicant wages and annual leave due to her. This text message was sent to Ms Liebming's partner's phone because her mobile phone was destroyed in the fire.

Morning Tracee, I've been up half the nite [sic] again thinking n [sic] stressing over all this, I've decided I'm not going to the meeting as I don't want to try n [sic] negotiate with Emma as we all no [sic] it wouldn't b [sic] a nice environment to work in, even for 2days a week! as much as I love working at our canteen, for the sake of 5 weeks work I don't need this stress at all, if u [sic] could just pay me out wat [sic] I'm owed please...holidays, pay etc please, and Emma can just run her canteen how she wants.

(Exhibit R1)

- The respondent sent the applicant the following letter dated 12 December 2014, which the applicant claims she received on 29 December 2014:

As you are aware as a result of the fire at Newman Senior High School on 29th October 2014 your contract with the Newman Senior High School P&C has been terminated and all money owing to you has been paid.

We will be advertising for a canteen assistant in the New Year and you are more than welcome to apply.

We thank you for your efforts in the past and wish you well for the future.

(Exhibit A1)

Evidence

Applicant

- 9 Soon after the fire on 29 October 2014 the applicant attended a meeting at NPS with Ms Rolfe, Ms Liebminger and 'Emma' who managed the NPS canteen to discuss the possibility of the applicant and Ms Rolfe working at the NPS canteen. Ms Liebminger previously told the applicant there was work for both her and Ms Rolfe at the NPS canteen but Emma made it clear that she only wanted one of them working at the canteen. The applicant said that Emma was rude to her and Ms Rolfe at the meeting and the applicant was not happy with the situation. The day after this meeting the applicant and Ms Rolfe had a meeting with Ms Liebminger to discuss what was happening and they discussed how uncomfortable it would be working at the NPS canteen and Emma only requiring one additional worker. The day after this meeting the applicant understood that Ms Rolfe telephoned Ms Liebminger and told her that Emma had advertised for volunteers to work at the NPS canteen on her Facebook page. Ms Liebminger said she would get back to them however nothing was resolved.
- 10 The applicant said she sent four text messages to Ms Liebminger after the fire. One was on the evening of 4 November 2014 telling Ms Liebminger that she was happy to recommence working at the NSHS canteen in 2015 and she did not need the stress that she was currently suffering. She sent Ms Liebminger another text message on the morning of 5 November 2014 (exhibit R1) and one on 14 November 2014 after Ms Liebminger paid her outstanding wages and her annual leave. In the third text message the applicant sent Ms Liebminger she thanked her for paying her holiday pay and said she was 'happy to start back, is (sic) that what's going to happen?' (ts17). There was no response from Ms Liebminger to her text messages apart from Ms Liebminger paying the wages and annual leave owing to her.
- 11 The applicant recalled Ms Liebminger ringing her on 5 November 2014 asking for the canteen wages book and she asked the applicant to put in writing what she wrote in the text. The applicant said the following:

All right. And then what happened?---Well, that's all I heard. I - there was nothing - I never had another conversation with Tracee until she rang me asking for the wage book; if I knew where the wage book was and that's what she's saying that I resigned but she never said that to me on the phone, she just asked me - - -

Well, she rang you asking about the wage book; when was that?---Yes.

Do you recall; approximately?---It would have been - gosh, I really can't remember the date. I think it was on the fifth. Of November?---Yes.

All right. And then what happened?---She rang me and asked me if I knew where the wage book was and I said, "No," and she said, "Oh, it must have - it must have been in the canteen," and then she asked me if - if I could write what I wrote in the text in writing and I said, "Write what?" and she said, "Oh, just what you wrote in the text." I said, "Why?" She said, "Oh, you know how the P & C are, they like things in writing," and I assumed she meant the text I sent the night before saying I'm uncomfortable going into that canteen and for the sake of five and a - five and a half weeks' worth, I'd rather just start back at our canteen next year. Start afresh next year.

(ts 15)

- 12 The applicant was upset when she received her letter of termination on 29 December 2014 as she was unaware she was to be terminated. She sent another text message to Ms Liebminger on or about 2 January 2015 about this letter but she did not receive any response.
- 13 The applicant claims that she was never offered another job after the fire instead of not working at the NPS canteen. The applicant did not believe it was necessary to apply for leave without pay for the period from 7 November 2014 to the end of the school year. Since ceasing employment with the respondent she has not looked for other work as she only wants to undertake canteen work. She has also been too stressed to do so. She recently had an anxiety attack which was unusual for her.
- 14 Mr Rick Miller gave evidence that after the fire he and the applicant discussed the applicant recommencing employment with the respondent in 2015.

Respondent

- 15 Ms Liebminger was the respondent's treasurer at the time of the fire and she is currently the respondent's assistant treasurer. The respondent tried to arrange work at the NPS canteen for both the applicant and Ms Rolfe. Ms Liebminger said that she attended a meeting with Ms Rolfe and the applicant to discuss them working at the NPS canteen. At this meeting Emma was rude and she made it clear that she did not want any additional staff to work at the NPS canteen.
- 16 Ms Liebminger said that the period after the fire was a difficult time and staff were not sure what would happen. Ms Liebminger gave evidence that the applicant and Ms Rolfe were told in the week after the fire that the respondent would continue to pay their wages. Both the applicant and Ms Rolfe were offered work at the NPS canteen because they remained employed by the respondent and the respondent had to pay their wages. Other options apart from the applicant and Ms Rolfe working at the NPS canteen were looked at, for example assisting with uniforms. Ms Rolfe and the applicant visited Ms Liebminger on one occasion to discuss working at the NPS canteen and she was aware that both the applicant and Ms Rolfe were unhappy with the situation there. Ms Rolfe then told Ms Liebminger that she was happy to work at the NPS canteen and she did so.
- 17 On 5 November 2014, which was the day after Ms Rolfe and the applicant visited her at her home, Ms Liebminger received a text from the applicant saying that she did not want to work at the NPS canteen for the rest of the year and she wanted to be

paid her entitlements. Ms Liebminger paid the applicant's wages up to 7 November 2014 and annual leave due to her as requested by the applicant. Ms Liebminger said that given what the applicant had said in this text message, she assumed the applicant did not want to continue working with the respondent and had resigned. Ms Liebminger gave the following evidence:

MOUNSEY, MR: So yes, Tracee, can you just give us a bit of - your views on what was discussed at those meeting and our interpretation of - - -?---Yeah, okay.

- - - of Gill's employment status?---So we knew that Gill - we paid Gill out - well, I paid Gill out and we knew she didn't want to do anything else, so we just assumed that she'd resigned and I was to ask for a letter of resignation. That was sort of my job. Um, and as far as I know Chrissie was doing all right. Um, but we - by the - by wanting to be paid out we just assumed that, um - that Gill didn't want to work anymore.

(ts 34)

Did you ask Gill for a letter of resignation?---I'm sure I did.

Could you just repeat that, that you directly said, "Gill, I would like a letter of resignation from you"?---Well, I knew that's what I had to ask for, so I'm sure I did ask for it. But I don't know - I wouldn't - I don't remember my exact words.

(ts 37)

- 18 Ms Liebminger confirmed that at the respondent's general meetings held on 13 November 2014 and 11 December 2014 the issue of the applicant not formally resigning was raised. The relevant parts of these minutes are as follows:

Minutes of the General Meeting held on 13 November 2014:

CANTEEN STAFFING REPORT:

Chrissy is working at NPS assisting in the canteen. We will continue to pay her wages. Jill did not want to work at NPS or do anything else and has requested she be paid out. Tracee has paid her out with holiday pay. We are still waiting on a formal letter of resignation.

Minutes of the General Meeting held 11 December 2014:

CANTEEN STAFF: Chrissy will remain working at NPS until the end of the school year. She has been able (sic) to have access to our canteen for food preparation for the morning tea that the P&C are providing for high school staff.

A letter of resignation has still not been received from Jill. Graeme has suggested we do a formal letter clarifying that her position with the P&C has been terminated and send it to her. We will then advertise for a new canteen assistant in Jan (sic) as a casual position.

- 19 Ms Liebminger's phone was burnt in the fire and she was then relying on her husband's phone for messages. Apart from receiving the text message on 5 November 2014 Ms Liebminger could only recall her partner receiving one other text message from the applicant asking her what was happening but she understood that by that stage the applicant's employment had been finalised. Ms Liebminger had no recollection of receiving a text message from the applicant saying that she was looking forward to continuing to work for the respondent in 2015.
- 20 Ms Liebminger said that no specific job offer was made to the applicant as an alternative to working in the NPS canteen and she gave evidence that the applicant was only sent the letter of termination to finalise her employment with the respondent even though the respondent understood she had resigned.
- 21 Mr Graeme Mounsey is the respondent's president. He stated that at the respondent's November 2014 meeting he raised the issue of the respondent obtaining a resignation letter from the applicant to ensure that all issues related to her employment were completed. Mr Mounsey said that the period after the fire was difficult for the respondent as the canteen was the respondent's main income earner and this income was lost and the respondent had to rely on a loan to pay the wages of the applicant and Ms Rolfe. Mr Mounsey said that every effort was made to find work for the applicant but no specific arrangement was made with the applicant to continue working with the respondent instead of working at NPS canteen. The respondent had an obligation to continue to pay the applicant's wages up to 18 December 2014 if she continued to be employed by the respondent.
- 22 Mr Mounsey said that the applicant's letter of termination was sent to her to acknowledge the applicant's resignation and to confirm that she had been paid what she was owed.

Submissions

Applicant

- 23 The applicant maintains that she did not resign from her employment with the respondent and she was terminated by letter dated 12 December 2014 at the respondent's initiative and there was no reason for her to be terminated. As she was not given any opportunity to respond to the respondent's decision to terminate her she was denied procedural fairness.
- 24 The applicant maintains that she was terminated due to a redundancy situation and there was no consultation with her about this as required under the Award. The applicant is therefore claiming severance pay as provided for in the Award as well as three weeks' pay in lieu of notice. The applicant is also seeking the payment of wages between 8 November 2014 and 18 December 2014 as she understood she would be working up to this date and three months' pay as compensation for her unfair dismissal. The applicant has not applied for alternative canteen positions due to the stress she has suffered as a result of her termination.

Respondent

- 25 The respondent argues that the applicant was not terminated, nor was she made redundant. The applicant resigned of her own accord given what she stated in the text message sent to Ms Liebminger on 5 November 2014 and the letter of termination the respondent sent to the applicant was to clarify the situation that the respondent understood was occurring with respect to the

applicant's employment with the respondent. The applicant refused to undertake further work which was available to her to complete after 5 November 2014 and she did not apply for leave without pay to ensure that she had continuous employment with the respondent. If the applicant worked for the respondent until the end of the 2014 school year she would have continued to be employed by the respondent on a permanent part-time basis in 2015.

Consideration

Witness Credit

- 26 I listened carefully to the evidence given by each witness. Even though I find that both the applicant and Ms Liebminger gave their evidence to the best of their recollection I have concerns about the veracity of some of the evidence they gave. In my view much of the evidence given by the applicant was vague, lacked clarity and was at times difficult to comprehend. In particular I find that the evidence given by the applicant about the text messages she sent on or about 5 November 2014 to be unconvincing. I find that Ms Liebminger's evidence about her discussions with the applicant in early November 2014 was vague at times. I understand that the fire at NSHS had a major impact on staff at NSHS including the applicant and Ms Liebminger and that the period after the fire was a difficult time for them as the NSHS canteen was not operational and there was uncertainty as to the respondent's financial viability. The lack of clarity in the evidence given by the applicant and Ms Liebminger at times was in my view therefore understandable and I find that when they gave their evidence about their discussions during this period it was not deliberately intended to be evasive. In the circumstances where there is a discrepancy in the evidence given by the applicant and Ms Liebminger I will rely on documentation which corroborates their evidence and any evidence they gave which is in common.
- 27 I accept the evidence given by Mr Miller and Mr Mounsey as I find they gave their evidence clearly and to the best of their recollection.

Was the applicant dismissed?

- 28 An unfair dismissal claim brought under s 29(1)(b)(i) of the Act requires that the applicant, on the balance of probabilities, demonstrates she has been dismissed by the respondent to attract the Commission's jurisdiction to deal with this application.
- 29 A termination usually occurs when an employer's actions result in the cessation of the employment relationship. In *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 the Full Court of the Industrial Relations Court of Australia said:

'termination at the initiative of the employer' involves a 'termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship ... [A]n important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship' (205).

(see Sappideen C et al; *Macken's Law of Employment* (7th ed, 2011), 443)

- 30 When taking into account s 26(1)(a) of the Act considerations and equity, good conscience and substantial merit, I find on the evidence that the applicant was not dismissed by the respondent even though on or about 12 December 2014 the respondent sent a letter to the applicant indicating that she had been terminated.
- 31 In the absence of any confirmation from the applicant that she intended to return to work with the respondent in 2015, I find that it was open for the respondent to conclude from the content of the text message sent to Ms Liebminger by the applicant on 5 November 2014 that she resigned from her employment with the respondent as at that date. The text message Ms Liebminger received from the applicant on 5 November 2014 indicated that she would not be returning to work in 2014 and she wanted to be paid wages due to her and accumulated annual leave entitlements. There was no indication in this message that she was proposing that she would continue working with the respondent in 2015. Even though Mr Miller gave evidence that from his conversations with the applicant she intended to resume her employment with the respondent in 2015 and the applicant gave evidence that she intended to return to work on a permanent part-time basis with the respondent in 2015 there was no evidence confirming that the respondent was aware that the applicant intended to resume working for the respondent in 2015. The applicant claimed that in addition to the email she sent to Ms Liebminger on 5 November 2014 she sent two other text messages to her around this date confirming her intention to return to work in 2015. I have already found that the applicant's evidence about the text messages she claimed to have sent to Ms Liebminger confirming her intention to return to work in 2015 was unconvincing. Copies of these text messages were not tendered into the evidence in support of this claim and Ms Liebminger denied receiving these text messages. It was also unclear if the applicant sent these texts to Ms Liebminger's partner and Ms Liebminger's partner was not summonsed by the applicant to give evidence about the possible receipt of these texts. In the absence of copies of the additional text messages the applicant claimed she sent Ms Liebminger and given Ms Liebminger's evidence about not receiving these text messages I can only conclude that the text message sent by the applicant to Ms Liebminger on 5 November 2014 was the only message Ms Liebminger acting on behalf of the respondent received on or about this date from the applicant. In reaching this conclusion I also note that the minutes of the respondent's general meetings held on 13 November 2014 and 11 December 2014 confirm that the respondent understood the applicant had resigned as at 5 November 2014 which could not have been the case if Ms Liebminger had received the two additional text messages the applicant claimed she sent to her.
- 32 I find that after receiving the applicant's text message on 5 November 2014, and in the absence of any information to the contrary, the respondent proceeded on the basis that the applicant had resigned as at 5 November 2014 and the respondent asked Ms Liebminger to request the applicant to confirm her resignation in writing. Ms Liebminger gave evidence that after receiving the applicant's text message on 5 November 2014, at her initiative, she had a conversation with the applicant on or about this date and asked the applicant to confirm her resignation in writing. Whilst Ms Liebminger could not recall specifically mentioning the word resignation to the applicant during this discussion, she gave evidence that she was sure she asked the applicant to confirm what she understood was the applicant's resignation in writing during this conversation. The applicant agreed that Ms Liebminger contacted her on or about 5 November 2014. The applicant gave evidence that

Ms Liebminger rang her to ask her about the location of the canteen wages book and she stated that during this conversation Ms Liebminger asked her to confirm her intentions in writing in line with what she had indicated in her text message. I find that the applicant's evidence in this regard corroborates Ms Liebminger's evidence that she asked the applicant to confirm her intentions in writing, which Ms Liebminger understood to be the applicant's resignation. Even if the applicant was confused about which text message Ms Liebminger was referring to when she asked her to confirm her position in writing the applicant did not respond to Ms Liebminger's request. If she had done so the applicant could have clarified that she intended to resume work with the respondent in 2015.

33 I find that the 'termination' letter sent to the applicant by the respondent did not constitute a termination of the applicant's employment with the respondent. I accept Mr Mounsey's evidence, which is corroborated by the minutes of the general meetings held by the respondent on 13 November 2014 and 11 December 2014, that this letter was sent to the applicant after Ms Liebminger's failed attempt to have the applicant send a letter of resignation to the respondent after receiving her text message on 5 November 2014.

34 As I have found that the applicant resigned the Commission does not have jurisdiction to deal with her claim that she was unfairly dismissed.

If the applicant was terminated was she unfairly dismissed?

35 In the alternative, if the applicant was terminated by the respondent, I find that she was not unfairly terminated.

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

37 I find that the applicant was not unfairly terminated as it is my view the respondent had good reason to terminate the applicant on the basis that the applicant refused to make herself available to undertake any further work for the respondent after 5 November 2014. I find that the applicant ceased her employment with the respondent of her own volition when she sent a text message telling Ms Liebminger on 5 November 2014 that she did not want to continue working with the respondent as at that date and asked that all of her outstanding entitlements be paid to her, which occurred on 7 November 2014. The applicant made this decision even though she was aware that the respondent would continue to employ her up to the end of the 2014 school year as this was confirmed by the applicant in her text message of 5 November 2014 and work was available for the applicant to undertake. I find that as the applicant abandoned her employment with the respondent of her own volition it was open to the respondent to terminate the applicant by letter dated 12 December 2014 without any payment in lieu of notice given that the applicant had indicated to the respondent on 5 November 2014 that she no longer wanted to work for the respondent as at that date (exhibit A1). Even though the NSHS canteen was closed due to the fire, I find that the respondent would have continued to employ the applicant after 5 November 2014 and into 2015 on a permanent part-time basis if she had remained working for the respondent, in the same way the respondent continued to employ Ms Rolfe on a permanent part-time basis until she resigned in March 2015. The applicant's claim that her position was made redundant by the respondent is therefore baseless.

38 The applicant's claims for pay in lieu of notice, wages for the period 8 November 2014 to 18 December 2014 and redundancy entitlements as provided for in the Award therefore fail.

39 An order will now issue dismissing these applications.

2015 WAIRC 00516

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GILLIAN DENISE MILLER

APPLICANT

-v-

NEWMAN SENIOR HIGH SCHOOL PARENTS & CITIZEN'S ASSOCIATION
INCORPORATED

RESPONDENT

CORAM

COMMISSIONER J L HARRISON

DATE

THURSDAY, 16 JULY 2015

FILE NO/S

U 18 OF 2015, B 18 OF 2015

CITATION NO.

2015 WAIRC 00516

Result	Dismissed
Representation	
Applicant	Mr R Miller (as agent)
Respondent	Mr G Mounsey

Order

HAVING HEARD Mr R Miller as agent on behalf of the applicant and Mr G Mounsey on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

1. THAT the name of the respondent be deleted and Newman Senior High School Parents and Citizen's Association Incorporated be substituted in lieu thereof.
2. THAT these applications otherwise be and are hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00508

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MR ALISTAIR DONALD MCNABB

APPLICANT

-v-

MR NEIL MITCHELL, ACTING CHIEF EXECUTIVE OFFICER
SHIRE OF SANDSTONE

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE FRIDAY, 10 JULY 2015
FILE NO/S U 159 OF 2014
CITATION NO. 2015 WAIRC 00508

Result	Application dismissed
Representation	
Applicant	Mr C Syme of counsel
Respondent	Ms C Moss 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 September 2014 the Commission convened a conference for the purpose of conciliating between the parties; and
WHEREAS at the conclusion of that conference the parties agreed to continue discussions with a view to reaching a settlement; and
WHEREAS the matter was listed for hearing for mention on the 29th day of May 2015; and
WHEREAS on the 7th day of July 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 00503

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MIRANDA GILLIAN PLUMB	APPLICANT
	-v- OUTBACK STORES	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 10 JULY 2015	
FILE NO/S	B 71 OF 2015	
CITATION NO.	2015 WAIRC 00503	
<hr/>		
Result	Application dismissed	

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 23rd day of June 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 7th day of July 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 00504

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MICHAEL CADE PLUMB	APPLICANT
	-v- OUTBACK STORES	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 10 JULY 2015	
FILE NO/S	B 72 OF 2015	
CITATION NO.	2015 WAIRC 00504	
<hr/>		
Result	Application dismissed	

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 23rd day of June 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 7th day of July 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 00806

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR JAMES POWER	APPLICANT
	-v- APTS PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	FRIDAY, 14 AUGUST 2015	
FILE NO/S	U 126 OF 2015	
CITATION NO.	2015 WAIRC 00806	

Result Application dismissed for want of jurisdiction

Order

WHEREAS this claim of unfair dismissal was filed on 28 July 2015;

AND WHEREAS on 10 August 2015, the respondent filed a *Form 5 – Notice of answer*, in which it said the Commission does not have jurisdiction to deal with the applicant's claim because the respondent is a trading or financial corporation;

AND WHEREAS by letter dated 11 August 2015, the Commission invited the applicant to respond in writing to the objection;

AND WHEREAS in correspondence dated 12 and 13 August 2015, the applicant indicated he agreed with the respondent's objection and requested the Commission 'cancel' his application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the Act, and by consent, hereby order:

THAT the application be, and is hereby dismissed for want of jurisdiction.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00777

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARC SCOTT	APPLICANT
	-v- GARETH JONES	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 6 AUGUST 2015	
FILE NO/S	B 62 OF 2015	
CITATION NO.	2015 WAIRC 00777	

Result Application dismissed

Order

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

WHEREAS on the 21st day of May 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 by email dated the 3rd day of August 2015 the applicant advised that he wished to discontinue 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 00787

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JAMES STUART THOMSON
APPLICANT

-v-
NEVILLE STEWART
RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE TUESDAY, 11 AUGUST 2015
FILE NO/S B 78 OF 2015
CITATION NO. 2015 WAIRC 00787

Result Name of respondent amended

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
WHEREAS on the 1st day of July 2015 the applicant filed an application to amend the name of the respondent to "Asset Partners Pty Ltd" and served the application on Asset Partners Pty Ltd; and
WHEREAS by email on the 13th day of July 2015 the respondent advised that the applicant's employer's name was "Asset Partners Pty Ltd" of which the respondent is Managing Director; and
WHEREAS at the hearing of the application on the 11th day of August 2015 there was no appearance by the respondent; and
WHEREAS the Commission formed the view that it is appropriate to amend the name of the respondent;

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

THAT the name of the respondent in the application be amended to "Asset Partners Pty Ltd".

[L.S.]

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

2015 WAIRC 00789

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JAMES STUART THOMSON
APPLICANT

-v-
ASSET PARTNERS PTY LTD
RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE TUESDAY, 11 AUGUST 2015
FILE NO/S B 78 OF 2015
CITATION NO. 2015 WAIRC 00789

Result Order issued

Order

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

1. THAT the respondent shall pay to the applicant within 7 days of today's date:
 - (a) an amount of \$450.00 being for wages less any amount due to the Australian Taxation Office; and
 - (b) an amount of \$50.00 being for reimbursement of the filing fee for the application.
2. THAT the application be, and is otherwise hereby dismissed.

[L.S.]

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

2015 WAIRC 00510

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TAMELA DAGMAR VESTERGAARD
APPLICANT

-v-
KARRAYILI ADULT EDUCATION CENTRE
RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE TUESDAY, 14 JULY 2015
FILE NO/S U 190 OF 2014
CITATION NO. 2015 WAIRC 00510

Result Application discontinued
Representation
Applicant Ms T D Vestergaard
Respondent Ms R Airey (of counsel)

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979*;
AND WHEREAS on 16 October 2014, 27 November 2014, 19 February 2015 and 24 April 2015 conferences between the parties were convened;
AND WHEREAS at the conclusion of the conference held on 24 April 2015 an agreement was reached between the parties;
AND WHEREAS on 17 June 2015 the applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2014 WAIRC 01275

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PETER MILFORD WESTON
APPLICANT

-v-
WA PROPERTY LAWYERS
RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 21 NOVEMBER 2014
FILE NO. B 215 OF 2014
CITATION NO. 2014 WAIRC 01275

Result Directions
Representation
Applicant Mr P Mullally as agent
Respondent Mr JLH Formby of counsel

Directions

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr JLH Formby of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby directs –

- (1) THAT the applicant and respondent file and serve an outline of submissions no later than 3 business days prior to the date of hearing.
- (2) THAT the matter be listed for hearing for one day.
- (3) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00282

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PETER MILFORD WESTON	APPLICANT
	-v- WA PROPERTY LAWYERS	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 1 APRIL 2015	
FILE NO/S	B 215 OF 2014	
CITATION NO.	2015 WAIRC 00282	

Result	Orders issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr JLH Formby of counsel

Orders

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr JLH Formby of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the applicant's amended further and better particulars of claim filed on 10 February 2015 stand as the applicant's amended further and better particulars of claim.
- (2) THAT the respondent's amended response and response to the further and better particulars filed on 11 March 2015 stand as the respondent's amended response and response to the applicant's further and better particulars.
- (3) THAT the applicant's application for discovery and production of documents filed on 25 February 2015 be and is hereby dismissed.
- (4) THAT the respondent's application for discovery filed on 11 March 2015 be and is hereby dismissed.
- (5) THAT the five witness summonses filed on 12 March 2015 be and are hereby set aside.
- (6) THAT the respondent be granted leave to call evidence from Mr Robert Davey, Ms Tania Nicole Davey and Ms Tracey Elizabeth Lane by video link, subject to the venue being approved by the Commission.
- (7) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00466

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
CITATION	: 2015 WAIRC 00466
CORAM	: COMMISSIONER S J KENNER
HEARD	: THURSDAY, 26 MARCH 2015, TUESDAY, 14 APRIL 2015, THURSDAY, 23 APRIL 2015
DELIVERED	: FRIDAY, 26 JUNE 2015
FILE NO.	: B 215 OF 2014
BETWEEN	: PETER MILFORD WESTON Applicant AND WA PROPERTY LAWYERS Respondent

Catchwords	: Industrial law (WA) – Contractual benefits claim – Written contract of employment – Implied terms – Claim for six months' salary, relocation and leasing costs, travel costs, membership fees and practising certificate costs – Principles applied – <i>BP Refinery</i> criteria – Business efficacy – Probationary employment – No basis for the implication of the terms sought – Application dismissed – Order made
Legislation	: <i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(ii) <i>Legal Profession Act 2008</i> (WA)
Result	: Application dismissed
Representation:	
Applicant	: Mr P Mullally as agent
Respondent	: Ms M Saraceni of counsel

Case(s) referred to in reasons:

Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia (1977) 139 CLR 54
Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited (In liquidation) (2000) 202 CLR 588
Attorney General of Belize v Belize Telecom Limited [2009] 1 WLR 1988
BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266
Brailey v Mendex Pty Ltd t/a Mair and Co Maylands (1993) 73 WAIG 26
Byrne v Australian Airlines Limited (1995) 185 CLR 410
Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales (1982) 149 CLR 337
Commissioner of Police for New South Wales v Eaton (2013) 252 CLR 1
Commonwealth Bank of Australia v Barker (2014) 312 ALR 356
Con-Stan Industries of Australia Proprietary Limited v Norwich Winterthur Insurance (Australia) Limited (1986) 160 CLR 226
Ex parte Wurth; Re Tully (1954) 55 SR (NSW) 47
GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited [2003] FCA 50
Hawkins v Clayton (1988) 164 CLR 59
Hutchinson v Cable Sands (WA) Pty Ltd (1999) 79 WAIG 951
Sim v Rotherham Metropolitan Borough Council [1986] 3 WLR 851
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1984] 1 Lloyd's Rep 555
Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services (2013) 93 WAIG 1425
Westheafner v Marriage Guidance Council of WA (1985) 65 WAIG 2311

Reasons for Decision

- 1 The applicant was employed as a restricted legal practitioner by the respondent for a short period from 28 July 2014 to 22 August 2014 as its resident solicitor in Northam. The parties entered into a written contract of employment on or about 22 July 2014. The applicant contended that despite the terms of the written agreement, there were a number of terms orally agreed between the parties, and a number should be implied. As a consequence of the application of these terms of the contract, the applicant contended that he was denied contractual benefits on the termination of his employment by the respondent.
- 2 The claims now made by the applicant against the respondent include \$5,693.33 for relocation and leasing costs in Northam; costs of joining appropriate organisations in Northam in the sum of \$265; travel costs in the sum of \$325.60; the balance of the applicant's salary for six months in the sum of \$24,750; and fees for the renewal of the applicant's practising certificate in the sum of \$1,250. The total sum claimed is \$32,283.93.
- 3 The applicant's claims are strongly resisted by the respondent. The respondent contended that the terms of the applicant's contract of employment were clearly spelt out in a detailed written agreement, referred to above. The respondent contended there was no basis for additional terms to be implied and the application should be dismissed.

General principles

- 4 As substantial aspects of the applicant's claim are based on the implication of terms into the applicant's contract with the respondent, I will first consider some general principles regarding the implication of terms. As a general proposition, the implication of a term into a contract is dependent on the presumed intention of the parties: Lewison K and Hughes D, *The Interpretation of Contracts in Australia* (2012), at 281-9. The law recognises that obligations may be implied into a specific contract to give the contract "business efficacy": Seddon NC, Bigwood RA and Ellinghaus MP, *Cheshire & Fifoot Law of Contract* (10th ed, 2012) at 486.
- 5 As courts and tribunals may have difficulty in identifying with any degree of certainty a term which the parties may have settled on had they turned their minds to it, courts and tribunals are generally slow to imply a term. The more detailed and comprehensive a contract is, the less scope there is for supposing that the parties have failed to address the particular matter in question: *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346.
- 6 Recently too, the High Court in *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356 at par 22, observed that the implication of a term into a contract is an exercise in interpretation, but is not an orthodox exercise in the interpretation of a contract, that is, assigning a meaning to a provision. It is not enough for a court to consider that the implied term expresses what would have been reasonable for the parties to agree to. Citing *Attorney General of Belize v Belize Telecom Limited* [2009] 1 WLR 1988 at par 22, the High Court said that a court must be satisfied that is what the contract actually means.
- 7 There are two broad approaches to the implication of terms. In cases where an agreement is wholly in writing and is apparently complete on its face, and represents the entirety of the agreement, the test in *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 should apply. This approach requires the satisfaction of the following conditions:
 - (a) the implication must be reasonable and equitable;
 - (b) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
 - (c) it must be so obvious that it goes without saying;

- (d) it must be capable of clear expression; and
 - (e) it must not contradict any express term of the contract.
- 8 A less strict approach applies in cases where a contract has not been recorded in a formal document. In these circumstances, a term may be implied if it is “necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case”: *Hawkins v Clayton* (1988) 164 CLR 59 at 573 (see too: *Byrne v Australian Airlines Limited* (1995) 185 CLR 410; *Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited (In liquidation)* (2000) 202 CLR 588). The approach in *Hawkins* is to place emphasis on considerations of reasonableness and the effective operation of the contract. It is a less stringent application of the approach in *BP Refinery*.
- 9 On the evidence in this matter, the parties entered into a written contract of employment, embodied in a letter from the respondent to the applicant dated 22 July 2014 (see exhibit A1). The letter is detailed and comprehensive. It covers most aspects of the employment relationship between the parties. It incorporated a detailed job description. It was prepared by a legal practitioner and signed by a legal practitioner. The evidence was, and I find, that the letter of contract followed a number of negotiations between the parties. Mr Formby, the respondent’s principal, said that the employment of the applicant represented some commercial risk for the respondent. The letter was obviously prepared with some care.
- 10 In my opinion, having regard to these matters, the approach in *BP Refinery* is appropriate. The present case is not one where it can be concluded that “the parties themselves did not reduce their agreement to a complete written form ...” where they have left some of the terms to be inferred or implied: *Byrne* at 442, as applied in *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] FCA 50 at par 311.
- 11 With these general principles in mind, I now turn to consider the specific claims made by the applicant.

Six month term

- 12 A key plank of the applicant’s claim was that it was an implied term of his contract with the respondent that the respondent could not terminate the contract prior to the expiry of six months from its commencement. The applicant’s submission was that the six month term was linked to his position as the “resident solicitor” for the respondent, which required him to relocate to Northam and lease a house for six months. While accepting that the contract of employment provided for notice of termination and a probationary period, it was contended by the applicant that this was not necessarily inconsistent with the implication of the term claimed.
- 13 In connection with this claim, the applicant testified that he spoke to Mr Formby of the respondent in about February 2014 about the possibility of employment. The applicant used to have some family connections in the Northam area and he also had a short period of employment with a Northam based solicitor. Apparently, the applicant had become aware of the fact that the respondent was interested in setting up an office in Northam and was looking for premises. It subsequently did find premises and opened an office in Northam in March 2014. Several meetings took place between the applicant and Mr Formby. The applicant said that the last time that they met was in a café in Northam in June 2014. They agreed a rate of pay and other general conditions.
- 14 It was clear from the discussions between the parties, that the applicant would be required to live in Northam to take up the position. The applicant was to be employed to run the Northam office for 22.5 hours per week and would work flexibly, over about three days per week. Also discussed, was the issue of sponsorship and the possibility of the applicant joining various clubs etc., to promote the respondent’s practice in Northam.
- 15 As the respondent’s main office was in Subiaco in Perth, there was some discussion between the applicant and Mr Formby about supervision arrangements and the requirements of the Legal Practice Board.
- 16 The applicant testified that he received a draft contract of employment in about late June 2014. Subsequently on 15 July 2014, the applicant applied for a tenancy of a residential property in Northam. He did this on the basis of what he said was an oral offer from Mr Formby, that he would be employed by the respondent in Northam as previously discussed. The formal offer of employment was set out in the letter from the respondent to the applicant dated 21 July 2014. On 23 July the evidence was that the applicant went into the respondent’s Northam office and signed the offer. He wrote on the last page of the letter “I concur with the content of this document”. The applicant commenced work with the respondent as a solicitor on 28 July.
- 17 There are a number of difficulties with the applicant’s claim for a six month term to be implied into the applicant’s contract of employment. As the agent for the applicant properly conceded, the terms of the written contract provide for termination of the contract. The contract provided that in the first three months of employment, the applicant would be on probation, within which time either party may terminate the contract on one week’s notice. After the period of probation, either party could terminate the contract on one month’s notice. That is, post probation, the employment was to be on a permanent part time basis.
- 18 It is well settled that the concept of probationary employment is a less secure basis of engagement than permanent employment: *Western Australian Prison Officers’ Union of Workers v The Minister for Corrective Services* (2013) 93 WAIG 1425 per Kenner C; *Westhefer v Marriage Guidance Council of WA* (1985) 65 WAIG 2311; *Hutchinson v Cable Sands (WA) Pty Ltd* (1999) 79 WAIG 951. Further, in *Commissioner of Police for New South Wales v Eaton* (2013) 252 CLR 1, Heydon J said at par 16 that “Probation involves a process of putting to proof. It is a process of investigation and examination. A probationary period is a ‘period of testing or trial for the purpose of ascertaining whether [a person] has the necessary qualifications for a permanent appointment, and the word ‘probation’ itself involves the idea of something in the nature of trial and experiment with a view to determining whether an applicant is to be appointed” (referring to and citing Street CJ and Roper CJ in *Ex Parte Wurth; Re Tully* (1954) 55 SR (NSW) 47). On the evidence, the probationary nature of the applicant’s appointment was well understood by him. Also, this was consistent with Mr Formby’s testimony that the employment of the applicant at its Northam office would involve some commercial risk for the respondent.

- 19 On the basis of the written contract and the factual matrix leading to the applicant's employment, in my view, for the following reasons, the tests for the implication of such a term are not met in this case. Firstly, the term, approaching the contract in a business-like manner, would not be reasonable and equitable. The contract provides adequately for termination of employment. The terms of the contract for both probation and notice of termination are clear and reasonable and consistent with terms often found in employment contracts.
- 20 I am not persuaded by the applicant's contention that because the position was to be based in Northam, which the applicant was well aware of from the very beginning, there must be some link inferred from the applicant's need to lease a residence in Northam. The applicant agreed, prior to the acceptance of the offer that he would reside in Northam. He was, on the evidence, also pursuing other business possibilities in the area, and had taken some preliminary steps to progress them. These included the registration of various business names and the commencement of an "aromatics" business, with two other people. I pause to note at this point that there was nothing untoward about this as the pursuit of other business activities by the applicant was expressly contemplated by the parties. This made its way into the written contract at cl 1.2 of the document and was described under the heading "1. Position – Solicitor, Northam Office".
- 21 I am not persuaded that a six month term provision was necessary to give business efficacy to the contract. As I have set out above, the written contract provided for, in some detail, provisions relating to termination of employment. The question can be asked whether the contract was able to operate in the manner the parties might reasonably have expected it to: *Lewis and Hughes at 239; Con-Stan Industries of Australia Proprietary Limited v Norwich Winterthur Insurance (Australia) Limited* (1986) 160 CLR 226. In my opinion, the answer to that question must be yes it could.
- 22 Having regard to the factual matrix leading up to the applicant's appointment, it cannot be reasonably concluded that the applicant's contract of employment would be unworkable without the implied term of six months of employment.
- 23 The applicant proposed to Mr Formby at an early stage in the discussions, that he was prepared to relocate to Northam in order to take up any position offered by the respondent. The applicant was well aware that the position contemplated by the respondent was for a "resident solicitor". The applicant had connections with the area in the past, and also as mentioned, was contemplating other business opportunities in Northam. Whilst the applicant described these business opportunities as "speculative" in his evidence, nonetheless, as I have already mentioned, he took steps to register business names, and developed an association with two other people in relation to a business proposal. These two individuals leased a property, and as it turned out, it was right next door to the one that the applicant ultimately leased himself, around the time he accepted the respondent's offer of employment. The applicant's evidence also was that he planned to live in Northam partly because of business opportunities.
- 24 The written agreement operated perfectly adequately without the implied term, as it contemplated the mode of termination, both during and after the period of probation. Equally importantly to all of the above, is the fact that such a term, even if it could be implied, would be futile. This is because, based on the express terms of the contract, either party could bring it to an end on the required notice, regardless of whether it had a specified period of six months or not. It would not be in any way an efficacious term: *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1984] 1 Lloyd's Rep 555 at 560.
- 25 Objectively considered, given the express terms of the contract, such a provision could not have been reasonably intended by the parties. Moreover, on the evidence, given that the applicant had a prior bad experience in legal practice, and testified that he would "give it the last shot" with the respondent, and Mr Formby's view on the evidence, that the appointment of the applicant involved a commercial risk for the respondent, it is entirely inconsistent with this state of affairs, to imply a minimum term of six months employment.
- 26 For the same reasons, such a term would not be so obvious that it would go without saying. This is to be considered from the perspective of an independent bystander: *Codelfa; Lewis and Hughes*. I do not consider that an independent bystander, armed with the relevant facts, would have said "of course", if asked whether the contract should have a six month term. On the facts, it certainly would not meet the test of "what would reasonable parties have agreed", in all of the circumstances: *Seddon et al at 494*. Whilst on the evidence, the applicant contended that support for a six month term came from the six month lease he had on the property he rented in Northam, the evidence was that Mr Formby was not aware of the applicant's leasing arrangements. Therefore it is difficult to conclude that such a term would be obvious, when one party to the contract was not aware of the basis on which the other party sought to imply the term.
- 27 On its face, it may be reasonably contended that a six month term would be capable of clear expression. However, given the basis for the term, as contended by the applicant, being the terms of his residential lease, there may be issues of certainty of such a term. This is because it was linked to an external event, not controlled by both parties. A question could be raised as to whether such a term would, in those circumstances, be sufficiently precise: *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia* (1977) 139 CLR 54.
- 28 Finally, the implication of a six month term would be inconsistent with the express terms of the contract, dealing with first, probation, and second, notice of termination after the expiry of probation. As noted earlier, the written agreement was detailed, prepared after a number of discussions between the applicant and Mr Formby, and was drawn with some care. Whilst the fourth paragraph of the letter of 21 July 2014 contains the sentence "This letter is not intended to be final and if there are terms which you would like to discuss or which require further negotiation we will do so on the next occasion that I meet with you", as I have also noted earlier, the applicant went to the respondent's office in Northam on 23 July 2014 and signed the letter with his express acceptance of the terms offered.
- 29 Thus, there were no further negotiations, no modifications to the contract and certainly none proposed by the applicant, who had by then, signed a lease and occupied his rental property. No further steps were taken to incorporate any provision in the contract consistent with the terms of the applicant's residential lease. In all of the circumstances, such a term would contradict the express terms of the contract.

Relocation costs

- 30 The applicant claimed relocation costs, including the costs associated with his six month lease on the property that he took in Northam. Whilst the applicant's initial claim was for \$8,784.73, the claim was subsequently amended during the course of the hearing, to \$5,693.33. The basis for the implication of a term that the respondent should pay to the applicant his relocation costs was on the same basis as the implication of the term of six months in his contract. That is, that the applicant was required to relocate to Northam to take up his position as the respondent's resident solicitor. The revised claim amount was based on the applicant's evidence that after his employment came to an end he returned to Perth. Despite attempts to do so, the property the applicant rented could not be sublet and he had to pay the claimed amount to the agent under the lease.
- 31 For the purposes of considering this claim, I apply the same principles as to the applicant's claim for the implication of a term of six months in his contract, and take into account the factual matrix surrounding the formation of the contract, outlined above.
- 32 On the evidence, initial discussions between the applicant and Mr Formby, suggested that the respondent may be willing to pay the applicant an hourly rate of \$24 or \$30 per hour. This was not particularly attractive to the applicant. Subsequently in about June 2014, a further meeting took place between the applicant and Mr Formby. By this time, Mr Formby had proposed that the applicant be paid \$50 per hour. Mr Formby said that it was clear that the position was based in Northam and the applicant's evidence was that \$50 per hour was reasonable for a restricted practitioner who would be a resident solicitor.
- 33 Later on 9 July 2014, at a further meeting, the applicant told Mr Formby that he was interested in moving to Northam and that he had located a place to live. Mr Formby did not recall any specific mention of the applicant's housing arrangements. However, shortly before formalising the respondent's offer of employment, the applicant provided his Northam address to Mr Formby. The applicant's starting date of 22 July 2014 was proposed, but this was extended by one week. An oral offer of employment was made by Mr Formby to the applicant on 15 July 2014. As mentioned above, on the same day the applicant applied for a tenancy on the property that he subsequently leased and the written offer of employment was accepted by the applicant on 23 July, without qualification.
- 34 The discussions leading up to the written offer of 21 July 2014, and the third paragraph of the letter itself, make it totally clear that the applicant was to reside in Northam to take up the position with the respondent. Mr Formby's evidence was also that because of the commercial risk to the respondent of employing the applicant, it would be only on the basis that he lived and worked in the town.
- 35 There was no evidence of any commitment by the respondent to indemnify the applicant for relocating to Northam. This was despite several discussions in person and others by telephone. Mr Formby's evidence was that he had no idea of the applicant's leasing arrangements and the respondent certainly never agreed to pay the applicant's leasing costs.
- 36 Importantly also in relation to this issue, was the applicant's evidence that he was focussed on Northam and planned to at least in part, live there to pursue business interests, as mentioned earlier.
- 37 In the context of the foregoing, the fact that the written contract of 21 July 2014, as comprehensive as it was, was silent in relation to relocation costs is very significant. In my view, all of the relevant terms of the employment were set out in the written agreement. There was clearly consideration of the requirement for the applicant to reside in Northam, in the parties' several discussions. They turned their minds to it and it was incorporated as one of the first terms in the letter of offer. Having regard to this factual matrix, and the totality of the terms of the written agreement, in my opinion, no reasonable person in the position of the parties, could have intended that the applicant's relocation costs to and whilst in Northam, would be paid by the respondent: *Lewis and Hughes* at 51-52. Such a term would not satisfy all of the criteria in *BP Refinery*.

Travel costs

- 38 As to this claim, the applicant said that the respondent should reimburse him for \$325.60. This was based on his fuel costs for travelling to and from Northam, to shift back to Perth, after his employment ceased in Northam. No receipts were produced by the applicant in support of this claim. It was an estimate of his fuel consumption.
- 39 Whilst the applicant mentioned that he and Mr Formby had some discussions about travel expenses in the course of his employment, on a reimbursement basis, the applicant could not point to any provision of the contract or any other undertaking from the respondent, to pay such costs. Rather, the applicant seemed to connect this claim with his leased property in Northam.
- 40 In my view, there is no contractual basis for this claim. An employee should generally be indemnified for expenses incurred by the employee on the employer's behalf, in the course of employment, in cases where such expenditure is authorised expressly or by necessary implication: *Sappideen C, O'Grady P, Riley J and Warburton G, Macken's Law of Employment* (7th ed, 2011) at 200. However in this case, the claim relates to a period after the applicant's employment came to an end. In any event, any costs or liabilities incurred during the employment under the written contract required the express consent of Mr Formby.
- 41 This claim cannot succeed.

Membership fees

- 42 This aspect of the applicant's claims relates to him joining various organisations in Northam, said to have been for the purposes of promoting the respondent's legal practice. In this connection, the applicant joined the Northam Chamber of Commerce, the Northam Country Club and the Northam Workers' Club. He claimed some \$265 in membership fees.
- 43 I accept on the evidence that in the course of discussions between the applicant and Mr Formby, leading up to the applicant's employment, the promotion of the respondent's legal practice in Northam was raised. It would be surprising if it was not. This was subsequently reflected in the written contract under the heading "6. Promotion of Business". This term referred to the applicant developing and maintaining the existing customers of the firm and to promote it and to develop business

relationships. However, importantly, at par 6.2, the contract further provided that “You are not to incur any potential or actual obligations financial or otherwise without Harry’s consent;”. Further, in par 10.2, the contract provided that “You are not to incur credit or expose the business of (sic) any loss or liability unless specifically authorised;”.

- 44 In my view, the terms of the contract are clear and unambiguous. Whilst the applicant was to engage in appropriate business promotion, and joining appropriate organisations would be consistent with this, the respondent’s consent to incur costs in doing so was first required. Given the principles referred to above regarding the implication of terms, there was no basis in my view to imply a term that if the contract came to an end prior to the expiry of a six month period, then the applicant would be reimbursed for the cost of joining the organisations. Such a term must fail for the reasons I have concluded that there was no basis for the implication of a term for a six month contract. In any event, such a claim is entirely inconsistent with the express terms of the contract, requiring the consent of the respondent for such expenditure by the applicant.
- 45 Whilst the respondent also sought to maintain that the applicant had other motives for joining these organisations to promote his own business interests, in view of my conclusions above, it is not necessary for me to consider this issue any further.

Practising certificate and reimbursement

- 46 I can deal with this claim very shortly. The applicant sought to recover from the respondent the cost of the renewal of his practising certificate under the Legal Profession Act 2008 in the sum of \$1,250. The written contract was silent on this issue and for good reason. On the applicant’s own evidence, in one of the two to three meetings he had with Mr Formby, prior to commencing employment, either in Subiaco or Northam, Mr Formby agreed to pay for the applicant’s professional indemnity insurance and the applicant agreed to pay for the renewal of his practising certificate. This evidence is fatal to his claim for \$1,250.
- 47 In any event, even if there was no such discussion, I would not be prepared to imply such a term. As a professional, the applicant would be expected to properly discharge all of the obligations expected of a solicitor. As a professional, a solicitor is obliged to provide their services properly and to meet proper professional standards: *Sim v Rotherham Metropolitan Borough Council* [1986] 3 WLR 851 at 871 and 873 per Scott J. In presenting himself to the respondent as ready, willing and able to discharge his professional duties as a solicitor, it is implicit in my view, that the applicant possessed the requisite qualifications and licences to do so. The applicant could not, as a solicitor, discharge his professional obligations unless he had a current practising certificate. If the applicant attempted to do so without a current practising certificate, he would have been in breach of his professional obligations as an officer of the Supreme Court of Western Australia and would be liable to a sanction under the Legal Profession Act.

Conclusion

- 48 It is unfortunate that the employment of the applicant by the respondent in Northam did not work out as intended. However, I am not persuaded that the applicant has established that he has been denied contractual benefits under his former contract of employment with the respondent. Accordingly, the application must be dismissed.
- 49 The respondent foreshadowed an application for costs should the applicant’s claim be unsuccessful. The hurdle for costs in this jurisdiction is very high: *Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (1993) 73 WAIG 26. However liberty will be reserved for any such application to be brought within 14 days.

2015 WAIRC 00467

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER MILFORD WESTON

APPLICANT

-v-

WA PROPERTY LAWYERS

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

FRIDAY, 26 JUNE 2015

FILE NO/S

B 215 OF 2014

CITATION NO.

2015 WAIRC 00467

Result

Application dismissed

Representation

Applicant

Mr P Mullally as agent

Respondent

Ms M Saraceni of counsel

Order

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

- (1) THAT the application be and is hereby dismissed.
 (2) THAT the respondent has liberty to apply for costs within 14 days.

(Sgd.) S J KENNER,
 Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties	Number	Commissioner	Result
Alexis Aveleyra Talamantes; Alexis Aveleyra Talamantes	(Deli Chicchi) Glenn Chapman; Deli Chicchi / Glenn Chapman (Owner) U 57/2015	Commissioner J L Harrison	Consent order issued
Timothy Gerard Clifford; Timothy Gerard Clifford	Austmail Global Logistics; Austmail Global Logistics U 222/2014	Commissioner J L Harrison	Consent order issued

CONFERENCES—Matters referred—

2015 WAIRC 00517

DISPUTE RE DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00517
CORAM : ACTING SENIOR COMMISSIONER P E SCOTT
HEARD : WEDNESDAY, 24 JUNE 2015, THURSDAY, 25 JUNE 2015, FRIDAY, 26 JUNE 2015,
 TUESDAY, 30 JUNE 2015
DELIVERED : FRIDAY, 17 JULY 2015
FILE NO. : CR 10 OF 2015
BETWEEN : THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
 Applicant
 AND
 THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Matter Referred for Hearing and Determination pursuant to s 44 – Deputy Principal/School Administrator – Alleged misconduct and breaches of discipline – Breach of duty of care – Aggressive and inappropriate behaviour – Penalties imposed were disproportionate, harsh and oppressive – Reduction in classification – Transfer of employment – Code of Conduct policy – Duty of Care for Students policy – Standards and Integrity Directorate Investigation Report

Legislation : *Industrial Relations Act 1979*

Result : Matter dismissed

Representation:

Applicant : Mr M Amati

Respondent : Mr D Anderson, of counsel

Reasons for Decision

- 1 The applicant claims that its member, Ms Trudi Watts, has been wrongly found to have engaged in misconduct by committing breaches of discipline. The applicant denies the allegations and says the investigation of the allegations was flawed and the penalties imposed on Ms Watts are disproportionate, harsh and oppressive.

Background

- 2 Ms Watts was employed by the respondent as a Deputy Principal classified as a School Administrator Level 3, increment 4. She has been employed by the respondent for 26 years, both as a teacher and an administrator. From 2010, Ms Watts was the Deputy Principal at High Wycombe Primary School (HWPS).
- 3 On Friday, 28 May 2014, HWPS was involved in an interschool sports carnival at Maida Vale Reserve (MVR). Students, parents, teachers, other community members from HWPS and at least one other school, Wattle Grove Primary School (WGPS), were present. Also present was at least one student from Darling Range Sports College as a volunteer umpire.

- 4 The sequence of events appears to be that Ms Watts went to school first thing in the morning. She then went to the MVR. A number of softball diamonds were set up on the oval. She was supervising the Years 6 and 7 girls' B grade softball games. The first game proceeded without incident, although it was late starting due to the lack of equipment.
- 5 In the second game, Mr Kade Prescod, a student volunteer from Darling Range Sports College, then around 16 years of age, was umpiring. Parents and another teacher from WGPS, Mr Petch, offered to score while Mr Prescod umpired. Ms Watts disagreed with this, believing the organisational requirements were for the umpire to do the scoring. She got into a dispute with some parents and Mr Petch. Ms Tracey Robinson, the HWPS sports teacher and organiser of the event for HWPS arrived at the game. Ms Watts had a discussion with her about the scoring. Ms Watts left the vicinity of the softball game and made a telephone call to her school principal, Mr Richard Walters, indicating her intention to leave. Ms Watts returned to the game and the disputation continued. Mr Walters came to the MVR and Ms Watts was relieved by the other Deputy Principal and left the MVR.
- 6 A number of people made complaints in writing regarding the events of the day involving Ms Watts. Ms Leonie Mildern, a former student and the parent of a prospective student of HWPS, wrote a letter of complaint dated 28 March 2014, the day of the incident. Ms Tara Heeney, a parent of a student from HWPS and a friend of Ms Mildern's, and Ms Sarah McClurg, a parent of a student of the school, sent emails dated Sunday, 30 March 2014 to the school principal regarding the events involving Ms Watts. Ms Robinson and Mr Petch also prepared reports. Mr Walters reported the matter to the Standards and Integrity Directorate of the Department of Education.
- 7 By letter dated 4 June 2014, Mr Geoff Davis, Manager, Investigative Services, Standards and Integrity Directorate of the Department of Education, wrote to Ms Watts setting out the allegations against her as to what was said to have occurred at the interschool sports carnival. The allegations were:

1. **It is alleged that on Friday, 28 March 2014, whilst employed as a Deputy Principal at High Wycombe Primary School you committed a breach of discipline contrary to section 80(b) of the *Public Sector Management Act 1994* by contravening the Department of Education's *Code of Conduct*.**

Particulars

- a. On Friday, 28 March 2014, you were employed as a Deputy Principal at High Wycombe Primary School.
- b. You attended the Interschool Sports Carnival, located at Maida Vale Reserve.
- c. During the course of supervising the Year six and seven girls B grade softball team, you acted in an inappropriate manner, including but not limited to:
 - i. you spoke aggressively and in an inappropriate tone towards a student umpire;
 - ii. you spoke aggressively and in an inappropriate tone towards Department of Education staff; and
 - iii. you spoke aggressively and in an inappropriate tone towards members of the public. This included directing a parent to 'Piss off'.
- d. The Department's Code of Conduct states in part:

'1. Personal Behaviour

As employees of the Department we behave with integrity in all personal conduct and treat others with due consideration.'
- e. Your conduct, if proven, is contrary to the *Personal Behaviour* principle of the Department of Education's *Code of Conduct*.

2. **It is alleged that on Friday, 28 March 2014, whilst employed as a Deputy Principal at High Wycombe Primary School you committed a breach of discipline contrary to section 80(b) of the *Public Sector Management Act 1994*, by contravening the Department of Education's *Duty of Care for Students* policy.**

Particulars

- a. On Friday, 28 March 2014, you were employed as a Deputy Principal at High Wycombe Primary School.
- b. You attended the Interschool Sports Carnival, located at Maida Vale Reserve.
- c. During the course of supervising the Year six and seven girls B grade softball team, you stated '*I'm not needed here*' or words to that effect.
- d. You left the oval with your personal belongings.
- e. In leaving the oval, you failed to provide adequate care to the students.
- f. The Department's *Duty of Care for Students* policy states in part:

'Policy Statement

 - a) *Teaching staff owe a duty to take reasonable care for the safety and welfare of students whilst students are involved in school activities or are present for the purpose of the school activity.'*
- g. Your conduct, if proven, is contrary to the *Duty of Care for Students* policy.

- 8 The letter went on to set out the process which would then apply and the possible alternative outcomes to the investigation, including possible findings of breach of discipline and the penalties available to the respondent. Ms Watts was provided with an opportunity to make a written or personal submission, and she did so in a detailed statement dated 12 June 2014, setting out the events of the day from her perspective. Interviews were then conducted as part of the investigation. Those interviewed were Mr Petch on 28 May 2014; Ms Mildern, Ms Heeney and Ms Robinson on 29 May 2014; Ms Watts on 29 July 2014; Mr Prescod on 30 July 2014; Mr Walters on 31 July 2014; and Ms McClurg on 7 August 2014.
- 9 The Investigation Report, dated 13 February 2015, found there was sufficient information to conclude, on the balance of probabilities, that Ms Watts had committed acts of misconduct by behaving contrary to the Department's Code of Conduct and its Duty of Care for Students policy. The respondent then made preliminary determinations that Ms Watts had committed two breaches of discipline and proposed penalties to be applied to her. By letter dated 23 February 2015, Ms Watts was advised of the preliminary conclusions and proposed penalties and invited to respond, which she did by letter dated 30 March 2015.
- 10 The respondent wrote to Ms Watts by letter dated 13 April 2015 confirming the findings, albeit noting aspects of Ms Watts's response, and confirmed that in respect of Allegation 1 the penalty to be imposed was a reduction in classification from Level 3 School Administrator to Level 2.9 Teacher and a transfer to another position within the Department. In respect of Allegation 2, she was issued with a reprimand and a fine of a day's pay, being \$446.81.

The evidence

- 11 During the course of the hearing of the matter, evidence was given about the events of the day by Ms Watts, Mr Walters, Ms Robinson, Mr Petch, Ms McClurg, Ms Heeney, Mr Prescod and Ms Mildern. I also heard evidence from Eamon Francis Ryan and Kristy Gulland regarding the conduct of the investigation and the process applied by the respondent to make the decision.
- 12 In considering the evidence in this matter, I have noted both the oral evidence of the witnesses, their comments to the investigator recorded in the investigator's report, and the accounts of the incidents of 28 March 2014 which were provided in the letters and emails of complaint or other records to which I have referred earlier. I have also taken account of what Ms Watts has put in her responses to opportunities to make submissions.
- 13 I have also taken account of the references and other materials which date back many years, provided by Ms Watts. I have noted in particular that in her evidence, Ms Robinson described Ms Watts as a Deputy Principal as being 'very hard working, very conscientious, supportive', and an 'able deputy' and 'very pedantic'.
- 14 Ms Watts gave evidence that the arrangements for the carnival were not as they should have been and gave examples. One such example was for scoring of the second game in particular for the Year 6 and 7 girls' B grade softball teams. She denies that she spoke aggressively or used an inappropriate tone to a student umpire, Mr Prescod; she denies speaking aggressively or in an inappropriate tone to other staff or to using inappropriate language and being aggressive towards members of the public, including parents. She alleges that the three women, who I take to be Ms Mildern, Ms Heeney and Ms McClurg, swore and shouted at her repeatedly, made personal insults, were name-calling, sarcastic and engaged in other conduct which she says was inappropriate.
- 15 Ms Watts says that she became quite ill that day. She has a gall bladder problem and was feeling ill with the stress of being abused by Ms Mildern and Ms Heeney. She says that when Ms Robinson approached the game, she gave Ms Robinson her team list and asked her to look after the team. She says Ms Robinson showed no signs of being distraught. Her intention was to share her duty of care with Ms Robinson so that she, Ms Watts, could go a short distance from the game, but still on the oval, and telephone Mr Walters, seeking to go home.
- 16 Ms Watts says that she did not leave the oval, thus she did not fail to provide adequate care to the students.
- 17 She says that during her conversation with Ms Robinson, she gave Ms Robinson her team list, said 'there's my team. Look after the team', or words to that effect. She says that by handing over the team list to Ms Robinson, she was sharing her duty of care with Ms Robinson.
- 18 In the grievance she lodged, Ms Watts said 'I wasn't sure what Ms Robinson would do, whether she would look after the team or walk away, even though she knew I was 60 metres away from the bin'. In cross-examination, Ms Watts explained what she meant by this. She said, 'Ms Robinson has a history at [HWPS] leaving her class unattended and it's – to my knowledge, it has continued into this year', and although she says Ms Robinson accepted the list of students from her, 'I knew in my heart of hearts I still had to monitor those kids. I could only share my duty of care because I couldn't trust her to look after the kids'. So Ms Watts says she went a few metres away, by the bin, to telephone Mr Walters, and kept an eye on the class from there. However, Ms Watts says that she did not see Ms Robinson fall to the ground.
- 19 In cross-examination, Ms Watts said that she did not breach the duty of care because there were other teachers there. She says she shared her duty of care with Mr Petch.
- 20 Ms Watts says that she packed up her chair and took it with her. It was a gift and she was concerned it would be damaged. She said she has a little bumbag that she carries, and a backpack. She left the backpack under a tree. However, in her statement to the investigation, she said she took her bag because she had previously had her bag stolen.
- 21 She says she walked approximately five metres away from where her students were playing, from the nearest student, to telephone Mr Walters. She did not leave the oval. She told him 'I'm sick. I'm going to vomit. I'm going to faint. I need to leave'. Mr Walters said he would be there in a minute. The telephone call lasted less than a minute, and she was gone from the game for no more than a minute. She then walked back to her team. As she did so, she saw Ms Robinson on her way down to the oval, to another game.
- 22 Ms McClurg said she heard Ms Watts say 'fuck' once and 'shit' several times. She described Ms Watts as 'storm[ing] over and yell[ing] at the umpire', Mr Prescod. She said that 'You could tell by Ms Watts' body language that she was pretty angry

- ... she was yelling and carrying on'. She described the umpire as having ended up in tears, and that this was 'quite disgusting', that he was a student volunteering to help and she 'felt so sorry for him'.
- 23 Ms McClurg described Ms Watts as 'carrying on in front of the students', of her saying 'I don't have to take this shit' and 'storm[ing] off the grounds'. Ms McClurg says the students were commenting that Ms Watts was swearing. According to Ms McClurg, when Ms Watts came back, she was yelling, ranting and raving.
- 24 Ms McClurg thought Ms Watts's behaviour was 'really disgusting'.
- 25 Ms McClurg says she overheard Ms Watts telephone Mr Walters, asking him to come, and that she did not hear Ms Watts say she was unwell, nor did she get the impression during a conversation with Ms Watts that Ms Watts was unwell.
- 26 Mr Petch describes Ms Watts's reaction when he and others offered to the umpire, Mr Prescod, that they score the game. He said as she got up and came across to the side of the field they were on, yelling, saying that if they were going to score, she was going to pull her team off the field. He said 'she was pretty angry and shouting', '[her] manner was quite forthcoming and direct.' She accused the umpire of being rude but Mr Petch says he quickly responded to Ms Watts '[y]ou are being a little rude and unprofessional'. He says he thought she was a 'bit angry and worked up ... [she] seemed really quite angry, it was her voice and her body language, the way she was walking and pointing.'
- 27 He said that when Ms Robinson came along, introduced herself, handed Mr Petch the scoring sheets and asked if they minded scoring, Ms Watts started yelling, complaining again about the disorganisation, and said she would pull her children off the field. 'She was having a bit of a rant'. He described her as 'angry, very confrontational, forthcoming and aggressive ... the volume, body language and demeanour was all totally inappropriate'. He described her as standing close to Ms Robinson and yelling.
- 28 After Ms Robinson became upset, Mr Petch described Ms Watts as being angry and she was throwing her arms around, her demeanour was 'aggressive and her volume was very loud'. He says it attracted the attention of those at the softball diamond next to theirs. He said:
- 'It was shocking to see someone going off like that but then to know that person is a Deputy Principal'.
- 29 Mr Petch said Ms Watts said 'I've had enough', went back to her area, folded her chair and stormed past 'saying she [was] going back to school and leaving' (exhibit R5 [39]).
- 30 Mr Petch described the sequence of the game between Ms Watts leaving and returning. She returned about five to 15 minutes later, unfolded her chair, and sat down. He described her behaviour as disgusting. He noted that a few students were commenting on Ms Watts's behaviour, and appeared shocked. On hearing him assist her own team, Ms Watts yelled out to him that he had no right to direct her team or talk to her students. He says she walked off the field while on her phone.
- 31 Mr Prescod described Ms Watts's behaviour towards the students at the start as 'yelling at the kids to get in line, like she was having a really bad day'; 'she stopped the game and started talking to me pretty aggressive'; she told him not to be rude. Mr Prescod says '[t]here were many people around and they came up to me asking if I was all right and told me they were putting in complaints'. They appeared to him to be 'gob smacked'. Ms Watts 'went all angry and snapped. She was yelling at them.' Mr Prescod described Ms Watts as 'storm[ing] off' after the conflict with Ms Robinson. He said Ms Watts 'then started going really angry, yelling and stuff and saying that she is going back to school'. 'She packed up her stuff, the kids were just staring and she was walking like she was going back to school' (exhibit R7 [37]). 'The lady left for the day' (exhibit R7 [40]). He was not cross-examined on this evidence. He described her as having 'spat the dummy in front of all the kids'.
- 32 Ms Mildern says that during the first game, Ms Watts was not yelling at the students but was 'loud and stern'. Ms Mildern did not think this was appropriate. She had 'the impression the kids were scared by the look on their faces when [Ms Watts] was speaking to them'. Ms Mildern described Ms Watts as yelling at Mr Prescod, ultimately making him distraught and crying. She also described Ms Watts as yelling at Ms Robinson, being 'loud, straight on the defensive'. She says 'Ms Watts picked up her chair and said, "You can all piss off, you don't need me anyway"' and stormed off.
- 33 Ms Mildern says after Ms Watts returned, she told Ms Mildern and Ms Heeney they could 'Piss off' because 'we weren't welcome'.
- 34 Ms Heeney says Ms Watts was yelling across to the Wattle Grove team and 'She wasn't happy ... [She] kept getting louder. Her voice was loud enough to ensure her point was put across from the other side of the field'. She described Ms Watts as 'kick[ing] up a bit of a stink' about Mr Prescod umpiring and scoring. She described Ms Watts as snatching the score sheet from the other parent or teacher, as ripping it from them, not taking it, and shoving the scoresheet at Mr Prescod's chest. She described Ms Watts's voice as angry.
- 35 According to Ms Heeney, Ms Watts threw up her hands, said 'Oh, that's it. I'm obviously not needed here ... Ms Watts walked back to where High Wycombe had their stuff, grabbed her bag, packed up her chair and walked off towards the car park' (exhibit A1 [26]). Ms Watts came back after 10 minutes. Ms Heeney said she had the impression Ms Watts was leaving.
- 36 Ms Heeney also described what happened after the altercation with Ms Robinson when Ms Watts returned to the game. Ms Watts told Ms Heeney, who was scoring, that she did not need to do it. When Ms Heeney said she had been asked to do it and would do it, Ms Watts said, 'Well I said you don't need to do it'. She took the clipboard off Ms Heeney and said 'Are you a teacher?' When Ms Heeney said she was not, Ms Watts said, 'Well piss off then'. Ms Heeney described Ms Watts's behaviour as 'a disgusting display of behaviour she had shown in front of everyone', and as 'appalling'.
- 37 Ms Robinson says that when she was approaching the game involving Ms Watts's students, Ms Mildern approached her complaining about Ms Watts. Ms Robinson said she would talk to Ms Watts. She says Ms Watts spoke to her in an aggressive manner, loudly, with intimidation, Ms Watts was complaining about the lack of organisation and about the scoring. Ms Robinson said that she did not think it mattered who scored, and Ms Watts had a clipboard or a sheet which she gave to

- Ms Robinson saying, 'Fine. You look after them. I am going'. She says that Ms Watts then collected her belongings and walked away, towards the clubrooms. Ms Robinson says she remembered thinking, 'she's gone' and she 'didn't expect her to come back'. She believed she was not returning.
- 38 Ms Robinson says she was trying to remain calm. Ms Robinson had a panic attack and 'melt[ed] down' after Ms Watts left and got her belongings and walked past Ms Robinson. Ms Robinson started to cry, she could not get her breath. Ms Robinson says that she was visibly upset, shocked, very distraught, extremely embarrassed and extremely humiliated.
- 39 Ms Robinson says that while she thinks Ms Watts did not see her crouching down after the panic attack, that Ms Watts saw that she was visibly upset, visibly shocked, that she, Ms Robinson, was in no fit state to have done anything. In any event, Ms Robinson says that Ms Watts knew she could not take on the children as she had other duties to do that day. She says though, that as upset as she was, 'I wasn't leaving without someone being there for duty of care'.
- 40 A number of people then gathered around Ms Robinson to assist her. A parent said they were going to find the organiser of the softball. After she had collected herself, Ms Robinson said that the young umpire came up and asked 'what do I do now?' and she reassured him.
- 41 Ms Robinson says Ms Watts was gone for about five to 10 minutes.
- 42 Asked if Ms Watts's behaviour on the day of the sports carnival was characteristic of Ms Watts, she said 'I have known other occasions, but it's – it's pertaining to the day that I am concerned about'. However, Ms Robinson appeared to indicate that Ms Watts's behaviour had concerned her before but 'not to that extent'.
- 43 Mr Walters says that when Ms Watts telephoned him to say she was leaving the carnival because there were a number of issues about the organisation of the event, she was unhappy to stay, it was too stressful. She reiterated that she was in dispute with parents and a teacher from another school. Ms Watts gave no indication of any medical issues affecting her that morning, but when he arrived at the grounds and spoke to Ms Watts, she said she was not feeling well as a result of being stressed, 'I don't feel well, I need to go home.' There was no reference to her feeling like vomiting or passing out.
- 44 Mr Walters says in cross-examination that he received a call from Ms Watts. She complained about organisational issues associated with the carnival, that there had been an incident, that she felt she was being harassed and intimidated by others and needed to leave. He told her she needed to stay until he came down to the oval and that she could not leave the students. He says that two to three minutes later, he phoned her back and they had a discussion about the equipment she said was needed, at which time she told him that it had already arrived. By the time he arrived at the oval, Ms Watts was back at the softball diamond. She gave no indication of feeling sick, although she told him 'I don't feel well. I need to go home'. Mr Walters says that Ms Watts's function that morning was supervision, to be in charge of the girls' softball B team.

Consideration

Allegation 1 - Contravention of the Code of Conduct

- 45 The respondent's Code of Conduct provides, amongst other things, principles to assist employees to meet the expectation of the Department by its employees 'to maintain high standards of behaviour'. In respect of point 1 Personal Behaviour, the principle is that '[a]s employees of the Department we behave with integrity in all personal conduct and treat all others with due consideration'. The explanation which follows this is:
- Employees are expected at all times to behave ethically and act with integrity. In practice, this means employees:
- treat others with respect, dignity, courtesy, honesty and fairness and with proper regard for their rights, safety and welfare;
 - ...
 - contribute to a workplace that is free of harassment, bullying or discrimination against colleagues, students or members of the public;
 - encourage positive work habits, behaviour and personal and professional workplace relationships and boundaries;
 - do not engage in behaviour that may bring your reputation or that of the Department and the Public Sector into disrepute; and
 - do not tolerate or participate in behaviour that is inconsistent with these principles.
- 46 The first thing I note about the various accounts of what occurred on the day is that there is a level of inconsistency between the various accounts. Part of that inconsistency, I think, is due to some people hearing parts of some conversations but not others, due to their proximity to those conversations or to other considerations.
- 47 Also, Ms Mildern wrote in her complaint on the day of the incident and was interviewed two months later; Ms Heeney and Ms McClurg each wrote emails two days after the event and were interviewed two months after the event. Mr Prescod did not write a report or complaint, but was interviewed four months after the event. Ms Robinson and Mr Petch wrote reports but I do not know the dates of those reports, but each was interviewed two months after the incident.
- 48 Therefore, it is hardly surprising that each person has not recalled or reported the incidents of the day in exactly the same terms. In spite of that, all but Ms Watts provide remarkably consistent, if not exactly the same, stories and there is no evidence of collusion as accounting for that consistency. A number of the witnesses were unknown to Ms Watts and to each other at the time of the incidents and there is no explanation as to why they would tell remarkably similar stories about her tone, volume, body language and words, except that they are telling the truth.

- 49 I found the evidence of Jonathan Petch to be the most convincing of all. He was a teacher from another primary school and he had not known Ms Watts before the incident. He had no reason to create false accusations against her, and yet his evidence is quite detailed as to her aggressive and offensive behaviour towards students, in particular Mr Prescod, parents and other staff.
- 50 The applicant sought to focus on Mr Petch's use of the word 'forthcoming' in his evidence, yet other language used by him is quite clear that Ms Watts was aggressive, loud and rude, not merely assertive.
- 51 In comparing and contrasting the various accounts, it is quite clear, including from Ms Watts's own accounts, that the day commenced very badly for Ms Watts. She arrived at the school in anticipation of the sports carnival to find that things were not as organised as she believed they ought to be. When she arrived at the MVR, she was concerned about other aspects of the organisation of the day. She was not in a happy frame of mind. It is clear, too, that she held Ms Robinson responsible for a lack of organisation in some aspects of the arrangements for the day. In fact, at the end of the day, she put in a complaint to Mr Walters, which she wanted to be treated as a grievance. However, she appears not to have known at the time that Ms Robinson was not solely responsible for the organisation of the event, yet held her to be responsible. She later withdrew the grievance, acknowledging that Ms Robinson was not solely responsible.
- 52 I find that whilst Ms Watts relies on feeling unwell on the day of the sports carnival as providing an explanation for her wanting to leave, there is no real indication that she was in such a state that she needed to leave. Mr Walters' evidence is that she was very upset at what she saw as a lack of organisation and that she may have mentioned feeling unwell, but certainly not to the extent that she needed to leave the carnival. His clear impression was she was intending to leave the carnival as a result of her unhappiness with the organisation and because she was in dispute with people there.
- 53 At its lowest, it is clear from all of the other evidence that Ms Watts was rude, overbearing and aggressive towards Mr Prescod because she wanted him to do not only the umpiring but the scoring. She says that she had understood that this was the arrangement put in place by Ms Robinson as part of the organisation of the day. When he indicated to her that some of the parents had offered to do the scoring while he did the umpiring, she was not happy with this response and demanded that he score. She did so in a tone and manner that was aggressive and inappropriate for a teacher, in the presence of all of the people at the event. Whether he cried as a response to her behaviour, as reported by a number of the other witnesses, is not so significant to me. He denies that he cried and I can understand why, if he had cried, he might now deny it. However, he was at least upset, bewildered and looking for assistance and support from others in response to Ms Watts's behaviour towards him.
- 54 It is also clear that Ms Mildern and Ms Heeney both heard Ms Watts say, on at least one occasion to one of them, to 'piss off'. She did so in circumstances where they were both attempting to assist the scoring, upset at her attitude towards Mr Prescod and her behaviour towards Ms Robinson. Whilst no one else heard her use the words 'shit' and 'fuck' as alleged by Ms Mildern, Ms Mildern was unswayed in her evidence that Ms Watts had used those words. The fact that Mr Petch or Mr Prescod did not hear any swearing by Ms Watts does not mean that it did not occur. It is clear from the evidence that they were not always within the vicinity of her to hear what she was saying, or were concentrating on other things.
- 55 It is also clear, and I have no reservations in finding, that Ms Watts's attitude towards Ms Robinson on the day was rude and aggressive. She made very clear her dissatisfaction with the arrangements for the day. Ms Robinson was so shocked and distraught by the attack by Ms Watts that she had a panic attack and dropped to the ground to catch her breath, and recover herself. Witnesses described her distress and that she was crying.
- 56 Whether Ms Watts saw her fall to the ground or not is hard to determine. It appears that Ms Watts may have turned away from Ms Robinson just as Ms Robinson went to the ground, and so may not have been aware of her doing so.
- 57 In any event, it is quite clear that Ms Watts was in a state of high dudgeon and was abusive towards anyone who crossed her path or took a different view to hers that morning, including towards Mr Prescod, Mr Petch and Ms Robinson, and towards Ms Mildern and Ms Heeney. She used an aggressive and inappropriate tone.
- 58 The applicant suggests that in describing Ms Watts's conduct as being aggressive, that this must be viewed as being that she was ready to physically attack those she displayed aggression to. However, this is a quite narrow definition of aggression. The allegation is that Ms Watts acted in an inappropriate manner, including but not limited to speaking aggressively and in an inappropriate tone towards Mr Prescod and toward Department of Education staff, and towards members of the public, and in respect of the last matter, including directing a parent to 'piss off'.
- 59 Aggressively is the adjective of aggressive. Aggressive is defined as characterised by aggression. Aggression is, most appropriately to this matter:
2. any offensive action or procedure; an inroad or encroachment: *an aggression upon one's rights*.
 3. the practice of making assaults or attacks; offensive action in general.
 4. *Psychology* the emotional drive to attack; an offensive mental attitude (rather than defensive).
- (the Macquarie Dictionary, 3rd ed)
- 60 It is quite clear that Ms Watts was behaving in a manner which was offensive in the sense of verbally attacking in a manner which displayed anger and frustration to the point where parents, students and other teachers observing her conduct were distressed by it.
- 61 In the circumstances, where Ms Watts's version of events conflicts with other evidence, I have no hesitation in accepting the other evidence. Ms Watts also displayed a somewhat pedantic and assertive demeanour while giving her evidence.
- 62 Therefore, whilst there are inconsistencies in the evidence, they tell a consistent story of the use of abusive language, volume, tone, body language and actions on Ms Watts's part, directed towards a student umpire, Departmental staff and members of the public. It was in the view of her students, students from another school, parents from her own school and another school, and teachers from her own school and another school. This is not the behaviour which is reasonably expected of a school deputy principal.

- 63 Ms Watts's conduct was contrary to the policy in that she did not maintain a high standard of behaviour. She did not treat others with respect, dignity, courtesy and fairness. She was rude, abusive and aggressive.
- 64 Of significance also is Ms Watts's refusal to acknowledge her own behaviour, and to respond to the allegations by making complaints against others where the evidence demonstrates no such behaviour on their part. She has refused to accept responsibility for her behaviour and cast responsibility onto others by her accusations against them. None of the other people who made statements or gave evidence heard any of the comments which Ms Watts attributes to the three women. I find there is no basis for Ms Watts's accusations against them.

The penalty

- 65 The respondent has imposed a penalty of reduction of classification and transfer. The reduction of classification is particularly significant for two reasons. Firstly, it reduces Ms Watts's status from School Administrator to Teacher. School Administrator is a leadership position. As a Deputy Principal, Ms Watts had a higher standard of behaviour to meet, both as a leader and manager of staff and as a representative of the school's management to the wider community. A number of the witnesses expressed particular concern at the behaviour because it was being displayed by a Deputy Principal (Ms Heeney in her witness statement; Mr Petch in his witness statement; Ms Mildern in her letter of 28 March 2014; Ms McClurg in her email of 30 March 2014).
- 66 The second element is the financial penalty which goes with the drop in classification level. It is true that this has both an immediate and ongoing effect. However, the salary attaches to the classification because of the duties and responsibilities applicable to the level and the position. In this case, it is not appropriate that Ms Watts be a school administrator, so her salary must be commensurate with the duties and responsibilities she will undertake as a teacher.
- 67 Therefore, I have no hesitation in not only finding that the first allegation is made out, but that it is not appropriate for Ms Watts to be a school administrator. She may at some stage in the future demonstrate appropriate behaviour which would warrant the respondent having sufficient confidence in her to appoint her to such a level, but it seems an appropriate penalty in these circumstances. In the meantime, the penalty of reduction in classification is not harsh or unfair.
- 68 Ms Watts does not oppose the penalty of transfer.

Allegation 2

- 69 The allegation is that Ms Watts breached the Duty of Care for Students policy by leaving the oval and thus failing to provide adequate care to the students. The respondent clarified that this did not mean she left the inter school carnival grounds, but she left the children she was responsible for unsupervised. Firstly, I accept without hesitation, for the reasons I gave earlier, that Ms Watts's version of events is not to be preferred over the contrary evidence of other witnesses.
- 70 I also note that she says she shared her duty of care with Ms Robinson by handing over the student list. However, she also says that in effect, she did not trust Ms Robinson to have that duty of care so she did not move out of sight of the students while she made a call to Mr Walters.
- 71 I am unable to determine that Ms Watts knew Ms Robinson went to the ground crying because she may have turned away by then. But I find unreservedly that what Ms Watts did not do was, in a calm and reasonable manner, tell Ms Robinson she was going away from the game to telephone Mr Walters, nor did she ask Ms Robinson to supervise her students until she got back. She simply thrust the list of students at her, told her to look after her students, and, as described by others, stormed off, packed up her chair and took her bag, and removed herself out of sight of those who remained at the game.
- 72 They appear not to have seen where she actually went, however, they were distracted by Ms Robinson and by the game. Had Ms Watts intended to remain in sight of the game, she would not have felt the need to pack up her chair and take it and her bag with her. I am satisfied that she intended to leave the oval and was on her way to doing so when she spoke to Mr Walters. He told her to stay there until he arrived, so she returned.
- 73 Ms Watts says she was gone only a minute or so, yet Mr Petch described the sequence of the game which had passed in her absence and he estimated she was gone between five and 15 minutes. Others have estimated between five and 10 minutes. Ms McClurg says it was 15 to 20 minutes.
- 74 In addition, Ms Robinson went to the ground as Ms Watts walked away to collect her things, she was distressed and crying, and others gathered around to assist her. She was comforted by them and composed herself. She then reassured Kade Prescod. When Ms Watts was coming back to the game, she saw Ms Robinson on her way down to the other game. It is unlikely that Ms Watts was so close to the game where her students were playing so as to be away for only around a minute if all of this happened in her absence.
- 75 Further, a number of witnesses believed from her words and actions that she was leaving, that is, going away from the vicinity, even back to the school.
- 76 Also, Ms Watts latterly said that she was sharing her duty of care with Mr Petch. However, she did not know him at the time.
- 77 Therefore, I find that it is highly likely that Ms Watts left the students for whom she had a duty of care in the care of a teacher, Ms Robinson, whom she did not trust and who had responsibility for the whole event, or another teacher whom she appears not to have known was a teacher, and parents and members of the public. I find that she left the game, not merely for the purpose of moving away from the game to make a call to Mr Walters, not to get him to provide relief before she went, but to tell him she was leaving then. I also find that as a number of witnesses heard her say that she was not needed there, that it was her intention to leave.
- 78 I find that it is most likely that she was not within sight of the game or she would have seen the gathering around Ms Robinson and the activity that followed. It is also unlikely that she was gone for less than five minutes.

- 79 In all of the circumstances, I find that Ms Watts left students for whom she had a duty of care in the hands of people she either did not trust or did not know. Ms Robinson had other responsibilities that day and could not have accepted the sharing of the duty of care for that class.
- 80 Therefore, I find that Ms Watts did not take reasonable care for the safety and welfare of those students, and this breached the Department's Duty of Care for Students policy.

The penalty

- 81 The applicant has not argued in particular that the penalty of a reprimand and a fine of a day's pay was harsh in the circumstances.

Reference to the 2011 incident

- 82 There is an issue of Ms Watts's conduct on a previous occasion in 2011, which resulted in the respondent sending her a letter in effect, warning her of future behaviour. I make no findings as to what that behaviour might have been on that occasion. I also note that Ms Watts appeared to have been justifiably frustrated at a lack of response or timely response to her own complaint of the treatment of her son in his school. Her complaint was as a private citizen, but by the same token her conduct may well have reflected on her as a school administrator. But nonetheless, no findings were actually made against her, but the respondent gave her a warning as to the expectations regarding her conduct for the future.
- 83 In the report by Ms Gulland, dated 4 February 2015, and the Director General's letter of 19 February 2015, in which she invited Ms Watts to make a submission, there is a comment that 'this is not the first time that an allegation of this nature has been brought to [the Director General's] attention', and reference to Ms Watts's conduct in 2011. I note that no such reference was made in the final letter, dated 23 February 2015. The comment could only ever have relied on Ms Watts having been given a warning about future behaviour because no findings were made about her conduct in 2011, nor could they have done so without an investigation. The comment should not have been included at all. It raised the prospect of that issue having been taken into account in the respondent's decision, when it should not have been.
- 84 I do not accept that the letter in 2011 could serve as a proper warning or as a 'courtesy', as it had been described.

Conclusion

- 85 In all of these circumstances, the allegations are upheld and the penalty is appropriate. I find that the Investigation Report has not failed in the ways alleged in the referral of the matter, nor was it flawed and its findings unsustainable. There was no evidence of bias or prejudice against Ms Watts.
- 86 In spite of the inappropriateness of the inclusion of the comment regarding the 2011 incident, I find that the findings regarding the incident on 28 March 2014 and the penalties imposed are not inappropriate. The conduct that day alone, without having regard to any other conduct, justified the findings and the penalty.

2015 WAIRC 00518

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, 17 JULY 2015

FILE NO/S CR 10 OF 2015

CITATION NO. 2015 WAIRC 00518

Result Matter dismissed

Order

HAVING heard Mr M Amati for the applicant and Mr D Anderson of counsel for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this matter be, and is hereby dismissed.

[L.S.]

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

2015 WAIRC 00772

DISPUTE RE DISCIPLINARY PROCESSWESTERN 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 WEDNESDAY, 5 AUGUST 2015
FILE NO/S CR 10 OF 2015
CITATION NO. 2015 WAIRC 00772

Result Consent Order Issued
Representation
Applicant Mr M Amati
Respondent Mr D Anderson of counsel

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979* (the Act); and
WHEREAS the Commission heard the matter on Wednesday the 24th day of June 2015; and
WHEREAS the respondent seeks that the Commission issue an order pursuant to s 33(1)(b) of the Act in respect of costs incurred by its witnesses as a result of summonses issued and provided a Minute of Consent Orders; and
WHEREAS the Commission considers that it is appropriate to issue such orders; and
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT the respondent pay an amount of \$143.04 to Mr Kade Prescod for expenses incurred by Mr Prescod by attending at the Commission in accordance with a summons.

[L.S.]

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

2015 WAIRC 00773

DISPUTE RE DISCIPLINARY PROCESSWESTERN 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 WEDNESDAY, 5 AUGUST 2015
FILE NO/S CR 10 OF 2015
CITATION NO. 2015 WAIRC 00773

Result Consent Order Issued
Representation
Applicant Mr M Amati
Respondent Mr D Anderson of counsel

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979* (the Act); and
WHEREAS the Commission heard the matter on Wednesday the 24th day of June 2015; and

WHEREAS the respondent seeks that the Commission issue an order pursuant to s 33(1)(b) of the Act in respect of costs incurred by its witnesses as a result of summonses issued and provided a Minute of Consent Orders; and

WHEREAS the Commission considers that it is appropriate to issue such orders; and

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

THAT the respondent pay an amount of \$172.35 to Ms Sarah McClurg for expenses incurred by Ms McClurg by attending at the Commission in accordance with a summons.

[L.S.]

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

2015 WAIRC 00752

**DISPUTE RE ALLEGED REFUSAL OF RENEWAL OF CONTRACT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2015 WAIRC 00752
CORAM : ACTING SENIOR COMMISSIONER P E SCOTT
HEARD : TUESDAY, 14 JULY 2015
DELIVERED : MONDAY, 27 JULY 2015
FILE NO. : CR 36 OF 2014
BETWEEN : THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
 Applicant
 AND
 THE GOVERNING COUNCIL OF CHALLENGER INSTITUTE OF TECHNOLOGY
 Respondent

CatchWords : Matter Referred for Hearing and Determination pursuant to s 44 – Lecturer – Termination of employment – Fixed term contracts – Contract extensions – Conversion to permanent employment – Compliance with the Agreement – Business case for fixed term appointment – Indicia for casual employment – SSTUWA/TAFE Employee Relations Committee (STERC) – Fixed Term Contract Policy – Equitable estoppel

Legislation : *Industrial Relations Act 1979*
Western Australian TAFE Lecturers' General Agreement 2008
Western Australian TAFE Lecturers' General Agreement 2011

Result : Matter dismissed

Representation:

Applicant : Mr M Amati

Respondent : Mr D Anderson of counsel

Reasons for Decision

The claim

- 1 The applicant says that its member, Ms Suravi Anand, a lecturer employed by the respondent on a series of fixed term contracts, ought to have that employment recognised as being ongoing. It seeks a declaration to that effect, and that the purported expiry of the contract is null and void. It also seeks an order that the employment relationship be restored on terms no less favourable to Ms Anand than those which applied on 31 December 2014. The applicant also says that the respondent's termination of Ms Anand's employment on 31 December 2014 by failing to roster her for Semester 1 in 2015, was an unconscionable act giving rise to equitable estoppel.
- 2 The respondent denies that the employment was permanent, saying that Ms Anand was, in fact, employed on contracts for a fixed term in circumstances where a fixed term contract was appropriate. It also says that whilst it did not comply with cl 4 of the Fixed Term Contract Policy (the Policy) incorporated into the *Western Australian TAFE Lecturers' General Agreement 2008* (the 2008 Agreement) or the *Western Australian TAFE Lecturers' General Agreement 2011* (the 2011 Agreement) in that it failed to provide a business case justifying a fixed term appointment prior to appointing Ms Anand on a fixed term contract, that this does not make the employment permanent. The respondent also says it is not open to infer that, had a business case been produced, that Ms Anand's employment would have been permanent or ongoing.
- 3 It also says that there is no mechanism by which the Commission can convert fixed term employment to indefinite employment, and even if there were such a mechanism, then it is not consistent with equity, good conscience and the substantial merits of the case for the Commission to do so.

Statement of agreed facts

4 The parties have produced the following agreed facts:

1. On the 8 February 2010, the respondent published an advertisement for Lecturers – Civil & Mechanical Engineering.
2. The positions were advertised as a 12 month extended pool requiring two separate twelve month contract positions to fill immediately in Civil Engineering and two separate twelve month contract positions to fill immediately in Mechanical Engineering, all with the possibility of extension or permanency.
3. Ms Anand applied for a position in the pool advertisement, was interviewed on 25 July 2010 and was recommended for a contract position as a Lecturer in Civil Engineering on 15 September 2010.
4. On 29 October 2010, Ms Anand was employed by the respondent, as a Lecturer in Civil Engineering on a fixed term contract expiring on 28 October 2011, at a fraction (0.76) of the full time equivalent (FTE) throughout the relevant period.
5. On 6 October 2011, Ms Anand accepted an offer to extend her contract of employment from 28 October 2011 to 26 October 2012.
6. On 16 August 2012, Ms Anand accepted an offer to extend her contract of employment from 26 October 2012 to 5 July 2013.
7. On 4 June 2013, Ms Anand accepted an offer to extend her contract of employment from 5 July 2013 to 4 July 2014.
8. On 24 June 2014, Ms Anand accepted an offer to extend her contract of employment from 4 July 2014 to 31 December 2014.
9. The abovementioned extensions were offered by the respondent without the position being re-advertised and, additionally, without Ms Anand being required to apply for an extension of her contract.
10. The respondent concedes that, for the purposes of the STERC Fixed Term Contract Policy (referred to at clause 17.3 of the *Western Australian TAFE Lecturers' Agreement 2008*), a written business case was not done to justify employing Ms Anand on a fixed term contract.
11. Ms Anand was timetabled in advance of each semester, but she was not timetabled for semester 1, 2015.
12. Ms Anand was entitled to accrue personal leave, annual leave, professional leave and long service leave whilst employed by the respondent.
13. Ms Anand's work performance throughout the period of her employment was satisfactory with no performance issues having been raised during that time.
14. To the best of the respondent's knowledge, Ms Anand had no health issues that affected her capacity to fulfil her employment obligations.

Statement of Agreed Facts

The applicant's contentions

- 5 The applicant says based on the agreed facts and the documents, it is open to the Commission to find that between 1 June 2007 and 31 December 2014, Ms Anand has had a continuing employment contract with the respondent in spite of the label characterising her employment as fixed term.
- 6 The applicant relies upon the description of casual employment and the definition of 'engaged as such' referred to in *Warren Graham Milward, Department of Consumer & Employment Protection v Christine Anne Miles & Richard Ginton Miles t/as Milesaway Tours and Melrose Farm Pty Ltd t/as Milesaway Tours* (FBA 7 and FBA 8 of 2007) [2007] WAIRC 01230. The applicant says that the principle is that how the employee was engaged or employed is a matter of law and fact, notwithstanding that the parties may have characterised the employment in a particular way. The applicant also says that notwithstanding that the contract purports to be for a fixed term, it was clearly not the intention of the parties at that time, and considering the subsequent behaviour of the parties, it cannot be said that it was properly a fixed term contract.
- 7 The applicant also refers to the Full Bench decision in *The Metals and Engineering Workers Union of Western Australia v Centurion Industries Ltd* (1996) 76 WAIG 1287 in which indicia were examined for the purpose of determining the true nature of employment, although they were not necessarily determinative, taken alone.
- 8 The applicant also relies on the employer's refusal to roster Ms Anand for Semester 1 2015 as being unconscionable giving rise to estoppel and refers to *Waltons Stores (Interstate) Ltd v Maher and another* (1988) 164 CLR 387.
- 9 I note that the applicant does not argue that the work was not subject to demand driven fluctuations, nor that the respondent in any way gave Ms Anand to understand that her employment was or would become permanent.
- 10 The applicant also argues that because of the length of her employment and the regular extensions of the contract, that Ms Anand's employment ought to be recognised as permanent.
- 11 In summary, although the applicant refers to Ms Anand's employment with the respondent from 1 June 2007, the applicant's arguments are limited to the fact of the length of the uninterrupted employment from 29 October 2010 until 31 December 2014; that there was no business case prepared to justify the fixed term appointment, and that the intentions of the parties are said to be demonstrated by their subsequent behaviour that the employment was ongoing.

The Agreements and the Policy

12 Ms Anand's employment was subject to the 2008 Agreement and its replacement, the 2011 Agreement, as well as the respondent's Fixed Term Contract Policy.

13 The 2008 Agreement includes clauses 17 System Consultation and Change Management, which records that 'The parties agree to set up and maintain the SSTUWA/TAFE Employee Relations Committee (STERC) on terms agreed by the parties'. It then sets out the areas or issues which the parties intend to deal with through STERC. They include 'Fixed Term Contracts and Conversion to permanency'. The final subclause, 17.3, says that '[a]ny policies, or positions, agreed by STERC will form part of this agreement'.

14 The relevant part of clause 18 Modes of Employment provides:

Employees covered by this Agreement will be employed in the mode of either permanent, fixed term contract or casual employment. The employer will inform each employee of the terms and conditions of their employment prior to commencement. Permanent is the preferred mode of employment of the parties to the agreement.

The 2008 Agreement, cl 18.1

15 Clause 19 Permanent provides at subclause 19.1 that 'A permanent lecturer is a lecturer employed in a position with the employer on an ongoing basis for an indefinite period'. The remainder of the clause is not relevant for current purposes.

16 Clause 20 Fixed Term Contract provides:

20.1 'Fixed term contract employee' means an employee who is employed to carry out work of a finite duration. Circumstances where this mode of employment is appropriate include:

- Covering one-off periods of relief;
- Work on projects with a finite life, where funding is not guaranteed past a certain date, or the work is subject to demand driven fluctuations, or is seasonal in nature;
- Specific tasks or projects which shall mean a definable work activity which has a starting time and which is expected to be completed within an anticipated timeframe;
- Roles where the skills and abilities required to perform a function are expected to vary over time;

20.2 An employee engaged on a fixed term contract will be notified in writing prior to the commencement of employment of the details of the work, the reason for the contract being for a fixed term, together with the conditions of employment, and the starting and finishing dates of the contract.

...

20.4 Where appropriate, policies relating to fixed term contracts, fixed term contract employment, conversion to permanent employment status and permanent employment status will be developed through STERC. The parties acknowledge there is currently a STERC agreed policy for conversion to permanent employment status. Amendment to that policy and development of new policies will be as required.

The 2008 Agreement, cl 20

17 The 2011 Agreement contains the same clause titles as those referred to above in the 2008 Agreement but their numbers are each one lower. Clause 16 provides for the continuation of STERC and it continues to provide for Fixed Term Contracts and permanent employment to be subject to policies and issues under STERC's purview.

18 Clause 17 Modes of Employment, clause 18 Permanent, at 18.1, and clause 19 Fixed Term Contract are in identical terms to those in the same titled clauses in the 2008 Agreement.

19 The Policy says that it is to be read in conjunction with the relevant clauses from the Agreement. It goes on in clause (3) to note that 'the Agreement prescribes the circumstances where it is appropriate for employees to be engaged on a fixed term contract' and goes on to note that these include:

- Covering one off periods of relief.
- Working on a project with a finite life.
- Working on a specific task or project.
- Performing a role where required skills and abilities are expected to vary over time.

20 It notes 'The employer must document and be able to demonstrate the rationale for the fixed term contract in accordance with the criteria listed above'.

21 Under the heading of Business Cases, the Policy notes:

(4) Other than for a reason in (3) above, where a business area proposes to appoint lecturers on fixed term contracts the business area must develop a business case to justify this decision and identify the sustainable level of permanency for a particular year.

(5) Business cases must:

- document the permanency level (FTE) that can realistically be sustained and must not refer to individual staff;
- be prepared/reviewed as and when required; or otherwise
- be reviewed on at least an annual basis;

- anticipate demand changes for the remainder of the year.

Agreed book of documents,
Fixed Term Contract Policy

- 22 There is provision for a lecturer to challenge the business case.
- 23 Under the heading of 'Appointment of staff' the Policy notes that, amongst other things, 'Fixed term contract appointments will only occur in accordance with the Agreement and this policy'. It provides for the circumstances under which a further fixed term contract or permanent appointment may be made. It says:

Appointment of staff

...

- (12) Where a vacant position is advertised and filled as fixed term contract without reference to the possibility of a further fixed term contract, or a permanent appointment, appointees to such vacancies cannot be appointed beyond the term of their fixed term contract without a further merit selection process.
- (13) Where a decision is made to fill a vacant position with a fixed term contract employee due to a business case as outlined in (4) and (5) above the advertisement and the employment contract must specify that there is the possibility of a further fixed term contract and permanent employment.
- (14) Where a vacant position has been advertised and filled as fixed term contract with the possibility of a further fixed term contract, or permanent appointment, the appointee must be offered a further fixed term contract or permanent appointment if either circumstance arises. This includes ad hoc vacancies that occur due to turnover of permanent, or fixed term lecturers, as well as anticipated higher demand for training in a business case that would justify a higher level of permanency. In such instances positions can only be re-advertised and filled with another appointee if the original appointee declines an offer of a further employment. A lecturer who, at the time a permanent position becomes available, is involved in formal, documented, sub-standard performance, or disciplinary, processes is not eligible for permanent appointment. Subject to the outcome of these processes, such a lecturer will not be precluded from future permanent appointment.
- (15) A lecturer referred to in 14 above will be deemed to include any lecturer employed on a fixed term as at the time of implementation of this policy who was appointed in a merit selection process for a fixed term for a reason other than in (3) above; notwithstanding the terms of the contract.

Agreed book of documents,
Fixed Term Contract Policy

The advertisement for the positions

- 24 The advertisement for the filling of the positions indicates that whilst they were 12 month extended appointment pool positions, there was 'the possibility of extension or permanency'.

The Commencement Advice Form

- 25 The Commencement Advice Form provides for a range of alternatives in a number of questions and the answer to the question is indicated by a cross to the relevant box. In respect of Ms Anand's employment the box crossed under the heading of 'Type of Placement' is recorded as 'Contract (New Starter)'. The options not marked include Permanent and Contract/Secondment Extension, amongst others. The Commencement Date is recorded as 29/10/2010 and the Cessation Date 28/10/11. Under the 'Contract Conditions' section, the box crossed was 'Extension or conversion to permanency option due to uncertain demand for training as supported by Business Case'. The box marked in the Reason for Fixed Term Contract section is 'Uncertain demand for training (*Lecturing only* – a business case is required for this reason that identifies the sustainable level of permanency in the program area)'.

The Contract Letter

- 26 The Fixed Term Contract Offer letter addressed to Ms Anand dated 22 October 2010, and apparently signed by her on 28 October 2010, offered her 'the opportunity for a fixed term contract under the provision of the Western Australian Vocational Education and Training Act 1996'. The commencement date of 29 October 2010 and expiring on 28 October 2011 inclusive were recorded. Under the heading of Cessation of Employment it noted:

Your employment will cease on the expiry of this contract. ... This contract may be terminated earlier than the nominated cessation date where one or more of the following circumstances arise:

- if your appointment is as a relief for another staff member and they return early to duty,
- if it is no longer viable to maintain the position due to low student enrolments and/or funding shortfall,
- in the situation of Institute restructures.

In such event, you will be given the appropriate notice of termination or pay in lieu of the required notice period.

- 27 Under the heading of Permanent Status, the letter provides 'Nothing in this contract shall confer upon the employee 'permanent officer' status within the meaning of the Public Sector Management Act 1994'.

Contract extensions

- 28 The documents provided by the parties include letters signed by Ms Anand to the respondent's Personnel and Payroll Officer, accepting extensions to the contract to 28 October 2012, 5 July 2013, 4 July 2014 and 31 December 2014. Each letter includes a paragraph which says 'I acknowledge that all details of my employment outlined in my contract, dated 22 October 2010 form the new terms and conditions relevant to the extension.'

29 The respondent provided to Ms Anand a Statement of Service dated 1 April 2015, which showed that she had the following service with the respondent:

- From 1 June 2007 to 20/4/2008 casual clerical;
- From 21/4/2008 to 20/1/2009 0.5 FTE lecturer literacy and numeracy;
- From 10/2/2009 to 28/10/2010, casual lecturer;
- From 29/10/2010 to 31/12/2014 0.76 FTE, Lecturer Civil Engineering.

Consideration

30 The designation to be applied to how an employee is engaged, that is, casual or permanent or for a fixed term, is a matter of law and fact, ‘...it is not simply a matter of looking at the designation of the parties although this can be a relevant consideration.’ (*Warren Graham Milward, Department of Consumer & Employment Protection v Christine Anne Miles & Richard Miles t/as Milesaway Tours and Melrose Farm Pty Ltd t/as Milesaway Tours* FBA 7 and FBA 8 of 2007 [2007] WAIRC 01230). The designation may change over time.

31 Parties are bound by their obligations undertaken in written contracts (*Equiscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471), except in limited circumstances.

Indicia for Fixed Term Compared with Ongoing Employment

32 The applicant refers to indicia said to be relevant to the nature of the employment set out in *The Metals and Engineering Workers Union of Western Australia v Centurion Industries* (op cit). This is a case about indicia for casual employment as opposed to permanent or ongoing employment (see also *Licensed Clubs Association of Victoria and Another v Higgins* 4 VIR 43 (SCVic), *Squirrell v Bibra Lakes Adventure World Pty Ltd t/a Adventure World* (1994) 64 WAIG 1834; *Serco v Moreno* (1996) 76 WAIG 937). The cases do not deal with the indicia for distinguishing between fixed term and ongoing employment.

33 The parties have not addressed this matter in their submissions and the applicant relies only on those indicia. It is not my intention to draw any conclusions as to the appropriate indicia for fixed term as opposed to ongoing employment in the absence of argument, except to say that I would think that a fixed term contract may have many of the same qualities as ongoing employment such as the working hours, rosters, regularity of hours, notification requirements as to absences, as those which apply to ongoing employment. Therefore, whilst certain indicia may assist in distinguishing between casual and ongoing employment, those same indicia do not necessarily assist in distinguishing fixed term from ongoing employment.

The contracts of employment pre 2010

34 Where the applicant refers to employment contracts between Ms Anand and the respondent prior to 29 October 2010, I find that these contracts are not related to those which applied after 29 October 2010. That is because the first such contract, from 1 June 2007 to 20 April 2008, for some 10 and a half months, was for a casual clerical position. The second contract was for a period of nine months as a 0.5 FTE lecturer in literacy and numeracy. The third was for a period of 20 months as a casual lecturer, although no details have been provided as to the subjects in which she lectured or the casual arrangements.

35 These three arrangements are to be distinguished from those which are relevant to this matter, which all arise from the contract which commenced on 29 October 2010 for a lecturer in Civil Engineering under the fixed term contract entered into by the parties from the letter of 22 October 2010 and the extensions of that particular contract. Therefore, for the purposes of this matter, I intend to take into account only those arrangements which commenced on 29 October 2010.

The 2010 Contract

36 The terms of the contract are set out in the Fixed Term Contract Offer letter of 22 October 2010. It has the appearance of being for a genuinely fixed term. This is demonstrated by:

1. Its title;
2. The inclusion of a commencement and a cessation date;
3. The statement that employment would cease on the expiry of the contract;
4. The statement that ‘nothing in this contract shall confer upon the employee ‘permanent officer’ status within the meaning of the Public Sector Management Act 1994’.

37 The extension of contract letters signed by Ms Anand each contained the acknowledgement that ‘the details of the letter of contract dated 22 October 2010 form the terms and conditions to this extension’.

38 Each of the extensions to the contract of 28 October 2010 was to be contiguous with the previous extension and was signed in advance of its commencement. This demonstrates that the parties did not merely assume that the employment would continue after the expiration of the then existing contract or extension, but they explicitly extended it and did so for a specified period.

39 The total period covered by the contract and the extensions was four years and two months. The extensions were in accordance with the advertisement of the position for ‘the possibility of extension or permanency’.

40 The reasons given in the Contract Conditions for extension or conversion to permanency option was ‘due to uncertain demand for training as supported by Business Case’ and the Reasons for Fixed Term Contract was ‘Uncertain demand for training’.

Is the Fixed Term Contract a sham?

41 Any written contract between employer and employee will be determinative of the nature of the employment relationship, unless that contract is otherwise proved to be a sham. The law in regard to a sham is set out by the Full Bench of the Australian Industrial Relations Commission in *Department of Justice v Lunn* (2006) 158 IR 410 at 423 [33] – [37] (footnotes omitted):

- 33 Of course, it is open to a party to show that a written contract that gives the appearance of creating binding legal rights and obligations was a 'sham' and did not in truth have that effect. The law in this regard was considered at length by the Full Court of the Federal Court in *Sharrment Pty Ltd v Official Trustee in Bankruptcy*. Lockhart J, with whom Foster J relevantly agreed, referred with approval to the description of the term given by Diplock LJ in *Snook v London and West Riding Investments Ltd* in these terms:

I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that *for acts or documents to be a 'sham'*, with whatever legal consequences follow from this, *all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.*

(emphasis added)

- 34 Lockhart J concluded:

A 'sham' is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.

- 35 Referring to *Sharrment*, the High Court in *Equuscorp* noted:

'Sham' is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.

- 36 The judgments in *Sharrment* demonstrate that it is often a difficult matter to establish that a document that gives the appearance of creating binding legal relations is a sham.

- 37 Further, as suggested by the passage in *Equuscorp*, it may be open to an employee to demonstrate that the true contract with the employer was partly oral and partly written – and that although the written part of the contract specified an end date, the parties had orally agreed that the contract would be renewed – or that there was a collateral agreement to the same effect. In such circumstances there may well be a 'termination of employment at the initiative of the employer' if the employer insisted that the employment had come to an end through the expiry of the written contract (or the written part) because this would involve the employer breaching the oral term or the collateral agreement as the case may be.

- 42 There is no evidence that the parties had any intention other than to enter into a fixed term contract and to subsequently extend it, that is, that the terms of the contract were not genuine, that the fixed term arrangement was a sham. Nor is there any evidence that 'uncertain demand for training' was not the genuine reason for both the contract being fixed term and for the extensions, and ultimately for the lack of any further extension.

- 43 There is no evidence that permanency was ever discussed between the parties or that Ms Anand was led to believe that the respondent would offer permanency.

- 44 In these circumstances, merely because Ms Anand entered into a contract for a fixed term of one year and it was extended four times for a total of a further three years and two months does not lead to the conclusion that the employment was not genuinely for a fixed term.

Compliance with the Agreement

- 45 The 2008 Agreement provides that '[p]ermanent is the preferred mode of employment' but permanent, fixed term contract or casual employment are available (cl 18.1). Fixed term contract employment is acknowledged as being appropriate to a list, but not an exhaustive list, of different circumstances including where 'the work is subject to demand driven fluctuations' (cl 20.1). This was the reason originally given for the employment to be for a fixed term.

- 46 With the exception that the employee is to be notified in writing prior to the commencement of employment of, among other things, 'the reason for the contract being for a fixed term', there is nothing to indicate that the provisions of the Agreement were not complied with.

Compliance with the Policy

- 47 There was no business case to demonstrate the rationale for the fixed term contract. The respondent appears to accept that one was required, however, with respect, I do not agree. Clause 20 Fixed Term Contract of the 2008 Agreement sets out the circumstances where fixed term employment is appropriate, including where 'the work is subject to demand driven fluctuations'.

- 48 The Policy says that fixed term appointments will only occur 'in accordance with the Agreement and this Policy'.

- 49 While it does not explicitly refer to the inclusion within the Agreement of where 'work is subject to demand driven fluctuations', the Policy, at cl (3), recognises that 'the Agreement prescribes the circumstances where it is appropriate for employees to be engaged on a fixed term contract' and goes on to specify some inclusions. Therefore, 'the work is subject to demand driven fluctuations' is a circumstance recognised by cl (3) of the Policy by reference to the terms of cl 20.1 of the Agreement.

- 50 The Policy goes on in (4) to say, in respect of the requirements for a business case that '[o]ther than for a reason in (3) above, where a business area proposes to appoint lecturers on fixed term contracts the business area must develop a business case to justify this decision...'
- 51 Therefore, it is only in cases other than those in paragraph (3) (which includes circumstances set out in the Agreement) that a business case is required. So, in the case where work is subject to demand driven fluctuations, no business case is required.
- 52 Accordingly, the respondent was not required in this case to produce a business case and the lack of one does not mean it is in breach of the Agreement or the Policy.
- 53 In any event, the lack of a business case does not change the character of the contract and turn it into one for ongoing employment. Rather, if one were required by the Policy, it would be a breach of the Policy.

Estoppel

- 54 In *Waltons Stores (Interstate) Ltd v Maher and another* (1988) 164 CLR 387, 404 Mason CJ and Wilson J said:

One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it' ... [e]quity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.

- 55 Brennan J noted at 428 – 429 that:

In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise ...

- 56 *Waltons Stores* involved 'a plaintiff who acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it'.
- 57 In this case, there is no evidence that Ms Anand made any assumption that her employment was or was to be permanent, or that the respondent played any part in her holding such an assumption. On the contrary, the facts demonstrate clearly that both parties agreed and knew that the employment was for a fixed term. There is also no evidence that if Ms Anand made an assumption that her employment was permanent, that she acted on the assumption to her detriment.

Conclusion

- 58 Therefore, as a matter of fact and law, the contract between Ms Anand and the respondent was genuinely for a fixed term due to the work being subject to demand driven fluctuations, due to uncertain demand for training and there is no indication that it was a sham.
- 59 Nor is there any evidence to support the applicant's assertion that the termination brought about by the expiration of the final extension was an unconscionable act giving rise to equitable estoppel.
- 60 The matter is to be dismissed.

2015 WAIRC 00753

DISPUTE RE ALLEGED REFUSAL OF RENEWAL OF CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

THE GOVERNING COUNCIL OF CHALLENGER INSTITUTE OF TECHNOLOGY

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

MONDAY, 27 JULY 2015

FILE NO/S

CR 36 OF 2014

CITATION NO.

2015 WAIRC 00753

Result Matter dismissed

Order

HAVING heard Mr M Amati for the applicant and Mr D Anderson of counsel for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this matter be, and is hereby dismissed.

[L.S.]

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

2015 WAIRC 00798

**DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION	:	2015 WAIRC 00798
CORAM	:	ACTING SENIOR COMMISSIONER SCOTT
HEARD	:	MONDAY, 27 JULY 2015 FURTHER EVIDENCE THURSDAY, 6 AUGUST 2015
DELIVERED	:	THURSDAY, 13 AUGUST 2015
FILE NO.	:	CR 13 OF 2015
BETWEEN	:	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE GOVERNING COUNCIL OF KIMBERLEY TRAINING INSTITUTE Respondent

CatchWords	:	Matter Referred for Hearing and Determination pursuant to s 44 – Harsh, oppressive or unfair dismissal – Interim Restraining Order – Misconduct – Inappropriate behaviour – Disciplinary process – Code of Conduct – Occupational Health and Safety policy – Public Sector Code of Ethics – Appropriate penalty – Reinstatement
Legislation	:	<i>Industrial Relations Act 1979</i> <i>Public Sector Management Act 1994</i> s 9
Result	:	Declaration and Order issued
Representation:		
Applicant	:	Mr M Amati
Respondent	:	Mr D Anderson of counsel

Reasons for Decision

1 The applicant claims that the respondent (KTI), has harshly, oppressively or unfairly dismissed its member, Mr James (Alex) Petticrew. It also claims that the respondent's treatment of Mr Petticrew in the time since it first dismissed him 16 months ago until it finally dismissed him on 28 May 2015 has also been callous, unreasonable and unfair. The applicant seeks that Mr Petticrew be reinstated without loss.

Agreed facts

2 The parties have agreed the following facts:

1. On 24 February 2014, Mr Petticrew was in a Vocational Education and Training in Schools class (VETiS) talking to Darrel Lee, the lecturer for the VETiS class.
2. Mr Petticrew was approached by Master Harry Claydon, a student of the VETiS class; whom he knew as he is a friend of his daughter.
3. Mr Petticrew asked Master Claydon if he had seen Jake Brooks.
4. Master Claydon told Mr Petticrew that he had not seen Jake Brooks.
5. Mr Petticrew told Master Claydon to give Master Brooks a message that if he saw Master Brooks near his home he would break his fucking legs.

6. Mr Petticrew's comment was overheard by at least one other student.

Statement of Agreed Facts
filed 23 July 2015

Background

- 3 Mr Petticrew was employed by the respondent from 21 January 2008 as a Lecturer, Maritime Security, that is, for over six years until it first dismissed him.
- 4 Mr Petticrew has a daughter. In 2014 she was around sixteen years of age. She was friendly with two students, Harry Claydon and Jake Brooks, both around sixteen years of age. Mr Petticrew's family and Jake Brooks' mother, Ms Lisa Griffin, had known each other since their children were small and had been friendly for many years. According to Mr Petticrew, Jake often came to his house. However in recent times, Mr Petticrew's house had been burgled a number of times. On one occasion he had found Jake in the house at night unexpectedly. He had Jake stay the night on the couch. When Mr Petticrew got up the next morning Jake had already left and money was missing from Mr Petticrew's wallet. Mr Petticrew strongly believed that Jake was responsible for the burglaries and for the money having gone missing.
- 5 Although Jake was a high school student, he was also enrolled at KTI for a VETiS program but he was not at the same campus as Mr Petticrew, nor was he one of Mr Petticrew's students.
- 6 Mr Petticrew also knew Harry Claydon through his daughter and Harry Claydon knew that Mr Petticrew was a lecturer at KTI.
- 7 On 24 February 2014, Mr Petticrew was working at the KTI Broome campus when he called in to the automotive workshop on campus to see if he could obtain some advice from the lecturer about repairs to his own trailer. At the time there was a class of VETiS students working in the workshop. Mr Petticrew walked into the workshop and was speaking to the lecturer, Mr Darrel Lee. Harry Claydon approached Mr Petticrew and greeted him. As set out in the agreed facts, Mr Petticrew asked Harry if he had seen Jake Brooks. After Harry responded, Mr Petticrew told Harry to give Jake a message that if he saw Jake near his house he would 'break his fucking legs'. Mr Petticrew's comment was overheard by Mr Lee and at least one other student.
- 8 By a series of emails, Ms Karen Dickinson, the Managing Director of KTI, and Mr Petticrew communicated regarding the incident. In particular, by email dated 27 February 2014 at 11.16 am, Mr Petticrew wrote to Ms Dickinson among other things as follows:

I am outlining for you the reasons for my outburst on Monday. I was talking Darrel Lee in autos when a student whom I know as Harry, as he is a friend of my daughters, approached me and said hello. I responded and asked if he had seen Jake to which he replied he had seen him on Saturday night. I told him to give him a message from me that if I saw him near my home I would break his f***** legs. This may have been overheard as another student said he had seen on facebook that he had robbed my home on Saturday night. In retrospect, I admit I was probably wrong passing comment in front of students. It was a heat of the moment comment.

Since last year, I have been battling some personal issues regarding my daughter, combined with a very tense time during the audit process and trying to keep up delivery at the same time. More recently, I have had a number of medical procedures and, I suppose, on top of being robbed 5 times, I guess, on Monday I just lost it. Inappropriate, I know, but many a word is spoken in haste and I deeply regret my actions. I have taken this on board and I am trying to deal with this. I believe, given the circumstances that your offer of counselling would be a wise decision on my part and I am investigating anger management assistance. If I may, I would like to give you some background and perhaps an explanation as to why I am so frustrated with this situation.

We have been friends of Lisa Griffin (Jake's mother) for almost 14 years. My daughter and Jake attended early childhood school from the year 2000, we always thought they would end up getting married. Since their return from Perth we have noticed a marked change in Jake's behaviour and have found that he is heavily into drugs. I have banned him from my house for this reason, however in saying that he turned up here a few months ago saying that his mother had kicked him out of their house and he was hungry and had no where to go. We fed him and gave him a bed for the night after advising his mother that he was safe.

Our thanks, he began robbing us. The police are at their wits end as he is a minor and little can be done. We know it is Jake because he is the only one who can get past our dog. We have been burgled a total of 5 times now, most recently last Saturday night and frankly I am at my wits end. We have always had a good relationship with Jake's mother and not long ago she came to our home begging for help as Jake had not been home for 3 weeks and she did not know whether he was alive or dead. I made the comment that he probably needed a good flogging to knock some sense into him. She replied 'you have my permission'

On Sunday morning I went to see Lisa and was met at the door where she immediately began defending Jake. As mother's do. I realised that it was a no win situation and left. I am telling you this because Jeff mentioned it yesterday. I must stress that this had absolutely nothing to do with KTI and no reference was made about KTI so I believe this to be of no relevance whatsoever. I have been told that a group of students from BSHS are going looking for Jake this weekend and I have conveyed this information to police.

In closing, an early resolution to this matter would be appreciated whatever your decision may be as I have students to consider. If, however your decision is not favourable then I need to make arrangements to move on.

Exhibit 1, Document 5

- 9 Also, on 27 February 2014, Mr Petticrew wrote to Jake's mother, Ms Lisa Griffin, in the following terms:

Hi Lisa,

I am writing to apologise for my comments at work the other day. Although I am frustrated with being robbed, and, I am not saying whether Jake is the culprit or not, you know I would never do anything to hurt him. We have been friends for too long to let this come between us. My comments were only meant to deter him if it was him. I have since installed CCTV cameras and perhaps this will identify who the real thief really is. God, he is like a son to us and we are very sorry to see him off the rails. We can only hope that he grows out of it quickly before he hurts himself or gets into trouble.

Once again, my deepest apologies,

Alex

27 February 2014

Exhibit 1, Document 6

Violence Restraining Order

- 10 In the meantime, Ms Griffin applied for a restraining order against Mr Petticrew on the basis of the incident and other conduct of Mr Petticrew said to have related to Jake. A copy of the transcript of the hearing before the Magistrates Court of Western Australia for the interim order on 28 February 2014 is included in the Agreed Documents. The hearing was conducted ex parte. The Magistrate heard evidence from Ms Griffin as to what Jake had told her and of her own knowledge. The Magistrate indicated that he would accept that evidence for the purposes of the hearing even though much of it was hearsay.
- 11 Ms Griffin noted that Mr Petticrew and Ms Griffin and Jake had been family friends for some time, and that Jake was not at the time living at home and was associating with people who Ms Griffin was not happy for him to associate with. She said Jake was 'running amok a bit'. She noted that Mr Petticrew had alleged that things had been stolen from his home and thought that Jake had taken them. She described Mr Petticrew as 'hot-headed' and that he had come around to their house and was screaming at her. She noted that Mr Petticrew was a lecturer at TAFE and her son goes to the aquaculture TAFE on Mondays, and although he was not there at the time that Mr Petticrew went to the classroom, she said Mr Petticrew burst into the classroom full of high school students and said, '(indistinct) where the fuck is Jake Brooks? I'm going to snap his fucking legs off'. Ms Griffin reported other concerns, including that Jake had had no idea that this had happened until he went to school on the Tuesday. She said:

I guess all the kids were talking about it. You know, there has been conflict that has been addressed by teachers because of the – say, on Saturday night, the two people Jake was hanging out with were also accused obviously by Alex if Jake was with them, they (indistinct) been stealing as well – of thieving I think they call it. So there has been lots of conflict at school; there's teachers that had to get involved about, you know, the rumours spreading, and you know, these people who were hanging out, (indistinct) they weren't happy to be involved in this, and their names kind of tarnished like that I suppose, and they were threatening the students that were saying it, and all kinds of things have happened since, I think. Yes. I think more to his reputation at school, he has had to defend himself a lot.

Exhibit 1, Document 7, page 5.

- 12 She also said that Mr Petticrew came to the house in the early morning and was banging on the front window, screaming that 'if I see your son, I'm going to kill him; I'm prepared to go to jail and do time for this'.
- 13 On the basis of this information, the Magistrate issued a restraining order. In particular, his Honour noted that the threat to kill and to be prepared to go to jail for it was of concern, and that the threat to kill and the threat of assault was 'an act of abuse'. He indicated that if Mr Petticrew did not object to the order, it would continue to operate for two years. If Mr Petticrew objected to it, it would come back to court.
- 14 Mr Petticrew did object, and the matter came back to court on Tuesday, 17 June 2014. On that occasion, Ms Griffin did not attend and the order was cancelled that day.

Formal disciplinary process

- 15 By letter to Mr Petticrew dated 28 February 2014, the respondent formally commenced a disciplinary process relating to the incident on 24 February 2014.
- 16 In his response dated 12 March 2014, Mr Petticrew admitted that he had spoken the words set out in the agreed facts, although the words used in the allegation were different. He denied that his comments and behaviour were threatening, disrespectful, irresponsible or unprofessional. He said that the comments were not intended to be overheard by the class, that they were made in a private conversation. He denied that he had shouted. He said that it was a personal issue and that if anyone overheard they should not have repeated it.
- 17 By letter dated 24 March 2015, the respondent informed Mr Petticrew that he had been found to have contravened Part 2, section 9 of the *Public Sector Management Act 1994*, the KTI's Code of Conduct, and its Occupational Health and Safety policy and, therefore, his behaviour constituted serious misconduct. He had also contravened the 'Relationships' principle of the Public Sector Code of Ethics. Mr Petticrew was invited to make a response before a decision on the matter was made. Mr Petticrew responded by letter dated 7 April 2014.
- 18 The respondent dismissed Mr Petticrew by letter dated 9 April 2014.
- 19 Following an application to the Commission, the respondent considered its position, rescinded the findings and reinstated Mr Petticrew, indicating an intention to redo the disciplinary process on the basis of there having been procedural flaws. Mr Petticrew was reinstated with effect from 15 May 2014 and was placed on suspension with pay pending further investigation. He was also paid for the intervening period.

- 20 The respondent then recast the allegations. The amended allegation made against Mr Petticrew is set out in the respondent's letter of 15 May 2014, in the following terms:

Allegation

You have allegedly behaved in a manner that is threatening, disrespectful, irresponsible, and unprofessional and has resulted in bringing the reputation of Kimberley Training Institute into disrepute.

Particulars

- On Monday, 24 February 2014, you entered a Kimberley Training Institute automotive VETiS class.
- Jake Brooks, a student of Broome Senior High School, was not in the class.
- You said to Harry Claydon, a student in the class, 'where the fuck is Jake Brooks I want to snap his legs off'.
- You said the above words in front of the rest of the class.
- You told some VETiS students that you are angry with Jake because he stole your wallet.
- Referring to Jake Brooks, you told some VETiS students that you will 'fucking kill him'.

If substantiated, the allegation above constitutes a breach of discipline in that the allegation is contrary to the Kimberley Training Institute's Code of Conduct ('Code of Conduct') which states that Kimberley Training Institute employees are to:

- a) behave in an ethical and professional manner at all times and not act in any way that brings Kimberley Training Institute into disrepute; and
- b) treat members of the public and colleagues with respect, courtesy, honesty and fairness, having proper regard for their interests, rights, safety and values.

Additionally, if substantiated, the allegation above also constitutes a breach of discipline in that the allegation is contrary to the Public Sector Code of Ethics, specifically the requirements that public sector employees 'treat people with respect, courtesy and sensitivity and recognise their interests, rights, safety and welfare'.

Exhibit 1, Document 15, page 2

- 21 The process was undertaken again and a decision was made following that process, to dismiss Mr Petticrew on 6 November 2014.
- 22 There was a further application to the Commission and in that matter I found that the decision maker did not have authority to have made the decision ([2015] WAIRC 00054; (2015) 95 WAIG 298). Accordingly, by letter dated 6 February 2015 the respondent again reinstated Mr Petticrew, paid him for the intervening period, and suspended him with full pay.
- 23 The respondent then undertook the decision making process again. Once again, it dismissed Mr Petticrew by letter dated 28 May 2015, having found as follows:

That is, the Governing Council finds that on Monday, 24 February 2014, you entered a Kimberley Training Institute automotive VETiS class, loudly telling a student of that class and overheard by other students present, that you would fucking break the legs of Mr Jake Brooks, another student of the Kimberley Training Institute, if you caught Mr Brooks near your home. The Governing Council notes that you have since admitted threatening Mr Brooks because you thought the student had previously robbed your house.

Exhibit 1, Document 30

- 24 Mr Petticrew has given some evidence of the effects upon him of this lengthy process and of having been dismissed again.

Previous conduct

- 25 Mr Petticrew was subject to allegations of misconduct in 2012. A number of allegations were not substantiated, however, one was substantiated and another was partly substantiated. The substantiated allegation was that '[o]n Tuesday 30th October you behaved in a manner that is unprofessional and disrespectful. It is alleged that whilst taking a Security class you took a phone call and told the person on the phone that [X] 'is fucked' that you had a copy of [X]'s certificates and '[X] wasn't qualified to teach, doesn't even have a marine ticket to teach' (Exhibit 1, Document 3).

- 26 The allegation which was partially substantiated was that:

You have spoken to students (in your Security class) in a manner that is unprofessional and disrespectful. It is specifically alleged:

- a. That you told one of the student's 'I'll knock your fucking head off if you keep calling me Sir'.
- b. You said to the whole class 'haven't you fuckers finished yet'
- c. You have told the aboriginal students that wherever they go 'they leave a smell behind'

Exhibit 1, Document 3

- 27 The allegation was partially substantiated in that the language used in class had been substantiated, however, the context of the allegation is not entirely reflective of the actual situation.
- 28 Allegation c. was not substantiated.

- 29 The letter informing him of the outcome of the process, dated 15 January 2013, noted that there had been a meeting on 13 December 2012, that Mr Petticrew was aware of the respondent's Code of Conduct in relation to various matters and the letter went on to say:

During the meeting you were advised and you acknowledged that all staff need to be treated with respect, professionalism, courtesy, honesty and fairness in accordance with KTI's code of conduct. As such it was acknowledged and recommended that all conversations regarding staff performance and/or conduct and grievances relating to staff need to be held in private areas with appropriate representatives of KTI so that conversations can be held in confidence.

In relation to the allegation that you spoke to students in an unprofessional and disrespectful manner it was acknowledged that the allegation was not put in context and that the specific allegation relating to the smell of aboriginal people was reported emotively. Although you have previously used harsh language to develop a report [sic] with students to engage with them it is strongly recommended that you tone your language down to a level that respectfully reflects the KTI SPIRIT demonstrating professionalism and integrity.

Exhibit 1, Document 3

- 30 The letter went on to note that a copy of the letter would be placed on his personal file.

Penalties available

- 31 The respondent has available to it a range of different penalties from a reprimand; a transfer to another position at the Institute; a fine not exceeding five days' pay; a reduction in remuneration within the employee's existing classification; a reduction in level of classification, dismissal or any two of the above.

Consideration and conclusions

- 32 The test in the case of a claim of harsh, oppressive or unfair dismissal is whether the employer has exercised its legal right to dismiss so harshly or oppressively against the employee as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles and Rose and Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, Western Australian Branch* (1985) 65 WAIG 385 at 386).

(a) The restraining order

- 33 I give the restraining order no weight. The hearing for the interim order being, as is usual with such applications, conducted in the absence of the respondent to the application. Ms Griffin was not cross examined. Secondly, Ms Griffin gave evidence of conduct which is not directly relevant to the employment about what Mr Petticrew did beyond what happened at KTI and it is this which seems to have swayed the Magistrate to grant the order. Thirdly, Mr Petticrew objected to the order becoming final and Ms Griffin did not attend at the hearing for it to be challenged. It is of no assistance to speculate as to why she did not attend.

(b) Misdemeanour

- 34 The applicant describes Mr Petticrew's conduct as a misdemeanour, that is as 'misbehaviour; a misdeed' (The Macquarie Dictionary, 3rd ed, p 1374). I do not believe labelling it that way is helpful. It is appropriate to look at the behaviour itself and its context.

(c) The behaviour and circumstances

- 35 The circumstances surrounding the conduct are that Mr Petticrew was at that time a man in his late 50s. He had been a TAFE lecturer for more than six years. As soon as the issue was raised with him, by his email of 27 February 2014, he acknowledged he was 'probably wrong passing comment in front of students'; that it was inappropriate; he explained his conduct, the circumstances directly related to it and his personal circumstances. He expressed deep regret. He also explained the other pressures he was under at the time.
- 36 Within three days of the conduct, he wrote a letter to Ms Griffin also containing an apology.
- 37 What Mr Petticrew has admitted to is this. As a lecturer at KTI, he went into a workshop where there was a lecturer and students. During his visit there, in the presence and within the hearing of the lecturer and at least one other student, he asked a sixteen year old male student to pass on to another sixteen year old male student a message containing a threat of physical violence, and in doing so he used language not appropriate for a lecturer of KTI.
- 38 I accept without reservation what Mr Petticrew says, that students at KTI and young people of his acquaintance use such language amongst themselves and occasionally in their conversation with him. However, for Mr Petticrew, as a lecturer, the use of such language to those students is not appropriate.
- 39 The most significant aspect of the conduct was that it contained a threat of violence against a student of KTI, and that Mr Petticrew told another 16 year old student to convey the threat.
- 40 Mr Petticrew's conduct has a direct connection with his employment in that it was undertaken on the premises of his employer, during the day when he works as a lecturer. At least one of the students knew Mr Petticrew as a lecturer at KTI, and both the person he asked to convey the message and the intended recipient were students of his employer.
- 41 The fact that Mr Petticrew was not Harry Claydon's or Jake Brooks's lecturer and knows them from personal rather than work related circumstances is not to the point of the conduct having occurred in relation to or having a direct connection with Mr Petticrew's employment.
- 42 It was not a private conversation in that it was undertaken in the presence of and overheard by the lecturer and at least one other student, as Mr Petticrew acknowledges, they were no more than a couple of metres from him. Had it been a private conversation Mr Petticrew might reasonably have drawn Harry Claydon to one side, out of earshot of the others. Even if the

- conversation had been conducted in private, it was not appropriate for Mr Petticrew to make the threat of violence and tell another student to convey the threat. However, I accept that Mr Petticrew was frustrated at what occurred, he had no real intention of carrying out the threat, he was angry and lost control due to his frustration and anger.
- 43 In all of those circumstances, Mr Petticrew's behaviour was threatening, in that he expressed an intention of physical violence. It was disrespectful to all of those who heard it and towards Jake Brooks, (whether Jake Brooks deserved it or not), it was irresponsible and unprofessional.
- 44 The agreed documents include KTI's Code of Conduct which sets out in the usual, generic terms, the standard of behaviour expected of public sector personnel. It does no more than attempt to set out what ought to be obvious – that is, that in the workplace, people are to treat each other with courtesy, respect and professionalism.
- 45 The standard by which to judge workplace conduct is set out by Fielding C in *UFTU v Pay-Co* (1990) 70 WAIG 2497 at 2498:
However, in dealing with workplace differences, it is well to remember that you are dealing with men and not angels. Employees are apt to act in strange ways, especially when all does not go to plan in the workplace, and if that reaction is confined to an occasional harsh word to a fellow employee then, I suspect, in most cases there ought to be no reason for despair or drastic action. Things are apt to be said in such circumstances which are little more than hollow bravado or empty rhetoric and which, with the benefit of hindsight, are not likely to be repeated.
- 46 It is true that in some workplaces, the type of conduct Mr Petticrew exhibited may be the norm and unexceptional. In other contexts, such as in a primary school, it might have been far more serious. However, it was at a TAFE college in the presence of 16 year old youths. While they may be young, they are not children, nor would they be unfamiliar with the language or type of threat made by Mr Petticrew. They may have been shocked by it coming from a lecturer, but I find it hard to believe they would have taken it literally.
- 47 However, I am not satisfied that the conduct struck at the heart of the contract of employment such as to warrant dismissal, even though it was inappropriate, threatening, unprofessional and disrespectful. At its highest, it may be seen as misconduct.
- 48 However, not every act of misconduct warrants dismissal.
- 49 In deciding on an appropriate penalty for such conduct, consideration is to be given to all of the circumstances including the background provided by Mr Petticrew; the age of the students; the explanation provided and contrition shown by Mr Petticrew very soon after the incident; Mr Petticrew's length of service; his age; the likely effects on him such as to his prospects of finding such work again; the need to move his home and family to other accommodation within the town or even move out of town.
- 50 The previous incidents referred to in the letter placed on Mr Petticrew's file also need to be noted. The penalty in that case was a letter recommending that he 'tone down his language to a level that reflects the KTI SPIRIT demonstrating professionalism and integrity'. It might be seen as a reprimand or a warning but was not couched in terms as strong as either of those words might suggest.
- 51 A further consideration is the range of penalties available to the respondent, from a reprimand to dismissal.
- 52 I have also taken account of the issue of damage to KTI's reputation. This evidence is of students and possibly other young people becoming aware of some aspects of Mr Petticrew's conduct but they appear to relate more to the behaviour of Jake and his friends. However, the evidence also indicates that rumours and 'Chinese whispers' escalated the reports to include other issues and inaccuracies.
- 53 It is true that the matter became the subject of proceedings in the Magistrate's Court, by the application for and issuing of an interim restraining order and it was noted on the public record. However, there is no evidence of any real or lasting reputational damage to the respondent. That does not make the conduct any more or less significant.
- 54 In all of these circumstances, I find that dismissal, being the strongest penalty available to the respondent, was disproportionate to the misconduct, and was harsh and unfair.
- 55 Even if this were not so, that the respondent failed to manage its own processes to the effect that Mr Petticrew was dismissed three times and reinstated twice over a period of 15 months, and suspended with pay for the whole time, had his housing arrangements threatened and was under the stress of an ongoing bureaucratic process for so long, was oppressive.
- 56 Given the penalties available to the respondent, the seriousness of the conduct and Mr Petticrew's response to it, and what Mr Petticrew has already suffered, a formal reprimand would be an appropriate penalty. In saying that, it must be clear to Mr Petticrew that further such conduct should be viewed very seriously and Mr Petticrew should be under no illusions about possible consequences.
- 57 There is no evidence that reinstatement is impracticable.
- 58 Therefore, I find that in all of the circumstances, the dismissal was harsh, oppressive and unfair. An order will issue for Mr Petticrew's reinstatement in his former position, and, for the avoidance of doubt, an order that he be paid for remuneration lost, and for him to be issued with a formal reprimand.
- 59 It is not my intention to grant the application for documents to be expunged from Mr Petticrew's personnel file. He has in fact misconducted himself. However, a copy of this decision and order ought to be placed on his personnel file.
-

2015 WAIRC 00811

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

THE GOVERNING COUNCIL OF KIMBERLEY TRAINING INSTITUTE

RESPONDENT**CORAM**

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

TUESDAY, 18 AUGUST 2015

FILE NO/S

CR 13 OF 2015

CITATION NO.

2015 WAIRC 00811

Result

Declaration and Order issued

Declaration and Order

HAVING heard Mr M Amati on behalf of the applicant and Mr D Anderson of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

1. DECLARES THAT the respondent harshly, oppressively and unfairly dismissed James (Alex) Petticrew.
2. ORDERS THAT:
 - (a) The respondent reinstate Mr Petticrew in the position of Lecturer Maritime Security, on conditions no less favourable than those on which he was employed immediately before he was dismissed;
 - (b) Mr Petticrew's employment be without loss of continuity;
 - (c) The respondent pay to Mr Petticrew any remuneration lost by him because of the dismissal;
 - (d) The respondent place a copy of the Reasons for Decision and Order in this matter on Mr Petticrew's personnel file; and
 - (e) The respondent provide to Mr Petticrew a formal reprimand as to his conduct on 24 February 2014; and
 - (f) The respondent is hereby prohibited from re-instigating disciplinary procedures in regard to the incident on 24 February 2014.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.**CONFERENCES—Notation of—**

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 1/2015	7/01/2015 17/06/2015	Dispute re employment status	Discontinued
The Civil Service Association of Western Australia Incorporated	Insurance Commission of Western Australia	Scott A/SC	PSAC 8/2015	N/A	Dispute re clause 31 IC Award, Trade Union Training Leave	Discontinued
The Civil Service Association of Western Australia Incorporated	Managing Director, Polytechnic West	Scott A/SC	PSAC 11/2015	1/05/2015 20/05/2015	Dispute re clause 36, GOSAC Award	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Department of Health	Scott A/SC	PSAC 7/2015	16/04/2015	Dispute re clause 56 DTGA, Trade Union Training Leave	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2015 WAIRC 00521

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JASON ZHOU

APPLICANT

-v-

CURTIN UNIVERSITY

RESPONDENT

CORAM

COMMISSIONER J L HARRISON

DATE

FRIDAY, 17 JULY 2015

FILE NO/S

B 58 OF 2015

CITATION NO.

2015 WAIRC 00521

Result Amending Order issued

Representation

Applicant In person

Respondent Ms J van den Herik

Order

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

On 2 July 2015 the Commission issued an order that the applicant provide particulars of his claim to the Commission and the respondent by 4.00 pm on 10 July 2015.

On 8 July 2015 the applicant rang the Commission seeking an extension of time to provide the particulars due to illness. In support of his request, the applicant provided medical certificates covering the period 9 to 14 July 2015 on 13 July 2015 and the periods 14 to 17 July 2015 and 16 to 23 July 2015 on 16 July 2015.

Given the reason for the applicant's request to extend time, and even though the medical certificates provided by the applicant were provided after he was required to provide particulars of his claim, the Commission is of the view that it is appropriate to amend the order that issued on 2 July 2015 to extend time for the applicant to provide the required information to 30 July 2015.

The Commission orders that the applicant provide the following information to the Commission with a copy to the respondent by 4.00 pm 30 July 2015:

1. The amounts he claims he is due to be paid and the dates these claims cover, specified on a yearly basis, for each of the following:
 - (a) Wages;
 - (b) Annual Leave;
 - (c) Superannuation; and
 - (d) Sick leave.
2. The medical expenses being claimed and the amount for each item.
3. Documents confirming his employment with the respondent for the period 2005 to 2015.
4. Written confirmation of his terms and conditions of employment with the respondent for the period 2005 to 2015.

If the applicant does not provide the information required of him with a copy to the respondent by the due date as specified in this order, the matter may be listed for a show cause hearing as to why the matter should not be dismissed pursuant to section 27(1) of the Act.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00755

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	IAN MOONEY	APPLICANT
	-v-	
	SHAUN BRADLEY	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 27 JULY 2015	
FILE NO/S	B 89 OF 2015	
CITATION NO.	2015 WAIRC 00755	

Result Order issued to amend the name of the respondent

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on Tuesday the 7th day of July 2015, the respondent filed its *Form 5 – Notice of answer*, in which it indicates that the employer of the applicant was ‘Seven G Engineering Pty Ltd’; and
 WHEREAS on Monday the 27th day of July 2015, at a conference convened by the Commission, the parties consented to the respondent’s name being amended to ‘Seven G Engineering Pty Ltd’;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT the name of the respondent in the application be amended to ‘Seven G Engineering Pty Ltd’.

[L.S.]

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

2015 WAIRC 00750

DISPUTE RE ALLEGED REQUIREMENTS IMPOSED ON TEACHERS
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00750
CORAM	:	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	THURSDAY, 23 JULY 2015
DELIVERED	:	FRIDAY, 24 JULY 2015
FILE NO.	:	CR 15 OF 2014
BETWEEN	:	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	:	Matter referred for hearing and determination - Application for leave to file witness statements late
Legislation	:	<i>Industrial Relations Act 1979</i> s 44
Result	:	Leave to file witness statements late granted
Representation:		
Applicant	:	Mr M Amati by correspondence
Respondent	:	Mr R Bathurst of counsel by correspondence

Reasons for Decision

- 1 This is a matter referred for hearing and determination under s 44 of the *Industrial Relations Act 1979*. The matter is listed for hearing for Thursday, 13 and Friday, 14 August 2015, in approximately three weeks.
- 2 On 7 July 2015, I issued Reasons for Decision ([2015] WAIRC 00493; (2015) 95 WAIG 844) in respect of an application by the applicant for an extension of time in which to file witness statements. In those Reasons for Decision, I noted that the applicant had twice previously decided not to file witness statements but to rely on a bundle of documents. I also note the

applicant's changes in representation which appear to have caused it to rethink its approach to the matter. I took account of the ongoing dispute at workplaces where members of the applicant work and decided that the need to resolve the dispute overrode the requirement for procedural compliance, and that if the applicant were not provided with a further opportunity to file its witness statements, this may affect the resolution of the dispute. I granted the application providing the applicant with 14 days in which to file and serve its witness statements. I noted that 14 days was greater than the period the applicant had sought at a conference on 4 May 2015 prior to it again deciding not to file witness statements. An order issued, 'THAT the applicant file and serve any witness statements on which it intends to rely by Wednesday, 22 July 2015'.

- 3 The Commission's Registry hours are from 8.30 am until 4.30 pm.
- 4 On Wednesday, 22 July 2015 at 4.54 pm, the applicant forwarded to the Registry for filing an email attaching two witness statements, one of which was incomplete in that substantial annexures referred to in the witness statement were not annexed.
- 5 On Thursday, 23 July 2015, at 12.59 pm, in accordance with my direction, my Associate wrote to the applicant noting the time at which the documents had been forwarded to Registry and advising that the Registry had not yet accepted the witness statements. The email also advised that 'you may wish to consider applying for leave to file the witness statements late, rather than simply assuming they may be filed late.'
- 6 At 1.52 pm on Thursday, 23 July 2015, the applicant forwarded to the Registry by email the annexures to the witness statement which had not been forwarded to the Registry the previous day.
- 7 By email of 2.06 pm that day, the applicant sought leave of the Commission to file the witness statements, noting that:
 1. There was no intent to defy or disregard the Commission's order of 7 July 2015;
 2. The filing at 4.54 pm the previous day attested to the applicant's efforts to file the documents on time; and
 3. In mitigation, one of the witnesses, Ms Gisborne, was convalescing at home due to her having been in an accident and the other witness, Mr Keely, resides in Manjimup.
- 8 At 3.52 pm that day, the respondent's counsel emailed the Commission advising that the respondent objected to the Commission receiving the two witness statements after the deadline set out in the Commission's Order, and noting that neither witness statement had yet been served. The respondent noted the history of the matter set out in the Commission's Reasons of 7 July 2015. It also noted that Ms Gisborne broke her leg on 1 May 2015 and that Mr Keely had not moved to Manjimup in the last two weeks, therefore neither of those circumstances provided an excuse for the non-compliance with the Order.
- 9 The applicant responded by email at 4.07 pm that it could provide evidence of the facts it had asserted; and the respondent responded at 4.19 pm that the point of its objection was that neither of the circumstances relied on by the applicant as mitigation occurred in the last two weeks and as such neither provided a reasonable excuse for the applicant's failure to comply.

Consideration

- 10 I have considered all of the circumstances of this matter and note that the attempt to file was late by about 24 minutes and that one of the two documents to be filed was incomplete, and that there was still no service of the application apparently until the afternoon of the next day. I am somewhat surprised at this situation given the history of this matter, that the applicant should firstly attempt to file late without first seeking leave and, having attempted to file late an incomplete witness statement, which was still incomplete until the afternoon of the next day, and at eight minutes to 4 pm on the day after the Order requiring filing and serving required it to be done, there was apparently still no service.
 - 11 In the normal course of events, this delay may be seen as trivial. However, given the history of this matter, it is inexplicable. The applicant's attempt to explain the delay does not ring true. If Ms Gisborne's injury occurred on 1 May 2015, nearly three months ago, this provides no explanation as to what would have prevented the preparation of the witness statement.
 - 12 Likewise, that Mr Keely lives in Manjimup does not explain how, given the importance which the applicant attached to its application for an extension of time which resulted in the Order of 7 July, that it failed to comply within the 14 days allowed.
 - 13 In those circumstances, it would be appropriate to refuse the application for leave to file out of time and the applicant would be bound by its conduct.
 - 14 However, the reason I gave for granting the application for an extension of time until 22 July 2015 still remains valid, that is that the dispute the subject of the impending hearing continues to arise at the workplace and needs to be resolved once and for all. The applicant's members continue to raise concerns about this issue. The matter needs to be fully ventilated. The applicant should be aware, though, that any future requests for indulgence of its failings will be less likely to be indulged.
 - 15 Finally, I note that where a party anticipates not being in a position to comply with directions or orders, the appropriate and courteous course of action is to give notice of the issue and seek leave ahead of time, not to ignore the issue and continue as if the direction or order need not be complied with.
 - 16 Therefore, leave is granted for the applicant to file and serve the witness statements of Ms Gisborne and Mr Keely by no later than Friday, 24 July 2015 at 1.00 pm.
-

2015 WAIRC 00751

DISPUTE RE ALLEGED REQUIREMENTS IMPOSED ON TEACHERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT**DATE** FRIDAY, 24 JULY 2015**FILE NO/S** CR 15 OF 2014**CITATION NO.** 2015 WAIRC 00751**Result** Leave to file witness statements late granted*Order*

HAVING heard Mr M Amati for the applicant and Mr R Bathurst of counsel for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT leave is granted to the applicant to file and serve the witness statements of Anne Catherine Lourde Gisborne and Michael John Keely by no later than 1.00 pm on Friday, 24 July 2015.

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

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Dental Technicians Industrial Agreement 2015 PSAAG 5/2015	27/07/2015	The Minister for Health in his incorporated capacity under s. 7 of the Hospital and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	The Civil Service Association of Western Australia Incorporated	Acting Senior Commissioner P E Scott	Agreement registered
Roman Catholic Archbishop of Perth Non-Teaching Staff Enterprise Bargaining Agreement, 2014 - The AG 13/2015	22/07/2015	The Independent Education Union of Western Australia, Union of Employees and Others	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered

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

2015 WAIRC 00788

NOTICE**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

TAKE NOTICE that the Commission acting pursuant to Section 47 of the *Industrial Relations Act, 1979*, intends, by order, and with the consent of the parties, to cancel the following award, namely the -

CHILD CARE WORKERS (EDUCATION DEPARTMENT) AWARD

on the grounds that there is no employee to whom the award applies.

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

Please quote File No. APPL 126/2015 on all correspondence.

Dated at Perth this 31st day of July 2015

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

RECLASSIFICATION APPEALS—

2015 WAIRC 00763

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00763

CORAM : PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

HEARD : TUESDAY, 28 JULY 2015, WEDNESDAY, 29 JULY 2015

DELIVERED : FRIDAY, 31 JULY 2015

FILE NO. : PSA 24 OF 2014, PSA 25 OF 2014, PSA 26 OF 2014, PSA 27 OF 2014, PSA 28 OF 2014, PSA 29 OF 2014, PSA 30 OF 2014, PSA 31 OF 2014, PSA 32 OF 2014, PSA 33 OF 2014, PSA 34 OF 2014, PSA 35 OF 2014, PSA 36 OF 2014, PSA 37 OF 2014, PSA 38 OF 2014, PSA 39 OF 2014, PSA 40 OF 2014, PSA 41 OF 2014, PSA 42 OF 2014, PSA 43 OF 2014, PSA 44 OF 2014, PSA 45 OF 2014, PSA 46 OF 2014, PSA 47 OF 2014, PSA 49 OF 2014, PSA 50 OF 2014, PSA 51 OF 2014, PSA 52 OF 2014, PSA 53 OF 2014, PSA 54 OF 2014, PSA 55 OF 2014, PSA 56 OF 2014, PSA 57 OF 2014, PSA 58 OF 2014, PSA 59 OF 2014, PSA 60 OF 2014, PSA 61 OF 2014, PSA 62 OF 2014, PSA 63 OF 2014, PSA 64 OF 2014, PSA 65 OF 2014, PSA 66 OF 2014, PSA 67 OF 2014, PSA 68 OF 2014, PSA 69 OF 2014, PSA 70 OF 2014, PSA 71 OF 2014, PSA 72 OF 2014, PSA 73 OF 2014, PSA 74 OF 2014, PSA 75 OF 2014, PSA 76 OF 2014

BETWEEN : ELIZABETH BALSHAW AND OTHERS

Applicants

AND

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

Respondent

CatchWords : Public Service Arbitrator – Reclassification appeals – Pharmacy Assistants – Pharmacy Technicians – Senior Pharmacy Technicians – Job Description Forms – Work Value Principle in State Wage Order – Work Value test – BiPERS – Higher level duties – Classification Assessment Report– Pharmacy Board of Australia Code of Conduct and Guidelines for Dispensing of Medications – Society of Hospital Pharmacists of Australia Code of Ethics

Legislation : *Industrial Relations Act 1979*

Result : Applications dismissed

Representation:

Applicant : Ms P Marcano and with her Mr S Fairclough

Respondent : Mr J Ross and with him Mr J Sheppard

(Given extemporaneously at the conclusion of the proceedings
as edited by the Arbitrator)

Reasons for Decision

- 1 These are claims for reclassifications of positions within pharmacy within the WA public health sector. They cover Pharmacy Assistants, Pharmacy Technicians and some positions at a higher level involving supervisory responsibilities.
- 2 I recognise the extensive work which has been put into providing comprehensive documentation, witness statements and submissions which have greatly assisted me in preparation for this hearing and for the decision, and I thank the witnesses for their evidence.

Background

- 3 The most significant part of these claims relates to Pharmacy Technicians seeking reclassification from Level G3 to Level G4, and they bear the main focus of attention. There was also evidence relating to Pharmacy Assistants seeking reclassification from Level G2 to Level G3. There were also claims for reclassification in respect of Senior Pharmacy Technician positions.
- 4 The evidence demonstrates that the number of FTE positions within tertiary and other metropolitan and regional facilities are 75 Technicians and 43.3 Assistants. In around 2002 to 2004, most Pharmacy Technician positions were reclassified to Level G3 and Pharmacy Assistants' positions from Level G1 to G2.
- 5 The parties have developed generic Job Description Forms (JDFs) in both metropolitan and country services. These are said to reflect the wide range of duties that may be undertaken. Individual positions may have duties which differ from site to site and position to position, however, they have been categorised according to a fairly standardised range of skills and responsibilities covering all of the likely combinations of duties and responsibilities.
- 6 The Agreed Documents include the Classification Assessment Report by Mr Ron Gabelish, dated 10 April 2014. It describes the generic JDFs and the roles in the following way:

The agreed Generic JDF's representing a typical Pharmacy Assistant and Pharmacy Technician role in Health are included at **Appendix 4**. These were designed and agreed to cover requirements for both metropolitan and country based Technician and Pharmacy Assistant positions and reflect the wide range of duties that may be undertaken.

The role of the Technician based on the agreed JDF is to:

- Maintain stock inventory of all pharmaceuticals and consumables.
- Facilitate imprest stock of pharmaceuticals including S8 and S4R medications, in wards, theatres and departments.
- Ensure prescriptions conform to legal and hospital requirements and that the prescription documentation requirements of PBS Reform are met. Perform calculations/balancing for correct dosing of medication. (These are checked by the Pharmacist)
- Assist in the generation and maintenance of PBS claims.
- Repack bulk drugs into unit of issue under supervision and assist with preparation for production.
- Prepare pharmaceuticals including; extemporaneous preparations, parenteral nutrition solutions, cytotoxic drugs and other aseptically dispensed products including cleaning of specialised equipment. (These are checked by the Pharmacist)
- Participate in cashier duties relating to Outpatient Pharmacy.
- Organise the postage of patient medication and assists in the generation of invoices.
- Undertake stores responsibilities including generating purchase orders, liaising with vendors, processing accounts and other general stores procedures.

There is a notation on the JDF's that 'Position may undertake some or all of these duties depending on location and specific requirements'.

It is acknowledged therefore that not all hospitals including tertiary hospitals will undertake all these duties and this is dictated by local policy and/or requirements for particular services or facilities present, or dedicated positions on site such as Purchasing Officers and Cashiers (some being HCN provided). Non-tertiary sites do not have aseptic dispensing and preparation facilities which is a prime difference in work undertaken. Additionally not all sites are PBS designated (e.g. PMH and KEMH).

Purchasing is normally undertaken by designated Purchasing Officers at tertiary sites who are not involved in Technician activities, although at some sites Technical staff may provide leave relief cover or assist in purchasing activities. WACHS technical staff may undertake or assist in purchasing activities where there are no dedicated Purchasing staff.

It is problematic then to categorise all Pharmacy Technicians as undertaking the same role and having the same work value.

Core duties for tertiary sites can be considered to be:

- Stock imprest, inventory, distribution duties and repacking of bulk drugs
- Dispensing from prescriptions including calculations/balancing for correct dosing of medication
- Preparation of sterile and non-sterile pharmaceuticals including; compounding, extemporaneous preparations, parenteral nutrition solutions, cytotoxic drugs and other aseptically dispensed products

Non tertiary sites will have similar duties and may include purchasing activities and some other duties but will not have aseptic preparation and dispensing duties which is a point of differentiation and discussed later in this report.

The agreed competencies included in the agreed generic Technician JDF are:

- Demonstrated relevant pharmacy experience including experience in drug distribution, dispensing or manufacturing services and a working knowledge of PBS and its application in the community and hospital sectors.
- Computer literacy and ability to use computer based inventory programs.

- Well developed oral and written communication skills to effectively interact with clients of this position and other hospital staff.
- Effective interpersonal, organisational and time management skills and ability to work flexibly and co-operatively in a team environment and independently with minimal supervision.
- Current knowledge of Occupational Health and Safety and Risk Management, including safe handling of general loads and how it impacts on employment and service delivery.

...

Pharmacy Assistant Duties

The role of the Pharmacy Assistant as shown on the generic JDF is to assist with the ordering, distribution and dispensing of medicines, drug packaging and related clerical and stores procedures as referenced in the generic JDF's. As with the Pharmacy Technician the duties will vary from site to site and this is acknowledged with the JDF notation that 'Position may undertake some or all of these duties depending on location and specific requirements'.

7 The Classification Assessment Report goes on to note:

There is a considerably higher ratio of Technician and Pharmacy Assistant staff to Pharmacists in regional areas compared to metropolitan sites and this is partly due to the technical staff undertaking a range of general administrative duties done by clerical staff in metropolitan hospitals. Pharmacy Stores (purchasing) positions have not been included in the table.

Agreed document 1, page 10

Consideration and conclusions

8 Claims for reclassification of positions are dealt with under the Work Value Principle contained in the State Wage Order. It provides for a Work Value test, and the test is described as this:

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

...

7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.

7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.

...

2015 State Wage Order [2015] WAIRC 00444; (2015) 95 WAIG 691
Schedule 2 – Statement of Principles, [7]

Work value claim for Pharmacists

9 The submission made by the Pharmacy Technicians refers to the work value claim for pharmacists in the Health Professions Reclassification Case (*Hospital Salaried Officers Association of Western Australian (Union of Workers) v Hon Minister for Health and Others* [2006] WAIRC 03473; (2006) 86 WAIG 279). It is said that the work value claim for pharmacists in that case provides some context and background to the changes to working conditions and requirements in the field of pharmacy work generally, which is said to have an impact on the working conditions and requirements of these positions. I find that while the work value submission by Pharmacists does provide some background and context, the responsibilities, duties and qualifications which apply to Pharmacists do not, generally speaking, automatically flow through to the requirements of Technicians or Assistants, and is mostly of little relevance or assistance for the reasons set out in the report by Mr Gabelish.

10 It is true that in some cases there has been a devolution of some responsibilities and functions from Pharmacist to Pharmacy Technicians, however, those are not typically the sorts of duties that are of a higher level than the remainder of the Technicians' duties as they currently exist. In the Front Line Clerical Positions case, I described a similar situation in this way:

...the mere fact that new duties, formerly undertaken by a higher level position, have been taken on by the FLCPs does not necessarily, and in this case does not actually, mean that the duty or responsibility is of a higher level justifying a claim of increased work value. I conclude that the evidence of duties and responsibilities taken on from higher level positions does not, in this case, demonstrate higher work value.

The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board v The Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00836; (2013) 93 WAIG 1565 [128]

Duties and responsibilities

11 As to the particular aspects of the duties, responsibilities, skills and educational requirements for Pharmacy Technicians in particular, I note the following.

(a) Dispensing role

12 There has been reference to the role of Technicians in dispensing medications and, in particular, duty 3 in the generic JDF specifies:

Ensure prescriptions conform to legal and hospital requirements...

Agreed document 1, page 7

13 Ms Bascombe and Mr Jenkins both gave evidence that the Pharmacy Board of Australia Code of Conduct and the Guidelines for Dispensing of Medications, and the Society of Hospital Pharmacists of Australia Code of Ethics provide that dispensing is the overall responsibility of Pharmacists. This is confirmed by the work value case that was pursued by Pharmacists.

14 It is clear that Pharmacy Technicians and Assistants undertake the administrative and process work to assist the Pharmacist to perform their role. They are an essential support to the Pharmacist and to the efficient and safe provision of pharmacy services, but they do not carry the responsibility – it is the responsibility of the Pharmacist.

15 I recommend to the parties that to avoid any confusion, the generic JDFs be amended to clarify this situation and to assist pharmacy staff at all levels to understand the true roles and responsibilities they bear, that is, that these tasks are undertaken under the direction and supervision of the Pharmacist.

(b) The clinical role

16 There are two aspects to this issue. One relates to Pharmacy Technicians dealing with patients and the other is to them telephoning doctors.

17 It is clear to me that in dealing with patients, the Pharmacy Technician is performing a basic information exchange with the patient, usually of an administrative nature. The information they might gather from the patient could include Medicare number, their doctors' details or their community pharmacy name. In providing information to the patient, this may be very basic instructions regarding the medication, such as 'shake the bottle' or 'take twice, daily' – things which are on the label – and this was confirmed in the evidence of Mr O'Connor. Any real clinical exchange must be with the Pharmacist, not with the Technician.

18 In regard to contacting doctors, this issue came to light during the exchange of evidence between the parties. Both Ms Bascombe and Mr Jenkins made clear that this is a serious issue which is appropriate to draw to the attention of Chief Pharmacists because it should not be occurring. Mr Jenkins, in particular, gave evidence of the good reasons why, for clinical purposes and patient safety, asking follow-up questions of the doctor requires detailed professional knowledge and so this is the responsibility of the Pharmacist.

19 Therefore, any contact a Pharmacy Assistant has with either a patient or a doctor requires a delegation or direction by the Pharmacist and can be for the exchange of administrative and basic information, not for any clinical purpose.

(c) PBS dispensing

20 For many of the positions, this is a new requirement and has resulted in technicians being required to:

- (1) Have greater knowledge of the legislation and the PBS Scheme;
- (2) Correctly check the claims; and
- (3) Contact relevant practitioners and others to provide correct information.

21 However, the Austral report which assessed the role and responsibilities of Technicians in 2004 noted that at Armadale Hospital, amongst others, the Level 3 Pharmacy Technician is also expected to coordinate the preparation of claims for the new PBS dispensing system being trialled in regional hospitals. This demonstrates that while the PBS system may be new for many positions, it was included in the assessment in 2004 and recognised in the Level G3 classification. Therefore, it is not a new duty for the Pharmacy Technician according to the generic JDF.

(d) S8 drugs

22 At many sites, the work such as regarding S8 drugs in ordering, receipting, supplying and recording is undertaken under the supervision of a Pharmacist. However, the technical staff order and deliver products to the ward, helping free up the Pharmacist to perform clinical duties. I am not satisfied that this constitutes a higher level duty.

(e) Aseptic preparation and dispensing

23 There are claims of new duties and responsibilities which are said to add a significant work value increase to these positions relating to a range of functions. However, the evidence demonstrates that these were largely recognised in the 2004 review. While some positions were not, at that point, subject to some of those changes, the changes were recognised in other positions and resulted in the reclassification to Level G3 at that time.

(f) The collation and provision of data

24 Technicians and Assistants collate and provide data on drug expenditure, amongst other things. It is not clear how this is a higher level duty compared with other administrative duties such as maintaining stock inventories, facilitating imprest stock,

participating in cashier duties and processing accounts. I note the evidence of Heather Sheldon as to what this involves, however, I am not satisfied that it is in fact a higher level duty than those other duties I have set out.

(g) Training and mentoring

25 In respect of training Pharmacy Students and mentoring Student Technicians and others, many clerical, administrative and technical staff assist in training professionals and others by demonstrating the skills they use in their own work. Ms Bascombe gave evidence of some training she received as a Pharmacist from a Technician.

26 Almost all jobs contain an element of training and mentoring new or inexperienced staff or students in their own and others' areas of work. It is part of what goes with having that skill and having used it over time, to show others how it is done. In the Frontline Clerical Positions Work Value case, I made the following comments:

There is nothing unique or of a higher skill or responsibility level in employees, at every level, training and orientating new staff members, be that at their own level or higher, as to the requirements of their own positions. Once a person has become familiar with the requirements of their own job, it is not difficult to show a suitably qualified person how that job is done. Further, when a person is familiar with a particular computer package, it requires no higher level of skill to help someone who is having difficulty. If they are unable to resolve the problem, there are specialist IT staff to assist. There is no real difference between the ordinary training and orientation of a new person of the same level or the orientation of, for example, a nurse, in the clerical aspects of the use of a particular computer programme. These situations apply to FLCPs whether training new or relief FLCP holders or clinical staff about computer records access. This does not constitute a real change, nor is it beyond the requirements of Level G2.

The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board v The Health Services Union of Western Australia (Union of Workers) [2013] WAIRC 00836; (2013) 93 WAIG 1565 [180]

(h) Computer skills and literacy

27 It is claimed that the requirements to utilise particular computer skills has increased significantly and computer software changes, sometimes increasing complexity and at other times reducing it. However, this is common in contemporary workplaces and has gone on for many, many years. Of itself, it does not add markedly to work value unless something additional is involved.

(i) Qualifications

28 The evidence is that some pre-existing JDFs list a Certificate III Medical Technicians and Assistants course or Certificate IV in Pharmacy or equivalent as an essential criteria for appointment as a Pharmacy Technician. However, the generic JDF now contains no essential minimum educational qualification but includes the above qualifications as desirable rather than essential.

Conclusion regarding work value increases

29 Having considered all of the evidence, and particularly regarding those issues I have noted above, I have no hesitation in acknowledging the important role undertaken by Pharmacy Technicians and Pharmacy Assistants in our state's public health system. However, I am unable to find that there has been a demonstration of significant net addition to work value which has not been accounted for already.

The BiPERS assessment

30 BiPERS is a tool to aid in the classification of positions. The assessment in this case shows a marginal increase from 224 to 234 in the case of the Level G3. I am satisfied that this is correct and is within the appropriate range, although it is at the very top of that range.

Supervisory positions

31 The evidence has demonstrated that when the Senior Pharmacy Technician positions at Fremantle Hospital, South Metropolitan Health Service and Sir Charles Gairdner Hospital were previously reclassified, that review took account of responsibility for the complete selection and recruitment process for all technical staff and for preparing rosters, not merely for day shift but also for evening, weekend and public holiday rosters; that is, for more complexity than merely the weekday Monday to Friday roster, or for determining lunchbreak arrangements. Therefore, these are not new responsibilities or duties for Level 5 positions generally, even if the individuals did not at that time fulfil the whole of the scope of those duties.

Conclusion

32 I noted during the course of the hearing that it has been my experience that the exchange of information and views in the preparation for and the hearing of reclassification claims, including the evidence during the hearing, often disclose issues which one side or the other had not been aware of previously. This often leads to a better understanding of practices and procedures, duties and responsibilities. In this case, a number of things became clear that I think were not previously understood. I trust that this has been of value to both sides in understanding, at least in part, the outcome of the hearing.

33 Orders will issue for the dismissal of the applications.

2015 WAIRC 00764

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ELIZABETH BALSHAW AND OTHERS	APPLICANTS
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 31 JULY 2015	
FILE NO	PSA 24 OF 2014, PSA 25 OF 2014, PSA 26 OF 2014, PSA 27 OF 2014, PSA 28 OF 2014, PSA 29 OF 2014, PSA 30 OF 2014, PSA 31 OF 2014, PSA 32 OF 2014, PSA 33 OF 2014, PSA 34 OF 2014, PSA 35 OF 2014, PSA 36 OF 2014, PSA 37 OF 2014, PSA 38 OF 2014, PSA 39 OF 2014, PSA 40 OF 2014, PSA 41 OF 2014, PSA 42 OF 2014, PSA 43 OF 2014, PSA 44 OF 2014, PSA 45 OF 2014, PSA 46 OF 2014, PSA 47 OF 2014, PSA 49 OF 2014, PSA 50 OF 2014, PSA 51 OF 2014, PSA 52 OF 2014, PSA 53 OF 2014, PSA 54 OF 2014, PSA 55 OF 2014, PSA 56 OF 2014, PSA 57 OF 2014, PSA 58 OF 2014, PSA 59 OF 2014, PSA 60 OF 2014, PSA 61 OF 2014, PSA 62 OF 2014, PSA 63 OF 2014, PSA 64 OF 2014, PSA 65 OF 2014, PSA 66 OF 2014, PSA 67 OF 2014, PSA 68 OF 2014, PSA 69 OF 2014, PSA 70 OF 2014, PSA 71 OF 2014, PSA 72 OF 2014, PSA 73 OF 2014, PSA 74 OF 2014, PSA 75 OF 2014, PSA 76 OF 2014	
CITATION NO.	2015 WAIRC 00764	

Result	Applications dismissed
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Order

HAVING heard Ms P Marcano and with her Mr S Fairclough on behalf of the applicants and Mr J Ross and Mr J Sheppard on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the applications be, and are hereby dismissed.

[L.S.]

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