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FULL BENCH—Appeals against decision of Commission—

2015 WAIRC 00797

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 36 OF 2014 GIVEN ON 22 APRIL 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2015 WAIRC 00797
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
HEARD	:	FRIDAY, 17 JULY 2015
DELIVERED	:	WEDNESDAY, 12 AUGUST 2015
FILE NO.	:	FBA 3 OF 2015
BETWEEN	:	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Appellant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner S J Kenner
Citation	:	[2015] WAIRC 00329; (2015) 95 WAIG 548
File No	:	APPL 36 of 2014

CatchWords	:	Industrial Law (WA) - Appeal against a decision of a single Commissioner - Entitlements of rail car drivers to credit hours in a fortnightly cycle when taking a week of annual leave - Interpretation of industrial agreement - Principles of construction considered - New point raised by appellant - Point allowed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 46, s 49 <i>Minimum Conditions of Employment Act 1993</i> (WA) s 5, s 23
Result	:	Appeal upheld, decision varied

Representation:

Appellant : Mr C Fogliani (of counsel) and with him Mr K Singh
 Respondent : Mr R Andretich (of counsel)
 Solicitors:
 Appellant : W G McNally Jones Staff Lawyers
 Respondent : State Solicitor for Western Australia

Case(s) referred to in reasons:

Alfresco Concepts Pty Ltd v Franse [2015] WAIRC 00244; (2015) 95 WAIG 437
 Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
 Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1
 Director General, Department of Education v United Voice WA [2013] WASCA 287; (2014) 94 WAIG 1
 Gattellaro v Westpac Banking Corporation [2004] HCA 6; (2004) 204 ALR 258; (2004) 78 ALJR 394
 H v Minister for Immigration and Multicultural Affairs [2000] FCA 1348
 Health Services Union of Western Australia (Union of Workers) v The Director General of Health [2012] WAIRC 01117; (2013) 93 WAIG 1
 Minister for Education v Liquor Hospitality and Miscellaneous Union, Western Australian Branch [2011] WAIRC 00818; (2011) 91 WAIG 1839
 Re Harrison; Ex parte Hames [2015] WASC 247
 Roberts v Bass [2002] HCA 57; (2002) 212 CLR 1; (2002) 194 ALR 161; (2002) 77 ALJR 292
 University of Wollongong v Metwally [No 2] [1985] HCA 28; (1985) 60 ALR 68; (1985) 59 ALJR 481

Case(s) also cited:

Health Services Union of Western Australia (Union of Workers) v The Director General of Health [2012] WAIRC 01117; (2012) 93 WAIG 1
 Kucks v CSR Ltd (1996) 66 IR 182
 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
 Transport Workers' Union of Australia, New South Wales Branch v Toll Transport Pty Ltd [2006] NSWIRComm 123

*Reasons for Decision***SMITH AP AND SCOTT ASC:****Introduction**

- 1 This is an appeal before the Full Bench instituted pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act). The appeal arises out of a declaration made on 22 April 2015: [2015] WAIRC 00329; (2015) 95 WAIG 548.
- 2 The declaration was made in determination of APPL 36 of 2014 which was an application by The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the union) made pursuant to s 46 of the Act seeking the true interpretation of cl 3.1.1, cl 3.1.2 and cl 6.7 of the *Public Transport Authority (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2013*, Agreement No. AG 18 of 2013 (the agreement).
- 3 The facts giving rise to the application are set out in the schedule to the application as follows (AB 6):
 - 3.1.1 The Rostering Anomalies related to the practices ('**the Practices**') adopted by the Public Transport Authority of Western Australia ('**the Authority**') in the rostering and payment of rail car drivers when they took a week's annual leave in a fortnightly cycle.
 - 3.1.2 The Practices resulted in rail car drivers being:
 - 3.1.2.1 **Rostered** to work for 42 hours in the second week in a fortnightly cycle after taking a week's annual leave in the preceding week; and
 - 3.1.2.2 **Paid** for 78 hours at their base rate of pay with two hours being accumulated towards credit days.
- 4 The application set out nine questions that the union sought to be answered by the Commission. These are as follows (AB 7 - 8):
 - 4.1 Are rail car drivers employed on a 76 hour per fortnight basis?
 - 4.2 Do 76 hours per fortnight represent a rail car driver's ordinary hours?
 - 4.3 Do 76 hours per fortnight represent a rail car driver's ordinary hours for the purposes of section 9A(1)(a)(i) of the *Minimum Conditions of Employment Act 1993* (WA)?
 - 4.4 Do rail car drivers, who are regular day shift employees, accrue four weeks' annual leave (with reference to their ordinary hours)?

- 4.5 Do rail car drivers, who are seven day shift employees, accrue five weeks' annual leave (with reference to their ordinary hours)?
- 4.6 When a rail car driver takes a week of annual leave, should 38 hours be deducted [sic] from their leave balance?
- 4.7 When a rail car driver takes a week of annual leave in a fortnightly cycle, are they only required to work 38 hours in the following week to make up their ordinary hours?
- 4.8 When a rail car driver takes a week of annual leave in a fortnightly cycle, can they only accumulate a maximum of two hours towards credit days in the following week?
- 4.9 When a rail car driver takes a week of annual leave in a fortnightly cycle, is any rostered time above 40 hours in the following week rostered overtime?
- 5 In the proceedings before the Commission at first instance, at the heart of the matter was a claim by the union on behalf of employees covered by the agreement that when an employee takes a week of annual leave and works 42 hours in the other week of a fortnightly cycle of work, the employee is entitled to be paid two hours' pay at overtime rates.
- 6 At the hearing at first instance, the parties were in agreement that each of the questions in 4.1 to 4.6 and 4.8 should be answered 'Yes'. The parties were in dispute, however, as to the answers that should be given to questions 4.7 and 4.9. The union contended that the answers to those two questions were 'Yes'. The Public Transport Authority of Western Australia (the PTA) contended the answer to:
- (a) Question 4.7 should be:
'No. In order to comply with clause 3.1.1 of the Agreement 40 hours are required to be worked.'
- (b) Question 4.9 should be:
'No. Time above 42 hours attracts overtime rates.'

Relevant provisions of the agreement

- 7 Pursuant to cl 1.3.1 the agreement extends to and binds all employees who are engaged by the PTA as trainee rail car drivers, rail car drivers, driver trainers and driver coordinators in the Transperth Train Operations who are members of or eligible to be members of the union.
- 8 Clause 3.1. provides as follows:
- 3.1.1 The ordinary hours of full-time employment shall be seventy six (76) hours per fortnight, and shall consist of up to ten shifts which shall constitute a fortnight's work.
- 3.1.2 For the purposes of subclause 3.1 the seventy six (76) hour fortnight shall be worked in accordance with the following provisions:
- (a) The Standard Hours of full-time employment in each fortnightly cycle will be 80 hours.
- (b) Four hours in each fortnightly cycle will be accumulated towards Credit Days, which may be cleared in accordance with subclause 6.6 - Taking of Leave or be cashed out in accordance with subclause 6.5 - Cashing out of Leave Entitlements.
- 3.1.3 Rosters when first posted shall show four rostered days off in each fortnightly cycle.
- 3.1.4 A rostered day off as provided for in subclause 3.1.3 shall be either:
- (a) 24 hours commencing 0001 hours to 2400 hours on the day designated as the rostered day off; or
- (b) Where the preceding rostered shift ends between 0000 and 0400 hours, the day on which that shift ends, provided either that:
- (i) there is a minimum period off duty of 32 hours between the end of that shift and the commencement of the next shift; or
- (ii) the employee agrees to a shorter period of duty before the commencement of the next shift, for example to enable the employee to work an additional overtime shift or to permit a mutual roster change.
- 3.1.5 No rostered shift shall be less than five (5) hours for a Full Time Employee or less than three (3) hours for a Part Time Employee and no rostered shift shall be more than nine (9) hours.
- 3.1.6 The maximum number of consecutive shifts an employee may be required to work will be ten (10).
- 3.1.7 Subject to subclause 3.2.5, the posted roster may include rostered overtime for an employee of up to a maximum of five hours more than the 80 Standard Hours in a fortnightly cycle for the purposes of a Special Event or other exceptional circumstance.
- 9 'Ordinary Hours' is defined in cl 1.5.19 to mean the hours as defined in cl 3.1.1. 'Standard Hours' is defined in cl 1.5.28 to mean the hours as defined in cl 3.1.2, which are paid at base rates only and not at overtime rates. 'Credit day' is defined in cl 1.5.6 to mean an extra day off accumulating in accordance with cl 3.1.2(b) and taken or cashed out in accordance with cl 6.5 and cl 6.6 of the agreement.
- 10 Clause 2.4 provides that an employee engaged on a 76 hour fortnight basis is a full-time employee. Pursuant to cl 3.1.5 full-time employees can be rostered for shifts of no less than five hours and no more than nine hours and pursuant to cl 3.1.6 the maximum number of consecutive shifts an employee may be required to work is 10.

- 11 Pursuant to cl 3.6.1 the PTA guarantees each full-time employee a full fortnight's work of at least 80 hours except during such period as by reason of any action on the part of any section of its employees or for any cause beyond the control of the PTA, it is unable wholly or partially to carry on the running of the trains. This clause also provides that each fortnight stands by itself.
- 12 Clause 6.5 allows employees to request the cashing out of hours accumulated for clearance as credit days and pursuant to cl 6.6 employees can add to their annual leave uncleared accumulated credit days. Further, pursuant to cl 6.6.17 employees are required to add at least five credit days to their annual leave each year or cash those days out.
- 13 Whilst hours of work are calculated as hours to be worked each fortnight the wage rates set out in cl 4 of the agreement are expressed as base rates of pay for each week of work.

The declaration made at first instance

- 14 After hearing the parties the learned Commissioner made a declaration in the following terms (AB 19 - 20):
 - (1) THAT railcar drivers are employed on a 76 hour per fortnight basis.
 - (2) THAT 76 hours per fortnight represents a railcar driver's ordinary hours.
 - (3) THAT railcar drivers, who are regular day shift employees accrue four weeks' annual leave (with reference to their ordinary hours).
 - (4) THAT railcar drivers who are seven day shift employees accrue five weeks' annual leave (with reference to their ordinary hours).
 - (5) THAT when a railcar driver takes a week of annual leave, 38 hours should be deducted [sic] from their leave balance.
 - (6) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, they are required to work 40 hours in the following week to make up their ordinary hours.
 - (7) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, they can only accumulate a maximum of two hours towards credit days in the following week.
 - (8) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, overtime will only apply after 42 hours are worked in the following week.

The issues raised in the hearing at first instance

- 15 The reason why the application was made by the union for a declaration as to the true interpretation of the agreement was because of a dispute that had arisen between the PTA and the union about the practice of the PTA to:
 - (a) pay an employee an additional two hours' pay when an employee had taken one week's annual leave in a fortnightly cycle and had worked 42 hours the other week of the fortnightly cycle; and
 - (b) credit two hours towards credit days.
- 16 It was not in issue in the proceedings at first instance whether an employee who worked this pattern of work in a fortnightly cycle should be paid two hours' pay in addition to the weekly base rate of pay. The dispute was whether the two hours of pay at ordinary hours should be paid as overtime.
- 17 Following the issuing of the declaration the union in its notice of appeal challenged paragraphs (6) and (7) of the declaration as follows (AB 2):

The Learned Commissioner made an error of law in the interpretation of the Agreement by declaring in the Decision that:

- a) when a railcar driver takes a week of annual leave in a fortnightly cycle, they are required to work 40 hours in the following week to make up their ordinary hours; and,
 - b) when a railcar driver takes a week of annual leave in a fortnightly cycle, they can only accumulate a maximum of two hours towards credit days in the following week.
- 18 Thus, the union raised the new point whether an employee who works the pattern of work in question should only be credited with two hours towards credit days.

Should the union be allowed to raise a different case on appeal?

- 19 The union seeks to raise an entirely different argument as to the true construction of the hours of work provisions of the agreement. In particular, paragraph (7) of the declaration which is now sought to be challenged in this appeal, was a proposition the union agreed to. The union stated in its written submissions it filed in the proceedings at first instance that the following question should be answered 'Yes':

When a rail car driver takes a week of annual leave in a fortnightly cycle, can they only accumulate a maximum of two hours towards credit days in the following week?: question 4.8

- 20 The reason for putting this question and answer to the Commission at first instance appears to be that the union did not take issue with the practice of the PTA paying the employees two hours' pay who worked 42 hours in a week of a fortnightly cycle after taking one week's annual leave. However, the union claimed an employee who worked 42 hours and took a week's annual leave in a fortnightly cycle is entitled to be paid overtime rates of pay for two hours and not at base rates. It concedes that the case before the Commission could have been 'done better and that would have made the case for Commissioner Kenner a lot easier and probably less confusing', that Commissioner Kenner 'did what he did on the basis of the submissions that were made at first instance'. The union says that what the Commission in its decision attempted to do was to align the agreement with practice rather than the other way around.

- 21 The union's position as to the true construction of the relevant provisions of the agreement has now shifted. It not only concedes that the learned Commissioner correctly found that overtime does not apply until more than 80 hours are worked in a fortnightly cycle, but it says that where an employee takes a week of annual leave and works 42 hours in the other week of the fortnightly cycle they are not entitled to be paid for two hours of work at base rates for the pattern of work in that fortnightly cycle as four hours in that cycle should be credited towards credit days. This construction is entirely different to the construction the union put to the Commission at first instance.
- 22 The PTA did not object to the union putting this construction to the Full Bench. It simply argued the construction put by the union at first instance and on appeal is wrong.
- 23 The general principle is that save in exceptional cases a party is usually bound by its case put at first instance: *University of Wollongong v Metwally [No 2]* [1985] HCA 28; (1985) 60 ALR 68, 71; (1985) 59 ALJR 481, 483; *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 (see the recent discussion of this principle in *Alfresco Concepts Pty Ltd v Franse* [2015] WAIRC 00244; (2015) 95 WAIG 437 [114] - [116]). The application of this principle usually arises in proceedings where a decision at first instance turns on questions of fact or fact and law.
- 24 In *Minister for Education v Liquor Hospitality and Miscellaneous Union, Western Australian Branch* [2011] WAIRC 00818; (2011) 91 WAIG 1839 the Acting President observed, after having regard to the observations of Branson and Katz JJ in *H v Minister for Immigration and Multicultural Affairs* [2000] FCA 1348 [7] - [9], that:
- [T]he following principles guide when a finding could be made that it is expedient and in the interests of justice to entertain a point:
- (a) The point must be one of construction or of law and not be met by calling evidence.
 - (b) In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance.
 - (c) In very exceptional cases an omission to put a case formulated on appeal may not be conclusive. The opportunity to assert the new case should be granted only where the interests of justice require it and such a course can be taken without prejudice to the defendant.
 - (d) Consideration of the interests of justice should extend to a consideration of relevant matters beyond the interests of the parties to the interests of other litigants and efficient case management.
 - (e) When assessing the interests of justice, the merit of the new point sought to be raised is a relevant consideration [26].
- 25 In this matter, the determination of the application at first instance and the issues raised in this appeal turn on a matter of law only; that is, a declaration of the true construction of a statutory instrument. The application before the Commission does not depend upon any exercise of discretion by the Commission in relation to any facts. The facts and reasons why a dispute arose which caused the union to make the application for interpretation of the agreement are immaterial to determination of the application.
- 26 It is well established that by their conduct in proceedings, parties cannot oblige a court to misapply the law: *Gattellaro v Westpac Banking Corporation* [2004] HCA 6 [93]; (2004) 204 ALR 258; (2004) 78 ALJR 394 (Kirby J); *Roberts v Bass* [2002] HCA 57; (2002) 212 CLR 1; (2002) 194 ALR 161; (2002) 77 ALJR 292 [143] (Kirby J).
- 27 In our opinion, the construction which is now sought to be raised in this appeal by the union has considerable force.
- 28 In this matter we are satisfied that it is expedient and in the interests of justice to entertain this new point. This is an exceptional case where the interests of justice require it and there is no suggestion of prejudice to the PTA. On the contrary, it is important that the application of the agreement be correct as it has a direct effect on the calculation of the entitlements of the employees.
- 29 In these circumstances, it is in the public interest to allow the union to raise the new point.

The issues raised by the union in this appeal

- 30 It is now not disputed by the union that when a rail car driver takes a week of annual leave in a fortnightly cycle, overtime will only apply after 42 hours are worked in the following week. However, the union says that a rail car driver who works 42 hours in a week of a fortnightly cycle after a week of annual leave should not be paid an additional two hours of pay but should be credited four hours towards a credit day. As set out above this was not an argument raised at first instance.
- 31 The union now says the true interpretation of the relevant provisions of the agreement, in particular cl 3.1, is that when a rail car driver takes a week of annual leave in a fortnightly cycle, they are required to work 38 hours in the following week to make up 'Ordinary Hours', but to make up standard hours they must work 42 hours and accumulate four hours towards credit days.

The PTA's submissions

- 32 The PTA points out the issue raised for consideration in the appeal is the treatment that is required to be accorded to annual leave taken during a fortnightly cycle, in particular its effect on the accrual of credit days off and the number of hours that an employee can be rostered for during the balance of a fortnightly cycle where it contains a period of annual leave.
- 33 It points out that pursuant to cl 6.7.1(a) regular day shift employees accrue 'four (4) consecutive weeks' of annual leave to be paid 'at the employee's base rate of wage'. Further, that cl 6.7.2(a) provides other shift employees are entitled to an additional week of leave 'on full pay'. It also points out that cl 4.1 contains the base rates of pay expressed as the amount payable per week for a full-time employee in relation to the classification specified. However, it contends that the amount payable for 38 hours per week worked in accordance with cl 3.1 is the base rate of pay: cl 1.5.16. For reasons that follow this contention is not entirely correct.

- 34 It says having regard to cl 3.1.1 and cl 6.7.1, the accrual of and the taking of annual leave can only be at the rate of 38 hours per week. This is confirmed by cl 6.1.3 which provides where a public holiday falls on a rostered day off, the employee will receive 7.6 hours' additional pay or 7.6 hours which may be taken in accordance with cl 6.6 as an additional period of annual leave.
- 35 The PTA argues that the declaration made by the Commissioner as to the true interpretation of the agreement is correct as it maintains the integrity of the 38 hour working week while recognising that up to 80 standard hours will be worked in any fortnightly cycle before overtime rates are attracted.
- 36 In support of this argument the PTA contends that if an employee takes one week of annual leave in the fortnightly cycle of 80 standard hours the terms of the agreement requires the employee to be paid as if the conditions required to be satisfied at work are satisfied during the period taken as annual leave. These are:
- (a) during the week of annual leave all of the requirements of cl 3.1.1 are satisfied so that there is no need to accrue two hours of that week towards credit days off to satisfy cl 3.1.1;
 - (b) the employee is to be treated as if he or she worked 38 hours during the week of annual leave;
 - (c) for the week not taken as annual leave, the employee is required to work a minimum of 40 hours in accordance with cl 3.1.1 so that two hours of work accrue towards credit days off; and
 - (d) the employee is able to be rostered for up to 42 hours in the week they are not on annual leave before overtime rates are attracted.

Principles of construction of industrial instruments

- 37 In *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2014) 94 WAIG 1 Pullin J, with whom Le Miere J agreed, briefly set out some of the principles that apply to the interpretation of industrial agreements. These are the principles that apply to interpretation of contracts. At [18] - [19] Pullin J stated:

The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].

Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [23].

- 38 Justice Buss in *Director General, Department of Education v United Voice WA* considered other principles that also apply to the construction of industrial instruments. He observed at [81] - [83]:

The construction of an industrial agreement involves ascertaining what a reasonable person would have understood the parties to the agreement to mean. The language of the agreement should be understood in the light of its industrial context and purpose. See *Ancor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ & McHugh J).

In *Kucks v CSR Ltd* (1996) 66 IR 182, Madgwick J observed:

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention *in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon*. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. *And meanings which avoid inconvenience or injustice may reasonably be strained for*. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand (184). (emphasis added)

See also *City of Wanneroo v Holmes* (1989) 30 IR 362, 378 - 379 (French J); *Ancor* [96] (Kirby J), [129] - [130] (Callinan J).

The words of a clause in a written agreement are to be given the most appropriate meaning which they can legitimately bear. A court must have regard to all of the provisions of the agreement with a view to achieving harmony among them. See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109 - 110 (Gibbs J). These propositions are applicable to instruments generally, subject to any particular rules of construction which have been developed in relation to a particular kind of provision or instrument.

- 39 These principles were applied by Smith AP and Beech CC (with whom Harrison C agreed) in *Health Services Union of Western Australia (Union of Workers) v The Director General of Health* [2012] WAIRC 01117; (2013) 93 WAIG 1 [36] - [42] and more recently by Beech J in *Re Harrison; Ex parte Hames* [2015] WASC 247 [50] - [52]. As Beech J pointed out in *Re Harrison* the starting point of construction is the text and the need to avoid a narrow or pedantic approach does not detract from the fact that construction is a text-based activity [53].
- 40 It is also an important principle of construction that when considering the whole of an instrument, not only may the meaning in one part be revealed in another but the words of every clause must if possible be construed so as to render them all harmonious one with another: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109 (Gibbs J).

The merits of the appeal

- 41 In our opinion, no ambiguity in the meaning of the provisions of the agreement sought to be interpreted in the agreement arises. Thus, it is not necessary to have regard to the circumstances that surrounded the making of the terms of the agreement.
- 42 In our opinion, the learned Commissioner who heard this matter erred in his interpretation of the agreement. Unfortunately, he was led into error by the union's argument, in particular its failure to question whether the practice of the PTA to pay an additional two hours' pay to its employees when they worked 42 hours in a week following a week of annual leave in a fortnightly cycle is authorised by the terms of the agreement. This failure in our view led to a construction of the agreement, that took account of this practice which when the terms of the whole of the agreement are considered, that does not accord with a true construction of the terms of the agreement.
- 43 The starting point in the analysis of the construction of the agreement is an analysis of the hours of work to be credited in a fortnightly cycle when an employee takes a week of annual leave in a fortnightly cycle of work. As the learned Commissioner points out in his reasons for decision, when an employee takes a week of annual leave in a fortnightly cycle, the hours worked for the purposes of cl 3.1 is 38. Pursuant to s 5 and s 23 of the *Minimum Conditions of Employment Act 1993* (WA) (the MCE Act), the minimum entitlement to annual leave implied in all industrial agreements, awards and contracts of employment is 152 hours a year calculated pro-rata on a weekly basis.
- 44 Section 5 of the MCE Act provides:
- (1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied —
 - [(a) *deleted*]
 - (aa) in any employer-employee agreement; or
 - (b) in any award; or
 - (c) if a contract of employment is not governed by an employer-employee agreement or an award, in that contract.
 - (2) A provision in, or condition of, an employer-employee agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.
 - (3) A provision in, or condition of, an agreement or arrangement that purports to exclude the operation of this Act has no effect, but without prejudice to other provisions or conditions of the agreement or arrangement.
 - (4) A purported waiver of a right under this Act has no effect.
 - (5) This section has effect subject to sections 8 and 9(1).
- 45 Section 23 of the MCE Act provides:
- (1) An employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 152 hours.
 - (2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis.
 - (2a) Entitlements under subsection (1) are cumulative.
 - (3) In subsection (1), **year** does not include any period of unpaid leave.
 - (4) Subsection (1) does not apply to an employee of a class prescribed by the regulations.
- 46 Clause 6.7.1(a) of the agreement provides that a day shift employee is entitled to four weeks' annual leave. Seven day shift employees are entitled to an extra week's leave: cl 6.7.2(a). From these provisions of the agreement and s 5 and s 23 of the MCE Act it is clear that when an employee takes a week's leave in a fortnightly cycle they are to be regarded to have 'worked' 38 hours in that week of that cycle for the purposes of cl 3.1 of the agreement.
- 47 It is not correct when an employee takes a week of annual leave that they are required to work 40 hours in the other week of the fortnightly cycle to make up their ordinary hours, as that would mean that the employee's ordinary hours in that fortnightly cycle is 78. Ordinary hours in a fortnightly cycle are 76 and standard hours are 80.
- 48 When pressed in light of the issues that the union seeks to raise in this appeal it was conceded on behalf of the union that the question posed by the union in its question 4.7 would be more properly put as follows:
- When a rail car driver takes a week of annual leave in a fortnightly cycle, what total number of hours in the following week are they required to work to make up their standard hours?
- 49 The union correctly says that the answer to this question is 42.
- 50 When regard is had to the whole of the terms of the agreement it is clear that:
- (a) Wages are calculated as a weekly rate of pay: cl 4.1
 - (b) 'Hours of full-time work' are calculated on a fortnightly basis and not a weekly basis. Thus, within a fortnightly cycle the hours worked in any one shift can vary, so too can the hours worked in any week in the cycle. For example, pursuant to cl 3.1.5 and cl 3.1.6 an employee could work five shifts of nine hours in the first week of the fortnightly cycle (being a total of 45 hours) and one five hour shift, two nine hour shifts and two six hour shifts in the second week of the cycle (being a total of 35 hours worked in the second week of the cycle). In total, an employee who worked these shifts in the fortnightly cycle would work 80 hours. Whether an employee would be rostered to work such shifts would depend upon the operational requirements of the PTA.
 - (c) The 76 ordinary hours and four credit hours together are classified as standard hours and total 80 hours each fortnight: cl 3.1 and cl 3.2.5(e)(i). Thus, standard hours comprise both ordinary hours and credit hours. Any

hours worked in excess of standard hours (80 hours a fortnight) in each cycle attract a payment of overtime: cl 3.3.2.

- (d) Each fortnight stands by itself: cl 3.6.
- (e) Standard hours of full-time work worked each fortnightly cycle are classified in cl 3.1 of the agreement as comprising two distinct categories which have attached different conditions. These are:
 - (i) 76 ordinary hours;

(other than an entitlement to a weekly base rate of pay, as part of an entitlement to payment of standard hours no other conditions of remuneration attach to the working of ordinary hours); and
 - (ii) four credit hours;

(pursuant to cl 3.1.2(b) credit hours are accumulated towards credit days, which can be taken as days off: cl 6.5.1(c)), or at least five credit days a year are required to be taken with annual leave: cl 6.6.17 and cl 6.6.18. Up to 64 hours a year can be 'cashed out' (paid out): cl 6.5.1 and cl 6.5.3.)

- 51 The error in the PTA's construction of the agreement appears to rely upon a premise that the 38 hours taken as worked when an employee takes a week of annual leave is to stand alone from the remaining week in the fortnightly cycle. This contention is contrary to the effect of cl 3.6.1 which provides that each fortnight stands alone.
- 52 The PTA's construction also relies upon the premise that the base rate of pay for a full-time employee is paid for a 38 hour week. This contention is not correct. 'Standard Hours' in cl 1.5.28 is defined to mean the 80 hours as defined in cl 3.1.2 worked in each fortnightly cycle which are paid at base rates. Thus, the base rate of pay, whilst expressed as a weekly rate of pay, is two weeks' base pay for an 80 hour fortnightly cycle (standard hours), and not one week of base pay for a 38 hour week or two weeks' pay for 76 hours a fortnight (ordinary hours).
- 53 An employee who takes a week of annual leave in a fortnightly cycle and who then works 42 hours in the other week of the cycle (being a total of 80 hours in the cycle) is not entitled to be paid two hours extra pay paid at base rates as cl 3.1.2 requires that they accrue four hours towards credit days in the cycle. Further, there is no provision in the agreement that provides for payment of 42 hours' pay at base rates and crediting of two hours towards credit days in a fortnightly cycle of 80 hours.
- 54 For these reasons, we are of the opinion that the grounds of appeal have been made out and that an order should be made in the following terms by the Full Bench:
- (a) The appeal be upheld.
 - (b) The decision be varied by deleting paragraph (6) and paragraph (7) of the decision and substituting:
 - (6) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, to accrue four credit hours towards credit days in that fortnightly cycle they must work 42 hours in the other week to make up their standard hours of 80 hours of full-time employment.
 - (7) THAT a railcar driver who works the pattern of work in paragraph (6) is not entitled to be paid two hours of pay at base rates, in addition to the rate of pay specified in cl 4.1 of the agreement, for work in that fortnightly cycle.

HARRISON C

- 55 I have had the benefit of reading the reasons for decision of her Honour, the Acting President and the Acting Senior Commissioner. I agree with those reasons and have nothing to add.

2015 WAIRC 00828

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. APPL 36 OF 2014 GIVEN ON 22 APRIL 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2015 WAIRC 00828
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
HEARD	:	MONDAY, 24 AUGUST 2015
DELIVERED	:	THURSDAY, 27 AUGUST 2015
FILE NO	:	FBA 3 OF 2015
BETWEEN	:	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Appellant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

Jurisdiction : **Western Australian Industrial Relations Commission**
Coram : **Commissioner S J Kenner**
Citation : **[2015] WAIRC 00329; (2015) 95 WAIG 548**
File No : **APPL 36 of 2014**

CatchWords : Industrial Law (WA) - Speaking to the minutes of an order - Principles considered - Amendment made to proposed order

Result : Appeal upheld, decision varied

Representation:*Counsel:*

Appellant : Mr C Fogliani

Respondent : Mr R Farrell

Solicitors:

Appellant : W G McNally Jones Staff Lawyers

Case(s) referred to in reasons:

Palermo v Rosenthal [2010] WAIRC 00242; (2010) 90 WAIG 371

*Supplementary Reasons for Decision***FULL BENCH:**

- 1 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the union) sought a speaking to the minute of proposed order on the grounds that order 2(6) of the minute will insert new obligations into the terms of the *Public Transport Authority (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2013* (the agreement) which are not currently provided for in the agreement. Proposed paragraph 2(6) of the order provides:
 2. The decision be varied by deleting paragraph (6) and paragraph (7) of the decision and substituting:
 - (6) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, to accrue four credit hours towards credit days in that fortnightly cycle they must work 42 hours in the other week to make up their standard hours of 80 hours of full-time employment.
- 2 The union argues that in [11] of the reasons for decision issued on 12 August 2015 of Smith AP and Scott ASC (with whom Harrison C agreed), it was accepted that the Public Transport Authority of Western Australia (the PTA) guarantees each full-time employee at least 80 hours of work per fortnight (subject to an exception): [2015] WAIRC 00797. It says implicit in this reasoning is that the guarantee of 80 hours per fortnight is an enforceable entitlement for each rail car driver. The union then argues that when regard is had to the express terms of paragraph 2(6) of the minute, it follows that if a rail car driver takes a week of annual leave in a fortnightly cycle they will not be entitled to accrue four hours' credit time if the PTA is unable to provide 42 hours in the other week. It says the purpose of cl 3.1.1 and cl 3.1.2 of the agreement is to provide a guaranteed entitlement to 80 hours of work per fortnight and to be paid 76 hours at normal rate and be credited with four hours of credit time.
- 3 For these reasons, the union seeks the following amendment to paragraph 2(6) as follows:
 - (6) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, they are entitled to work 42 hours in the other week to make up their standard of 80 hours of full-time employment. In any fortnight where a railcar driver is available to work their standard hours, they are entitled to be paid at base rate for 76 hours and to accrue 4 credit hours towards credit days.
- 4 It is argued by the PTA that the minute of proposed order gives full and proper effect to the reasons for decision of the Full Bench. In particular, it points out that the union conceded in argument before the Full Bench that the question that should have been put for answer by the union in the application was:

When a rail car driver takes a week of annual leave in a fortnightly cycle, what total number of hours in the following week are they required to work to make up their standard hours?
- 5 The PTA also argues that the reasons for decision of the Full Bench does not deal with the 'guarantee' of hours that is provided for in the agreement where a rail car driver is not available or rostered to work the full 80 hours in a fortnight.
- 6 At the hearing of the speaking to the minute of proposed order Mr Farrell, on behalf of the PTA, put a submission to the Full Bench that it is unusual for a rail car driver to be rostered 42 hours following the taking of a week of annual leave. Members of the Full Bench were surprised by this submission as it was an agreed fact before the Commission at first instance and before the Full Bench that there is a practice of the PTA to roster a rail car driver to work for 42 hours in the second week in a fortnightly cycle after the rail car driver takes a week's annual leave in the preceding week; and for the PTA to pay the rail car driver an additional two hours' pay at their base rate with two hours being accumulated towards credit days. These facts are set

out at [3] of the joint reasons for decision of Smith AP and Scott ASC. Any other rostering practices were not raised in any material way in these proceedings.

- 7 The only issues directly raised in these proceedings related to the taking of one week's annual leave in one week of a fortnightly cycle of full-time work, the number of standard hours in that fortnight and number of credit hours when that occurred. Any issue as to what the terms of the agreement required if in the event that the PTA was unable to provide 42 hours of work in the second week was not the subject of any meaningful submission by either party that required an interpretation of the terms of the agreement in respect of such an issue at first instance, or by the Full Bench.

Conclusion

- 8 The purpose of the speaking to the minutes of an order was reviewed by the Full Bench in *Palermo v Rosenthal* [2010] WAIRC 00242; (2010) 90 WAIG 371. In that matter the Full Bench stated [59]:

The purpose of speaking to the minutes of an order was considered by the Full Bench in *Steele v Clarke* (2003) 84 WAIG 17. President Sharkey with whom Coleman CC and Gregor C observed that the purpose of a speaking to the minutes is entirely limited and that the process exists pursuant to s 35 of the Act to enable the parties to put to the Commission matters directed to ensuring that the orders do issue to properly reflect the Commission's decision and reasons therefor [62]. The purpose of a speaking to the minutes is not to address why the reasons for decision are wrong but simply to consider whether the orders set out in the minutes of proposed orders reflect what the Commission says it will order in the reasons for decision. Historically the purpose of a speaking to the minutes was to give parties to a matter an opportunity to point out any provisions of an award that may have been unworkable in some way to render the award or order less perfect than the Commission intended to be: *Sheahan v State School Teachers Union of WA (Inc)* (1989) 69 WAIG 3267; *Tan v Paris and Christie Kafetzis t/as Gabriel's Café*.

- 9 Having heard both the parties in this matter the Full Bench informed the parties that it would issue an order containing paragraph 2(6) in the following terms:

2. The decision be varied by deleting paragraph (6) and paragraph (7) of the decision and substituting:

- (6) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, to accrue four credit hours towards credit days in that fortnightly cycle 42 hours shall be worked in accordance with cl 3.1.2 of the agreement in the other week to make up their standard hours of 80 hours of full-time employment.

- 10 The reason why the Full Bench found this amendment was necessary was that it is clear from the reasons for decision issued on 12 August 2015 that paragraph (6) should not be open to be construed to affect the interpretation of cl 3.6.1 of the agreement. The terms of cl 3.6.1 provide that (subject to a limitation, which is not material to this appeal), there is an obligation on the PTA to provide 80 hours' work a fortnight to each full-time rail car driver. In [50](b) of the reasons for decision of Smith AP and Scott ASC it was observed that the rostered hours of a rail car driver can vary in each week of a fortnightly cycle to make up the 80 standard hours. It was then stated:

Whether an employee would be rostered to work such shifts would depend upon the operational requirements of the PTA.

- 11 To ensure that the requirements of cl 3.6.1 of the agreement are not affected by the terms of the order, the words 'they must work' have been deleted from paragraph 2(6) and the words 'shall be worked in accordance with cl 3.1.2 of the agreement' added to reflect the requirement in cl 3.1.2 that a 76 hour fortnight 'shall be worked' as an 80 hour fortnight.
- 12 If a dispute arises between the union and the PTA in relation to contingencies that arise in the PTA's rostering practices, make up pay (including any issue as to any practice or requirement to pay) and the effect of the 'guarantee' of 80 hours' work that arises from cl 3.6 of the agreement, this is a matter that should be dealt with by the parties through its dispute resolution procedures, and if not resolved, is a matter that can be the subject of a separate application before the Commission.

2015 WAIRC 00830

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPELLANT

-and-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT
ACTING SENIOR COMMISSIONER P E SCOTT
COMMISSIONER J L HARRISON

DATE

THURSDAY, 27 AUGUST 2015

FILE NO.

FBA 3 OF 2015

CITATION NO.

2015 WAIRC 00830

Result Appeal upheld, decision varied

Order

This appeal having come on for hearing before the Full Bench and having heard Mr C Fogliani (of counsel) and with him Mr K Singh on behalf of the appellant and Mr R Andretich (of counsel) on behalf of the respondent on 17 July 2015 and reasons for decision having been delivered on 12 August 2015, and having heard Mr C Fogliani (of counsel) on behalf of the appellant and Mr R Farrell (of counsel) on behalf of the respondent on 24 August 2015 at a speaking to the minute of proposed order and supplementary reasons for decision having been delivered on 27 August 2015, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be upheld.
2. The decision be varied by deleting paragraph (6) and paragraph (7) of the decision and substituting:
 - (6) THAT when a railcar driver takes a week of annual leave in a fortnightly cycle, to accrue four credit hours towards credit days in that fortnightly cycle 42 hours shall be worked in accordance with cl 3.1.2 of the agreement in the other week to make up their standard hours of 80 hours of full-time employment.
 - (7) THAT a railcar driver who works the pattern of work in paragraph (6) is not entitled to be paid two hours of pay at base rates, in addition to the rate of pay specified in cl 4.1 of the agreement, for work in that fortnightly cycle.

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

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2015 WAIRC 00862

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 47 OF 2013 GIVEN ON 21 JANUARY 2015 AND APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 48 OF 2013 GIVEN ON 21 JANUARY 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2015 WAIRC 00862
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
HEARD	:	WEDNESDAY, 10 JUNE 2015; MONDAY 17 AUGUST 2015
DELIVERED	:	FRIDAY, 4 SEPTEMBER 2015
FILE NO.	:	FBA 1 OF 2015
BETWEEN	:	HUGH SUTHERLAND ROGERS Appellant AND J-CORP PTY LTD Respondent - AND -
FILE NO.	:	FBA 2 OF 2015
BETWEEN	:	ANDJELKO BUDIMLISH Appellant AND J-CORP PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction : **Industrial Magistrate's Court**
Coram : **Industrial Magistrate G Cicchini**
Citation : **[2015] WAIRC 00018; (2015) 95 WAIG 267**
File Nos : **M 47 of 2013 and M 48 of 2013**

CatchWords : Industrial Law (WA) - Applications to strike out appeals - Claims for accrued annual leave accrued under *Minimum Conditions of Employment Act 1993* (WA) terms of which became a NAPSA pursuant to *Workplace Relations Act 1996* (Cth) and later a transitional instrument pursuant to *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) - Commission is a court for the purposes of s 78B of the *Judiciary Act 1903* (Cth) - s 79 of the *Judiciary Act* considered - The right to appeal a decision of the Industrial Magistrate in s 84 of the *Industrial Relations Act 1979* (WA) by operation of s 109 *Commonwealth Constitution* inconsistent with s 565 of the *Fair Work Act 2009* (Cth) - Section 565 creates an exclusive right of appeal from the Industrial Magistrate's Court exercising its civil jurisdiction under the *Fair Work Act* - Appeals dismissed for want of jurisdiction

Legislation : *Industrial Relations Act 1979* (WA) pt II, s 11(1), s 12, s 12(1), s 13, s 14, s 14B, s 22, pt II div 2, s 23(1), s 26(1)(b), s 26(3), s 72(1)(b) s 27(1)(o), s 27(1a), s 29(1)(a), s 29(1)(b)(i), s 29(1)(b)(ii), s 31, s 34, s 34(3), s 34(4), s 35, pt II div 2A - div 2D, s 41, s 46, pt II div 2E, s 49, s 49(11), pt II div 3, s 81, s 81CA, s 82A, s 83, s 84, s 84(1), s 84(2), s 84A, s 84A(8), s 90(1), s 92(4)

Minimum Conditions of Employment Act 1993 (WA) s 3(1), s 7(c), s 23, s 24

Minimum Conditions of Employment Regulations 1993 (WA) reg 3, item 1 of sch 1

Workplace Relations Act 1996 (Cth) s 4, s 5, s 6, s 16(1)(a), s 16(1)(b), sch 8, cl 31 of sch 8, sl 34 of sch 8, sl 34(2) of sch 8, sl 34(3) of sch 8, sl 38(3) of sch 8, sl 43(1) of sch 8, s 717, s 718, s 719

Fair Work Act 2009 (Cth) s 12, s 26, s 26(1), s 26(2)(c), s 44(1), s 90, s 90(2), ch 4, ch 4 pt 4, s 539(2), s 540, s 549, s 562, s 565, s 565(1), s 565(1A)

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) sch 3, item 2(1) of sch 3, item 2(2) of sch 3, item 2(5) of sch 3, item 5A of sch 3, item 7 of sch 3, item 6 of sch 4, item 2(1) of sch 16, item 16(1) of sch 16, item 38 of the table to item 16

Judiciary Act 1903 (Cth) s 78B, s 78B(1), s 79, s 79(1)

Commonwealth of Australia Constitution (Cth) s 77(iii) s 109

Corporations Law (Cth) s 471B

Industrial Relations Commission Regulations 2005 (WA) reg 33, reg 40 - reg 44

Acts Interpretation Act 1901 (Cth) s 8 [sic]

Interpretation Act 1984 (WA) s 7

Liquor Act 1912 (Qld)

Commonwealth Electoral (War-time) Act 1917 (Cth)

Forty-four Hours Week Act 1925 (NSW)

Conciliation and Arbitration Act 1904 (Cth)

Result : Appeals dismissed for want of jurisdiction

Representation:

Appellants : Mr P Mullally, as agent

Respondent : Mr R LHooker (of counsel)

Solicitors:

Appellants : Not applicable

Respondent : Squire Patton Boggs

Case(s) referred to in reasons:

Ansett Transport Industries (Operations) Pty Ltd v Wardley [1980] HCA 8; (1980) 142 CLR 237

Assistant Commissioner Condon v Pompano Pty Ltd [2013] HCA 7; (2013) 87 ALJR 458

Australian Liquor Hospitality and Miscellaneous Workers Union WA Branch v Silver Chain Nursing Association (1995) 75 WAIG 1511

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd [2001] HCA 1; (2001) 204 CLR 559

Clyde Engineering Co Ltd v Cowburn [1926] HCA 6; (1926) 37 CLR 466

Forge v Australian Securities and Investments Commission [2006] HCA 44; (2006) 228 CLR 45

Helm v Hansley Holdings Pty Ltd (In Liq) [1999] WASCA 71; (1999) 118 IR 126

Kable v Director of Public Prosecutions (NSW) [1996] HCA 24; (1996) 189 CLR 51

K-Generation Pty Ltd v Liquor Licensing Court [2009] HCA 4; (2009) 237 CLR 501

Kirk v Industrial Court (NSW) [2010] HCA 1; (2010) 239 CLR 531

Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Director General, Department of Education and Training [2010] WAIRC 00089; (2010) 90 WAIG 127

Mathews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 136 IR 56; (2004) 84 WAIG 2152

Momcilovic v The Queen [2011] HCA 34; (2011) 245 CLR 1

Myers v Myers [1969] WAR 19

Network Ten Pty Ltd v TCN Channel Nine [2004] HCA 14; (2004) 218 CLR 273

Northern Territory of Australia v GPAO [1999] HCA 8; (1999) 196 CLR 553

Owen v Menzies [2012] QCA 170; (2012) 265 FLR 392

Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment [2012] HCA 58; (2012) 250 CLR 343

R v The Licensing Court of Brisbane; Ex parte Daniell [1920] HCA 24; (1920) 28 CLR 23

Rainbow Coast Neighbourhood Centre Inc v Wood [2011] WAIRC 00821; (2011) 91 WAIG 1831

Shacam Transport Pty Ltd v Damien Cole Pty Ltd [2013] WAIRC 00872; (2013) 93 WAIG 1628

Sue v Hill [1999] HCA 30; (1999) 199 CLR 462

Case(s) also cited:

Certain Lloyds Underwriters v Cross (2012) 248 CLR 378

Compass Group (Australia) Pty Ltd t/as ESS World Wide Services v Bartram [2006] FCA 1337

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

Reasons for Decision

SMITH AP:

Introduction

1 These appeals are sought to be instituted under s 84(2) of the *Industrial Relations Act 1979* (WA) (the IR Act). Mr Rogers seeks to appeal the decision in M 47 of 2013 and Mr Budimlich seeks to appeal the decision in M 48 of 2013. In each matter the Industrial Magistrate dismissed a claim by each appellant seeking an entitlement to paid annual leave pursuant to s 23 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) during a period of employment with the respondent. The central issue before the Industrial Magistrate in both matters was whether each of the appellants were paid wholly by commission and as such were not employees for the purposes of the MCE Act, the *Workplace Relations Act 1996* (Cth) (WR Act) and the *Fair Work Act 2009* (Cth) (FW Act).

The notices of appeal

2 Each notice of appeal in these matters is the same. The notices of appeal were filed one day out of time on 10 February 2015.

3 At the hearing of this matter, the Full Bench granted leave to each of the appellants to amend their grounds of appeal by substituting ground 1 of the appeal and abandoning ground 2 of the appeal as follows:

GROUND 1

The learned magistrate erred in fact and in law in determining that the appellants were not employees of the respondent as defined in the *Minimum Conditions of Employment Act 1993*

PARTICULARS

- 1.1 It was an error of fact and law in determining that the appellants were paid wholly by commission;
- 1.2 It was an error of fact and law in determining that the appellants' receipt of payments, such as incentives, bonuses and rewards paid to them by the respondent other than commissions did not alter the character of their remuneration by the respondent as being wholly by commission.
- 1.3 It was an error of fact and law in determining the clause in the appellant Rogers' (Budimlich's) written contract for the payment of a holiday allowance did not mean that he was paid otherwise than wholly by commission.
- 1.4 It was an error of fact and law in determining that the provision of a discount on the construction of the appellant Budimlich' s home by the respondent did not alter the character of his remuneration by the respondent as being wholly by commission.

- 4 The orders sought on appeal are as follows:
1. That the appeal be upheld;
 2. That the matter be remitted to the Industrial Magistrate's Court for annual leave entitlements to be determined in accordance with the decision of the Full bench

Background

- 5 It is not in dispute in the proceedings before the Industrial Magistrate that at all material times each appellant was employed by the respondent as a full-time sales consultant pursuant to the terms of a common law contract of employment. The respondent employed Mr Rogers continuously for 19 years from 24 December 1993 to 18 December 2012. Mr Budimlich was employed for 14 years from 19 May 1997 to 2 November 2011.
- 6 The claims to paid annual leave during the period of employment of Mr Rogers and Mr Budimlich can be divided into three periods of time. These are as follows:
- (a) Period 1 - from the commencement of employment of Mr Rogers on 24 December 1993 and Mr Budimlich on 19 May 1997 until 26 March 2006 the claims are made pursuant to the provisions of the MCE Act.
 - (b) Period 2 - any entitlement to accrued and accruing annual leave from 27 March 2006 to 30 June 2009 arose under the WR Act.
 - (c) Period 3 - from 1 July 2009 and on the cessation of the employment of Mr Rogers and Mr Budimlich the claims to accrued and accruing annual leave and a right to be paid annual leave for annual leave not taken is made under the provisions of the FW Act.
- 7 An important point in this matter is the principle that any accrued entitlements to annual leave that the appellants had were preserved, carried forward and only became payable in lieu of taking leave at the point in time when each of the appellants ceased employment.

The respondent's grounds of objection

- 8 On 2 April 2015, the respondent filed notices of grounds of objection to each of the appellants' notices of appeal. The jurisdictional objection raised in both matters is as follows:
- (a) The claim by each appellant concerned an application for accrued annual leave which, each appellant contended, should have been paid out on termination of employment with the respondent pursuant to s 90(2) of the FW Act.
 - (b) In each case, on commencement of employment, the terms and conditions of each appellant were regulated by the MCE Act.
 - (c) On 26 March 2006, amendments were made to the WR Act by virtue of which the MCE Act became a notional agreement preserving a state award (NAPSA) and any accrued entitlements under the MCE Act were thereby preserved.
 - (d) As a consequence, any entitlements the appellants had to annual leave under the MCE Act became enforceable under the WR Act and were no longer enforceable under any legislation of the Western Australian Parliament.
 - (e) Following the enactment of the FW Act, the NAPSA became a transitional instrument and all accrued entitlements to paid annual leave were preserved under the then operative Commonwealth legislation.
 - (f) Accordingly, in each case the claim for paid annual leave on termination was enforceable under, and only under, the FW Act.
 - (g) Section 26 of the FW Act relevantly provides that the FW Act is intended to apply to the exclusion of all state industrial laws (which at all material times included the MCE Act) in circumstances such as each of the appellants' employment with the respondent.
 - (h) The Industrial Magistrate's Court had jurisdiction to determine each of the claims for accrued annual leave, because it is an 'eligible State or Territory court' within the meaning of s 12 of the FW Act for the purposes of ch 4 of the FW Act.
 - (i) Section 565 of the FW Act materially provides that appeals from decisions of the Industrial Magistrate's Court (in its capacity as an 'eligible State or Territory court') lie, and lie exclusively, to the Federal Court.
 - (j) It necessarily follows that each purported appeal is not competent and the Commission is, relevantly, without jurisdiction.

Section 78B of the *Judiciary Act 1903* (Cth)

- 9 The applications to dismiss the appeals were first listed to be heard on 10 June 2015. Prior to the hearing, enquiries were made of the respondent's solicitors on behalf of the Full Bench whether notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) had been given to the Attorneys-General of the Commonwealth and of the States. Section 78B provides:
- (1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.
 - (2) For the purposes of subsection (1), a court in which a cause referred to in that subsection is pending:
 - (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
 - (b) may direct a party to give notice in accordance with that subsection; and

- (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.
- (3) For the purposes of subsection (1), a notice in respect of a cause:
- (a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and
- (b) is not required to be given to the Attorney-General of the Commonwealth if he or she or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or she or the State is a party to the cause.
- (4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.
- (5) Nothing in subsection (1) prevents a court from proceeding without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.
- 10 In response to the enquiry, the respondent's solicitors advised that there was a view that the procedure in s 78B was not invoked as:
- (a) the proceedings do not involve any 'matter arising under the Commonwealth Constitution or its interpretation' in any substance; further or alternatively;
- (b) notwithstanding the text of s 12(1) of the IR Act, the Commission is not necessarily a 'court' within the meaning of the *Judiciary Act*.
- 11 After hearing submissions about this issue on 10 June 2015, the Full Bench advised the parties that the members were of the opinion that the matters raised by the respondent in its notice of objection required the service of the notices and that we were of the opinion that the Commission is a 'court' within the meaning of s 78B of the *Judiciary Act*.
- 12 When regard was had to the submissions made by the parties, in particular the submissions made on behalf of the respondent, it was clear that the proceedings do involve a matter arising under the Commonwealth of Australia Constitution (the Constitution), in particular the application of s 109 of the Constitution.
- 13 Section 78B notices subsequently issued on 15 June 2015 to each Attorney-General of the States and the Commonwealth. Prior to the hearing, all Attorneys-General with the exception of the Attorney-General for New South Wales advised that they did not intend to intervene in the appeals. Upon resumption of the appeals on 17 August 2015, the members of the Full Bench were of the opinion that the appeals could proceed as it had discharged its duty under s 78B(1) of the *Judiciary Act* not to proceed with the hearing of the appeals until reasonable time had elapsed since the giving of notice.
- The Commission is a 'court' within the meaning of s 78B of the *Judiciary Act* 1903 (Cth)**
- 14 Pursuant to s 12(1) of the IR Act, the Commission is a court of record and has a judicial seal. It exercises judicial power in some matters. For example it exercises judicial power in industrial matters that are contractual benefit claims pursuant to s 29(1)(b)(ii) of the IR Act, arbitral power in other matters which cannot be classified as 'judicial' such as the making of awards and it exercises some administrative functions such as the registration of agreements under s 41 of the IR Act.
- 15 Authorities of the High Court have made it clear that the test for determining whether a state court or tribunal is a court of a state does not turn on whether it carries out administrative functions, nor is any distinction made about a concept of a court of a state being a 'court of law'.
- 16 In *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment* [2012] HCA 58; (2012) 250 CLR 343 [14] (French CJ) and [57] (Hayne, Crennan, Kiefel and Bell JJ) observed that it is established that state legislatures are not constrained constitutionally by the separation of powers doctrine. State legislatures can create a body that combines judicial and non-judicial functions. Thus, the institutional integrity of a state court is not affected by its members applying the law when performing non-judicial functions: see *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51, 78 - 80, 92 - 94, 109, 118; *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531 [69].
- 17 The test when considering whether a tribunal such as the Commission can be characterised as a court of a state, is whether it exercises its powers and functions in a judicial manner.
- 18 In *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 87 ALJR 458 French CJ set out the defining characteristics of a court. His Honour's observations were made in the context of whether federal jurisdiction can be conferred on a court of a state. His Honour said federal jurisdiction cannot be conferred where the state court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which mark a court apart from other decision-making bodies [67]. He then went on to say the defining characteristics of a court include:
- the reality and appearance of decisional independence and impartiality (*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at 343 [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ, 373 [116] per Kirby J; [2000] HCA 63; *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31; (2004) 218 CLR 146 at 152 [3] per Gleeson CJ, 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2004] HCA 31; *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 77 [66] per Gummow, Hayne and Crennan JJ; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 at 553 [10] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4);
 - the application of procedural fairness;
 - adherence as a general rule to the open court principle (*Dickason v Dickason* (1913) 17 CLR 50; [1913] HCA 77; *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; [1976] HCA 23; *Scott v Scott* [1913] AC 417);

- the provision of reasons for the courts' decisions (*Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 at 213 - 215 [54] - [56] per French CJ and Kiefel J and authorities there cited).

Those characteristics are not exhaustive. As Gummow, Hayne and Crennan JJ said in *Forge v Australian Securities and Investments Commission* ([2006] HCA 44; (2006) 228 CLR 45 at 76 [64]:

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so.'

19 Chief Justice French then said [68]:

[T]he defining characteristics of courts are not and cannot be absolutes. Decisional independence operates within the framework of the rule of law and not outside it (*Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* [2012] HCA 58; (2012) 87 ALJR 162; 293 ALR 450). Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters.

20 Justice Gageler in *Assistant Commissioner Condon v Pompano Pty Ltd* also made a similar point. He said [182]:

That structural expedient can function only if State and Territory courts are able to act 'judicially'. To be able to act judicially, a court must have institutional integrity: it must 'be and appear to be an independent and impartial tribunal' (*Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at 81 [78]; [2006] HCA 44; *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31; (2004) 218 CLR 146 at 163 [29]; [2004] HCA 31).

21 Thus, it appears the clear characteristics of a court and thus performing judicial functions are:

- (a) impartiality and independence in decision-making;
- (b) a requirement to provide procedural fairness;
- (c) general principles of open hearings;
- (d) the provision of reasons for decision.

22 In *Helm v Hansley Holdings Pty Ltd (In Liq)* [1999] WASCA 71; (1999) 118 IR 126 Kennedy J (with whom Anderson and Parker JJ agreed) found that the Commission was a court within the meaning of s 471B of the *Corporations Law* (Cth). In his reasons for judgment Kennedy J pointed out that by s 12 of the IR Act, it is expressly provided that the Commission is a 'court of record'. He then went on to observe that it acts judicially. In particular, he said [9]:

Furthermore, in determining whether an employee has been unfairly dismissed from his employment, and in considering whether, pursuant to s 23A(1)(ba), it should order the employer to pay any, and what, amount of compensation to the claimant for loss or injury caused by the dismissal, the Commission is acting judicially.

23 In *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501, French CJ at [85] found after considering the powers and functions of the Licensing Court of South Australia, and gave particular weight to its designation as a court of record by the state legislature, and found that it could be regarded as a 'court of a State' for the purposes of receiving federal jurisdiction under s 77(iii) of the Constitution. Justice Kirby made a similar point and found that such a statement in a statutory provision warranted the High Court taking the state Parliament's description at face value: [219].

24 It is clear that each member of the Commission, including the President, must act impartially and act with independence in their decision-making. This is reflected in the oath that each member of the Commission is required to take. Pursuant to s 11(1) of the IR Act, each member of the Commission is required to make an oath before a judge of the Supreme Court that he or she will faithfully and impartially perform the duties of his office and that he or she will not, except in the discharge of those duties, disclose to any person any evidence or other matter brought before the Commission. Further, under s 13 of the IR Act, each person who is a member of the Commission has, in the performance of his or her functions and duties as such a member, the same protection and immunity as a Supreme Court judge. Pursuant to s 14 of the IR Act, the President and each of the Commissioners have the jurisdiction expressly conferred on each in accordance with the IR Act. In these circumstances, the President and each of the Commissioners are required to exercise those powers in accordance with the provisions of the IR Act. The only directions that can be given by a Minister of the Crown are under s 14B of the IR Act which arises where there is an arrangement made between the Chief Commissioner and the President of Fair Work Australia to perform powers and functions in respect of dual appointments to carry out duties of a secondary office as a member of the Fair Work Australia.

25 Members of the Commission, including the President, have security of tenure and cannot be required to retire until the age of 65 years pursuant to s 10 of the IR Act. Members of the Commission, including the President, are appointed by the Governor and pursuant to s 22 of the IR Act each member of the Commission shall hold their office during good behaviour, subject to a power of removal by the Governor upon the address of both Houses of Parliament. Thus, it is quite clear that each member of the Commission must act independently and is not subject to the direction and control by any entity, including any Minister, which are central features of a judicial process.

26 Whilst only the President of the Commission, including the Acting President, is required to hold legal qualifications and other members of the Commission are not, in *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 it was observed that such a factor was not significant: see also *Owen v Menzies* [2012] QCA 170; (2012) 265 FLR 392 in which de Jersey CJ [15(6)] (with whom Muir JA agreed [101]).

27 The principal jurisdiction of the Commission is provided for in s 23(1) of the IR Act which provides that subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter. The principal industrial matters the Commission deals with are:

- (a) industrial matters referred by employers and industrial organisations under s 29(1)(a) of the IR Act which range in matters in dispute between employers and employees including disputes referred to the Commission to make awards which requires a determination of future rights of employees;
 - (b) industrial matters referred under s 29(1)(b)(i) of the IR Act, by an employee that he or she has been harshly, oppressively or unfairly dismissed from his or her employment;
 - (c) industrial matters which constitute a claim by an employee under s 29(1)(b)(ii) of the IR Act that he or she has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he or she is entitled under his or her contract of employment;
 - (d) applications for a declaration made under s 46 of the IR Act of the true interpretation of an award (including a general order and an industrial agreement).
- 28 Under s 29(1)(b)(i) of the IR Act each member of the Commission called upon to hear and determine claims is required to exercise discretion as to whether they are of the opinion (having regard to the principles of law that apply to unfair dismissals), whether the employee has been unfairly dismissed. However, in determining a claim under s 29(1)(b)(ii) of the IR Act, the Commission does not have a discretion to determine whether a contractual provision is fair or not. The Commission must apply common law contractual principles and consider the remedies in the law of contract: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 136 IR 56; (2004) 84 WAIG 2152 [24] (Steytler J). If a claim is made out the Commission may award compensation in the nature of damages for the failure to provide the contractual benefit. Many of these matters involve the determination and consideration of principles that apply to commercial contracts (for example *Shacam Transport Pty Ltd v Damien Cole Pty Ltd* [2013] WAIRC 00872; (2013) 93 WAIG 1628).
- 29 Whilst the Commission, pursuant to s 26(1)(b) of the IR Act, is not bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just, such a provision is not 'inimical to the exercise of judicial power' as the provision does not exonerate the Commission from the application of substantive rules of law and is consistent with, and requires the application of, the rules of procedural fairness: *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 [42]; applied in *K-Generation Pty Ltd* by Gummow, Hayne, Heydon, Crennan and Kiefel JJ [125].
- 30 In any event, through its statutory powers and duties under the IR Act, the Commission adopts the practices and procedures of a conventional court. This is reflected in s 27(1)(b) and reg 40 - reg 44 of the *Industrial Relations Commission Regulations 2005* (WA) whereby in proceedings before the Commission, the Commission takes evidence on oath. It also has power to make interlocutory orders for costs of witness expenses, delivery of particulars, discovery and inspection of documents (see s 27(1)(o)) of the IR Act).
- 31 Parties to proceedings are entitled to be represented pursuant to s 31 of the IR Act. The procedure in a hearing before the Commission is provided for in reg 33 of the *Industrial Relations Commission Regulations*. This procedure applies to the Commission, except before the President, on an appeal to be heard by the Full Bench or before a Commission in Court Session. It is notable that the procedure is the same as the procedure which usually applies to courts such as the District Court and Supreme Court in civil matters. The procedure provides for parties to make opening statements, call witnesses, cross-examine, re-examine and provision is made for closing submissions and rights of reply.
- 32 The rules of evidence are often applied by Commissioners because of the nature of the matter before them. In many cases a failure to do so may mean that the Commissioner falls into error and if so their decision could be set aside if appealed: see for example the observations of the Full Bench in *Australian Liquor Hospitality and Miscellaneous Workers Union WA Branch v Silver Chain Nursing Association* (1995) 75 WAIG 1511, 1516.
- 33 The Commission is bound by the doctrine of precedent: see the observations of Ritter AP in *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Director General, Department of Education and Training* [2010] WAIRC 00089; (2010) 90 WAIG 127 [10] - [20].
- 34 In some matters, the Commission is bound to strictly apply the rules of evidence. This is when the President and two members of the Commission sit to hear an appeal against a decision made by the Industrial Magistrate under s 84 of the IR Act. As the Industrial Magistrate is bound by the rules of evidence, on an appeal each member of the Full Bench must determine the appeal by strictly applying all relevant rules of evidence.
- 35 The Full Bench itself also has powers to enforce contraventions of the IR Act and enforcement of certain orders made by the Commission pursuant to s 84A of the IR Act. If contravention or failure to comply is proved the Full Bench is empowered to issue a number of orders, including the imposition of a fine. Also, when hearing such a matter pursuant to s 84A(8) of the IR Act the standard to be applied by the Full Bench is to be the standard observed in civil proceedings.
- 36 Except for appeals from a constituent authority of a Public Service Appeal Board, all decisions made by the Commission and its constituent authorities can be appealed to the Full Bench by operation of s 49 of the IR Act. The President also has the power under s 49(11) of the IR Act to hear and determine applications for a stay of a decision pending the hearing and determination of an appeal.
- 37 It is only the President either presiding on the Full Bench or sitting alone who has the power to punish for contempt. Pursuant to s 92(4) of the IR Act, the President has the same power to punish for contempt of its power and authority as has the Supreme Court in respect of contempts of court.
- 38 The Commission is obliged to comply with the rules of procedural fairness.
- 39 The Commission's duty to provide procedural fairness is also expressly reflected in s 26(3) of the IR Act which provides as follows:
- Where the Commission, in deciding any matter before it proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.
- 40 When hearing applications for adjournments it is required to consider the same principles which apply to other courts in Western Australia. Those are the principles set out in the decision of the Supreme Court in *Myers v Myers* [1969] WAR 19, 21

which require the Commission to consider the principle that where a refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party: *Rainbow Coast Neighbourhood Centre Inc v Wood* [2011] WAIRC 00821; (2011) 91 WAIG 1831.

41 The Commission conducts its hearings in public. It is required to do so expressly pursuant to s 27(1a) of the IR Act which provides as follows:

Except as otherwise provided in this Act, the Commission shall, in relation to any matter before it, conduct its proceedings in public unless the Commission, at any stage of the proceedings, is of the opinion that the objects of the Act will be better served by conducting the proceedings in private.

42 Pursuant to s 34 of the IR Act, all decisions of the Commission have to be signed and delivered by the Commissioner constituting the Commission. As required by s 35 of the IR Act, each decision is to be drawn up in the form of minutes and reasons for decision must be published at the same time. This provision has been interpreted to the effect that written reasons for decision must be delivered in all matters.

43 There are rights of appeal to the Industrial Appeal Court from any decision of the President, the Full Bench or the Commission in Court Session pursuant to s 90(1) of the IR Act on certain grounds.

44 Decisions of the Commission cannot be removed to any court by certiorari or otherwise on any ground relating to jurisdiction or any other ground pursuant to s 34(3) of the IR Act. Also, pursuant to s 34(4) of the IR Act, no award, order, declaration, finding or proceeding before the President, the Full Bench or the Commission can be challenged, appealed against, reviewed, quashed, or called into question by any court on any ground relating to jurisdiction or any other ground.

45 When all of these matters are considered it is clear that the Commission is a court of a state, as it has institutional integrity, it is an independent and impartial tribunal, conducts its hearing in public and has all of the defining characteristics of a court.

Legislative framework

(a) *Minimum Conditions of Employment Act 1993 (WA)*

46 Under s 23 of the MCE Act an employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required to ordinarily work in a four week period during that year, up to 152 hours. The entitlement under s 23 accrues pro rata on a weekly basis and is cumulative.

47 The meaning of 'employee' found in s 3(1) of the MCE Act excludes a person who belongs to a class of persons prescribed by the *Minimum Conditions of Employment Regulations 1993 (WA)* (MCE Regulations) as persons not to be treated as employees for the purposes of the MCE Act. Regulation 3 and item 1 of schedule 1 of the MCE Regulations prescribe persons whose services are remunerated wholly by commission or percentage reward are persons who are not employees for the purposes of the MCE Act.

48 Pursuant to s 24 of the MCE Act an employee is paid for a period of annual leave at the time payment is made in the normal course of the employment. If, however, an employee lawfully leaves his or her employment before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for all of that annual leave. The only exception is where the employee is dismissed for misconduct, the employee is not entitled to be paid for any untaken leave that relates to a year of service that was completed after the misconduct occurred.

(b) *Workplace Relations Act 1996 (Cth)*

49 It is not in dispute that when the WR Act commenced on 27 March 2006, the terms of the MCE Act became, under sch 8 of the WR Act, a NAPSA. It is not in dispute the finding made by the Industrial Magistrate that Mr Rogers' and Mr Budimlich's conditions of employment had been governed by the MCE Act and when the NAPSA came into operation, Mr Rogers, Mr Budimlich and the respondent became bound by the NAPSA: [5], AB 28. It is also not in dispute that the Industrial Magistrate properly found that it was a term of the NAPSA that accrued leave under the MCE Act was preserved under the WR Act: [5], AB 28.

50 Pursuant to s 16(1)(a) of the WR Act, the WR Act applied to the exclusion of a state or territory industrial law so far as they would otherwise apply in relation to an employee or employer. Under s 4, a state or territory industrial law was defined to mean the IR Act and an Act of a state providing for the determination of terms and conditions of employment. Clearly the MCE Act is an Act of a state that provides for the determination of terms and conditions of employment, and thus when the WR Act came into effect the MCE Act ceased to have effect insofar as it extended to employees and employers covered by the provisions of the WR Act, which, pursuant to s 5 and s 6 of the WR Act, were employees employed by constitutional corporations. It is not in dispute in these proceedings that the respondent can be characterised as a constitutional corporation.

51 The entitlement to paid annual leave which Mr Rogers and Mr Budimlich claim they are entitled to became a NAPSA pursuant to cl 31 of sch 8 of the WR Act. Clause 31 provided that if, immediately before the reform commencement, (which was 26 March 2006), the terms and conditions of employment of one or more employees in a single business were determined in whole or in part under a state law, a NAPSA was taken to come into operation on the reform commencement in respect of the business or that part of the business. Pursuant to cl 34 of sch 8, it became a term of the NAPSA that accrued leave under the MCE Act was preserved. Clause 34(2) of sch 8 provided that if, immediately before the reform commencement, a provision of a state industrial law would have determined, in whole or in part, a preserved entitlement of a person employed in the business who was not bound by or not a party to a state employment agreement, or whose employment was not subject to such an agreement, then to that extent, that provision, as in force at that time, was taken to be a term of the notional agreement. A preserved entitlement was defined under cl 34(3) of sch 8 to mean an entitlement to annual leave.

52 Under cl 38(3) of sch 8 of the WR Act, none of the terms and conditions of employment included in the NAPSA was enforceable under the law of a state or territory. The WR Act did, however, provide for enforcement of the NAPSA. Pursuant to cl 43(1) of sch 8, a NAPSA could be enforced as if it were a collective agreement.

53 Pursuant to s 718 of the WR Act, a term of a collective agreement could be enforced by an employee who was bound by the agreement and pursuant to s 719 of the WR Act an eligible court could impose a penalty if the person was bound by an

applicable provision and the person breached the provision. Under s 717, 'applicable provision' was defined to mean a collective agreement and an 'eligible court' was defined to mean:

- (a) the Court; or
- (b) the Federal Magistrates Court; or
- (c) a District, County or Local Court; or
- (d) a magistrate's court; or
- (e) the Industrial Relations Court of South Australia; or
- (f) any other State or Territory court that is prescribed by the regulations.

(c) **Fair Work Act 2009 (Cth)**

- 54 On the coming into operation of the FW Act on 1 July 2009, pursuant to item 2(2) of sch 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (FWTP Act) a NAPSA became a WR Act instrument. Pursuant to item 2(1) of sch 3 of the FWTP Act each WR Act instrument became a transitional instrument and continues in existence in accordance with sch 3 from when it becomes a transitional instrument, despite the WR Act repeal. Pursuant to item 5A of sch 3 of the FWTP Act, the same state and territory interaction rules, that applied in relation to the WR Act immediately before the WR Act was repealed, continue to apply in relation to instruments of that kind that become transitional instruments.
- 55 Pursuant to item 7 of sch 3 of the FWTP Act, there is no loss of accrued rights or liabilities when a transitional instrument terminates or ceases to apply to a person. Although the Industrial Magistrate in his reasons for decision relied upon s 8 [sic] of the *Acts Interpretation Act 1901* (Cth) for the principle that when the FW Act came into operation any accrued rights were not affected by the repeal of the WR Act, it is not necessary to rely upon the *Acts Interpretation Act* as the provisions referred to in sch 3 of the FWTP Act expressly preserved any accrued rights that had accrued under the WR Act.
- 56 Under item 6 of sch 4 of the FWTP Act, the provisions of the National Employment Standards relating to the taking of annual leave (including rates of pay while taking leave) or cashing-out that kind of leave, apply, as a minimum standard, to the accrued leave as if it had accrued under the National Employment Standards. This provision applies to leave accrued under the WR Act and a transitional instrument.
- 57 Contravention of the National Employment Standards is prohibited under s 44(1) of the FW Act. Further, under this provision contravention of the National Employment Standards is a civil remedy provision. Under s 540 of the FW Act, an employee can make an application in relation to a contravention of a civil remedy provision.
- 58 Pursuant to item 2(5) of sch 3 of the FWTP Act, transitional instruments are classified in a number of ways. In particular, NAPSAs are classified as award-based transitional instruments. Under item 2(1) of sch 16 of the FWTP Act, a person is prohibited from contravening a term of an award-based transitional instrument that applies to a person and that this sub-item is a civil remedy provision. By operation of item 16(1) of sch 16 of the FWTP Act and item 38 of the table to item 16, the Federal Court, the Federal Magistrates Court and an eligible state or territory court has jurisdiction under s 539(2) of the FW Act to determine any proceedings in relation to a contravention of a term of an award-based transitional instrument. An eligible state or territory court is defined in s 12 of the FW Act to mean one of the following courts:
- (a) a District, County or Local Court;
 - (b) a magistrates court;
 - (c) the Industrial Relations Court of South Australia;
 - (ca) the Industrial Court of New South Wales;
 - (d) any other State or Territory court that is prescribed by the regulations.
- 59 Thus, the Industrial Magistrate as a magistrate's court had jurisdiction to hear and determine the claims for accrued annual leave made by Mr Rogers and Mr Budimlich. In particular, the Industrial Magistrate had the jurisdiction to deal with and determine the claims made for annual leave which was said to have accrued pursuant to the provisions of the MCE Act.

The appellants' submissions

- 60 Each of the appellants concede that the provisions of s 565 and s 12 of the FW Act render any appeal from the findings made by the Industrial Magistrate with respect to any claim for an entitlement to accrued annual leave or accruing annual leave under the WR Act and the FW Act are beyond the jurisdiction of the Full Bench.
- 61 Each of the appellants point out that the respondent submits that s 26 of the FW Act is intended to exclude the MCE Act from operation. Yet the appellants say that that argument only can be upheld for each period of employment of each of the appellants subsequent to 26 March 2006.
- 62 The appellants say when considering the effect of s 26 of the FW Act the Full Bench should have regard to the purposive approach to statutory interpretation which insists that the context be considered in the first instance and not merely at some later stage when ambiguity may be thought to arise and 'context' is to be construed in its widest sense to include such things as the existing state of the law and the mischief which by legitimate means the Parliament intended to change the law: *Network Ten Pty Ltd v TCN Channel Nine* [2004] HCA 14; (2004) 218 CLR 273.
- 63 In particular, the appellants say when the objects and their context of the FW Act are considered it follows that the appellants' rights under the MCE Act are preserved. This they say was so when the WR Act provided for the MCE Act to be a NAPSA and through the operation of the protected transitional instruments as defined in the FW Act.
- 64 The appellants contend that the 'decisions' made by the Industrial Magistrate in these matters are reviewable under s 84(1) of the IR Act as s 84 confers jurisdiction on the Full Bench to hear and determine an appeal in the manner prescribed from a 'decision' of the Industrial Magistrate's Court and a 'decision' is defined in s 84(1) to include an 'order, order of dismissal, and any other determination of an industrial magistrate's court'. Thus, it is said the claims for unpaid annual leave that arise under the MCE Act can be characterised as 'any other determination of an industrial magistrate's court' or 'other' determination under s 84(1) of the IR Act.

- 65 The appellants' claims in these appeals are now confined to a consideration only of the entitlements that arise in the first period that the appellants were employed by the respondent. The first period is the period of time that Mr Rogers and Mr Budimlich were employed prior to the WR Act coming into force on 27 March 2006 and thus Mr Rogers' claim for accrued annual leave is from 24 December 1993 until 26 March 2006 and Mr Budimlich's claim is from 19 May 1997 until 26 March 2006. The appellants claim that the Full Bench has jurisdiction to consider this part of the claim unrestricted by the provisions of the WR Act and the FW Act because a consideration of the Industrial Magistrate's findings reveals that the Industrial Magistrate dealt with the MCE Act in that period as a separate portion of the claims.
- 66 The Industrial Magistrate had regard to previous decisions of the Full Bench in construing the provisions of the MCE Act and found at [95] of his reasons for decision (AB 40) that Mr Rogers and Mr Budimlich were not 'employees' for the purposes of the MCE Act and thus they say it follows that they had failed to establish an entitlement to annual leave for period 1. Thus, they had no entitlement to accrued annual leave that could be carried forward and preserved as a NAPSA under the WR Act and as a transitional instrument under the FW Act. The appellants point out that the FW Act and the WR Act do not act retrospectively and contend as a matter of jurisprudence the MCE Act provisions remain unfettered with respect to the period prior to 27 March 2006. For these reasons, they say it is entirely competent for the Full Bench to entertain these appeals as the definition of a 'decision' in s 84(1) of the IR Act is broad enough to encompass these appeals.
- 67 The appellants in effect seek declaratory relief which encompasses an assessment whether the Industrial Magistrate's interpretation of the provisions of the MCE Act are in error.
- 68 The appellants say that the decision in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559, which is relied upon by the respondent, in fact supports the appellants' arguments. In that matter a distinction between the jurisdiction of a court to hear and determine a matter and the power to do so was made. Whilst the appellants concede that the power to enforce accrued entitlements of annual leave under the MCE Act is a matter that can be raised in an application under s 90 of the FW Act only, the appellants say that when the jurisdiction of the Full Bench to review the matter of state law (the provisions of the MCE Act) is divided from the power of enforcement that arises under s 90 of the FW Act, the state law can be left intact enabling a review by the Full Bench of the jurisdiction created by the state law.
- 69 The appellants say that s 90 of the FW Act can be regarded separately as a power to recover from the matter of jurisdiction of the Full Bench to decide the matter arising under the MCE Act. In putting this argument the appellants also rely upon s 79(1) of the *Judiciary Act*. Section 79 states:
- (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.
 - (2) A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.
 - (3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:
 - (a) limiting the period for bringing the suit to recover the amount;
 - (b) requiring prior notice to be given to the person against whom the suit is brought;
 - (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.
 - (4) For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:
 - (a) an amount paid as the tax;
 - (b) an amount of penalty for failure to pay the tax on time;
 - (c) an amount of penalty for failure to pay enough of the tax;
 - (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.
- 70 The appellants argue that s 79 has application because it preserves the application of the state law; namely the MCE Act and s 84 of the IR Act. In particular, they rely upon the observations of McHugh J at [141] in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* in which his Honour stated:
- [C]ourts exercising federal jurisdiction should operate on the hypothesis that s 79 will apply the substance of any relevant State law in so far as it can be applied. The efficacy of federal jurisdiction would be seriously impaired if State statutes were held to be inapplicable in federal jurisdiction by reason of their literal terms or verbal distinctions and without reference to their substance. In *Railway Co v Whitton's Administrator* ((1871) 13 Wallace 270 at 286 [80 US 270 at 286]), decided thirty years before our Constitution was enacted, the Supreme Court of the United States declared:
- 'Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.'
- Subject to the proviso that the nature of some State and Territory statutes may make them inapplicable to proceedings in federal jurisdiction, that statement of the Supreme Court is a sound guide as to the effect of s 79 of the *Judiciary Act*.
- 71 For these reasons, the appellants put an argument that s 26 of the FW Act does not oust the operation of the jurisdiction of the Full Bench to determine whether the Industrial Magistrate erred in his construction of the provisions of the MCE Act. In particular, they say that whilst it is true that the claims for payment for unpaid annual leave are only enforceable under s 90 of the FW Act, the decision of the learned Industrial Magistrate in determining that the appellants were not 'employees' for the purposes of the MCE Act meant that for period 1 no entitlement to paid annual leave arose. Thus, they say it follows that there

was no entitlement to enforce anything under s 90 of the FW Act in respect of period 1 and it is this entitlement to which ground 1 of the appeals properly particularised goes.

- 72 In essence, the appellants say that the subject matter of their appeals is the proper interpretation of the provisions of the MCE Act which is not a matter arising under s 90 of the FW Act.

The respondent's submissions

- 73 The respondent points out that s 26 of the FW Act expresses the intention that the provisions of the FW Act are to apply to the exclusion of all state industrial laws which at all material times include the MCE Act. It says that the Industrial Magistrate's Court had jurisdiction to determine the claims made by the appellants because it is an 'eligible State or Territory court' within the meaning of s 12 of the FW Act for the purposes of ch 4, pt 4 of the FW Act. The FW Act as an enactment of the Commonwealth Parliament confers federal jurisdiction on a state court, which is the sole source of that jurisdiction.
- 74 The respondent points out that although the IR Act enacts the Industrial Magistrate's Court in s 81 and confers upon it with a variety of different kinds of jurisdiction, it is necessarily state jurisdiction not federal jurisdiction that the IR Act is capable of conferring and on its own terms does confer.
- 75 The respondent makes a submission that once a 'matter' within the meaning of ch III of the Constitution can be said to 'arise under' a Commonwealth statute, the entirety of the matter is then derived from federal legislation. In other words, the whole controversy can be said to be 'federal': *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [7] (Gleeson CJ, Gaudron and Gummow JJ).
- 76 The respondent also says from when federal jurisdiction has been attracted to a court (as was the case here in the hearing and determination of the claims at first instance), then from that point:
- (a) the jurisdiction so attracted throughout the case will remain federal (unless there happens to be a completely disparate claim constituting in substance a separate matter, which plainly is not the case here); and
 - (b) equally a court determining such a matter in federal jurisdiction is not capable of also, or instead, exercising state jurisdiction; there can be no legitimate concept of a 'concurrent' exercise of both federal and state jurisdiction: Justice James Allsop, *Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002* (2003) 22 Australian Bar Review 29, particularly at 41 - 42.
- 77 Further, the respondent says that when the provisions of the IR Act and, in particular, its scheme and forms of original jurisdiction of the Commission are considered, s 84 of the IR Act cannot be construed in any way to provide an alternative source of appellate jurisdiction from a matter that arises under the FW Act. In particular, the respondent says:
- (a) Part II of the IR Act confers various forms of original jurisdiction on the Commission, generally in div 2, and for more specific purposes in each of div 2A to div 2D. Division 3 confers particular original jurisdiction on the Commission to make general orders. Section 84A confers a particular kind of original jurisdiction upon a Full Bench of the Commission to enforce certain provisions of the IR Act and orders, directions and the like of the Commission.
 - (b) Division 2E of the IR Act, which is confined to s 49, confers appellate jurisdiction on the Commission, empowering a Full Bench to hear and determine appeals from decisions of the Commission made under the IR Act by a Commissioner. This provision is inapplicable to the present matter beyond comprising one part of the overall statutory context in which the material provisions of the FW Act conferring appellate jurisdiction on the Federal Court are to be construed and applied.
 - (c) Section 84 of the IR Act confers appellate jurisdiction upon a Full Bench of the Commission concerning 'decisions' (as defined, in terms, by s 84(1) of the IR Act) of an Industrial Magistrate's Court. This provision does not provide support for a contention that the present appeals are competently brought under this provision. The flaws in the appellants' arguments are:
 - (i) the relevant appellate jurisdiction is that conferred by s 565 of the FW Act, which is unambiguously conferred in terms which provide for it to be exclusive of any other court;
 - (ii) neither the IR Act nor any other legislation of the Western Australian Parliament purports to confer any relevant jurisdiction to determine the claims in question which are confined to legislation of the Commonwealth Parliament (namely either or both of the WR Act and the FW Act);
 - (iii) the expression 'any decision' in s 84(2) of the IR Act, read with s 84(1), must be read so as to arrive at the correct legal meaning, which is not a technical literal meaning, but reflects that the decisions which are under challenge in these appeals did not derive from any conferral of original jurisdiction by the IR Act;
 - (iv) the unambiguous meaning of s 26 of the FW Act (applied, to the extent necessary, against the background of s 109 of the Constitution) puts the matter beyond any shadow of doubt. To construe s 84 of the IR Act as in any way providing an alternative source of appellate jurisdiction in the circumstances of this case would conflict with the operation of s 26 of the FW Act and thus the expressly manifested intent of the Commonwealth Parliament.
- 78 The respondent says that the appellants' arguments (even as restricted as it is proposed now in these appeals) are artificially unworkable and is impermissible in light of the clear manifestation of the intent of the federal laws of the Commonwealth. It says whether one analyses the appellants' arguments along the pathway of the statutory text of the relevant provisions of the state and federal law and the operation of s 109 of the Constitution, or construes the provisions of the federal jurisdiction and the state laws, the result is the same, the Full Bench has no jurisdiction to hear and determine these appeals.
- 79 The respondent says that when regard is had to s 7 of the *Interpretation Act 1984* (WA) which provides that every written law is to be construed subject to the limits of the state and not to exceed that power, the language of s 84 of the IR Act, which confers jurisdiction on the Full Bench to hear appeals against decisions of the Industrial Magistrate's Court, must be read down so it operates in a way that is compatible with the limits imposed on the state power by the relevant legislative provisions of the Commonwealth.

- 80 The argument put on behalf of the appellants that there is a dichotomy between jurisdiction and power does not assist the appellants in these matters as such a dichotomy has no consequence in this case.
- 81 In essence, the respondent says that the jurisdiction conferred upon the Industrial Magistrate's Court to hear and determine whether the appellants had an accrued right to annual leave is conferred solely by the provisions of the FW Act and previously by the WR Act and that the power for enforcement of any right to accrued annual leave relies solely upon a federal law, namely s 90 of the FW Act. Thus, the respondent says that the matters are 'federalised' and the Industrial Magistrate's Court at all material times exercised only federal jurisdiction.
- 82 The respondent points out that the appellants importantly concede that the power to enforce any accrued rights to annual leave arises solely in s 90 of the FW Act and thus there is nothing left for the state law to operate.
- 83 In relation to the 'declaratory relief' the appellants seek against the findings of fact and law made by the Industrial Magistrate, as set out in their grounds of appeal, cannot be granted by the Full Bench, as it is not possible to split any findings of declarations of the law from the relief that can only be granted by and within the exclusive jurisdiction of the Federal Court.
- 84 The respondent also argues that s 79 of the *Judiciary Act* does not assist the appellants. The effect of s 79 is to pick up and apply state law with respect to procedure, evidence and ancillary matters with respect to rights and obligations. In these particular matters the work that s 79 of the *Judiciary Act* has is that the procedures for hearing and determining the applications by the Industrial Magistrate's Court is to be found in the IR Act and the *Evidence Act 1906* (WA). In any event, it says the construction put on behalf of the appellants of s 79 is inaccurate. Section 79 of the *Judiciary Act* can only have effect where the subject matter of the state law has not been otherwise provided for by Commonwealth legislation.
- 85 For these reasons, the respondent says each of the appeals should be struck out as incompetent.

Does the Full Bench have jurisdiction to determine the appeals?

- 86 Section 7(c) of the MCE Act provides:

A minimum condition of employment may be enforced —

- (c) where the condition is implied in a contract of employment, under section 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.

- 87 It is notable that if the appellants made a claim for accrued annual leave solely pursuant to the provisions of s 7(c) the MCE Act and under s 83 of the IR Act and not s 90 of the FW Act and that the entitlements claimed are only in respect of leave that accrued prior to the coming into operation of the WR Act on 26 March 2006, the claims would be out of time as such claims must be instituted within six years of the date when the cause of action arose: s 7(c) of the MCE Act and s 82A of the IR Act. Section 82A of the IR Act provides:

An application under section 77, 83, 83B, 83E or 84A shall be made within 6 years from the time of the alleged contravention or failure to comply.

- 88 The provisions of the FW Act and the FWTP Act confer jurisdiction on the Industrial Magistrate's Court to determine the claims made by Mr Rogers and Mr Budimlich. Turning to the scheme provided for in the FW Act for appeals from a decision of an eligible state or territory court, in respect of the claims for accrued annual leave that are said to be payable on termination of employment of the appellants, the right to claim payment (if so established) can only arise under a transitional instrument. In these circumstances, it is clearly apparent that the Full Bench of this Commission has no jurisdiction to hear and determine the appeals as the entirety of the claims, including period 1, only arise under and pursuant to the provisions of the FW Act.
- 89 The provisions of the state law and the federal law that create the right to appeal from a decision of the Industrial Magistrate's Court are s 84 of the IR Act and s 565 of the FW Act.
- 90 Section 84 of the IR Act provides:

- (1) In this section *decision* includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.
- (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate's court.
- (3) An appeal under this section shall be instituted within 21 days from the date of the decision against which the appeal is brought and may be instituted by any party to the proceedings wherein the decision was made.
- (4) On the hearing of the appeal the Full Bench —
- (a) may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of the appeal; and
- (b) may remit the matter to the industrial magistrate's court or to another industrial magistrate's court for further hearing and determination according to law; and
- (c) subject to subsection (5), may make such order as to costs as the Full Bench considers appropriate.
- (5) In proceedings under this section costs shall not be given to any party to the proceedings for the services of any legal practitioner, or agent of that party unless, in the opinion of the Full Bench, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the other party.

- 91 Section 565 of the FW Act provides:

Appeals from original decisions of eligible State or Territory courts

- (1) An appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act.
- (1A) No appeal lies from a decision of an eligible State or Territory court exercising jurisdiction under this Act, except:
- (a) if the court was exercising summary jurisdiction—an appeal, to that court or another eligible State or Territory court of the same State or Territory, as provided for by a law of that State or Territory; or

- (b) in any case—an appeal as provided for by subsection (1).

Appeals from appellate decisions of eligible State or Territory courts

- (1B) An appeal lies to the Federal Court from a decision of an eligible State or Territory court made on appeal from a decision that:
- (a) was a decision of that court or another eligible State or Territory court of the same State or Territory; and
- (b) was made in the exercise of jurisdiction under this Act.
- (1C) No appeal lies from a decision to which subsection (1B) applies, except an appeal as provided for by that subsection.

Leave to appeal not required

- (2) It is not necessary to obtain the leave of the Federal Court, or the court appealed from, in relation to an appeal under subsection (1) or (1B).

92 Examination of the legislative scheme of the FW Act reveals the following:

- (a) A contravention of a civil remedy provision is not an offence: s 549 of the FW Act.
- (b) Jurisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under the FW Act: s 562.
- (c) An appeal lies to the Federal Court from a decision of an eligible state or territory court exercising jurisdiction under the FW Act: s 565(1).
- (d) No appeal lies from a decision of an eligible state or territory court exercising jurisdiction under the FW Act, except if the court was exercising summary jurisdiction an appeal may be made to that court or another eligible state or territory court of the same state or territory as provided for by a law of that state or territory: s 565(1A).

93 The Industrial Magistrate's Court in these matters was not exercising summary jurisdiction. Summary jurisdictions are criminal proceedings. The Industrial Magistrate was exercising civil jurisdiction. In particular, the Industrial Magistrate's Court was exercising the procedure provided for in its general jurisdiction rather than prosecution jurisdiction within the meaning of s 81CA of the IR Act, in determining the claims.

94 The Full Bench of the Commission, whilst it is a court, it is not an eligible state or territory court within the meaning of the FW Act as it is not a court that is prescribed by the regulations made under the FW Act.

95 Whilst the originating claims before the Industrial Magistrate's Court were made on grounds that the entitlement to accrued annual leave arose under the MCE Act, the WR Act and the FW Act, the claim for payment was based on an argument and facts accepted by the learned Industrial Magistrate that the entitlement to payment to each appellant crystallised on the termination of their employment, as an accrued entitlement preserved under the FW Act as a transitional instrument. Consequently, the right to claim payment arose solely under the provisions of the FW Act and not under the MCE Act. The effect of the provisions of the MCE Act being preserved as a transitional instrument is that the entitlement in the MCE Act to payment for accrued annual leave arises not in the MCE Act as a state law but as a federal law.

96 The text of s 79 of the *Judiciary Act* does not assist the appellants. Leaving aside the breadth of operation of s 79, it is expressly stated in s 79 that a law of the state only applies to a court exercising Federal jurisdiction 'except as otherwise provided by the Constitution or the laws of the Commonwealth'. The effect of s 79 in relation to a law of the state was explained in *Northern Territory of Australia v GPAO* [1999] HCA 8; (1999) 196 CLR 553 by Gleeson CJ and Gummow J at [78] - [80] (with whom Gaudron J [135] and Hayne J [254] agreed) as follows:

The text of s 79 is set out earlier in these reasons. It was derived from s 34 of the *Judiciary Act* 1789 (1 Stat 73, 92 (1789)), now codified as amended at 28 USC §1652 (1994)), enacted by the First Congress of the United States and more often referred to as the *Rules of Decision Act*. Section 34 stated:

'That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.'

It has been said of s 34 that, if the federal courts are directed to apply federal law, it governs by 'displacing' state law, even on matters of substance (Freer, 'Some Thoughts on the State of *Erie* After *Gasperini*', *Texas Law Review*, vol 76 (1998) 1637, at p 1637; Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction*, 2nd ed, (1996), vol 19, §4501), and that this operation of s 34 is dictated by the Supremacy Clause of the United States Constitution (Art VI, cl 2) (See *Sola Electric Co v Jefferson Electric Co* (1942) 317 US 173 at 176. The Supremacy Clause provides: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.').

In applying the phrase 'otherwise provided' in s 79, Latham CJ (*De Vos v Daly* (1947) 73 CLR 509 at 515) and Starke J (*De Vos v Daly* (1947) 73 CLR 509 at 518) asked whether the particular law of the Commonwealth was to be regarded in any way as 'inconsistent' with the application of the State Act which was said to be 'picked up' by s 79. Later, Menzies J asked whether the law relied upon as a law of the Commonwealth was one 'displacing' the law of the State (*Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 39). In *Australian National Airlines Commission v The Commonwealth* ((1975) 132 CLR 582 at 587. See also *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 368-369 where it was concluded that the relevant law of the Commonwealth left 'no room' for the application of the State law), Mason J said:

'Section 26A of the *High Court Procedure Act* [1903 (Cth)], which provides that judgments of the Court shall carry interest, should be regarded as a comprehensive expression of the entitlement in this Court of a litigant to interest on damages to the exclusion of any provision in State law which would otherwise be made applicable by virtue of s 79.'

The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself. Seen in that light, the notion of 'inconsistency' involved in the phrase 'otherwise provided' in s 79 is akin to that first identified by Mason J in the passage from the judgment in *University of Wollongong v Metwally* ((1984) 158 CLR 447 at 463) set out earlier in these reasons. This is the need to resolve the problem that arises by conflict between conflicting statutes having the same source. The law of a State or Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth.

97 Thus, any applicable law of a state that is capable of applying to a federal matter is displaced by an inconsistent federal law. The source of the effect of s 79 is to be found in s 109 of the Constitution.

98 Pursuant to s 109 of the Constitution an inconsistency between a law of the Commonwealth and a law of the state is to be resolved by applying the law of the Commonwealth and not the state. Section 109 of the Constitution provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

99 The first step in determining whether an inconsistency arises is to identify the law of the Commonwealth and the law of the state to which it is said to apply: *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 [102] (French CJ).

100 In these appeals, the law of the Commonwealth is s 565 and the definition of 'eligible State or Territory court' in s 12 of the FW Act. The law of the state is s 84 of the IR Act and not the provisions of the MCE Act, as the provisions of the MCE Act as a law of a state are inoperative. It is a state law that was 'displaced' on 27 March 2006 by the operation of s 16(1)(b) of the WR Act which was in the same terms as s 26(1) and s 26(2)(c) of the FW Act. Section 26(1) and s 26(2)(c) of the FW Act provide as follows:

- (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.
- (2) A State or Territory industrial law is:
 - (c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or

101 As the MCE Act is a state industrial law dealing with leave other than long service leave, it cannot apply to the respondent as the respondent is a national system employer. This is a matter that is in effect properly conceded by the appellants.

102 Section 565 of the FW Act provides that an appeal lies to the Federal Court from a decision of an eligible state court. The Industrial Magistrate's Court is an eligible state court: s 12 of the FW Act.

103 Both s 84 of the IR Act and s 565 of the FW Act create a right of appeal from a 'decision' of the Industrial Magistrate's Court. Section 565 only applies to appeals in respect of actions that arise under the FW Act. Section 84 of the IR Act is not so circumscribed; this provision creates an all-encompassing right of appeal in respect of 'any other determination of an industrial magistrate's court' which the appellants contend could be construed to create a right of an appeal against a 'decision' of the Industrial Magistrate's Court that arises under or pursuant to a law of the Commonwealth.

104 Inconsistency arises in three ways.

105 The first form of inconsistency arises where the two laws make contradictory provisions upon the same subject matter, making it impossible to obey both laws. This form of inconsistency was considered by the High Court in *R v The Licensing Court of Brisbane; Ex parte Daniell* [1920] HCA 24; (1920) 28 CLR 23. In that matter the *Liquor Act 1912* (Qld) required that a local election be held on the date of the next Senate election. The *Commonwealth Electoral (War-time) Act 1917* (Cth) prohibited the conduct of state elections on a day appointed. The High Court found the law of the state was invalid and thus inoperative as it could only be obeyed by disobeying the Commonwealth Act.

106 The second form of inconsistency arises where Commonwealth law confers a right, privilege or immunity upon a person which the state law alters, impairs or detracts from the operation of a law of the Commonwealth. In *Clyde Engineering Co Ltd v Cowburn* [1926] HCA 6; (1926) 37 CLR 466, the High Court found the *Forty-four Hours Week Act 1925* (NSW) to be inconsistent with the *Conciliation and Arbitration Act 1904* (Cth). The state law obliged employers to pay employees a full-time wage for 44 hours a week and the Commonwealth law granted employers a right to demand a 48 hour work week for full-time work. In a joint judgment, Knox CJ and Gavan Duffy JJ rejected an argument that no inconsistency arose between the state law and the Commonwealth law as an employer could obey both laws by paying a full-time wage for a shorter week. Their Honours said (478):

Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.

107 In *Momcilovic* Gummow J observed that this form of inconsistency, which he described as class (2), might have been supplemented to include cases where it is the state law which confers a right or privilege and it is the federal law that modifies or restricts it [240].

108 The first two forms of inconsistency have been described as 'direct' inconsistency and arise where there is direct conflict or direct textual collision between state and Commonwealth laws: *Ansett Transport Industries (Operations) Pty Ltd v Wardley* [1980] HCA 8; (1980) 142 CLR 237 (260 - 261) (Mason J) and (253) (Stephen J).

109 The third form of inconsistency is indirect; it arises where the Commonwealth and state laws deal with the same subject or field whereby the intention of the Commonwealth Parliament to 'cover the field' is revealed in Commonwealth law. In these circumstances, the Commonwealth law is construed as not supplementary to, or cumulative on the state law: see the discussion in *Momcilovic* (324 - 326) (Hayne J).

110 In *Momcilovic* at [244] Gummow J, with whom Bell J agreed at [660], explained:

This situation is addressed by class (3), which has come to be known as 'indirect inconsistency'. Here, the essential notion is that, upon its true construction, the federal law contains an implicit negative proposition that nothing other than what the federal law provides upon a particular subject matter is to be the subject of legislation; a State law which impairs or detracts from that negative proposition will enliven s 109.

111 However, Gummow J in *Momcilovic* was critical of the use of the metaphor 'to cover the field'. He said that the use of this metaphor to identify the consequence of an imputed legislative intention has served to confuse what is a matter of statutory interpretation [263]. His Honour's approach is that the task is to ascertain whether the proper construction of the Commonwealth law evinces an intention to deal exclusively and exhaustively with the subject matter in question: [265] - [268], [272] (Gummow J); see also [341] - [342] (Hayne J).

112 The effect of s 84 of the IR Act and s 565 of the FW Act can be characterised as raising a direct inconsistency in the sense of a class 2 inconsistency considered by Gummow J in *Momcilovic* as s 84 of the IR Act creates a right of appeal against a 'decision', including among other decisions, an order of dismissal and any other determination of an Industrial Magistrate's Court and s 565 of the FW Act restricts the right of appeal against a decision of an Industrial Magistrate's Court to the Federal Court where the Industrial Magistrate's Court exercises federal civil jurisdiction under the FW Act. The operation of s 84 and s 565 could also be characterised as an indirect inconsistency as both laws deal with the same subject matter whereby the plain text of the federal law, s 565 of the FW Act, manifests a clear intention to operate in the field to the exclusion of any law of a state that confers a right of appeal from an eligible state court. In these matters, that is the Industrial Magistrate's Court.

113 For the reasons set out above, the Industrial Magistrate exercised federal civil jurisdiction in the determination of the claims in both of these matters. No issue of state jurisdiction arose. Thus, any dichotomy or distinction between the exercise of jurisdiction and power does not arise.

114 For these reasons, I am of the opinion that the appeals should be dismissed for want of jurisdiction as the Full Bench has no jurisdiction to hear and determine an appeal against a decision of the Industrial Magistrate's Court where the claim made in the Industrial Magistrate's Court is a claim to enforce entitlements under s 90 of the FW Act, for alleged rights that are said to have accrued under a transitional instrument.

SCOTT ASC

115 I have had the benefit of reading the draft reasons for decision of Her Honour, the Acting President. I agree with those reasons and have nothing to add.

HARRISON C

116 I have had the benefit of reading the reasons for decision of her Honour, the Acting President. I agree with those reasons and have nothing to add.

2015 WAIRC 00863

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	HUGH SUTHERLAND ROGERS	APPELLANT
	-and-	
	J-CORP PTY LTD	RESPONDENT
CORAM	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	ACTING SENIOR COMMISSIONER P E SCOTT	
	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 4 SEPTEMBER 2015	
FILE NO.	FBA 1 OF 2015	
CITATION NO.	2015 WAIRC 00863	

Result Appeal dismissed for want of jurisdiction

Appearances

Appellant Mr P Mullally, as agent

Respondent Mr R L Hooker (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 10 June 2015 and 17 August 2015, and having heard Mr P Mullally, as agent on behalf of the appellant, and Mr R L Hooker (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 4 September 2015, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

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

[L.S.]

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

2015 WAIRC 00864

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANDJELKO BUDIMLICH	APPELLANT
	-and-	
	J-CORP PTY LTD	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON	
DATE	FRIDAY, 4 SEPTEMBER 2015	
FILE NO.	FBA 2 OF 2015	
CITATION NO.	2015 WAIRC 00864	

Result Appeal dismissed for want of jurisdiction

Appearances

Appellant Mr P Mullally, as agent

Respondent Mr R L Hooker (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 10 June 2015 and 17 August 2015, and having heard Mr P Mullally, as agent on behalf of the appellant, and Mr R L Hooker (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 4 September 2015, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

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

[L.S.]

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

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

2015 WAIRC 00867

	FOOD INDUSTRY (FOOD MANUFACTURING OR PROCESSING) AWARD	
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS	APPLICANT
	-v-	
	ANCHOR PRODUCTS PTY LTD	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	WEDNESDAY, 9 SEPTEMBER 2015	
FILE NO/S	APPL 1554 OF 2002	
CITATION NO.	2015 WAIRC 00867	

2015 WAIRC 00873

NOTICE
AG 10 OF 1991
RETAIL FOOD SERVICES EMPLOYEES' AGREEMENT 1991
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 145 of 2015

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Shop, Distributive and Allied Employees' Association of Western Australia will cease to be a party to the *Retail Food Services Employees' Agreement 1991, No. AG 10 of 1991*, on and from the 8th day of October 2015.

DATED at Perth this 10th day of September 2015.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

2015 WAIRC 00872

NOTICE
AG 15 OF 1992
RETAIL FOOD ESTABLISHMENTS EMPLOYEES AGREEMENT 1992
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 146 of 2015

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

The Shop, Distributive and Allied Employees' Association of Western Australia will cease to be a party to the *Retail Food Establishments Employees Agreement 1992, No. AG 15 of 1992*, on and from the 8th day of October 2015.

DATED at Perth this 10th day of September 2015.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00869

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2015 WAIRC 00869
CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD : WEDNESDAY, 12 AUGUST 2015, WEDNESDAY, 26 AUGUST 2015
DELIVERED : THURSDAY, 10 SEPTEMBER 2015
FILE NO. : M 66 OF 2015
BETWEEN : TIMOTHY WILLIAM BARLOW

CLAIMANT

AND

FWA MEDIA PTY LTD, TRADING AS FISHING WESTERN AUSTRALIA
 PROTACKLE

RESPONDENT

Catchwords	:	Alleged failure to comply with the General Retail Industry Award 2010 (MA000004); Alleged underpayment; Small Claim; Limitation of claim to bring it within Small Claims jurisdiction.
Legislation	:	<i>Fair Work Act 2009</i> Industrial Magistrates Court (General Jurisdiction) Regulations 2005
Instruments	:	General Retail Industry Award 2010 (MA000004)
Result	:	Findings made
Representation:		
Claimant	:	In Person
Respondent	:	Mr Harry Baumann (Director of the Respondent)

REASONS FOR DECISION

Introduction

- 1 FWA Media Pty Ltd, Trading as Fishing Western Australia Protackle (the Respondent) employed Mr Timothy William Barlow (the Claimant) to manage its fishing tackle store at Wangara from about March 2014 until 2 February 2015.
- 2 The Claimant asserts that he worked very long hours and for numerous consecutive days without a break. He alleges that the Respondent, in requiring him to work such hours, contravened the requirements of the General Retail Industry Award 2010 (MA000004) (the Award) which governed his employment.
- 3 The Claimant alleges that the Respondent was in breach of the Award for the entirety of his employment, but notwithstanding that, limits his Claim to only cover the period 13 March 2014 to 25 September 2014 (the relevant period). He alleges that during the relevant period he was underpaid \$20,878.17. The Claimant has abandoned the amount in excess of \$20,000.00 in order to facilitate the bringing of this Claim, utilising the Small Claims procedure provided for under s.548 of the *Fair Work Act 2009* (FW Act). Despite that, the Claimant asks the Court to award him whatever sum in excess of \$20,000.00 that the Court thinks fits.
- 4 Prior to the commencement of the Trial, I explained to the Claimant that this Court does not, in dealing with this matter as a Small Claim, have the power to award him any more than \$20,000.00. Further, the Claimant was informed that in dealing with this Small Claim, the Court does not have the power to make the other orders that he seeks which are in respect to the following:
 - the Respondent's alleged failure to pay the Claimant's correct superannuation guarantee levy;
 - the Respondent's alleged fraud, impropriety and misconduct;
 - the Respondent's alleged mis-statement to the Australian Taxation Office; and
 - the imposition of a caveat on the Respondent's property.
- 5 The Claimant was also informed that his Claim for costs in the sum of \$1,550.00, on account of the Respondent's "*constant delaying tactics*" is not maintainable because what he seeks is not the recovery of legal costs incurred, but rather, the imposition of a punitive penalty.
- 6 The Respondent denies the Claim on the basis that the Claimant did not work all of the hours and consecutive days he alleges, and further, that the Claimant has used the wrong Award classification in calculating his Claim. The Respondent says also that even if it has failed to comply with the Award for a specific pay period or periods, the Claimant has, in any event, over the course of his employment, been paid more than that to which he was entitled to.

Background

- 7 The Claimant has worked in the recreational fishing retail business for many years. The Respondent is also involved in the recreational fishing industry and has produced television programs and magazines about recreational fishing in Western Australia.
- 8 In late December 2013, the Respondent's Director, Mr Harry Baumann (Mr Baumann), sought out the Claimant's advice about opening up a tackle store. Mr Baumann enquired whether the Claimant might be interested in helping the Respondent set up a new tackle store, and thereafter, to manage the store. The Claimant indicated that he was.
- 9 In about February 2014, the Respondent secured premises in Wangara from which the new business was to operate. The Claimant assisted in setting up the store prior to its opening however was not paid for his efforts in that regard. The store opened for business on or about 12 March 2014.
- 10 Prior to the store's opening, the Claimant and Mr Baumann discussed the Claimant's remuneration. They agreed that the Claimant was to be paid an annualised salary of \$55,000.00, payable in weekly instalments. They also agreed that the Claimant would be paid a \$200.00 bonus for each occasion that his weekly sales figures exceeded \$7,000.00. The agreement was never reduced to writing. Little else was discussed about the Claimant's working conditions, although it was understood by both parties that the Claimant would, during the business' formative period, work its busy days which were forecast to be Fridays, Saturdays and Sundays.

- 11 When the store first opened, its trading hours were;
- Monday to Thursday from 8:00am to 6:00pm;
 - Friday from 8:00am to 7:00pm;
 - Saturday from 8:00am to 5:00pm; and
 - Sunday from 10:00am to 4:00pm.
- 12 The store was initially staffed by the Claimant and Mr Baumann. A casual employee was later employed to work weekends. Ms Larissa Pak-Poy (Ms Pak-Poy), an administrative officer who managed the Respondent's financial affairs, also helped out. She usually worked at the store three days per week performing accounting and administrative duties. When necessary she also assisted with sales and covered for the Claimant during his lunch breaks.
- 13 The Claimant asserts that he ran the store despite Mr Baumann being present and working within it. He said that Mr Baumann would come and go as he pleased. Indeed, Mr Baumann was often away for extended periods filming fishing shows and it was the Claimant who was left to run the store in Mr Baumann's absences. He further asserts that Mr Baumann was often drunk and therefore incapable of running the store.
- 14 The Claimant says that he initially worked seven days per week without any days off allocated to him. In due course, he took some days off but that was on an ad-hoc basis. Indeed, there was no formal arrangement made for the taking of days off until the latter part of 2014. It was only when those arrangements were made in about September 2014 that he was thereafter able to take pre-arranged consecutive days off.
- 15 The Claimant says that although there was from mid-year, a reduction in his working hours to take into account the slower winter season, his hours remained long and he worked most Fridays, Saturdays and Sundays.
- 16 In about October 2014, there was a further change in the store's opening hours. Contemporaneously with the change of opening hours in October 2014, another employee was taken on to assist the Claimant. At that time, the Respondent unilaterally changed the Claimant's bonus arrangement, introducing a requirement that the Claimant achieve \$8,000.00 in sales before he became eligible to receive the \$200.00 bonus payment.
- 17 In October 2014, the Claimant took time off on sick leave. However, he noted that the Respondent had not paid him sick leave, but rather, had allocated annual leave to some of that time off. It is fair to say that from that time onward, the parties became involved in a dispute concerning the Claimant's employment. The dispute was the subject of correspondence and meetings between the parties. None of the issues were resolved. The relationship continued to be strained thereafter and on 2 February 2015, the Claimant was summarily dismissed. The Claimant subsequently initiated an unfair dismissal action. That action was settled by the parties, by entering into a confidential agreement.
- 18 Mr Baumann testified that the Claimant was employed to help him manage the store and that the Claimant only managed the store during his absences. Mr Baumann said that the Claimant was under his direction and could not place orders, except when instructed to do so by Mr Baumann. He was not given autonomy or any significant administrative duties, nor was he given the power to hire or fire employees. The Claimant's duties were primarily related to stocking the store and selling the store's products. Mr Baumann suggests that the Claimant was, in reality, no more than a salesman. Despite holding the title of manager, he did not in fact manage and was a manager in name only. Mr Baumann said that the Claimant could take time off as he required but chose to work on Fridays, Saturdays and Sundays because they were the store's busiest days. He agrees however that a formal monthly roster was only implemented from 1 October 2014 onwards.
- 19 Mr Baumann testified that the relationship between him and the Claimant deteriorated so significantly that they were, towards the end of the employment relationship, in continual conflict. In the end, he was forced to summarily dismiss the Claimant.

Determination

- 20 There can be no doubt that there is a great deal of acrimony between the parties in relation to the Claimant's employment by the Respondent. Many of the issues that give rise to that acrimony are not relevant for my purposes and I do not intend to address them. What I am required to do is relatively straight forward. That is, to determine the following:
- whether the employment relationship between the parties was governed by the Award;
 - whether, during the relevant period, the Respondent paid the Claimant his correct entitlements under the Award; and
 - if not, the amount owed to the Claimant.

Issues

- 21 The parties agree that the Award applied to them during the relevant period.
- 22 That being the case, the only issues that require determination are:
- the Claimant's classification under the Award; and
 - whether he was paid his correct entitlements for the hours that he worked during the relevant period.

Award Classification

- 23 The Claimant asserts that his correct classification under the Award was that of "Retail Employee Level 8", whereas, the Respondent says that his correct classification under the Award was "Retail Employee Level 4". The various Award classifications are set out in Schedule B - Classifications of the Award. Clause B.4 of the Award sets out the duties of a Retail Employee Level 4:

“B.4 Retail Employee Level 4**B.4.1** *An employee performing work at a retail establishment at a higher level than a Retail Employee Level 3.***B.4.2** *Indicative of the tasks which might be required at this level are the following:*

- *Management of a defined section/department,*
- *Supervision of up to 4 sales staff (including self),*
- *Stock control,*
- *Buying/ordering requiring the exercise of discretion as to price, quantity, quality etc.,*
- *An employee who is required to utilise the skills of a trades qualification for the majority of the time in a week, or*
- *Clerical functions Level 2.*

B.4.3 *Indicative job titles which are usually within the definition of a Retail Employee 4 include:**[B.4.3 varied by [PR992724](#) ppc 29Jan10]*

- *An Assistant, Deputy, or 2IC Shop Manager of a shop without Departments,*
- *An employee who is required to utilise the skills of a trades qualified person for the majority of the time in a week. This includes: Butcher, Baker, Pastry Cook, Florist,*
- *An employee who has completed an appropriate trades course or holds an appropriate Certificate III and is required to use their qualifications in the course of their work,*
- *A Qualified Auto Parts and Accessories Salesperson,*
- *A Window Dresser (Cert III or equivalent experience),*
- *A Boot/Shoe Repairer (Cert III),*
- *A Shiftwork Supervisor,*
- *Section/Department manager with up to 2 employees (including self),*
- *Service Supervisor of up to 15 employees,*
- *Nightfill Supervisor/Leader,*

B.4.4 Clerical Officer Level 2 characteristics:

- *This level caters for the employees who have had sufficient experience and/or training to enable them to carry out their assigned duties under general direction.*
- *Employees at this level are responsible and accountable for their own work which is performed within established guidelines. In some situations detailed instructions may be necessary. This may require the employee to exercise limited judgment and initiative within the range of their skills and knowledge.*
- *The work of these employees may be subject to final checking and as required progress checking. Such employees may be required to check the work and/or provide guidance to other employees at a lower level and/or provide assistance to less experienced employees at the same level.*

B.4.5 *Indicative typical duties and skills at this level may include:*

- *Reception/switchboard duties as in Level 1 and in addition responding to enquiries as appropriate, consistent with the acquired knowledge of the organisation's operations and services, and/or where presentation and use of interpersonal skills are a key aspect of the position.*
- *Operation of computerised radio/telephone equipment, micro personal computer, printing devices attached to personal computer, dictaphone equipment, typewriter.*
- *Word processing, e.g. the use of a word processing software package to create, format, edit, correct, print and save text documents, e.g. standard correspondence and business documents.*
- *Stenographer/person solely employed to take shorthand and to transcribe by means of appropriate keyboard equipment.*
- *Copy typing and audio typing.*
- *Maintenance of records and/or journals including initial processing and recording relating to the following:*
 - (i) *reconciliation of accounts to balance;*
 - (ii) *incoming/outgoing cheques;*
 - (iii) *invoices;*
 - (iv) *debit/credit items;*

- (v) *payroll data;*
- (vi) *petty cash Imprest System;*
- (vii) *letters etc.*
- *Computer application involving use of a software package which may include one or more of the following functions:*
 - (i) *create new files and records;*
 - (ii) *spreadsheet/worksheet;*
 - (iii) *graphics;*
 - (iv) *accounting/payroll file;*
 - (v) *following standard procedures and using existing models/fields of information.*
- *Arrange routine travel bookings and itineraries, make appointments.*
- *Provide general advice and information on the organisation's products and services, e.g. front counter/telephone."*

24 Clause B.8 of the Award describes a Retail Employee Level 8 as follows:

"B.8 Retail Employee Level 8

B.8.1 *An employee performing work in or in connection with a retail establishment at a higher level than a Retail Employee Level 7.*

B.8.2 *A person with a Diploma qualification.*

B.8.3 *Indicative job titles which are usually within the definition of a Retail Employee 8 include:*

[B.8.3 varied by [PR992724](#) ppc 29Jan10]

- *A Shop Manager of a shop with Departments/Sections, or*
- *Clerical Officer Level 5.*

B.8.4 *Clerical Officer Level 5 characteristics:*

- *Employees at this level are subject to broad guidance or direction and would report to more senior staff as required.*
- *Such employees will typically have worked or studied in a relevant field and will have achieved a standard of relevant and/or specialist knowledge and experience sufficient to enable them to advise on a range of activities and features and contribute, as required, to the determination of objectives, within the relevant field(s) of their expertise.*
- *They are responsible and accountable for their own work and may have delegated responsibility for the work under their control or supervision, in terms of, among other things, scheduling workloads, resolving operations problems, monitoring the quality of work produced as well as counselling staff for performance as well as work related matters.*
- *They would also be able to train and to supervise employees in lower levels by means of personal instruction and demonstration. They would also be able to assist in the delivery of training courses. They often exercise initiative, discretion and judgment in the performance of their duties.*
- *The possession of relevant post secondary qualifications may be appropriate but not essential.*

B.8.5 *Indicative typical duties and skills at this level may include:*

- *Apply knowledge of organisation's objectives, performance, projected areas of growth, product trends and general industry conditions.*
- *Application of computer software packages within either a micropersonal computer or a central computer resource including the integration of complex word processing/desktop publishing, text and data documents.*
- *Provide reports for management in any or all of the following areas:*
 - (i) *account/financial*
 - (ii) *staffing*
 - (iii) *legislative requirements*
 - (iv) *other company activities.*
- *Administer individual executive salary packages, travel expenses, allowances and company transport; administer salary and payroll requirements of the organisation."*

25 In its Outline of Submissions lodged on 5 August 2015, the Respondent says that the Claimant should not be classified at Level 8 because he was not a manager of a shop with "departments or sections". Further, the Respondent says that there were no staff under the Claimant's direction during the relevant period and that, in any event, Mr Baumann was consistently at the shop providing the Claimant with direction and instruction.

- 26 Despite those submissions and what was said by Mr Baumann in evidence, at the completion of the Claimant's employment Mr Rik Thornton, a co-director of the Respondent, provided the Claimant with a statement of service.
- 27 The statement of service, dated 9 February 2015 was provided to the Court by the Claimant. I, pursuant to the provisions of s.548(3) of the FW Act and Regulation 35(4) of the Industrial Magistrates Court (General Jurisdiction) Regulations 2005, have regard to that document which is now before the Court marked as Exhibit 11. In the statement of service, Mr Thornton described the Claimant as a Store Manager and said that, as Store Manager, the Claimant had the following responsibilities:
- Sales, staff selection, training and performance management
 - Inventory management
 - Store Presentation
 - Store Sales and Marketing
- 28 Attached to the statement of service is a Store Manager job description which provided more details. I will not repeat what was said in that document, save to observe that the Claimant is said to have had responsibilities with respect to staff, sales and marketing, dealing with customers, business development, administration, placing orders and reporting to management.
- 29 Based on that job description, the Claimant certainly did not come within the Award classification of Retail Employee Level 4. Furthermore given the extent of his responsibilities, he did not come within the descriptions of the Award classifications relevant to a Retail Employee Level 6 or a Retail Employee Level 7.
- 30 The Respondent argues that the Claimant does not fall within the Retail Employee Level 8 Award classification because he was not a manager of a shop with departments or sections, as is required by Clause B.8.3 of Schedule B of the Award. I observe, however, that Clause B.8.3 does not provide an exhaustive list of job titles falling within that level. The titles and functions are indicative only and do not exclude other permutations. The level of responsibility given to the Claimant as is evidenced in Mr Thornton's statement of service and job description document completely undermines the Respondent's position in regards to the Claimant's Award classification.
- 31 Although the Claimant's circumstances did not fit neatly within what is provided in Clause B.8 (Retail Employee Level 8), in that he was not the manager of a store with departments or sections, the breadth of his responsibilities take him outside the lower classifications and into the higher Level 8 classification.
- 32 It is irrelevant for my purposes to consider whether the Claimant actually carried out all or some of those tasks satisfactorily, or even at all. In the end he was charged with those responsibilities and engaged as a manager. He did in fact manage the store in Mr Baumann's absences whilst Mr Baumann was filming. The Claimant carried managerial responsibilities at those times and supervised staff (the casual employee).
- 33 I find that the Claimant was a Retail Employee Level 8, given the extent of his autonomy and responsibilities.

Was the Claimant Paid Correctly?

- 34 In order to determine this issue I will need to make findings as to the days and hours worked during the relevant period. Further, I must necessarily determine whether the Claimant was forced to work numerous consecutive days without a day off and when he was given a day or days off whether he was given adequate notice of such.

Claimant's Position

- 35 The Claimant's Claim is best indicated by what he has set out in Attachment "E" to his Claim (Exhibit 5). I replicate Attachment E below:

Calculations of Pay as per Award Pay Level 8

13/03/2014	\$	1,800.70	
20/03/2014	\$	1,800.70	
27/03/2014	\$	1,800.70	
3/04/2014	\$	1,800.70	
10/04/2014	\$	1,800.70	
17/04/2014	\$	1,800.70	
24/04/2014	\$	1,800.70	
1/05/2014	\$	1,800.70	
8/05/2014	\$	1,800.70	
15/05/2014	\$	1,800.70	
22/05/2014	\$	2,068.91	****
29/05/2014	\$	1,800.70	
5/06/2014	\$	1,800.70	
12/06/2014	\$	1,800.70	
19/06/2014	\$	1,800.70	
26/06/2014	\$	1,800.70	
3/07/2014	\$	2,068.91	****

10/07/2014	\$	1,800.70	
17/07/2014	\$	1,800.70	
24/07/2014	\$	1,800.70	
31/07/2014	\$	1,800.70	
7/08/2014	\$	1,800.70	
14/08/2014	\$	1,800.70	
21/08/2014	\$	1,800.70	
28/08/2014	\$	2,068.91	****
4/09/2014	\$	2,068.91	****
11/09/2014	\$	1,800.70	
18/09/2014	\$	1,800.70	
25/09/2014	\$	1,800.70	
Wages due at Retail Pay Level 8	\$	53,293.14	
Wages actually paid	\$	17,665.00	
	\$	14,749.97	
Total wages Paid	\$	32,414.97	
Amount Owing	\$	20,878.17	
Claimed amount		\$20,000.00	

Notes:

1. No continuous break until 13 Sept. 6 Months continuous work, minimal RDO's
2. RDO's were all at less than 24 hours notice, therefore not valid under the Award.
3. Claimed 65 hours per week when Harry away, unable to have breaks as on my own in store.
4. Paid for 38 hours but worked 62.50 average.
5. Annual leave accumulated at 38 hours but worked excess of 62.
6. Does not include Superannuation.

Refer Note 3

Hours Worked

- 36 The Claimant has calculated his Claim by adopting the store's opening and finishing times as his starting times and finishing times.
- 37 There are no available records relating to the Claimant's start and finish times. The Respondent did not record the Claimant's start and finish times believing it to be unnecessary given that the Claimant was on an annualised salary. So much is apparent from Mr Baumann's evidence. There was therefore, from the Respondent's perspective, no need to account for the hours the Claimant actually worked.
- 38 The Claimant asserts that the store's opening times during the relevant period were as follows:
- February 2014 to July 2014
- | | |
|--------------------|-------------------|
| Monday to Thursday | 8:00am to 6:00pm |
| Friday | 8:00am to 7:00pm |
| Saturday | 8:00am to 5:00pm |
| Sunday | 10:00am to 4:00pm |
- July 2014 to October 2014
- | | |
|--------------------|-------------------|
| Monday to Thursday | 9:00am to 5:00pm |
| Friday | 9:00am to 6:00pm |
| Saturday | 8:00am to 5:00pm |
| Sunday | 10:00am to 4:00pm |
- 39 The Claimant says he worked between those hours. He also asserts that he worked an extra two hours on one Sunday in each month in order to give talks to customers.
- 40 Although there were no records kept of the starting and finishing times, some assistance in that regard can be gained from the available alarm monitoring records for August and September 2014 (see Exhibit 8). Those records show that the store did not necessarily open and close exactly on time. Notwithstanding that, I am satisfied that the Claimant's evidence about the opening and closing times is generally correct despite allowances made for minor latitudes.
- 41 Mr Baumann says that it is apparent from the Respondent's alarm records that the Claimant is inaccurate in what he claims. He therefore argues that the Claimant's calculation of his entitlements using the Fair Work Ombudsman Website Calculator (see Exhibit 6) is fundamentally flawed.

- 42 Mr Baumann's recollection of the designated opening and closing times of the store is less convincing. He admitted as to being unsure as to when changes in the opening times took effect. Further the alarm record he has produced is limited in utility and does not displace the Claimant's assertions concerning hours worked.
- 43 I prefer the Claimant's evidence concerning the store's opening times. His approach was more regimented and as I am satisfied that the Claimant has a better recollection of the store's opening times. I accept and rely on what he says in that regard.
- 44 I find that during the relevant period the Claimant worked the hours set out in the schedule hereto. There is however insufficient evidence that would lead me to conclude that the Claimant was denied lunch breaks on days worked.

Days Off

- 45 The Claimant has calculated his Claim on the basis that he has worked continuously during the relevant period using the store's opening and closing times to frame his Claim.
- 46 Although the Claimant acknowledges that he may have had some days off during the relevant period, he nevertheless maintains that he was entitled to be paid for those days as if they were worked by reason of the fact that his days off were not rostered and he was given inadequate notice to take days off.
- 47 The Claimant says that the taking of days off was unplanned and occurred ad-hoc, with Mr Baumann often saying to him the night before, "don't come in tomorrow". He says that there was no 'rostered day off' (RDO) roster or schedule as required by the Award, and as a result, he was unable to plan his days off in advance.
- 48 Mr Baumann on the other hand testified that the Claimant could and did arrange his affairs as he pleased. He took time off as he required it. In any event, the time to be taken off was reflected in the planner (Exhibit 1) used by the Claimant and Mr Baumann.
- 49 Mr Baumann strenuously denies the Claimant's assertions about the ad-hoc arrangements regarding leave.
- 50 The Respondent further says that it should not pay the Claimant for the days that the Claimant took off. It says that the days that the Claimant had off can be established from various sources, including:
- the Respondent's point of sales records which demonstrate that there were no sales by the Claimant on certain days (Exhibit 7);
 - the alarm records showing that the Claimant did not deactivate, or activate the alarm on certain days (Exhibit 8); and
 - the planner (Exhibit 1).
- 51 The Respondent has produced an annotated version of Attachment E of the Claimant's Claim, setting out the number of days the Respondent says that the Claimant took off during each week of the relevant period. That version of Attachment E was tendered during proceedings as Exhibit 13 and is reproduced below:

13/03/2014	\$	1,800.70	1 day off
20/03/2014	\$	1,800.70	2 days off
27/03/2014	\$	1,800.70	2 days off
3/04/2014	\$	1,800.70	1 day off
10/04/2014	\$	1,800.70	
17/04/2014	\$	1,800.70	3 days off
24/04/2014	\$	1,800.70	1 day off
1/05/2014	\$	1,800.70	
8/05/2014	\$	1,800.70	2 days off
15/05/2014	\$	1,800.70	
22/05/2014	\$	2,068.91	****
29/05/2014	\$	1,800.70	2 days off
5/06/2014	\$	1,800.70	2 days off
12/06/2014	\$	1,800.70	2 days off
19/06/2014	\$	1,800.70	3 days off
26/06/2014	\$	1,800.70	1 day off
3/07/2014	\$	2,068.91	**** 2 days off
10/07/2014	\$	1,800.70	1 day off
17/07/2014	\$	1,800.70	3 days off
24/07/2014	\$	1,800.70	2 days off
31/07/2014	\$	1,800.70	2 days off
7/08/2014	\$	1,800.70	3 days off
14/08/2014	\$	1,800.70	2 days off
21/08/2014	\$	1,800.70	2 days off
28/08/2014	\$	2,068.91	**** 3 days off
4/09/2014	\$	2,068.91	****
11/09/2014	\$	1,800.70	3 days off
18/09/2014	\$	1,800.70	2 days off
25/09/2014	\$	1,800.70	2 days off

- 52 I observe, however, that there is an inconsistency between the annotations indicated above and what is demonstrated by the point of sales record (Exhibit 7). For example, there is no point of sale record produced relating to the week ending 13 March 2014.

- 53 The Claimant asserts that the point of sales records should not be relied upon because they are a fabrication. However, there is absolutely no evidence to support that contention and I accept the evidence of Ms Pak-Poy that the document is genuine.
- 54 Based on those records it is apparent that the Claimant made no sales on particular days. Some of those days correlate precisely to the days which the Claimant accepts that he took as a day or days off (see Exhibit 1).
- 55 I find it more probable than not that the Claimant was not at work on the days when no sales were recorded against his name. I make that finding in the full knowledge that there was a practice that allowed the Claimant's sales to be put through by Mr Baumann. In my view, that would not explain the total absence of sales on any given day.
- 56 Based on the point of sales records (Exhibit 7), I find that the Claimant took the following days off during the relevant period in 2014:
- Tuesday 18 March
 - Sunday 23 March
 - Tuesday 25 March
 - Tuesday 1 April
 - Sunday 20 April
 - Wednesday 23 April
 - Sunday 4 May
 - Sunday 11 May
 - Tuesday 13 May
 - Sunday 1 June
 - Monday 2 June
 - Sunday 8 June
 - Monday 9 June
 - Tuesday 17 June
 - Wednesday 18 June
 - Sunday 22 June
 - Monday 23 June
 - Tuesday 24 June
 - Sunday 29 June
 - Friday 4 July
 - Saturday 5 July
 - Wednesday 16 July
 - Thursday 17 July
 - Friday 18 July
 - Saturday 19 July
 - Sunday 27 July
 - Monday 28 July
 - Sunday 3 August
 - Monday 4 August
 - Sunday 10 August
 - Monday 11 August
 - Wednesday 13 August
 - Sunday 17 August
 - Monday 18 August
 - Sunday 24 August
 - Monday 25 August
 - Thursday 28 August
 - Friday 29 August
 - Saturday 30 August

- Saturday 13 September
- Sunday 14 September
- Monday 15 September
- Saturday 20 September
- Monday 22 September

- 57 The planner (Exhibit 1) supports that, during the relevant period in 2014, 16-19 July, 10 August, 13 August, 17-18 August, 24-25 August, 28-30 August and 14-15 September, were not worked. The planner and the point of sales records correlate.
- 58 Notwithstanding not having worked the aforementioned days, the Claimant says that he is entitled to payment for those days because the Respondent did not give him the notice required under the Award relevant to the taking of those days off.
- 59 The Claimant bears the onus of proving his contention on the balance of probabilities. Mr Baumann's evidence was that the Claimant's taking of days off was left entirely to the Claimant, and that he could take time off as and when it suited him.
- 60 In determining the conflict in the evidence on this issue, I have no reason to prefer one version over another. Indeed, given the loose arrangements, the Respondent's contention was entirely feasible. In the circumstances, I cannot be satisfied on the balance of probabilities that the Claimant was given insufficient notice of the days off to take. In that regard, a breach of the Award has not been demonstrated.

Public Holidays

- 61 No evidence has been led concerning the working of particular public holidays during the relevant period. It is self-evident, for example, that the Claimant did not work on Easter Sunday (20 April 2014), however the evidence concerning other public holidays is lacking. In the absence of evidence that public holidays were worked, I proceed on the basis that they were not worked.

Conclusion

- 62 It is apparent that the Respondent failed to consider the Award with respect to hours of work. Mr Baumann believed that the placement of the Claimant on an annualised salary removed the Respondent's obligation to comply with specific requirements of the Award, subject to it ensuring that the Claimant was paid no less than that which was required by the Award. That was a misconception on his part.
- 63 The provision of an annualised salary needs to be specific as to what Award obligation it covers. The arrangements with the Claimant were non-specific. The fact that the Claimant was paid an annualised salary did not permit the working of long hours without payment of overtime. The Award still applied to ensure that the Claimant was correctly paid for all of the hours he worked which included penalty rates for the hours worked in excess of 38 hours per week. The applicable penalty rate must be calculated on the hourly rate produced from the \$55,000 annualised salary.
- 64 Given that neither party contemplated this outcome their calculations relating to the claim contained in the relevant exhibits is of no assistance. It is impossible for this Court to determine, based on those documents, how much is owed, if anything. It will not be appropriate therefore to determine what is owed, if anything, without first having given the parties an opportunity to re-calculate quantum.
- 65 I accordingly invite the Claimant to recalculate, in accordance with the Award, the quantum of his Claim based on my findings as to classification and the days and hours worked as set out in the schedule hereto. In so doing the Claimant is not to treat the days taken off as days worked.
- 66 The Claimant's recalculation is to be lodged with this Court and served on the Respondent within seven days hereof. The Respondent shall, if it wishes to do so, within seven days thereafter lodge with this Court and serve on the Claimant, any responding calculation that it wants the Court to consider. If the Respondent does that the Claimant shall have a further seven days to lodge and serve his reply to the Respondent's responding calculations.
- 67 Unless within 21 days hereof either party applies in writing to the Clerk of Court to be further heard, the Court will determine the issue of quantum on the papers in the absence of the parties.

G. CICCHINI INDUSTRIAL MAGISTRATE

<u>SCHEDULE</u>					
Week Ending	Days Worked	Times	Daily Hours	Weekly Hours	
13 March 2014	Wednesday, 12 March 2014	8:00am to 6:00pm	9.5	19	
	Thursday, 13 March 2014	8:00am to 6:00pm	9.5		
20 March 2014	Friday, 14 March 2014	8:00am to 7:00pm	10.5	53	
	Saturday, 15 March 2014	8:00am to 5:00pm	8.5		
	Sunday, 16 March 2014	10:00am to 4:00pm	5.5		
	Monday, 17 March 2014	8:00am to 6:00pm	9.5		
	Wednesday, 19 March 2014	8:00am to 6:00pm	9.5		
27 March 2014	Thursday, 20 March 2014	8:00am to 6:00pm	9.5	47.50	
	Friday, 21 March 2014	8:00am to 7:00pm	10.5		
	Saturday, 22 March 2014	8:00am to 5:00pm	8.5		
	Monday, 24 March 2014	8:00am to 6:00pm	9.5		
	Wednesday, 26 March 2014	8:00am to 6:00pm	9.5		
	Thursday, 27 March 2014	8:00am to 6:00pm	9.5		

Week Ending	Days Worked	Times	Daily Hours	Weekly Hours
3 April 2014	Friday, 28 March 2014	8:00am to 7:00pm	10.5	53
	Saturday, 29 March 2014	8:00am to 5:00pm	8.5	
	Sunday, 30 March 2014	10:00am to 4:00pm	5.5	
	Monday, 31 March 2014	8:00am to 6:00pm	9.5	
	Wednesday, 2 April 2014	8:00am to 6:00pm	9.5	
	Thursday, 3 April 2014	8:00am to 6:00pm	9.5	
10 April 2014	Friday, 4 April 2014	8:00am to 7:00pm	10.5	62.5
	Saturday, 5 April 2014	8:00am to 5:00pm	8.5	
	Sunday, 6 April 2014	10:00am to 4:00pm	5.5	
	Monday, 7 April 2014	8:00am to 6:00pm	9.5	
	Tuesday, 8 April 2014	8:00am to 6:00pm	9.5	
	Wednesday, 9 April 2014	8:00am to 6:00pm	9.5	
17 April 2014	Thursday, 10 April 2014	8:00am to 6:00pm	9.5	62.5
	Friday, 11 April 2014	8:00am to 7:00pm	10.5	
	Saturday, 12 April 2014	8:00am to 5:00pm	8.5	
	Sunday, 13 April 2014	10:00am to 4:00pm	5.5	
	Monday, 14 April 2014	8:00am to 6:00pm	9.5	
	Tuesday, 15 April 2014	8:00am to 6:00pm	9.5	
24 April 2014	Wednesday, 16 April 2014	8:00am to 6:00pm	9.5	47.5
	Thursday, 17 April 2014	8:00am to 6:00pm	9.5	
	Friday, 18 April 2014	8:00am to 7:00pm	10.5	
	Saturday, 19 April 2014	8:00am to 5:00pm	8.5	
	Monday, 21 April 2014	8:00am to 6:00pm	9.5	
	Tuesday, 22 April 2014	8:00am to 6:00pm	9.5	
1 May 2014	Thursday, 24 April 2014	8:00am to 6:00pm	9.5	52
	Friday, 25 April 2014	Anzac Day		
	Saturday, 26 April 2014	8:00am to 5:00pm	8.5	
	Sunday, 27 April 2014	10:00am to 4:00pm	5.5	
	Monday, 28 April 2014	8:00am to 6:00pm	9.5	
	Tuesday, 29 April 2014	8:00am to 6:00pm	9.5	
8 May 2014	Wednesday 30 April 2014	8:00am to 6:00pm	9.5	57
	Thursday, 1 May 2014	8:00am to 6:00pm	9.5	
	Friday, 2 May 2014	8:00am to 7:00pm	10.5	
	Saturday, 3 May 2014	8:00am to 5:00pm	8.5	
	Monday, 5 May 2014	8:00am to 6:00pm	9.5	
	Tuesday, 6 May 2014	8:00am to 6:00pm	9.5	
15 May 2014	Wednesday, 7 May 2014	8:00am to 6:00pm	9.5	47.5
	Thursday, 8 May 2014	8:00am to 6:00pm	9.5	
	Friday 9 May 2014	8:00am to 7:00pm	10.5	
	Saturday, 10 May 2014	8:00am to 5:00pm	8.5	
	Monday, 12 May 2014	8:00am to 6:00pm	9.5	
	Wednesday, 14 May 2014	8:00am to 6:00pm	9.5	
22 May 2014	Thursday, 15 May 2014	8:00am to 6:00pm	9.5	64.5
	Friday, 16 May 2014	8:00am to 7:00pm	10.5	
	Saturday, 17 May 2014	8:00am to 5:00pm	8.5	
	Sunday, 18 May 2014	(TALK) 10:00am to 6:00pm	7.5	
	Monday, 19 May 2014	8:00am to 6:00pm	9.5	
	Tuesday, 20 May 2014	8:00am to 6:00pm	9.5	
29 May 2014	Wednesday, 21 May 2014	8:00am to 6:00pm	9.5	62.5
	Thursday, 22 May 2014	8:00am to 6:00pm	9.5	
	Friday, 23 May 2014	8:00am to 7:00pm	10.5	
	Saturday, 24 May 2014	8:00am to 5:00pm	8.5	
	Sunday, 25 May 2014	10:00am to 4:00pm	5.5	
	Monday, 26 May 2014	8:00am to 6:00pm	9.5	
5 June 2014	Tuesday, 27 May 2014	8:00am to 6:00pm	9.5	47.5
	Wednesday, 28 May 2014	8:00am to 6:00pm	9.5	
	Thursday, 29 May 2014	8:00am to 6:00pm	9.5	
	Friday, 30 May 2014	8:00am to 7:00pm	10.5	
	Saturday, 31 May 2014	8:00am to 5:00pm	8.5	
	Tuesday, 3 June 2014	8:00am to 6:00pm	9.5	
5 June 2014	Wednesday, 4 June 2014	8:00am to 6:00pm	9.5	47.5
	Thursday, 5 June 2014	8:00am to 6:00pm	9.5	

Week Ending	Days Worked	Times	Daily Hours	Weekly Hours
12 June 2014	Friday, 6 June 2014	8:00am to 7:00pm	10.5	47.5
	Saturday, 7 June 2014	8:00am to 5:00pm	8.5	
	Tuesday, 10 June 2014	8:00am to 6:00pm	9.5	
	Wednesday, 11 June 2014	8:00am to 6:00pm	9.5	
	Thursday, 12 June 2014	8:00am to 6:00pm	9.5	
19 June 2014	Friday, 13 June 2014	8:00am to 7:00pm	10.5	45.5
	Saturday, 14 June 2014	8:00am to 5:00pm	8.5	
	Sunday, 15 June 2014	(TALK) 10:00am to 6:00pm	7.5	
	Monday, 16 June 2014	8:00am to 6:00pm	9.5	
	Thursday, 19 June 2014	8:00am to 6:00pm	9.5	
26 June 2014	Friday, 20 June 2014	8:00am to 7:00pm	10.5	38
	Saturday, 21 June 2014	8:00am to 5:00pm	8.5	
	Wednesday, 25 June 2014	8:00am to 6:00pm	9.5	
	Thursday, 26 June 2014	8:00am to 6:00pm	9.5	
3 July 2014	Friday, 27 June 2014	8:00am to 7:00pm	10.5	57
	Saturday, 28 June 2014	8:00am to 5:00pm	8.5	
	Monday, 30 June 2014	8:00am to 6:00pm	9.5	
	Tuesday, 1 July 2014	8:00am to 6:00pm	9.5	
	Wednesday, 2 July 2014	8:00am to 6:00pm	9.5	
Thursday, 3 July 2014	8:00am to 6:00pm	9.5		
<u>CHANGE OF HOURS</u>				
10 July 2014	Sunday, 6 July 2014	10:00am to 4:00pm	5.5	35.5
	Monday, 7 July 2014	9:00am to 5:00pm	7.5	
	Tuesday, 8 July 2014	9:00am to 5:00pm	7.5	
	Wednesday, 9 July 2014	9:00am to 5:00pm	7.5	
	Thursday, 10 July 2014	9:00am to 5:00pm	7.5	
17 July 2014	Friday, 11 July 2014	9:00am to 6:00pm	8.5	36.5
	Saturday, 12 July 2014	9:00am to 5:00pm	7.5	
	Sunday, 13 July 2014	10:00am to 4:00pm	5.5	
	Monday, 14 July 2014	9:00am to 5:00pm	7.5	
	Tuesday, 15 July 2014	9:00am to 5:00pm	7.5	
24 July 2014	Sunday, 20 July 2014	(TALK) 10:00am to 6:00pm	7.5	37.5
	Monday, 21 July 2014	9:00am to 5:00pm	7.5	
	Tuesday, 22 July 2014	9:00am to 5:00pm	7.5	
	Wednesday, 23 July 2014	9:00am to 5:00pm	7.5	
	Thursday, 24 July 2014	9:00am to 5:00pm	7.5	
30 July 2014	Friday, 25 July 2014	9:00am to 6:00pm	8.5	38.5
	Saturday, 26 July 2014	9:00am to 5:00pm	7.5	
	Tuesday, 28 July 2014	9:00am to 5:00pm	7.5	
	Wednesday, 29 July 2014	9:00am to 5:00pm	7.5	
	Thursday, 30 July 2014	9:00am to 5:00pm	7.5	
7 August 2014	Friday, 1 August 2014	9:00am to 6:00pm	8.5	38.5
	Saturday, 2 August 2014	9:00am to 5:00pm	7.5	
	Tuesday, 5 August 2014	9:00am to 5:00pm	7.5	
	Wednesday, 6 August 2014	9:00am to 5:00pm	7.5	
	Thursday, 7 August 2014	9:00am to 5:00pm	7.5	
14 August 2014	Friday, 8 August 2014	9:00am to 6:00pm	8.5	31
	Saturday, 9 August 2014	9:00am to 5:00pm	7.5	
	Tuesday, 12 August 2014	9:00am to 5:00pm	7.5	
	Thursday, 14 August 2014	9:00am to 5:00pm	7.5	
21 August 2014	Friday, 15 August 2014	9:00am to 6:00pm	8.5	38.5
	Saturday, 16 August 2014	9:00am to 5:00pm	7.5	
	Tuesday, 19 August 2014	9:00am to 5:00pm	7.5	
	Wednesday, 20 August 2014	9:00am to 5:00pm	7.5	
	Thursday, 21 August 2014	9:00am to 5:00pm	7.5	
28 August 2014	Friday, 22 August 2014	9:00am to 6:00pm	8.5	31
	Saturday, 23 August 2014	9:00am to 5:00pm	7.5	
	Tuesday, 26 August 2014	9:00am to 5:00pm	7.5	
	Wednesday, 27 August 2014	9:00am to 5:00pm	7.5	
4 September 2014	Sunday, 31 August 2014	10:00am to 4:00pm	5.5	35.5
	Monday, 1 September 2014	9:00am to 5:00pm	7.5	
	Tuesday, 2 September 2014	9:00am to 5:00pm	7.5	
	Wednesday, 3 September 2014	9:00am to 5:00pm	7.5	
Thursday, 4 September 2014	9:00am to 5:00pm	7.5		

Week Ending	Days Worked	Times	Daily Hours	Weekly Hours
11 September 2014	Friday, 5 September 2014	9:00am to 6:00pm	8.5	51.5
	Saturday 6 September 2014	9:00am to 5:00pm	7.5	
	Sunday, 7 September 2014	10:00am to 4:00pm	5.5	
	Monday, 8 September 2014	9:00am to 5:00pm	7.5	
	Tuesday, 9 September 2014	9:00am to 5:00pm	7.5	
18 September 2014	Wednesday, 10 September 2014	9:00am to 5:00pm	7.5	31
	Thursday, 11 September 2014	9:00am to 5:00pm	7.5	
	Friday, 12 September 2014	9:00am to 6:00pm	8.5	
	Tuesday 16 September 2014	9:00am to 5:00pm	7.5	
25 September 2014	Wednesday 17 September 2014	9:00am to 5:00pm	7.5	36.5
	Thursday 18 September 2014	9:00am to 5:00pm	7.5	
	Friday, 19 September 2014	9:00am to 6:00pm	8.5	
	Sunday, 21 September 2014	10:00am to 4:00pm	5.5	
	Tuesday, 23 September 2014	9:00am to 5:00pm	7.5	
	Wednesday, 24 September 2014	9:00am to 5:00pm	7.5	
	Thursday, 25 September 2014	9:00am to 5:00pm	7.5	

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00505

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00505
CORAM	:	COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 10 JULY 2015
DELIVERED	:	FRIDAY, 10 JULY 2015
FILE NO.	:	B 22 OF 2015
BETWEEN	:	CHERYL ARUNDEL Applicant AND OK YOUTH SERVICES INC. C/O M. PARKER Respondent

Catchwords	:	Industrial law (WA) – Contractual benefits claim – Claim for unpaid wages, accrued annual leave and redundancy payment – Principles applied – Wages and accrued annual leave found to be denied contractual benefits – Application upheld in part – Declaration and order made
Legislation	:	Industrial Relations Act 1979 (WA) s 29(1)(b)(ii)
Result	:	Application upheld in part
Representation:		
Applicant	:	In person
Respondent	:	No appearance by the respondent

Ex tempore Reasons for Decision

- 1 The applicant Ms Arundel commenced employment with the respondent the OK Youth Services Inc. which runs a care school for children in Wanneroo, Western Australia, as its Financial Manager, on or about 30 January 2013.
- 2 The evidence of Ms Arundel was that as the Financial Manager she was responsible for maintaining the books of the respondent, preparation of financial returns such as the business activity statement and other returns, payroll and general financial reporting for the respondent.
- 3 Ms Arundel also tells me that she was employed as the Financial Manager on a part time basis working 25 hours per week and was paid, as at the termination of her employment on 4 December 2013, at an hourly rate of \$34.55 per hour.
- 4 Ms Arundel's evidence also is that the respondent was funded by Commonwealth and State government funding. It appears that towards about November 2013, it became apparent that there were significant difficulties being encountered for ongoing funding of the respondent and from the pay period commencing 9 October 2013, Ms Arundel ceased to receive her regular fortnightly wage of \$1,727.75 gross.

- 5 Pay advices by way of exhibit A1 before me, which commence from the period commencing on 9 October 2013 up to and including 3 December 2013, disclose Ms Arundel's fortnightly rate of pay, but as she informed me in evidence, these documents were prepared for financial record keeping purposes only and, as funding ceased for the organisation over these pay periods, these transaction reports were reversed. Ms Arundel confirmed in her evidence that she did not receive the wages set out in exhibit A1. Her total claimed wages for the period of 9 October 2013 through to and including 4 December 2013, is the sum of \$7,126.97.
- 6 Ms Arundel's evidence also was however, that just prior to Christmas 2013 on 23 December 2013, she received a payment of \$1,000 from Mr Parker, the Chief Executive Officer of the respondent. She has deducted that amount from her total claim, leaving a total wages claim of \$6,126.97.
- 7 Ms Arundel also claims an amount of \$3,078.15, being for accrued but untaken annual leave in the amount of 89.08 hours for the 2013 calendar year. Ms Arundel informed me in evidence that she did take some leave however, her pay advices in exhibit A1 for the pay period ending 3 December 2013 reflect her accrued untaken annual leave at 89.08 hours at her hourly rate of \$34.55 in the gross sum of \$3,078.15, in accordance with her claim.
- 8 Thirdly Ms Arundel claims redundancy pay in an unspecified amount. I accept that, as stated in her evidence, given Ms Arundel has had less than one year's service she would not be entitled to a redundancy payment in any event. Regardless of that there is no evidence before me that it was a term and condition of Ms Arundel's employment that she be entitled to redundancy payments.
- 9 Accordingly based on the evidence I am satisfied and I find that Ms Arundel has, on the balance of probabilities, established that she was entitled to a fortnightly wage of \$1,727.75 and that from the period of 9 October 2013 through to and including 4 December 2013, she did not receive a contractual benefit in the sum of \$7,126.97 for her wages over that period of time. From that figure I am satisfied that Ms Arundel was paid \$1,000 by the respondent leaving a gross debt due of \$6,126.97.
- 10 Insofar as the annual leave claim is concerned, I am satisfied on the evidence that as at the termination of Ms Arundel's employment, she did have an accrued entitlement to annual leave in the amount of 89.08 hours, leading to a gross amount of \$3,078.15 as claimed. This leads to an all up gross entitlement of \$9,205.12, in accordance with Ms Arundel's claim.
- 11 I am therefore satisfied that in accordance with the applicant's claim and the evidence, that the entitlements claimed by Ms Arundel have been denied to her. The Commission will make an order that the respondent pay to the applicant the sum of \$9,205.12 gross within 21 days of today.

2015 WAIRC 00506

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CHERYL ARUNDEL

APPLICANT

-v-

OK YOUTH SERVICES INC. C/O M. PARKER

RESPONDENT**CORAM** COMMISSIONER S J KENNER**DATE** FRIDAY, 10 JULY 2015**FILE NO/S** B 22 OF 2015**CITATION NO.** 2015 WAIRC 00506**Result** Application upheld in part**Representation****Applicant** In person**Respondent** No appearance*Order*

HAVING HEARD the applicant on her own behalf and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby –

- (1) DECLARES that the respondent is indebted to the applicant in the sum of \$9,205.12 gross as a denied contractual benefit.
- (2) ORDERS that the respondent pay to the applicant the sum of \$9,205.12 gross within 21 days.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00471

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ROBERT BAIN **APPLICANT**

-v-
PILBARA IRON COMPANY (SERVICES) PTY LTD **RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 29 JUNE 2015
FILE NO/S B 26 OF 2015
CITATION NO. 2015 WAIRC 00471

Result Discontinued by leave
Representation
Applicant Mr R Bain
Respondent Mr P Swingler

Order

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

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 00815**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
WARREN FREDERIK JOHAN CUIJPERS **APPLICANT**

-v-
PERTH METAL WORK CO PTY LTD **RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 20 AUGUST 2015
FILE NO/S U 85 OF 2015
CITATION NO. 2015 WAIRC 00815

Result Discontinued by leave
Representation
Applicant No appearance
Respondent Mr M Ahern of counsel

Order

THERE having been no appearance on behalf of the applicant and having heard Mr M Ahern 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 discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00768

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00768
CORAM : COMMISSIONER S J KENNER
HEARD : THURSDAY, 16 JULY 2015
DELIVERED : MONDAY, 3 AUGUST 2015
FILE NO. : B 47 OF 2015
BETWEEN : KERRY DONOVAN
 Applicant
 AND
 STEWART MARTINCIC / MARC MARUSCO
 M3 BUILDING & CONSTRUCTION PTY LTD
 Respondent

Catchwords : Industrial law (WA) – Contractual benefits claim – Whether the Commission has jurisdiction – Whether a director is an employee – Principles applied – Multi-factor test – Totality of the relationship considered – Director found not to be an employee on the evidence – Application dismissed for want of jurisdiction – Order made
Legislation : *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Corporations Act 2001 (Cth)
Result : Application dismissed
Representation:
Applicant : In person
Respondent : Mr M Marusco and with him Mr S Martincic

Case(s) referred to in reasons:

Abdalla v Viewdaze Pty Ltd (2003) 122 IR 215
Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424
Clark v Clark Construction Initiatives Ltd [2008] IRLR 364
Eaton v Robert Eaton Ltd [1988] IRLR 83
Fleming v Secretary of State for Trade and Industry [1997] IRLR 682
Hollis v Vabu Pty Limited (2001) 207 CLR 21
Lee v Lee's Air Farming Ltd [1960] 3 All ER 420
Neufeld v A & N Communications In Print Ltd – In liquidation [2008] UKEAT/0177/07/JOJ
Secretary of State for Trade and Industry v Bottrill [2000] 1 All ER 915
Southern Group Ltd v Smith (1997) 37 ATR 107
The State of Queensland v Whiteman [2006] QSC 325
The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd trading as Florida Exclusive Pools (1997) 77 WAIG 4
Yaraka Holdings Pty Ltd v Giljevic (2006) 149 IR 339

Reasons for Decision

- 1 In March 2013 the applicant, Mr Donovan, met with Mr Marusco and Mr Martincic at a café in Applecross, Perth to discuss a business proposition. That proposition was an invitation to Mr Donovan to join both Mr Marusco and Mr Martincic in a home building business venture to be conducted by the respondent company, M3 Building & Construction Pty Ltd. Both Mr Marusco and Mr Martincic have a new residential home sales background and Mr Donovan is a registered builder. In order for the company to commence construction activity, it needed to obtain a building licence from the Western Australian Building Commission. A building licence can only be obtained if the company has appointed a registered builder as a Building Supervisor. Mr Donovan met that requirement. Some discussion took place between Mr Donovan, Mr Marusco and Mr Martincic for Mr Donovan to take a share in M3's business as consideration for its use of his builder's registration.
- 2 A further café meeting took place about one week later. At that meeting it was proposed that Mr Donovan take a 20% share of the business because he was not required to make any capital contribution to the business. Mr Donovan was appointed as a director of M3 on 20 March 2013. Both Mr Marusco and Mr Martincic were also directors. Of the 60 ordinary shares issued by M3, the Australian Securities and Investments Commission's company record shows that 24 were issued each to Mr Marusco

and Mr Martincic and 12 to Mr Donovan. It was common ground that Mr Donovan was to be responsible for the construction side of the business and Mr Marusco and Mr Martincic were to be responsible for the sales and administration side.

- 3 As a start-up business, there was little work for Mr Donovan to do until about October 2013, when the first of the houses sold started to be built. Mr Donovan was without income during this time and M3 said that it was not anticipated there would be any income until the business had sufficient cash flow for distributions to be made to the directors. As Mr Donovan was unable to continue without income, he pressed Mr Marusco for some money and was paid \$6,000 net as a director's payment, on a monthly basis, from December 2013 to May 2014. A dispute arose between Mr Donovan, Mr Marusco and Mr Martincic. Mr Donovan stopped working for M3 on 18 June 2014. He ceased to be a director of M3 on 8 September 2014. Mr Donovan sold his shareholding in M3 to Mr Marusco and Mr Martincic in November 2014.
- 4 Mr Donovan now claims that when he was working for M3, he did so at all material times as an employee of the company, as its Building Supervisor. He maintains that at the time of commencement, he was to be paid \$6,000 net per month. Taking into account the money paid by M3 to him already, Mr Donovan now claims to be paid for April to November 2013 and for June 2014, in the sum of \$56,000 net. M3 disputes Mr Donovan's claim and said that it was never intended that he be an employee of the business. As Mr Donovan was a part owner of M3, it was intended that he be paid on a profit share basis, along with the other directors, once the business was viable and able to generate income for director's payments.
- 5 As the issue of jurisdiction has been raised, it is necessary for the Commission to first consider whether Mr Donovan was an employee of M3. The onus is on Mr Donovan to establish this: *The Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v R B Exclusive Pools Pty Ltd trading as Florida Exclusive Pools* (1996) 77 WAIG 4 at 8 per Fielding SC. If so, it will then be necessary to consider whether the claim made by Mr Donovan, represented benefits under his contract of employment and whether those benefits have been denied to him by M3.

Director and employee?

- 6 Essential to the Commission's jurisdiction in this matter, is the existence of an employer/employee relationship between Mr Donovan and M3 over the period of Mr Donovan's claim. It is established that the determination of the status of a person as an employee involves a "multi-factor test": *Hollis v Vabu Pty Limited* (2001) 207 CLR 21. This involves the consideration of a range of indicia. The totality of the relationship is to be considered. The various factors, distilled from the cases, are set out by the learned authors Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment* (7th ed, 2011) at pars 2.200-2.340. I will refer to these factors later in these reasons.
- 7 A company is a separate legal entity, and is separate from its controllers and owners: *Lee v Lee's Air Farming Ltd* [1960] 3 All ER 420. A director of a company, whilst an office holder under the *Corporations Act 2001* (Cth) may also have the status of an employee. A managing director is one such example. This may be the case in a small sole director company, because of the separate entity doctrine: *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; *Lee*. In the case of a director of a company, whether the director also occupies the dual capacity as an employee, involves the application of the multi-factor test, referred to earlier, along with some particular features in cases where the putative employee is also a director of a company. Whilst each case will ultimately turn on its own particular circumstances, some helpful assistance can be obtained from several English employment cases.
- 8 A leading case from the United Kingdom is *Secretary of State for Trade and Industry v Bottrill* [2000] 1 All ER 915. In this case the question to be determined was whether a person who occupied the position as both controlling shareholder and the managing director of the company concerned could also be its employee. Importantly in this case, Mr Bottrill had signed a written contract of employment document which provided for a term of three years, set out his duties and responsibilities, including his working hours, and provided for his remuneration and holiday and sick leave entitlements. Other relevant facts were that Mr Bottrill generally worked the hours set out in the employment contract, and did not work for anyone else. Tax was deducted from payments made to him and there were no payments described as "director's fees" and the like.
- 9 In its judgement, the Court of Appeal held that Mr Bottrill was an employee. He was entitled to redundancy pay under the relevant employment legislation. One of the questions that the Court of Appeal said was important was whether there was a genuine contract between the company and the director/shareholder: at 926. An important focus was the actual conduct of the parties in accordance with the terms of the relevant contract: at 927. Additionally, a usual indicator of an employment relationship that being the degree of control exercised by the company over the person was regarded as an important consideration also: at 926.
- 10 The importance of the existence of a contract was similarly emphasised by the Employment Appeal Tribunal in *Clark v Clark Construction Initiatives Ltd* [2008] IRLR 364. In *Clark* the Tribunal referred to the existence of an employment contract and held that if its terms have not been reduced to writing or have not been identified, then their absence would be "powerful evidence" that the relationship between the parties was not an employment relationship: at par 98 (citing *Fleming v Secretary of State for Trade and Industry* [1997] IRLR 682). A similar view was expressed by McMullen J in *Neufeld v A & N Communications In Print Ltd – In Liquidation* [2008] UKEAT/0177/07/JOJ to the effect that in the case of directors of a company, the absence of a written contract of employment will undermine the existence of an employment relationship: at par 28.
- 11 The existence of express terms of an employment contract, were also significant in two Australian cases in holding that an employment relationship existed between a director and a company: *The State of Queensland v Whiteman* [2006] QSC 325; *Southern Group Ltd v Smith* (1997) 37 ATR 107.
- 12 Further, in *Eaton v Robert Eaton Ltd* [1988] IRLR 83 the issue before the Employment Appeal Tribunal was whether the managing director of a company, was an employee, again, for the purposes of obtaining a redundancy payment when the company ceased trading. In this case, the Tribunal summarised some relevant principles to apply and in this respect, Sir Ralph Kilner-Brown said at par 3:

Without presuming or intending to lay down principles or guidelines because every case depends on its own facts we have over the years been able to identify some of the factors which crop up in these cases. In the first place Industrial

Tribunals have to bear in mind that generally speaking, a director of a company is the holder of an office and is not in employment (see *McMillan v Guest* (1942) AC 562). Evidence is required to establish that a director is employed by a company. Any descriptive term such as managing director or technical director may provide the first indication of employment. Obviously the position of a properly appointed managing director or the so-called working director who draws a weekly wage is one which is more likely to present an arguable case for a contract of employment. In this context the most pertinent question is whether or not there was an agreement to employ a person as managing director which should either be an express contract or minuted at a board meeting or noted by a memorandum in writing. This is not conclusive. It may then have to be ascertained whether remuneration is by way of salary or by way of director's fees. If the latter, it points away from employment. Then it might be appropriate to consider whether there was remuneration fixed in advance or merely made on an ad hoc basis. If the latter, this too points away from employment. In some cases remuneration may be identified as gratuitous and not by way of entitlement. Again this would point away from employment. Finally there is the important consideration of the functions actually performed by the director. Was he merely acting in a directorial capacity or was he under the control of the board of directors? An Industrial Tribunal may not find it necessary to pose all of these questions and they may identify other factors as relevant. It is entirely a matter for the Tribunal to approach the problem as it thinks appropriate.

- 13 There are many other cases which turn upon their own particular facts.
- 14 I now consider the various factors relevant to an assessment of whether Mr Donovan was an employee of M3, having regard to all of the evidence led in these proceedings. It is also important to observe at this point, that this assessment involves not merely the application of a mechanical checklist of factors. An assessment involves an overall qualitative evaluation of the evidence in light of the factors to be considered: *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215.
- 15 An important factor, is the exercise of control, either actual or the residual capacity for its exercise. This means that the putative employee is subject to direction not only as to what is to be done, but how the work is to be performed. In the case of highly skilled or professional occupations however, the indicia of control is not so much the day to day direction of how work is to be performed, but a reserved right in the employer to provide general oversight and direction.
- 16 In this case the evidence of both Mr Donovan and Mr Marusco was to the effect that Mr Donovan would be responsible for the construction side of the M3 business. As already noted, Mr Marusco and Mr Martincic were to be responsible for the sales and administration. Discussions prior to Mr Donovan joining the business were to the effect that the company would acquire Mr Donovan's qualification as a registered builder, and Mr Donovan would share in the profits of the firm, along with the two other directors, if it was successful.
- 17 While after construction of houses commenced, Mr Donovan, Mr Marusco and Mr Martincic met on a weekly basis. On the evidence this was for the purpose of Mr Donovan providing information on the progress of new homes under construction. He prepared a spreadsheet for this purpose and it was updated as the construction of homes progressed. There was some suggestion that Mr Donovan was given some guidance on how to present himself to clients, but I do not regard this of any great significance. At these regular meetings Mr Donovan said that Mr Marusco and Mr Martincic provided an update on the sales of new homes and other matters. As the registered builder and the director with the required building qualification, both Mr Marusco and Mr Martincic let Mr Donovan get on with his side of the business, without interference.
- 18 There was a job description prepared for Mr Donovan in the designated position of "Building Supervisor", but I am not persuaded that this is in any sense persuasive. It merely set out Mr Donovan's responsibilities. Mr Marusco testified that it was also necessary to submit this document as a part of the application to the Building Commission in order for M3 to obtain its building licence. This was because the company needed to have a qualified Building Supervisor, as part of the regulatory requirements.
- 19 From all of the evidence, I am not persuaded either that Mr Marusco or Mr Martincic exercised any real degree of control over Mr Donovan, or had reserved to them the right to do so. It was common ground that in fact Mr Donovan had very little to do in the business from about April to October 2013, because no homes were ready for construction. Mr Donovan said that given there was not enough work to keep him occupied full time, it was discussed whether Mr Donovan should get another job in the meantime. In the meantime also, both Mr Marusco and Mr Martincic were busy trying to sell homes and prepare designs for customers. To that extent, there was no barrier to Mr Donovan performing work for others, certainly while the business was quiet in the early stages. Whilst not decisive, this is a factor inconsistent with a direct employment relationship.
- 20 Mr Donovan gave evidence that as a registered builder, he had his own tools of trade. In some cases this may count against employment. However, in the context of a person in this industry, it is not a persuasive factor. More important, in the context of this matter, is whether it may be said that a person is in business on their own account, by the making of capital contributions or there is the capacity for their endeavours to contribute to building up goodwill in a business.
- 21 In this case, Mr Donovan took a 20% share of the M3 business. In effect, Mr Donovan provided his builder's registration as his contribution, which was an essential asset. From all of the evidence, I have no doubt that the intention was for Mr Marusco, Mr Martincic and Mr Donovan, to build up the business and its value, so all three of them could share in its success. Mr Donovan's qualifications and experience was as necessary as Mr Marusco's and Mr Martincic's contributions through sales, to make this happen.
- 22 The existence of integration into an employer's business, by the use of uniforms and signage etc, may be a factor evidencing employment. In this case, Mr Donovan was designated as "Construction Manager" in M3 correspondence and had a business card to this effect. As a director it may be assumed that he would be part of the company organisation. However, it is in my opinion, not a major factor in its own right. There are many examples of independent contractors for instance, appearing to be integrated into a business.
- 23 Taxation arrangements may be of some significance in determining a person's employment status, although often it is a neutral factor. In this case no tax was deducted at the source on the payments made by M3 to Mr Donovan from December 2013. Mr Donovan testified that Mr Marusco informed him that he was responsible for any tax payable as the payments were in the

nature of director's payments and were not salary or wages. Mr Donovan in his evidence said he understood that the director's fees paid would be regarded as wages and he was "astounded" that M3 would say that he was responsible for his own taxation.

- 24 As to the issue of remuneration, the payment of a regular wage or salary, at regular intervals, not linked to completion of tasks or discrete work assignments, is indicative of employment, even for a director: *Eaton*. In this case, Mr Donovan said that he initially agreed with Mr Marusco and Mr Martincic, to be paid \$6,000 per month. This was in return for his builder's registration. On the other hand, Mr Marusco testified that as M3 was a start-up business, there was no money available for payments to directors until there was sufficient cash flow. It was not until after Mr Donovan requested money from Mr Marusco, in about November 2013, that M3 made payments of director's fees from December 2013. Mr Marusco said it was the intention from the beginning of the business, that once sufficient revenue, after costs, had been generated, the directors would be able to take equal director's payments and share in the profits of the business. Mr Marusco testified that neither he nor Mr Martincic had been paid by the business prior to December 2013 either.
- 25 Given the M3 business was, at the time of the initial discussions, a new start-up venture it is difficult to accept a commitment could have been given to make regular and consistent payments of \$6,000 net per month from Mr Donovan's commencement. This was particularly so as no construction work at all was envisaged for some time. In my view, from all of the evidence, it was intended that the capacity of paying the directors of the company an income, was dependent on the financial success of the business. This is supported by an email from Mr Marusco to Mr Donovan of 30 November 2013. In it, Mr Marusco refers to the need to build up a cash reserve in the business, based on sales and substantial completion of homes under construction, before they can start to pay themselves as directors. Mr Marusco referred to "Going forward I think we should all get used to the idea of getting payments of closer to \$5k at a time each as homes go past a certain point". There was no reference in this email to the figure of \$6,000 net per month, which Mr Donovan said was the agreed sum from the outset.
- 26 Additionally, Mr Marusco's evidence was that when payments were made to Mr Donovan, the amount of \$6,000 was in response to a question put by him to Mr Donovan, as to what Mr Donovan needed at that time. Mr Marusco said that decisions were only made after taking accounting advice. All directors were then paid the same amounts as Mr Donovan in director's fees.
- 27 As to other employment entitlements such as annual leave and sick leave etc, there were no such benefits discussed, agreed or provided. The fact that such benefits do not apply is not, however, of itself of great weight: *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 at 351. Nor was there any express right in M3 to suspend or dismiss Mr Donovan.
- 28 Overall however, an important factor against Mr Donovan being an employee, as well as a director of M3, was, consistent with the cases referred to above, the complete absence of any record of his terms and conditions of purported employment. There was no evidence at all of any written record, either by way of a memorandum, letter or other company record, noting any employment arrangement between Mr Donovan and M3. The employment relationship would need to be between the company, as a separate legal person from its controllers and shareholders, and Mr Donovan. Having regard to the equivocal nature of some of the other indicia, the absence of this in Mr Donovan's case is significant.

Conclusion

- 29 It is necessary for the Commission to step back and evaluate, in a qualitative sense, the overall relationship between the parties, in view of all of the evidence, having regard to the legal principles discussed above. Having done so, I am not persuaded that Mr Donovan has discharged the burden on him to establish that he was at all material times an employee of M3. That being so, Mr Donovan's claim cannot be regarded as an industrial matter and it must be dismissed for want of jurisdiction.

2015 WAIRC 00767

<p>PARTIES</p> <p>WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION</p> <p>KERRY DONOVAN</p> <p style="text-align: center;">-v-</p> <p>STEWART MARTINCIC / MARC MARUSCO</p> <p>M3 BUILDING & CONSTRUCTION PTY LTD</p> <p>CORAM</p> <p>DATE</p> <p>FILE NO/S</p> <p>CITATION NO.</p>	<p>COMMISSIONER S J KENNER</p> <p>MONDAY, 3 AUGUST 2015</p> <p>B 47 OF 2015</p> <p>2015 WAIRC 00767</p>	<p>APPLICANT</p> <p>RESPONDENT</p>
<p>Result</p> <p>Representation</p> <p>Applicant</p> <p>Respondent</p>	<p>Application dismissed</p> <p>In person</p> <p>Mr M Marusco and with him Mr S Martincic</p>	

Order

HAVING heard the applicant on his own behalf and Mr M Marusco and with him Mr S Martincic 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 for want of jurisdiction.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00846

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00846
CORAM : COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS : TUESDAY, 30 JUNE 2015, THURSDAY, 2 JULY 2015, FRIDAY, 21 AUGUST 2015, THURSDAY 27 AUGUST 2015
DELIVERED : TUESDAY, 1 SEPTEMBER 2015
FILE NO. : U 70 OF 2015
BETWEEN : IAN HALLYBONE
 Applicant
 AND
 JEFF KEILES - MANAGING DIRECTOR - WORKWEAR INDUSTRIES
 Respondent

Catchwords : Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal claim - Whether Commission has jurisdiction - Trading activities of respondent considered - Commission satisfied respondent is a trading corporation - Application dismissed

Legislation : *Industrial Relations Act 1979* s 27(1) and s 29(1)(b)(i)
Fair Work Act 2009 s 12, s 13, s 14(1)(a) and s 26

Result : Dismissed

Representation:

Applicant : In person
 Respondent : Mr J Keiles and Mr M Silver

Case(s) referred to in reasons:

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

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Reasons for Decision

- 1 This application was lodged on 8 May 2015 by Ian Hallybone (the applicant) under s 29(1)(b)(i) of the *Industrial Relations Act* (the Act). Mr Hallybone claims that he was unfairly dismissed on 1 May 2015 by Jeff Keiles – Managing Director – Workwear Industries.
Name of the respondent
- 2 It became apparent during the proceedings that the respondent has been incorrectly named in this application. 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 Jeff Keiles – Managing Director – Workwear Industries be deleted as the named respondent in this application and be substituted with Workwear Industries Pty Ltd (the respondent) (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).
- 3 The respondent claims that the Commission cannot deal with this application as it is a trading corporation and therefore subject to the *Fair Work Act 2009* (the FW Act).
- 4 The issue of the Commission’s power to deal with this application was dealt with by written submissions.
Is the respondent a trading corporation?
- 5 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the Act. If the respondent is a trading corporation the jurisdiction of the Commission to deal with the applicant’s unfair dismissal claim is excluded.

- 6 The issues to be determined in this matter when deciding whether the respondent is a trading corporation are whether the respondent is incorporated, the character of the activities carried on by the respondent at the relevant time and whether the respondent was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.
- 7 The applicant provided a statutory declaration dated 27 June 2015 stating that he was employed by 'Workwear Industries' and he attached a copy of a payslip given to him by the respondent which refers to Workwear Industries Pty Ltd as his employer.
- 8 The respondent's Managing Director Mr Jeffrey Keiles provided sworn statutory declarations dated 26 June 2015 and 21 August 2015 containing the following information. Mr Keiles has been the respondent's Managing Director since its incorporation on 2 August 1993. Mr Keiles confirmed that the entity which employed the applicant is Workwear Industries Pty Ltd and attached to one of the statutory declarations is an Australian Securities and Investment Commission Company Summary dated 23 June 2015 confirming that Workwear Industries Pty Ltd is an Australian Proprietary Company. Mr Keiles also confirmed that Workwear Industries Pty Ltd is the corporate trustee of the Multirange Unit Trust. The respondent employs approximately 25 employees across a number of Australian States and the respondent is a commercial enterprise with the objective of generating revenue and earning a profit for its shareholders. The respondent engages in significant and substantial trading activities of a commercial nature and its primary focus is to trade with a view to making a profit. The respondent's core activities include the overseas manufacture and sale of its own brands of protective workwear, footwear and disposable safety products. The respondent imports these products into Australia and then sells them to distributors across Australia and direct to large corporations. The respondent also exports its products overseas. Millions of dollars in sales revenue are generated each year through the respondent's trading activities and 100% of this revenue is from significant and substantial commercial activities.
- Conclusions**
- 9 On the undisputed information and documentation presented by the respondent I am satisfied and I find that the applicant's employer Workwear Industries Pty Ltd is an incorporated entity and I find that its main purpose is to trade with the aim of generating a profit. The statutory declarations made by Mr Keiles confirm that the respondent employs approximately 25 employees across Australia and its main activities involve the manufacture, distribution and sale of protective workwear, footwear and disposable safety products. It also obtains all of its revenue from these commercial activities.
- 10 In the circumstances I find that the respondent is a trading corporation and the applicant was therefore an employee of a national system employer employed pursuant to the FW Act and the Commission does not have jurisdiction to deal with the applicant's claim for unfair dismissal.
- 11 An order will issue dismissing this application for want of jurisdiction.

2015 WAIRC 00851

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION IAN HALLYBONE	APPLICANT
	-v-	
	WORKWEAR INDUSTRIES PTY LTD	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	THURSDAY, 3 SEPTEMBER 2015	
FILE NO/S	U 70 OF 2015	
CITATION NO.	2015 WAIRC 00851	

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr J Keiles and Mr M Silver

Order

HAVING HEARD the applicant on his own behalf and Mr J Keiles and Mr M Silver 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 Workwear Industries Pty Ltd be substituted in lieu thereof.
2. THAT this application otherwise be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00816

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MS SHARON HISLOP	APPLICANT
	-v-	
	DEPARTMENT OF EDUCATION	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 21 AUGUST 2015	
FILE NO/S	U 94 OF 2015	
CITATION NO.	2015 WAIRC 00816	

Result	Application dismissed
Representation	
Applicant	Ms N Barsby of counsel
Respondent	Mr D Anderson of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on 23 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 agreed to exchange further documents; and
 WHEREAS on 14 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.

2014 WAIRC 00322

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MATHEW JACOBS	APPLICANT
	-v-	
	CONVENIENT CARTAGE PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 23 APRIL 2014	
FILE NO/S	B 23 OF 2014	
CITATION NO.	2014 WAIRC 00322	

Result	Order issued
Representation	
Applicant	Mr G Ferguson
Respondent	Ms N Rachilla

Order

WHEREAS the respondent is being wound up in insolvency pursuant to the Corporations Act 2001 (Cth);
 AND WHEREAS pursuant to s 471B of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company while it is being wound up in insolvency, except with leave of the Court;

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

—
 THAT subject to further order of the Commission this application be and is hereby stayed.

[L.S.]

(Sgd.) S J KENNER,
 Commissioner.

2015 WAIRC 00847

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 MATHEW JACOBS

APPLICANT

-v-

CONVENIENT CARTAGE PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 1 SEPTEMBER 2015
FILE NO/S B 23 OF 2014
CITATION NO. 2015 WAIRC 00847

Result Discontinued

Representation

Applicant No appearance

Respondent No appearance

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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 J KENNER,
 Commissioner.

2015 WAIRC 00821

PARTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 MOHAMED ALI KOROMA

APPLICANT

-v-

PARKERVILLE CHILDREN AND YOUTH CARE (INC)

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 25 AUGUST 2015
FILE NO/S U 61 OF 2015
CITATION NO. 2015 WAIRC 00821

Result Discontinued

Representation

Applicant Ms K Kickett (as agent)

Respondent Ms C Leavesley (of counsel)

Order

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

On 17 June 2015, and with the consent of the respondent, the Commission convened a conciliation conference.

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

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00308

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SHAUN MADDOCK	APPLICANT
	-v-	
	KEN GRATTON-WILSON REDLION BUS AND COACH	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 15 APRIL 2015	
FILE NO/S	U 53 OF 2015	
CITATION NO.	2015 WAIRC 00308	

Result	Order issued
Representation	
Applicant	No appearance required
Respondent	Mr J Sortberg

Order

HAVING heard Mr J Sortberg on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders –

THAT the time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 23 April 2015.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00395

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2015 WAIRC 00395
CORAM	: COMMISSIONER S J KENNER
HEARD	: WEDNESDAY, 6 MAY 2015
DELIVERED	: MONDAY, 25 MAY 2015
FILE NO.	: U 53 OF 2015
BETWEEN	: SHAUN MADDOCK Applicant AND KEN GRATTON-WILSON REDLION BUS AND COACH Respondent

Catchwords	:	Industrial law (WA) – Termination of employment – Alleged harsh, oppressive and unfair dismissal – Application filed outside of 28 day time limit – Application for an extension of time – Principles applied – Action taken to contest the dismissal – Federal unfair dismissal claim – Partnership – Advice sought – Reasonable explanation for delay – Claim is not without merit – Commission satisfied that discretion should be exercised – Acceptance of application out of time – Order made
Legislation	:	<i>Fair Work Act 2009</i> (Cth) <i>Industrial Relations Act 1979</i> (WA) s 29(3) <i>Industrial Relations Act 1988</i> (Cth) s 170EA
Result	:	Extension of time granted
Representation:		
Applicant	:	In person
Respondent	:	Mr J Sortberg

Case(s) referred to in reasons:

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298

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

Reasons for Decision

- The applicant Mr Maddock was employed by the respondent Redlion Bus and Coach as a bus driver between 28 May 2012 and 26 November 2014. Redlion operates a school bus service in Esperance in the southern region of the State. On 26 November 2014 Mr Maddock's employment was terminated by Redlion summarily for alleged misconduct. Redlion, by letter of 27 November 2014 confirmed Mr Maddock's dismissal and asserted that his conduct had caused a "serious and imminent risk to the reputation, viability or profitability of Redlion". A number of allegations were set out in the letter confirming Mr Maddock's dismissal. In essence, they were complaining about Mr Maddock's disruptive and intimidatory behaviour in the workforce. Mr Maddock denies the allegations and contended that he had no opportunity to properly respond to the assertions made by Redlion, prior to his summary dismissal.
- On the afternoon of his dismissal, Mr Maddock said he attempted to contact Mr Gratton-Wilson, the general manager of Redlion, to discuss his dismissal. Telephone messages were left. The same day Mr Maddock wrote to Mr Gratton-Wilson, complaining about the conduct of Mr Sortberg, Redlion's Operations Manager, and complaining about the circumstances of his dismissal. Mr Maddock also telephoned and copied his letter to Mr Burns, a part owner of the business. Furthermore, several days after his dismissal, when returning property of the business, Mr Maddock attempted to raise the matter of his dismissal again with Mr Gratton-Wilson.
- On 16 December Mr Maddock commenced an unfair dismissal claim in the Fair Work Commission under the Fair Work Act 2009 (Cth). This claim was made within the 21 day time limit prescribed. On or about 26 December 2014 Redlion lodged its response to Mr Maddock's unfair dismissal application and also lodged an "Objection to Application for Unfair Dismissal Remedy". Redlion asserted in both its response and objection, that it is a partnership and is not a constitutional corporation for the purposes of the Fair Work Act. On 24 March 2015, the Fair Work Commission determined, after a telephone hearing, in brief reasons, that Redlion was a partnership of two natural persons and therefore was not a national system employer falling within the Fair Work Commission's jurisdiction. The application was therefore dismissed.
- On 26 March 2015 Mr Maddock commenced a claim of harsh, oppressive or unfair dismissal in this jurisdiction. He now seeks an extension of time to bring his claim, on the basis that it would be unfair for the Commission to not extend time. The contention of Mr Maddock was that he initially took advice from the Department of Commerce of Western Australia and commenced his claim in the Fair Work Commission on the basis of an assumption that Redlion was a company. Even when the notice of objection by Redlion was filed, Mr Maddock said that his advice was, and that he understood that he should complete the process before the Fair Work Commission, in order to receive a final determination.
- The relevant principles in relation to whether an unfair dismissal claim should be accepted out of time under s 29(3) of the Industrial Relations Act 1979 are well settled. In *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683, the Industrial Appeal Court generally endorsed the principles for extensions of time in unfair dismissal claims under the then s 170EA of the Industrial Relations Act 1988 (Cth) in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298. In this respect, EM Heenan J said at par 74:
 - The principles enunciated by Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 are apposite. In that case his Honour was considering the jurisdiction under s 170EA of the *Industrial Relations Act 1988* (Cth), as it then was, to grant an extension of time. His Honour said, after examining previous applicable authority:

"I agree, with respect, that those principles are appropriate to be applied in the circumstances of this matter.

Briefly stated the principles are:

 - Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.

2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."

I agree, with respect, with that formulation of the principles and their application in the present case. See also *Clark v Ringwood Private Hospital* (1997) 74 IR 413 (AIRC). However, counsel for the applicant/appellant citing the decision in *Kornicki v Telstra - Network Technology Group* [Print P3168, 22 July 1997] submits that the language of s 29(3) suggests that considerations of fairness towards an applicant are central to the exercise of the discretion and that, at least in the federal sphere, such a test was intended to convey an approach to the exercise of the Commission's discretion more generous to applicants than that which previously prevailed. I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.

- 6 Applying those principles to the present circumstances, which are not controversial, leads to the following conclusions. It is clear that Mr Maddock actively contested his dismissal from the outset. This was both directly with officers of Redlion and self-evidently, by commencing proceedings in the Fair Work Commission. I accept that Mr Maddock took advice at an early stage and may have been under the initial misapprehension that his employer was a corporation. I note that the pay slips in evidence in exhibit R2, do not identify either way, whether the employer is a corporation or a partnership. Even after the notice of objection was filed by Redlion, it is understandable that Mr Maddock, having commenced proceedings in the federal jurisdiction, would have the understanding that those proceedings would need to take their course and the preliminary objection be determined.
- 7 Two days after the Fair Work Commission determined it had no jurisdiction, Mr Maddock then commenced his claim in this Commission. I therefore consider there is a reasonable explanation for the delay in filing the present application and that Mr Maddock actively contested his dismissal from the outset.
- 8 Redlion did not point to any material prejudice caused by the delay in the commencement of these proceedings. Furthermore, whilst I have only had a reasonably scant opportunity of reviewing the circumstances of Mr Maddock's dismissal, I am not able to conclude on what is presently before me, that his unfair dismissal claim is without merit.
- 9 Accordingly, in the circumstances, the Commission will exercise its discretion and extend the time for filing Mr Maddock's dismissal claim to 26 March 2015. The application will now be listed for conciliation under the Act.

2015 WAIRC 00398

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	SHAUN MADDOCK	APPLICANT
	-v-	
	KEN GRATTON-WILSON REDLION BUS AND COACH	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 26 MAY 2015	
FILE NO/S	U 53 OF 2015	
CITATION NO.	2015 WAIRC 00398	
Result	Extension of time granted	
Representation		
Applicant	In person	
Respondent	Mr J Sortberg	

Order

HAVING heard the applicant on his own behalf and Mr J Sortberg on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the time for filing the application be and is hereby extended to 26 March 2015.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00509

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SHAUN MADDOCK	APPLICANT
	-v-	
	MG & WG BURNS TRADING AS REDLION BUS AND COACH	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 14 JULY 2015	
FILE NO/S	U 53 OF 2015	
CITATION NO.	2015 WAIRC 00509	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr K Gratton-Wilson

Order

HAVING heard the applicant on his own behalf and Mr K Gratton-Wilson on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the name of the respondent on the notice of application and the notice of answer be amended by deleting the name “Ken Gratton-Wilson Redlion Bus and Coach” and inserting in lieu thereof the name “MG & WG Burns trading as Redlion Bus and Coach”.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00756

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SHAUN MADDOCK	APPLICANT
	-v-	
	MG & WG BURNS TRADING AS REDLION BUS AND COACH	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	MONDAY, 27 JULY 2015	
FILE NO/S	U 53 OF 2015	
CITATION NO.	2015 WAIRC 00756	

Result	Application discontinued
Representation	
Applicant	Mr S Maddock
Respondent	Mr K Gratton-Wilson

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00759

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	CLAIRE MARTIN	APPLICANT
	-v-	
	MILLIYA RUMURRA ABORIGINAL CORPORATION	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 28 JULY 2015	
FILE NO/S	U 64 OF 2015	
CITATION NO.	2015 WAIRC 00759	

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr S Butcher of counsel

Order

HAVING heard the applicant on her own behalf and Mr S Butcher 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 adjourned to a date to be fixed and the hearing as to jurisdiction listed on 30 July 2015 be vacated.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00776

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	CLAIRE MARTIN	APPLICANT
	-v-	
	MILLIYA RUMURRA ABORIGINAL CORPORATION	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 5 AUGUST 2015	
FILE NO/S	U 64 OF 2015	
CITATION NO.	2015 WAIRC 00776	

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Mr S Butcher of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00211

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GIORGOS NEOFYTIDIS	APPLICANT
	-v-	
	ASPHAR SURVEY PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 19 MARCH 2014	
FILE NO.	B 32 OF 2014	
CITATION NO.	2014 WAIRC 00211	

Result	Direction issued
Representation	
Applicant	Ms E Douglas of counsel
Respondent	Mr D Murray

Direction

HAVING heard Ms E Douglas of counsel on behalf of the applicant and Mr D Murray 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 respondent file a notice of answer and counter proposal in answer to the application by no later than 2 April 2014.
- (2) THAT the matter be listed for hearing on a date to be fixed.
- (3) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00266

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GIORGOS NEOFYTIDIS	APPLICANT
	-v-	
	ASPHAR SURVEY PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 3 APRIL 2014	
FILE NO/S	B 32 OF 2014	
CITATION NO.	2014 WAIRC 00266	

Result	Order issued
Representation	
Applicant	Ms E Douglas of counsel
Respondent	Mr D Murray

Order

HAVING heard Ms E Douglas of counsel on behalf of the applicant and Mr D Murray on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

The applicant be granted leave to appear by video link subject to the venue being approved by the Commission.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00311

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GIORGOS NEOFYTIDIS	APPLICANT
	-v-	
	ASPHAR SURVEY PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 17 APRIL 2014	
FILE NO/S	B 32 OF 2014	
CITATION NO.	2014 WAIRC 00311	

Result Order issued

Representation

Applicant Ms E Douglas of counsel

Respondent Mr D Murray

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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

THAT subject to further order of the Commission this application be and is hereby stayed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00829

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GIORGOS NEOFYTIDIS	APPLICANT
	-v-	
	ASPHAR SURVEY PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 27 AUGUST 2015	
FILE NO/S	B 32 OF 2014	
CITATION NO.	2015 WAIRC 00829	

Result Application discontinued

Representation

Applicant No appearance

Respondent No appearance

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);
 AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;
 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 J KENNER,
 Commissioner.

2015 WAIRC 00823

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION GRAHAM JOHN PIPER	APPLICANT
	-v-	
	AEG OGDEN (PERTH) PTY LTD	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	TUESDAY, 25 AUGUST 2015	
FILE NO/S	B 1 OF 2015	
CITATION NO.	2015 WAIRC 00823	

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr L Moloney (as agent)

Order

This is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.
 On 10 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.
 On 21 March 2015 the applicant advised the Commission that he did not wish to proceed with the matter.
 The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 12 August 2015 and the respondent consents to the matter being discontinued.
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
 Commissioner.

2015 WAIRC 00807

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BROOKE QUINSEE	APPLICANT
	-v-	
	SERCO AUSTRALIA ACACIA PRISON	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 14 AUGUST 2015	
FILE NO/S	U 80 OF 2015	
CITATION NO.	2015 WAIRC 00807	

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance on behalf of the applicant
Respondent	No appearance on behalf of the respondent

Order

THERE having been no appearance on behalf of the applicant and there being no compulsion for the respondent to attend, 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 for want of prosecution.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00855

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR. JOHN SHERINGTON	APPLICANT
	-v-	
	MR. JARRED SMITH	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 4 SEPTEMBER 2015	
FILE NO/S	U 254 OF 2014	
CITATION NO.	2015 WAIRC 00855	

Result	Discontinued
Representation	
Applicant	Ms S Gheller (as agent)
Respondent	Ms S Owen (as agent) and later Mr D Jones (as agent)

Order

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

On 11 February 2015 the Commission convened a conference for the purpose of conciliating between the parties however, no agreement was reached.

The matter was set down for hearing and determination on 24 and 25 June 2015.

On 18 June 2015 the applicant advised the Commission that the parties had reached a settlement of the matter and the hearing was vacated.

On 25 August 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00825

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	YVONNE SIEGWART	
	-v-	
	EDUCATION DEPARTMENT OF WESTERN AUSTRALIA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	THURSDAY, 27 AUGUST 2015	
FILE NO/S	U 185 OF 2014	
CITATION NO.	2015 WAIRC 00825	

Result	Discontinued
Representation	
Applicant	Mr C Siegwart (as agent)
Respondent	Mr D Anderson (of counsel)

Order

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

The matter was set down for hearing and determination on 25, 26 and 27 August 2015.

The applicant advised the Commission on 25 June 2015 that the parties had reached an in principle settlement of the matter and on 17 July 2015 the hearing was vacated.

On 5 August 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 01128

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	STEVEN CRAIG STEEGE	
	-v-	
	CITY OF STIRLING	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 10 OCTOBER 2014	
FILE NO.	B 158 OF 2014	
CITATION NO.	2014 WAIRC 01128	

Result	Directions issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr S Farrell as agent

Directions

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr S Farrell as agent 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 file and serve on the respondent further and better particulars of his claim by no later than 31 October 2014.

- (2) THAT the respondent file and serve on the applicant further and better particulars of its notice of answer and counter proposal no later than 21 days from service of the applicant's further and better particulars of claim.
- (3) THAT the applicant and respondent file and serve an outline of submissions upon which they intend to rely no later than 3 business days prior to the date of hearing.
- (4) THAT the matter be listed for hearing for 2 days on dates to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 00501**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STEVEN CRAIG STEEGE **APPLICANT**

-v-
CITY OF STIRLING **RESPONDENT**

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 9 JULY 2015
FILE NO/S B 158 OF 2014
CITATION NO. 2015 WAIRC 00501

Result Application discontinued by leave
Representation
Applicant Mr K Trainer as agent
Respondent Mr S Farrell as agent

Order

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 00819**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
LAURANNE RENEE SWINNEN **APPLICANT**

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

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 25 AUGUST 2015
FILE NO/S B 9 OF 2015
CITATION NO. 2015 WAIRC 00819

Result Discontinued
Representation
Applicant In person
Respondent Mr L Moloney (as agent)

Order

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

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

On 31 March 2015 the applicant advised the Commission that she did not wish to proceed with the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 16 July 2015 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00822

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PETER JAMES TAYLOR	APPLICANT
	-v-	
	CITY OF CANNING	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	TUESDAY, 25 AUGUST 2015	
FILE NO/S	U 66 OF 2015	
CITATION NO.	2015 WAIRC 00822	

Result	Discontinued
Representation	
Applicant	Ms S O'Brien (of counsel)
Respondent	Mr S Roffey (as agent)

Order

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

On 17 June 2015 the Commission convened a conference for the purpose of conciliating between the parties and the Commission was advised on 2 July 2015 that the parties had reached an in principle agreement to settle the matter.

On 30 July 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* in respect of the application and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00820

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AMMAR TIMOUR	APPLICANT
	-v-	
	AEG OGDEN PERTH	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	TUESDAY, 25 AUGUST 2015	
FILE NO/S	B 3 OF 2015	
CITATION NO.	2015 WAIRC 00820	

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr L Moloney (as agent)

Order

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

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

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

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 16 July 2015 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00834

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MARK WANG	APPLICANT
	-v-	
	ANTHONY BRYSON, DIRECTOR OF PROSTRUCT CONTRACTING	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 28 AUGUST 2015	
FILE NO/S	B 221 OF 2014	
CITATION NO.	2015 WAIRC 00834	

Result	Dismissed
Representation	
Applicant	In person
Respondent	No appearance

Order

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

The Commission convened two conferences with respect to this matter.

The Commission wrote to the applicant on 10 April 2015 notifying him that it appeared the respondent was in liquidation and the applicant was required to inform the Commission prior to 10 June 2015 of his intentions in relation to the application. The applicant did not do so and on 23 June 2015 the Commission wrote to him advising him that if he did not contact the Commission by 7 July 2015 the application would be listed for a show cause hearing as to why the matter should not be dismissed pursuant to s 27(1) of the Act. The applicant did not contact the Commission by 7 July 2015.

The matter was listed for a show cause hearing on 27 August 2015 and the applicant was advised that non-attendance by him at these proceedings will result in an order issuing dismissing the application. The applicant did not attend the show cause hearing on 27 August 2015 at the required time. However, the hearing was reconvened later in the day to give the applicant the opportunity to put submissions about why the application should not be dismissed. At the time the applicant was also provided with a document confirming that the respondent had been put into liquidation. Apart from the applicant's assertions that the respondent owed him money and that the respondent was still trading no evidence was provided by the applicant confirming that the respondent was not in liquidation.

As the respondent has been placed into liquidation an order will issue dismissing this matter.

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

THAT this application be and is hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00254

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PETER MILFORD WESTON

PARTIES

APPLICANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 26 MARCH 2015
FILE NO. B 30 OF 2015
CITATION NO. 2015 WAIRC 00254

Result Directions issued
Representation
Applicant Mr P Mullally as agent
Respondent Ms J Rhodes of counsel

Directions

HAVING heard Mr P Mullally as agent on behalf of the applicant and Ms J Rhodes 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 on the questions of jurisdiction no later than seven days prior to the date of hearing.
- (2) THAT the matter be listed for hearing on the questions of jurisdiction for half a day on a date to be fixed.
- (3) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00515

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00515
CORAM : COMMISSIONER S J KENNER
HEARD : THURSDAY, 26 MARCH 2015, FRIDAY, 17 APRIL 2015; WRITTEN SUBMISSIONS
FRIDAY, 10 APRIL 2015; MONDAY, 13 APRIL 2015; TUESDAY, 21 APRIL 2015;
MONDAY, 4 MAY 2015
DELIVERED : WEDNESDAY, 15 JULY 2015
FILE NO. : B 30 OF 2015
BETWEEN : PETER MILFORD WESTON
Applicant
AND
COMMISSIONER OF POLICE, WESTERN AUSTRALIA
Respondent

Catchwords	:	Industrial law (WA) – Contractual benefits claim – Whether the Commission has jurisdiction – Whether a Police Officer is an “employee” for the purposes of s 7 of the <i>Industrial Relations Act 1979</i> (WA) – Whether a Police Officer is an “employee” at common law – Principles applied – Police Officers are not employees at common law or for the purposes of s 7 of the Act – Application dismissed for want of jurisdiction – Order made
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) ss 7, 83(1) <i>Industrial Relations Act 1988</i> (Cth) Div 3, Pt VIA <i>Limitation Act 2005</i> (WA) <i>Police Act 1892</i> (WA) ss 8, 23
Result	:	Application dismissed
Representation:		
Applicant	:	Mr P Mullally as agent
Respondent	:	Ms J Rhodes of counsel
Solicitors:		
Respondent	:	State Solicitor’s Office

Case(s) referred to in reasons:

Attorney-General for New South Wales v Perpetual Trustee Company (Limited) (1955) 92 CLR 113

Attorney-General for New South Wales v The Perpetual Trustee Company (Limited) (1952) 85 CLR 237

Enever v The King (1906) 3 CLR 969

Finnerty v Commissioner of Police (2005) 85 WAIG 1545

Konrad v Victoria (1999) 91 FCR 95

Menner v Commissioner of Police (1997) 74 IR 472

The Honourable Minister of Police v Western Australian Police Union of Workers (2001) 81 WAIG 356

Weston v Commissioner of Police (2015) 95 WAIG 133

Reasons for Decision

- 1 The applicant, Mr Weston, was a Police Officer with the Western Australian Police between April 1978 and May 2006. Mr Weston brings the present claim for denied contractual benefits by way of six months’ salary for the period 15 December 2005 to 30 May 2006. Mr Weston previously commenced a claim in the Industrial Magistrates Court alleging a breach by the respondent of the terms of the Western Australian Police Service Enterprise Agreement for Police Act Employees 2003 but that claim was dismissed on the basis that it was lodged out of time: *Weston v Commissioner of Police* (2015) 95 WAIG 133.
- 2 The Commissioner of Police resists Mr Weston’s claim principally on the basis that as a Police Officer at the material time, he was not an employee at common law or for the purposes of s 7 of the Industrial Relations Act 1979. Reliance was principally placed by the Commissioner of Police in this respect, on the decision of the Full Bench of the Commission in *The Honourable Minister of Police v Western Australian Police Union of Workers* (2001) 81 WAIG 356. Furthermore, the Commissioner of Police contended that being bound by the Agreement, at the material time, means the claim falls within the sole jurisdiction of the Industrial Magistrates Court under s 83(1) of the Act. Finally, even if Mr Weston is held to be an employee for the purposes of the Act, and s 83(1) provides no barrier to his claim, the Commissioner of Police further contended that Mr Weston’s claim is statute barred by the terms of the Limitation Act 2005, it being a claim outside of the six year limitation period.

Jurisdiction

- 3 As the question of jurisdiction is agitated, that matter must first be determined by the Commission.
- 4 As noted, the Commissioner of Police placed heavy reliance on the decision of the Full Bench in *The Hon Minister of Police*. In that matter, an appeal was brought from a decision of the Commission at first instance in relation to a dispute between the appellant and the respondent concerning disciplinary proceedings and the removal of a Police Officer under ss 8 and 23 of the *Police Act 1892*. A ground of the appeal was that the matter before the Commission was beyond jurisdiction, because a Police Officer was not, as a matter of law, an employee for the purposes of the Act. In the decision, Sharkey P held that as to the jurisdictional ground, a Police Officer was not, at common law and for the purposes of s 7 of the Act, an employee. It was held that Police Officers are statutory office holders who hold a public office as a member of a force in the regular service of the Crown: *Enever v The King* (1906) 3 CLR 969; *Attorney-General for New South Wales v Perpetual Trustee Company (Limited)* (1955) 92 CLR 113; *Attorney-General for New South Wales v The Perpetual Trustee Company (Limited)* (1952) 85 CLR 237. On this ground of appeal, the other members of the Full Bench, Fielding SC and Scott C, did not find it necessary to finally decide the issue of whether a Police Officer was an employee at common law, having concluded that the appeal should be upheld on other grounds. However, Fielding SC observed that whilst there was considerable decided authority that Police Officers are not employees, at least for the purposes of the common law, a number of decisions have held that Police Officers may be so regarded for the purposes of industrial relations legislation, such as *Konrad v Victoria* (1999) 91 FCR 95.

- 5 Furthermore, Fielding SC, at 368, referred to the judgement of Anderson J in *Menner v Commissioner of Police* (1997) 74 IR 472 “to the effect that the relationship between the Crown and a member of the Police Force ‘is that of servant to master notwithstanding that the constable has specific powers and duties which he must execute as a matter of independent responsibility. [Attorney-General for New South Wales v The Perpetual Trustee Company (Limited) (1952) 85 CLR 237 at 248-249, 252]’ suggest that members of the Police Force in this State might properly be taken as employees for the purposes of the Industrial Relations Act 1979”. In her decision, Scott C also did not find it necessary to finally decide the issue, but tended to the view taken by Sharkey P, that the common law approach should be adopted, but that “this matter requires further consideration”: 368.
- 6 I therefore agree with the submissions of Mr Weston, that, contrary to for example, the decision of Smith C in *Finnerty v Commissioner of Police* (2005) 85 WAIG 1545 at par 32, where Smith C said that “the Full Bench held [in *The Hon Minister of Police*] that Police Officers are not employees for the purposes of the Act”, that is not so. Sharkey P certainly did, however, the other members of the Full Bench, were somewhat equivocal on the issue. It is correct to say that very shortly after the decision of the Full Bench in *The Hon Minister of Police* Schedule 3 was inserted into the Act, to at least in part, deem Police Officers to be employees, as Government Officers, within the meaning of s 80C of the Act. However, Schedule 3 has the effect of bringing Police Officers within the jurisdiction of the Public Service Arbitrator, not within the jurisdiction of the Commission generally. There are also express exclusions from jurisdiction contained in Schedule 3. Thus, whilst I consider that there is some force in the submissions made by Mr Weston in this matter, the uncertainty surrounding the effect of the decision of the Full Bench in *The Hon Minister of Police* has now largely been overcome.
- 7 During the course of the proceedings, I brought to the attention of the parties the decision of Anderson J in *Menner*. Both parties were given the opportunity of making further written submissions in connection with the case, which they did. The Commissioner of Police submitted that the question of whether Police Officers are employees for the purposes of s 7 of the Act was not a matter which was squarely raised in *Menner*. There was no detailed consideration of relevant authority by Anderson J, as did Sharkey P in *The Hon Minister of Police*. Furthermore, whilst reference was made to the proposition of Police Officers being engaged in a “dual capacity” as both office holders at common law and as an employee for the purposes of the Act, it was contended that decisions to this effect, were made under relevant Commonwealth legislation, with a wider definition of “employee” than that which exists under the Act.
- 8 For Mr Weston, it was submitted that *Menner* supports the applicant’s contentions that a Police Officer can be both an employee as well as an office holder, exercising specific powers independently of their employer.
- 9 Whilst in this case there was some evidence led through Mr Weston as to his duties and responsibilities as a Police Officer, that evidence does not, in my view, materially affect the state of the authorities to which I have referred. At all material times Mr Weston, as a Police Officer, was appointed under and was subject to the relevant provisions of the Police Act. Whilst it is correct to say, as I have noted above, that the decision of the Full Bench in *The Hon Minister of Police*, was not a unanimous decision on the jurisdictional ground as to whether Police Officers are employees for the purposes of the Act, Sharkey P did consider in some depth, the relevant common law authorities. Some qualified support was given to Sharkey P’s conclusions by the other members of the Full Bench, without finally deciding the matter.
- 10 Mr Weston placed some reliance on federal authorities and the application of international conventions. A leading case is *Konrad*. However, the decision of the Federal Court in *Konrad*, as was acknowledged by Mr Weston, is distinguishable from the present. In *Konrad*, the issue was whether Victorian Police Officers were employees and amenable to the federal unfair dismissal jurisdiction for the purposes of Div 3 of Part VIA of the then Industrial Relations Act 1988 (Cth). The Full Court (Ryan, North and Finkelstein JJ) overturned the primary judge, who held that as Police Officers were not employees at common law, they were not covered by the federal unfair dismissal legislation. The Full Court concluded that the question was not whether Police Officers were employees at common law, but whether they were employees for the purposes of Div 3 of Part VIA of the legislation. Significant for these purposes, was that the legislation gave effect to relevant International Labour Organisation Conventions and Recommendations, substantially widening the scope of coverage beyond traditional common law definitions of employment. Such considerations have no application to the definition of “employee” under s 7 of the Act.

Conclusion

- 11 Having regard to all of these matters and despite the obiter observations of Anderson J in *Menner*, I consider that it is preferable to adopt the approach taken by Sharkey P in *The Hon Minister of Police*, to the effect that Police Officers are not employees either at common law, or for the purposes of s 7 of the Act.
- 12 The application must be dismissed for want of jurisdiction and I so order.

2015 WAIRC 00514

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 PETER MILFORD WESTON

PARTIES

APPLICANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 15 JULY 2015
FILE NO/S B 30 OF 2015
CITATION NO. 2015 WAIRC 00514

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Ms J Rhodes of counsel

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Ms J Rhodes 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 for want of jurisdiction.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 00312**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARK WILSON
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APPLICANT

-v-
BWS

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 APRIL 2015
FILE NO.	B 40 OF 2015
CITATION NO.	2015 WAIRC 00312

Result	Direction made
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr A Talbert of counsel

Direction

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

- (1) THAT each party shall give informal discovery by serving its list of documents by 30 April 2015.
- (2) THAT the matter be listed for hearing on a date to be fixed.
- (3) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2015 WAIRC 00496**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARK WILSON
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APPLICANT

-v-
BWS

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 7 JULY 2015
FILE NO/S	B 40 OF 2015
CITATION NO.	2015 WAIRC 00496

Result Discontinued by leave
Representation
Applicant Mr P Mullally
Respondent Mr A Talbot of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Merelyn Jane Demarte	G and T Boulos G and T Enterprises T/A Business Promotions Australia	U 192/2014	Commissioner S J Kenner	Discontinued
Peter James Gallagher	Genesis Homes Master Builders	B 16/2015	Commissioner S J Kenner	Discontinued

CONFERENCES—Matters arising out of—

2015 WAIRC 00845

DISPUTE RE ALLEGED UNFAIR DISMISSAL OF UNION MEMBER
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

PARTIES

APPLICANT

-v-

GOVERNING COUNCIL OF CENTRAL INSTITUTE OF TECHNOLOGY

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 1 SEPTEMBER 2015
FILE NO/S C 16 OF 2015
CITATION NO. 2015 WAIRC 00845

Result Application for interim order dismissed
Representation
Applicant Mr D Stojanoski (of counsel)
Respondent Ms S Teoh (of counsel)

Order

On 22 June 2015 the State School Teachers' Union of W.A. (Incorporated) (the applicant) lodged an application under s 44 of the *Industrial Relations Act 1979* (the Act) concerning a dispute with the Governing Council of Central Institute of Technology (the respondent) about the dismissal of one of its members, Ms Bethany Kinsela on 14 November 2014.

The applicant is seeking an order that Ms Kinsela be reinstated on an interim basis without loss of salary, entitlements and continuity of service pending this application being heard and determined.

The respondent opposes the interim reinstatement order being sought by the applicant.

Submissions

Applicant

The applicant relies on its detailed submissions, authorities cited therein and a number of exhibits in support of the interim reinstatement order issuing.

The applicant claims that it is just and correct for the Commission to make the interim order being sought as there is a substantial matter to be tried, Ms Kinsela has a prima facie case for relief and procedural errors existed in the respondent's process of terminating Ms Kinsela. The damage which may be done to the respondent by granting the order and the damage to Ms Kinsela if the order is not granted results in the balance of convenience being with Ms Kinsela as she will suffer significant financial distress if the interim order is not awarded. The respondent is a large organisation and Ms Kinsela's qualifications and transferrable skills allow her to be reinstated to an alternative position and there is no irreversible consequence of granting the interim order. The delay in the application being made is also justifiable.

The applicant further submits that:

- Following Ms Kinsela's dismissal her mental state deteriorated, she fell into a state of depression and she was homeless and unemployed. As a result Ms Kinsela was not in a position to expeditiously obtain advice about her termination.
- Ms Kinsela has already suffered being away from her chosen career and the fact that Ms Kinsela is homeless following her dismissal is an indicator that Ms Kinsela will continue to suffer financially if an interim reinstatement order is not granted. Regard must also be had to Ms Kinsela's age (50) and re-joining the workforce at such a late age would be difficult if there was too significant a gap between employment.
- The respondent took into consideration irrelevant matters and denied Ms Kinsela procedural fairness when deciding to terminate her. A proper investigation was also not undertaken by the respondent.
- Ms Kinsela had not been the subject of any disciplinary proceedings during her employment with the respondent and she denies she committed any breach of discipline.
- Ms Kinsela's reinstatement would not be impractical as a number of positions are or have recently been advertised by the respondent and are/were suited to Ms Kinsela. Given the subject matter of the present case involves Ms Kinsela's conduct related to two consenting adults it is unlikely the profitability of the respondent's business would be affected or that there may be other ongoing concerns for the respondent's business.

Respondent

The respondent relies on its detailed submissions, authorities cited therein and a number of exhibits in support of the interim reinstatement order not issuing.

The respondent submits that it terminated Ms Kinsela's employment on 18 November 2014 due to misconduct after an investigation found that in or about April 2014 Ms Kinsela commenced a sexual relationship with one of her male students and she socialised with him and another student mentored by Ms Kinsela. Lecturers hold a special position of power over their students and are required to act impartially towards them. A lecturer who forms an inappropriate relationship with a student creates a perception of bias that is incompatible with that duty and causes damage to the employer's interests. Ms Kinsela's summary dismissal was therefore appropriate.

The respondent claims that the relationship of trust and confidence between the respondent and Ms Kinsela has been irrevocably damaged and it would be too much of a risk to return Ms Kinsela into a situation where she is to be responsible for lecturing and mentoring students. This is based on the findings of the investigation into the allegations against Ms Kinsela, the weight of the evidence in support of those allegations, Ms Kinsela's initial denial of any inappropriate relationship with the male and female students and Ms Kinsela's subsequent contradictory admission that she engaged in an intimate relationship with the male student and she socialised with him and the female student. Additionally, Ms Kinsela did not recognise that her conduct was grossly inappropriate for a person in the position of a lecturer/mentor to behave towards students.

The respondent also submits that:

- The respondent denies any procedural errors in terminating Ms Kinsela and the respondent provided Ms Kinsela with sufficient detail of the alleged breaches of discipline to enable her to provide a response.
- Reinstatement would be impracticable. The respondent is shrinking as an organisation in response to emerging trends in the training sector. The respondent no longer teaches any Aboriginal programs and the respondent denies that Ms Kinsela was dismissed because the Koolark Centre was disbanded. Ms Kinsela also does not hold any vocational qualifications that would enable her to lecture in an alternative study area with the respondent.
- The damage suffered by the respondent should an interim reinstatement order be made outweighs the damage that would be suffered by Ms Kinsela. If an interim reinstatement order is granted the respondent would be forced to employ someone who is not qualified to perform any of the positions that it has available and the respondent would suffer significant reputational damage as it would appear to condone inappropriate relationships between lecturers and students.
- The respondent denies that Ms Kinsela had not been the subject of any previous disciplinary proceedings.
- The balance of convenience lies against the issuing of the interim order. If the applicant is not successful in its claim that Ms Kinsela was unfairly terminated the respondent would not have any capacity to recover wages paid to Ms Kinsela.
- The applicant's application was not lodged expeditiously as it was lodged seven months after Ms Kinsela's employment was terminated.

Consideration

I find that this application relates to an industrial matter as it concerns Ms Kinsela's employment status with the respondent.

The Commission is of the view that it has the power to issue the interim order being sought by the applicant as s 44(6)(bb)(ii) of the Act enables the Commission to issue an interim reinstatement order on a claim related to an allegation of unfair dismissal pending resolution of the claim.

After carefully considering the parties' lengthy and comprehensive submissions with respect to this matter and when taking into account equity and fairness and s 26 considerations I have decided that it is not appropriate in all of the circumstances that Ms Kinsela be reinstated as an employee of the respondent on an interim basis pending the hearing and determination of this application.

Without reaching a concluded view on the merits of the contentions made by the applicant and the respondent with respect to whether Ms Kinsela was unfairly terminated, I find that there is a serious issue to be tried with respect to this application given the nature of the offences that resulted in Ms Kinsela's termination and the fact that Ms Kinsela was employed in a position of trust as a lecturer.

In deciding not to order that Ms Kinsela be reinstated to a position with the respondent on an interim basis I take into account that this application was lodged seven months after Ms Kinsela was terminated, which is a lengthy period. Whilst Ms Kinsela may have become impecunious and unwell after her termination an individual's personal difficulties are not always central to an employee not being able to pursue a claim relating to an unfair dismissal in a timely manner. I also note that the respondent has ceased operating teaching programmes at the Koolark Centre where Ms Kinsela was employed and there appears to be limited if any opportunity to return Ms Kinsela to meaningful and appropriate employment with the respondent on an interim basis given Ms Kinsela's qualifications and a reduction in the respondent's workforce. Additionally, I find that if Ms Kinsela is reinstated on an interim basis and if the respondent is successful in defending the applicant's claim that Ms Kinsela was unfairly terminated the respondent will have little if any prospect of recovering the wages paid to Ms Kinsela given her current financial difficulties.

I find that there may well be damage to Ms Kinsela if the interim reinstatement order does not issue however I also find that the respondent may suffer damage if Ms Kinsela returns as a lecturer with the respondent given Ms Kinsela's conduct which resulted in her termination.

NOW THEREFORE having heard Mr D Stojanoski of counsel on behalf of the applicant and Ms S Teoh 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 for an interim reinstatement order be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00513

DISPUTE RE MOVEMENT OF PROTECTION PRISONERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE MINISTER FOR CORRECTIVE SERVICES

APPLICANT

-v-

THE SECRETARY

WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE TUESDAY, 14 JULY 2015

FILE NO/S C 15 OF 2015

CITATION NO. 2015 WAIRC 00513

Result Order issued

Representation

Applicant Ms T Borwick

Respondent Mr J Welch

Order

WHEREAS on 19 June 2015, the Minister made an application for an urgent compulsory conference under s 44 of the Industrial Relations Act 1979 regarding a proposed prisoner movement to move protection prisoners from Unit 12 to Unit 5 at Hakea Prison. The proposed prisoner movement is for the purposes of preparation for a new Women's Precinct at Hakea Prison;

AND WHEREAS the parties have previously conferred in accordance with the dispute resolution process provided for in the Department of Corrective Services Prison Officers' Enterprise Agreement 2013 since 4 May 2015. The dispute was unable to be resolved;

AND WHEREAS the Commission convened a compulsory conference on 29 June 2015. At the conference, the Commission was informed by the Minister that the proposed Women's Precinct at Hakea Prison is a priority issue for the State Government. There is

an identified need to transfer protection prisoners from Unit 12 to Unit 5 in order for the necessary building works to be conducted to complete the Women's Precinct;

AND WHEREAS the Minister further informed the Commission that as a consequence of the parties conferring under the dispute resolution procedure in the Agreement, a risk assessment has been performed and mitigation measures have been proposed to ensure the good governance and good order of the prison. These measures including the appropriate use of barriers, and behaviour management, including appropriate sanctions for disruptive prisoners, would be adequate. The Minister also informed the Commission that Unit 5 had been identified as the optimum location for the protection prisoner group given its location;

AND WHEREAS the Union informed the Commission that the principal concern by its members was the absence of a secure control room for Prison Officers, given the nature of the proposed Unit 5 cohort. There are genuine occupational health and safety concerns regarding the proposed transfer. The Union also raised concerns about a lack of proper consultation by the Department of Corrective Services in relation to the proposed prisoner transfer and the perceived inadequacies of the risk assessment undertaken in connection with it;

AND WHEREAS the Union noted that Unit 5 is the only unit within the prison facility that does not have a secure control area, which poses a significant potential risk for the Union's members;

AND WHEREAS the Union opposed the application by the Minister to lift the status quo under the dispute resolution procedure in the Agreement;

AND WHEREAS after consideration of the issues arising in the conference, the Commission directed the parties to urgently confer, in order to further attempt to resolve the outstanding issues;

AND WHEREAS on 10 July 2015 the compulsory conference was reconvened. At the conference, the parties informed the Commission that as directed, the parties had conferred on 30 June, 3 July, and 7 July 2015. As a consequence of those discussions, the parties have identified a number of proposals to aid in the resolution of the dispute. The Union informed the Commission that the parties had agreed to prepare a Unit Plan for Unit 5 which would include appropriate prisoner behavioural management processes. Further, as a part of appropriate barrier management, an additional staff member would be deployed in Unit 5. Thirdly, a commitment had been made by the Minister that there would be capital works modifications to Unit 5 to make secure the existing control station. The Department informed the Commission that it was anticipated this would be part of budget considerations for minor works and would therefore take place over the next 18 months;

AND WHEREAS on this basis the parties informed the Commission that this agreed framework would enable the prisoner transfer process to commence. The Union no longer opposes the lifting of the status quo under the dispute resolution procedure in the Agreement. The Union also noted that the Minister had agreed to not action the relocation process until such time as the Unit Plan for Unit 5 had been finalised, which was anticipated to be within the next few days;

NOW THEREFORE the Commission, having regard to the foregoing, and pursuant to the powers conferred on it under the Act, hereby orders –

THAT for the purposes of the present dispute, in accordance with cl 174.5 of the Department of Corrective Services Prison Officers' Enterprise Agreement 2013, the status quo no longer applies.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

CONFERENCE—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	Department of Corrective Services	Kenner C	PSAC 12/2015	4/06/2015 8/07/2015	Dispute re severance package	Discontinued
Health Services Union of Western Australia (Union of Workers)	Director General, Department of Health	Scott A/SC	C 14/2015	24/06/2015 14/07/2015	Dispute re alleged change in employment conditions	Concluded
The Minister for Corrective Services	The Secretary Western Australian Prison Officers' Union of Workers	Kenner C	C 15/2015	29/06/2015 10/07/2015 10/07/2015	Dispute re movement of protection prisoners	Discontinued
The Western Australian Prison Officers' Union of Workers	Minister for Corrective Services	Kenner C	C 22/2014	8/05/2015	Dispute re entitlement of Pro Rata Long Service Leave	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
United Voice WA	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	Kenner C	C 192/2013	28/02/2013 22/05/2013 21/11/2013 31/01/2014 22/04/2014 1/07/2014 27/08/2014 16/09/2014 26/09/2014 25/11/2014 4/12/2014	Dispute requesting the assistance of the Commission to facilitate consultation in regards to reconfiguration of the Health Service	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2015 WAIRC 00367

DISPUTE RE ENTITLEMENT OF PRO RATA LONG SERVICE LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS

APPLICANT

-v-

MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

FRIDAY, 8 MAY 2015

FILE NO.

C 22 OF 2014

CITATION NO.

2015 WAIRC 00367

Result Recommendation issued

Representation

Applicant

Ms R Marton and with her Mr J Welch and Ms S van der Merwe

Respondent

Ms I Rizmanoska and with her Mr N Cinquina

Recommendation

WHEREAS by an application filed on 18 June 2014 the Union applied for a compulsory conference under s 44 of the Industrial Relations Act 1979 in relation to Prison Officer Brook's entitlement to pro rata long service leave under cl 120 of the Department of Corrective Services Prison Officers' Enterprise Agreement 2013;

AND WHEREAS a s 44 compulsory conference was listed by the Commission on 5 September 2014 in order to discuss the matters in dispute. However, prior to the conference the parties requested and were granted an adjournment, to pursue discussions amongst themselves;

AND WHEREAS the conference was re-listed on 8 May 2015 as the parties had not been able to resolve the matters in dispute;

AND WHEREAS the Union informed the Commission that Officer Brook applied for pro-rata long service leave on 5 December 2013. He satisfied the requirements of cl 120.1 of the Agreement, as being within seven years of preservation age and his application was approved by the Superintendent of his Prison on 17 December 2013. According to the Union, Officer Brook is entitled to four weeks of leave, based on the formula contained in cl 120.1 of the Agreement;

AND WHEREAS the Department disputed Officer Brook's entitlement on the basis that cl 120.1 should be read with the Implementation Guidelines and Explanatory Notes for the Public Service and Government Officers General Agreement 2011, applying to its public sector workforce generally, which leads to a lesser benefit than claimed by Officer Brook;

AND WHEREAS the Commission has considered the matters in dispute and believes that it would be in the interests of the progress of the matter and similar matters in the future that a recommendation is made;

NOW THEREFORE the Commission pursuant to the powers conferred on it under s 44 of the Industrial Relations Act, 1979, hereby recommends –

- (1) THAT Officer Brook is paid four weeks pro rata long service leave as at the date of his application.

- (2) THAT the parties confer in relation to the interpretation and implementation of the provisions of the Department of Corrective Services Prison Officers' Enterprise Agreement 2013 to which the Department contends the Implementation Guidelines and Explanatory Notes for the Public Service and Government Officers General Agreement 2011 may have application.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 01070

**DISPUTE REQUESTING THE ASSISTANCE OF THE COMMISSION TO FACILITATE CONSULTATION IN
REGARDS TO RECONFIGURATION OF THE HEALTH SERVICE**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

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

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 26 SEPTEMBER 2014
FILE NO. C 192 OF 2013
CITATION NO. 2014 WAIRC 01070

Result Recommendation issued
Representation
Applicant Ms S Hanrahan
Respondent Mr M Warner

Recommendation

WHEREAS by an application dated 25 February 2013 the Union applied for a compulsory conference under s 44 of the Industrial Relations Act 1979 in relation to facilitating consultation concerning the configuration of the Western Australian Health Service as a result of the impending opening of the Fiona Stanley Hospital, the Midland Hospital, and related consequential changes. The Union sought the assistance of the Commission to ensure that consultation in relation to major change is given effect, in accordance with cl 46 of the WA Health – United Voice – Hospital Support Workers Industrial Agreement 2012;

AND WHEREAS a series of s 44 compulsory conferences had been convened by the Commission in order to discuss the matters in dispute;

AND WHEREAS as a result of compulsory conferences held before the Commission on 1 July and 27 August 2014 the parties have exchanged correspondence in relation to both requests for information by the Union and commitments to the provision of information and consultation by the employer respectively. It is noted by the Commission that regular weekly meetings are being held between the parties to further discuss the issues the subject of this application;

AND WHEREAS at a further compulsory conference on 16 September 2014 the Commission was informed by the parties that as set out in correspondence from the Department to the Union dated 8 September 2014 that hospitals are continuing to determine their required staffing profiles with the final configuration not being known with certainty until all clinical activity transition plans are implemented by the first quarter of 2015;

AND WHEREAS by a further letter from the Department to the Union of 16 September 2014 the Department reiterated its earlier commitments in relation to consultation processes as soon as a final determination of a staffing oversupply or undersupply is made. Furthermore, in the same letter the Department notified the Union of the proposed staffing arrangements for the Catering Department at the Wellington Street Campus of Royal Perth Hospital and in particular, that there will be an overstaffing situation and a merit based assessment process will be required and the proposed process was briefly outlined;

AND WHEREAS the Commission reiterates the importance of appropriate consultation and discussion between the parties in accordance with cl 46 of the Agreement and in particular, the obligation to discuss effects the changes are likely to have on affected employees, and measures to be taken to reduce the adverse effects of such changes; the employer giving prompt consideration to matters raised by employees and/or the Union in relation to the changes and for the employer to provide all relevant information, other than confidential information;

AND WHEREAS the Union expressed the view that it still has concerns that it is not being given an adequate opportunity to discuss and consult with the employer in relation to specific proposed changes to staffing arrangements at metropolitan hospitals and has sought the assistance of the Commission in that regard;

AND WHEREAS the Department has informed the Commission that it remains committed to the timely provision of information to the affected employees and the Union as it becomes available and to consult with the affected employees and the Union about the changes to be made;

AND WHEREAS the Commission indicated to the parties that it would consider the request made by the Union and the responses provided by the employer for the purposes of determining whether any further steps may be taken. The Commission has considered the matters raised by the parties and believes that it would be in the interests of the future progress of the matter and the parties directly affected to make a recommendation;

NOW THEREFORE the Commission pursuant to the powers conferred on it under s 44 of the Industrial Relations Act, 1979, hereby recommends –

- (1) THAT once a final decision is made regarding an undersupply or oversupply of permanent staff in a department of a hospital, as soon as possible, the following steps, in addition to or in conjunction with any commitments already given by the employer, will be undertaken:
 - (a) the affected employees and the Union will be notified by the Department of the undersupply or oversupply as the case may be and the number of employees affected, their location, and the approximate time period over which any change will be introduced;
 - (b) the hospital will provide the affected employees with as much information as possible, and by all available means, in relation to alternative employment opportunities in the same or other hospitals in the metropolitan area;
 - (c) that in the case of an oversupply of permanent employees the affected employees and the Union be informed that a merit based selection process may be required;
 - (d) in cases where a merit based selection process is required the hospital will consult with the Union in a timely manner in relation to the design and management of the merit based selection process and in particular:
 - (i) whether and if so, what form of pre-employment testing may be required of candidates for appointment;
 - (ii) if there is a surplus of suitable candidates for available positions the obtaining of supervisors’ reports on candidates and how they may be used; and
 - (iii) the need, if necessary, for interviews with candidates; and
 - (e) for the purposes of (d) above the Union and the hospital will consult in a timely manner by:
 - (i) the provision by the Union of a written request for information and/or issues for the hospital to consider;
 - (ii) the hospital giving prompt and serious consideration to any matters raised by the Union and communicating its response in writing to the Union in a timely manner; and
 - (iii) the convening of meetings of the appropriate persons from both the Union and the hospital with authority to make decisions on their respective behalf, to discuss the matters referred to above.
- (2) THAT for the purposes of obtaining advice and assistance arising from an oversupply or undersupply of staffing as the case may be, any affected employees be given appropriate access to site based Union delegates.
- (3) THAT the compulsory conference may be re-listed at the request of either party on the giving of short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 01316

DISPUTE REQUESTING THE ASSISTANCE OF THE COMMISSION TO FACILITATE CONSULTATION IN REGARDS TO RECONFIGURATION OF THE HEALTH SERVICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

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

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

FRIDAY, 5 DECEMBER 2014

FILE NO.

C 192 OF 2013

CITATION NO.

2014 WAIRC 01316

Result	Recommendation issued
Representation	
Applicant	Ms S Hanrahan
Respondent	Mr M Warner

Recommendation

WHEREAS the background to these proceedings is set out in the Commission's recommendation of 26 September 2014;

AND WHEREAS as a result of further developments, in particular the announcement by the State Government of a Targeted Separation Scheme, the Department has notified the Union that approximately 500 positions in the Department will be amenable to the application of the Scheme and expressions of interest for voluntary redundancy are to be lodged in the very near future;

AND WHEREAS the Union, in light of this development, requested an urgent relisting of the compulsory conference, to further discuss the matters in dispute and in particular, arising from the application of the Scheme;

AND WHEREAS the Commission relisted the compulsory conference on 4 December 2014. At the conference the Commission was informed by the Union that discussions between the parties had resolved some issues in relation to consultation and provision of information about the application of the Scheme to the potentially affected employees within the Department. However, the Union contended that concerns now exist about the Scheme being implemented in conjunction with the merit based selection process presently underway and the subject of the Commission's recommendation of 26 September 2014.

AND WHEREAS the Union contended that the application of the Scheme within public hospitals to its members may avert the need for merit based selection in some areas of hospitals, alternatively, may reduce the need for it significantly;

AND WHEREAS the Department outlined the process to be followed in applying the Scheme, in accordance with the Targeted Separation Scheme 2014 – 2015 Guidelines published by the Public Sector Commission. It is noted that in the Guidelines, agency applications for voluntary severance are to be submitted to the PSC for approval by no later than close of business 30 January 2015. Employees who are invited to take up an offer of voluntary severance will be required to accept a formal offer before close of business on 27 February 2015. All employees accepting a voluntary severance offer are required to leave the public sector on or before 30 June 2015.

AND WHEREAS the Department further informed the Commission that the timetable for consideration of expressions of interest by Chief Executive Officers is compressed. There is a requirement for expressions of interest by employees to be lodged with the Department by 10 December 2014. It is anticipated that Chief Executives will be considering those expressions of interest and making decisions in relation to them, within a further one or two days;

AND WHEREAS from the terms of the Guidelines, the Commission observes that the decision to offer targeted severance is to be made by the Chief Executive Officers of the relevant employing authorities, which decisions are to be subject to approval of the PSC. Such decisions are to be based on the impact of any separation requests on the employer's operations and service delivery;

AND WHEREAS the Commission acknowledges the submissions of the Union as to the impact of the present selection processes on affected employees, who will now be subject to a further substantial process of expressions of interest and decisions as to voluntary severance. The Commission also acknowledges the requirement for the Department, as the employer, to ensure that staffing decisions for the anticipated implementation of the restructuring in early 2015, is undertaken in a timely fashion;

AND WHEREAS the Commission also notes that as a consequence of the process to be undertaken with accordance with the Scheme, the Department may have, based upon expressions of interest, and those to be progressed, a reasonable indication of those employees who may qualify for voluntary severance, by the date of initial decisions by Chief Executives. Any decisions to progress voluntary severance proposals may also inform requirements for merit based selections for available positions;

NOW THEREFORE the Commission pursuant to the powers conferred on it under s 44 of the Industrial Relations Act, 1979, hereby recommends –

- (1) THAT the Department suspend its merit based selection process until initial decisions are made by Chief Executives regarding expressions of interest for voluntary severance, in accordance with the timetable set out above, to enable an assessment to be made by the Department, in consultation with the Union, of the anticipated impact of voluntary separations on the need for merit based selection for available positions within the Department.
- (2) THAT the parties report back to the Commission following consultation in par (1) above.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 01267

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 17 JULY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIESTHE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED ON
BEHALF OF MR EARLE LOPEZ**APPELLANT****-v-**

DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION

RESPONDENT**CORAM**PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G SUTHERLAND - BOARD MEMBER
MS M MCHUGH - BOARD MEMBER**DATE**

WEDNESDAY, 19 NOVEMBER 2014

FILE NO

PSAB 10 OF 2014

CITATION NO.

2014 WAIRC 01267

Result

Directions issued

Representation**Appellant**

Ms J O'Keefe and with her Mr K Rukunga

Respondent

Mr R Andretich of counsel and with him Ms L Wiese and Ms P De Mello

Directions

HAVING heard Ms J O'Keefe and with her Mr K Rukunga on behalf of the appellant and Mr R Andretich of counsel and with him Ms L Wiese and Ms P De Mello on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT each party shall give informal discovery by serving its list of documents by 17 December 2014.
- (2) THAT inspection of documents shall be completed by 14 January 2015.
- (3) THAT the appellant and respondent file an agreed statement of facts (if any) no later than 7 days prior to the date of hearing.
- (4) THAT the appellant and respondent file and serve a brief outline of submissions no later than 3 days prior to the date of hearing.
- (6) THAT the appeal be listed for hearing for 2 days on dates to be fixed.
- (7) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

On behalf of the Public Service Appeal Board.

2015 WAIRC 00844

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ANNETTE TRACY GARLETT

APPLICANT**-v-**

BRENDAN PENZER - WIRNA BARNA ART GALLERY

WIRNDA BARNA ARTISTS INC.

RESPONDENT**CORAM**

CHIEF COMMISSIONER A R BEECH

DATE

MONDAY, 31 AUGUST 2015

FILE NO.

U 60 OF 2015

CITATION NO.

2015 WAIRC 00844

Result Direction issued

Direction

WHEREAS the Commission has listed this claim of unfair dismissal for hearing in the Geraldton Courthouse on 15 September 2015;

AND WHEREAS both Ms Annette Garlett and Mr Brendan Penzer, the Manager of Wirnda Barna Artists Inc, are to appear in the hearing;

AND WHEREAS the applicant Ms Annette Garlett is bound by a Violence Restraining Order issued by the Mount Magnet Magistrates Court on 2 July 2015 which among other things requires that she is not to approach Mr Brendan Penzer or remain within 20 metres of him;

THE COMMISSION, being of the opinion that it is necessary for the expeditious and just hearing and determination of the matter to issue a direction addressing the place and mode of the hearing so that the hearing may proceed without Ms Garlett contravening the Violence Restraining Order, hereby issues the following Direction pursuant to s 27(1)(o) and (v) of the *Industrial Relations Act, 1979*:

1. THAT Mr Brendan Penzer participate in the hearing in a separate room at the Geraldton Courthouse which is connected to the courtroom via CCTV.
2. THAT this Direction does not affect the operation of the Violence Restraining Order issued by the Mount Magnet Magistrates Court on 2 July 2015.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
UnionsWA Enterprise Agreement 2015 AG 16/2015	(Not applicable)	Western Australian Municipal Administrative Clerical and Services Union of Employees	UnionsWA	Chief Commissioner A R Beech	Agreement registered
Aboriginal Legal Service of Western Australia (Inc.) Agreement 2015 AG 11/2015	2/09/2015	Western Australian Municipal Administrative, Clerical and Services Union of Employees	Aboriginal Legal Service of Western Australia (Inc)	Commissioner J L Harrison	Agreement registered
Shire of Murray Enterprise Bargaining Agreement 2015 AG 9/2015	19/08/2015	Western Australian Municipal, Road Boards, Parks and Racecourse Employees Union of Workers, Perth	The Shire of Murray	Commissioner J L Harrison	Agreement registered
Shire of Waroona Outside Staff Collective Enterprise Agreement 2015 AG 12/2015	2/09/2015	Western Australian Municipal Administrative, Clerical and Services Union of Employees	Shire of Waroona and another	Commissioner J L Harrison	Agreement registered
T.L.C. Emergency Welfare Foundation of Western Australia (Inc.) Enterprise Bargaining Agreement 2014 AG 15/2015	2/09/2015	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	TLC Emergency Welfare Foundation of Western Australia (Inc.)	Commissioner J L Harrison	Agreement registered
Waikiki Private Hospital and United Voice WA Industrial Agreement 2015 AG 14/2015	19/08/2015	Anthony James Robinson trading as Waikiki Private Hospital and United Voice WA	(Not applicable)	Commissioner J L Harrison	Agreement registered

SCHOOL TEACHERS—Matters dealt with—

2015 WAIRC 00817

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MS SHARON HISLOP

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 21 AUGUST 2015

FILE NO. APPL 122 OF 2015

CITATION NO. 2015 WAIRC 00817

Result Directions issued

Representation

Applicant Ms N Barsby of counsel

Respondent Mr D Anderson of counsel

Direction

WHEREAS this is a referral pursuant to section 78(2) of the *Public Sector Management Act 1994*; and

WHEREAS on 23 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 agreed to exchange further documents; and

WHEREAS by email on 14 August 2015 the applicant provided a Minute of Proposed Consent Orders in preparation for the hearing of the matter; and

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

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

1. THAT on or before 7 September 2015 the parties exchange by way of informal discovery any documents upon which they intend to rely at hearing.
2. THAT on or before 14 September 2015 the applicant file and serve written witness statements of each witness she intends to call, constituting the whole of the evidence in chief of the witnesses. The witness statements are to annex any documents referred to by the witness.
3. THAT on or before 21 September 2015 the respondent file and serve written witness statements of each witness it intends to call, constituting the whole of the evidence in chief of the witnesses. The witness statements are to annex any documents referred to by the witness.
4. THAT the matter be set down for a two day hearing on a date not before 29 September 2015.
5. THAT there be liberty to apply.

[L.S.]

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



ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2015 WAIRC 00039

DISPUTE RE OUTSTANDING PAYMENTS
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

B & V HEGARTY PTY LTD

APPLICANT**-v-**

SEA TO SUMMIT TRANSPORT PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE WEDNESDAY, 28 JANUARY 2015
FILE NO/S RFT 31 OF 2014
CITATION NO. 2015 WAIRC 00039

Result Order issued**Representation****Applicant** Mr A Dzieciol of counsel**Respondent** Mr S Melia

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007 hereby orders -

THAT subject to further order of the Tribunal this application be and is hereby stayed.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2015 WAIRC 00827

DISPUTE RE OUTSTANDING PAYMENTS
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

B & V HEGARTY PTY LTD

APPLICANT**-v-**

SEA TO SUMMIT TRANSPORT PTY LTD

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 27 AUGUST 2015
FILE NO/S RFT 31 OF 2014
CITATION NO. 2015 WAIRC 00827

Result Application discontinued

Representation**Applicant** No appearance**Respondent** No appearance

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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

—

THAT this application be and is hereby discontinued.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
L.J Smith & L.J Smith t/as L J and L J Smith	Interlloy Pty Ltd	Kenner C	RFT 8/2015	14/07/2015	Dispute re alleged termination of contract	Discontinued
