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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2015] WASCA 150

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA -v- THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH [2015] WASCA 150
CORAM	:	BUSS J
		MURPHY J
		LE MIERE J
HEARD	:	13 FEBRUARY 2015
DELIVERED	:	4 AUGUST 2015
FILE NO/S	:	IAC 4 of 2014
BETWEEN	:	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Appellant
		AND
		THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
		Respondent
ON APPEAL FROM:		
Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	J H SMITH ACTING PRESIDENT
		A R BEECH CHIEF COMMISSIONER
		S M MAYMAN COMMISSIONER
Citation	:	[2014] WAIRC 00535
File No	:	FBA 12 of 2013

Catchwords:

Industrial Appeal Court - Appeals from Western Australian Industrial Relations Commission - Jurisdiction of Industrial Appeal Court - No error in construction

Legislation:

Industrial Relations Act 1979 (WA)

Result:

Full Bench of the Industrial Relations Commission of Western Australia made no error of construction or interpretation

Category: B

Representation:

Counsel:

Appellant	:	Mr D J Matthews
Respondent	:	Mr T R Kucera & Ms R Young

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	W G McNally Jones Staff Lawyers

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

BHP Billiton Iron Ore Pty Ltd v CFMEU [2006] WASCA 49; (2006) 151 IR 389

Personnel Contracting Pty Ltd T/as Tricord Personnel v CMFEU [2004] WASCA 312; (2004) 141 IR 31

1 **BUSS J**: I agree with Le Miere J.

2 **MURPHY J**: I agree with Le Miere J.

3 **LE MIERE J**: Mr M was employed by the appellant, the Public Transport Authority of Western Australia (PTA) as a transit officer. In the course of his duties Mr M assaulted a patron of the PTA at a train station as a result of which he was charged with three counts of common assault contrary to *Criminal Code* (WA) s 313(1). Mr M was convicted of the charges in the Magistrates Court and fined. Mr M filed an appeal to the Supreme Court against his conviction and penalty. The PTA terminated Mr M's employment. The respondent, The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (Union) filed an application for a conference in the Industrial Relations Commission of Western Australia (Commission) claiming that the dismissal was unfair. The hearing was vacated until after the delivery of the decision in Mr M's appeal in the Supreme Court. After the hearing in the Commission had been vacated, Mr M amended his grounds of appeal in the Supreme Court to remove his appeal against conviction. The appeal proceeded on the ground that there had been a miscarriage of justice occasioned by the failure of Mr M's counsel to apply to the Magistrates Court for a spent conviction order. Justice McKechnie upheld the appeal and granted a spent conviction order.

4 The PTA then applied under *Industrial Relations Act 1979* (WA) (IR Act) s 27(1)(a) for an order that the Commission dismiss the union's application on the ground that further proceedings are not desirable in the public interest. Commissioner Kenner found that further proceedings were not desirable in the public interest and dismissed the union's application. The union appealed to the Full Bench of the Commission. The Full Bench allowed the appeal, suspended the decision of Commissioner Kenner, dismissed the PTA's application under IR Act s 27(1)(a) and remitted the matter to the Commission for further hearing and determination.

Grounds of appeal

5 The PTA now appeals to this court against the decision of the Full Bench on the ground that the Full Bench erred in interpreting the term 'public interest' in IR Act s 27(1)(a)(ii). In its particulars of its ground of appeal the PTA says that the Full Bench erred in the interpretation of the term 'public interest' by failing to properly consider the potential for conflict between the decision of his Honour McKechnie J in granting

Mr M a spent conviction order and the continuation of the unfair dismissal claim brought on Mr M's behalf in circumstances where potential for conflict arose out of matters specified by the PTA in its further particulars.

Union says appeal beyond jurisdiction

6 In its written outline of submissions the Union submitted that the PTA's single ground of appeal is incompetent because it does not disclose or refer to any obvious error by the Full Bench in the construction or interpretation of IR Act s 27(1)(a)(ii) and hence the appellant's single ground of appeal should be struck out as incompetent and the appeal dismissed.

7 The IR Act s 90(1) provides that an appeal lies to this court from any decision of the Full Bench on the grounds set out in (a), (b) and (c) but upon no other ground. The PTA says that its appeal falls within s 90(1)(b) which provides that an appeal lies:

> on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act … in the course of making the decision appealed against.

PTA says appeal within jurisdiction

8 The PTA advances three arguments why the appeal is within the right of appeal provided by IR Act s 90(1)(b). The three arguments are as follows:

> (1) The decision of the Full Bench involved the determination and application of the meaning of the term 'public interest' as that term is employed in the Act. This involved the proper construction

or interpretation of section 27(1)(a)(ii) and the Full Bench erred in its construction or interpretation of the subparagraph;

(2) In deciding where the public interest lay, it is evident from a consideration of the reasons for decision of the Full Bench that the Full Bench acted on a wrong principle of law applying to section 27(1)(a)(ii) or, put another way, did not correctly understand the applicable law and thus erred in the construction or interpretation of section 27(1)(a)(ii);

(3) There was only one conclusion reasonably open in relation to the matter of public interest and that as the Full Bench reached a different conclusion it must have misunderstood the statutory criterion imported by section 27(1)(a)(ii) and thereby erred in the construction or interpretation of section 27(1)(a)(ii).

PTA's first argument

9 In oral submissions counsel for the PTA elaborated upon those arguments. The first argument is based on the proposition that the determination of whether or not further proceedings are desirable in the public interest involves the determination and application of the meaning of 'public interest' in IR Act s 27(1)(a)(ii) and therefore it is open to this court to look at the evidence and decide whether the Full Bench came to the right conclusion in deciding whether or not further proceedings were desirable in the public interest. The PTA says that its argument is supported by the judgment of E M Heenan J in ***Personnel Contracting Pty Ltd T/as Tricord Personnel v CMFEU*** [2004] WASCA 312; (2004) 141 IR 31. His Honour dissented in that case.

10 An appeal lies under IR Act s 90(1)(b) on the ground that the decision is erroneous in law *in that there has been an error in the construction or interpretation* of any Act. Not all appeals on the ground that the Full Bench erred in not finding that further proceedings are not desirable in the public interest are appeals on the ground that there has been an error in the construction or interpretation of IR Act s 27(1)(a)(ii). The dissenting judgment of E M Heenan J in ***Personnel Contracting*** is not authority for that proposition and if it is, then in my respectful opinion it is wrong. It is not sufficient for the PTA to establish that the Full Bench was wrong in not finding that further proceedings are not desirable in the public interest. The PTA must additionally establish that the error made by the Full Bench is an error of law in that there has been an error in the construction or interpretation of the statutory provision in the course of making the decision.

PTA's second argument

11 Counsel for the PTA explained the difference between the PTA's second and third jurisdictional arguments. The second argument is that the reasons of the Full Bench disclose that they erred in interpreting the phrase 'public interest'. The third argument is that the reasons do not expressly disclose the error of interpretation but it is to be inferred that the Full Bench erred in its interpretation of 'public interest' because the only decision reasonably open to it was that further proceedings are not desirable in the public interest.

12 The PTA's second argument is that it is evident from the reasons for decision of the Full Bench that the Full Bench incorrectly construed or interpreted the term 'public interest' in IR Act s 27(1)(a)(ii). The PTA starts from the proposition that it is not in the public interest for there to be potential or actual conflict between the decision of the Commission and the decision of the Supreme Court. The PTA says that the applicable correct principle is that a conflicting judgment includes a judgment that contradicts an assumption fundamental to an earlier decision in the sense that if the assumption had not been made, the decision would have been different. The PTA submits that it is clear from [61] to [74] of the reasons for decision the Acting President and [82] to [84] of the reasons for decision of the Chief Commissioner that they did not apply the correct principle referred to. That is, the PTA submitted, the Full Bench did not properly understand that in deciding the 'public interest' regard had to be had to whether success in the unfair dismissal proceedings would contradict assumptions fundamental to the decision of McKechnie J granting the employee a spent conviction order.

13 I am not persuaded that the reasons for decision of the Acting President or of the Chief Commissioner disclose that they misunderstood the meaning of 'public interest' in IR Act s 27(1)(a)(ii). In [49] to [57] the Acting President, with whom Commissioner Mayman agreed, discussed the meaning of 'public interest'. The PTA does not say that that discussion discloses any error. In [58] of her reasons the Acting President said that when all the principles she had discussed are considered, it is clear that Commissioner Kenner was obliged to have regard to certain matters. One such matter is:

> If it could be established that the continuation of the unfair dismissal claim had the potential to undermine the decision given by McKechnie J, the competing matter of public interest that was to be weighed and balanced is that the Commission is part of the hierarchy of courts of the State, and it should not act in such a way which may undermine the due administration of justice in the State.

14 The PTA does not say that that statement by the Acting President discloses any error. To the contrary, the PTA argues that further proceedings are not in the public interest because the continuation of the unfair dismissal claim has the potential to undermine the decision given by McKechnie J. At [74] the Acting President said:

> In the event that the Commission was to find that Mr M had been unfairly dismissed and concluded that Mr M should be reinstated, that finding would [be] unlikely to be inconsistent with the findings made by McKechnie J as his Honour left open the issue whether Mr M should be re-employed as a transit officer in the future. Thus, this is a matter that would be open to the Commission to consider if a finding is made that the dismissal of Mr M was harsh, oppressive or unfair.

It was for that reason that the Acting President upheld the appeal.

15 The Chief Commissioner said at [82] that a finding that Mr M's dismissal was unfair would not undermine the reasons why he was granted a spent conviction because reinstatement is not the only remedy open if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair. The Chief Commissioner further held that in any event he was not persuaded that an order of reinstatement would have the potential to undermine the decision of McKechnie J because the conclusion of McKechnie J was not that Mr M's employment would not be recovered but that it is unlikely that he will obtain employment where he is in a position to exercise lawful force over others for some time, if ever, and that conclusion leaves open whether or not Mr M would obtain employment in a position where he is able to exercise lawful force over others.

16 Neither the reasons of the Acting President nor those of the Chief Commissioner disclose any error in the interpretation of 'public interest'. The PTA says that the Acting President and the Chief Commissioner mischaracterised the reasons for decision of McKechnie J or made errors in finding what were the relevant reasons of McKechnie J. Those are not errors of interpretation or construction of the term 'public interest'.

PTA's third argument

17 The PTA's third argument is said to be based on my statement in ***BHP Billiton Iron Ore Pty Ltd v CFMEU*** [2006] WASCA 49; (2006) 151 IR 389:

> … Where only one conclusion is reasonably open and the Full Bench reaches a different conclusion it may be open to infer that the Full Bench misunderstood the statutory criteria and thereby erred in law in the construction or interpretation of the Act [107].

18 Judicial reasons for decision should not be construed as if they were a statute. In any event, the relevant statement is that 'where only one conclusion is reasonably open and the Full Bench reaches a different conclusion it **may** be open to infer that the Full Bench misunderstood the statutory criteria' (emphasis added). Whether or not that inference is open will depend upon the circumstances of the case. The inference is not open in this case for two reasons. First, I am not persuaded that the only conclusion reasonably open to the Full Bench was that further proceedings are not desirable in the public interest.

19 Secondly, if the only conclusion reasonably open to the Full Bench was that further proceedings are not desirable in the public interest and the Full Bench reached a contrary conclusion, it may have done so because it made incorrect findings of fact or it incorrectly applied the facts to the law which it correctly understood. The crucial finding of the Acting President and the Chief Commissioner is that if the Commission was to find that Mr M had been unfairly dismissed and should be reinstated that finding is unlikely to be inconsistent with the findings made by McKechnie J and would not undermine the decision of McKechnie J. If the Full Bench was wrong in those findings, and I am not persuaded that it was, it is not an error in the construction or interpretation of 'public interest'.

Full Bench made no error of construction or interpretation

20 The Full Bench correctly identified the principles to be applied to an exercise of the power conferred by IR Act s 27(1)(a)(ii). Those principles are set out in [49] - [58] of the Acting President's reasons for decision. The Full Bench made no error in the construction or interpretation of IR Act s 27(1)(a)(ii) in the course of making the decision to uphold the appeal before it.

21 It is not open to this court to review the findings of fact by the Full Bench or its application of the law which it correctly understood to the facts which it found. It is not open to this court to review the conclusion of the Acting President and of the Chief Commissioner in applying the facts as found by them to the law which they correctly understood. The PTA's appeal to this court does not disclose any ground that the Full Bench made an error in the construction or interpretation of the IR Act in the course of making the decision to allow the appeal from Commissioner Kenner. The appeal to this court is incompetent and must be dismissed.

2015 WAIRC 00786

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 12 OF 2013 GIVEN ON 20 JUNE 2014

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	BUSS J
	MURPHY J
	LE MIERE J
DATE	TUESDAY, 4 AUGUST 2015
FILE NO/S	IAC 4 OF 2014
CITATION NO.	2015 WAIRC 00786

Result	Appeal dismissed; Orders made on the issue of costs
Representation	
Appellant	Mr D J Matthews (Counsel)
Respondent	Mr C Fogliani (Counsel)

Order

It is hereby Ordered that:

1. The appeal be dismissed.
2. On or before 18 August 2015, the Respondent is to file written submissions in relation to the issue of costs.
3. On or before 1 September 2015, the Appellant is to file written submissions in reply in relation to the issue of costs.
4. The issue of costs is to be determined on the papers.

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

[2015] WASCA 150 (S)

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA -v- THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH [2015] WASCA 150 (S)
CORAM	**:**	BUSS J LE MIERE J MURPHY J
HEARD	**:**	4 AUGUST 2015
DELIVERED	**:**	15 SEPTEMBER 2015
FILE NO/S	**:**	IAC 4 of 2014
BETWEEN	**:**	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Appellant AND THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Respondent
ON APPEAL FROM:		
Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	J H SMITH ACTING PRESIDENT A R BEECH CHIEF COMMISSIONER S M MAYMAN COMMISSIONER
Citation	**:**	[2014] WAIRC 00535
File No	**:**	FBA 12 of 2013

Catchwords:

Costs - Awarding costs incurred for legal services provided in Industrial Appeal Court proceedings - Whether appeal instituted frivolously or vexatiously

Legislation:

Industrial Relations Act 1979 (WA)

Result:

Respondent's application for an order that the appellant pay costs to the respondent for the services of a legal practitioner is dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr D J Matthews
Respondent	:	Mr T R Kucera & Ms R Young

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	W G McNally Jones Staff Lawyers

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

Matthews v Cool & Cozy Pty Ltd [2003] WASCA 136

The Commissioner of Police of Western Australia v AM [2010] WASCA 163(S)

1 **BUSS J**: I agree with Le Miere J.

2 **LE MIERE J**: This court dismissed an appeal by the appellant against the decision of the Full Bench of the Western Australian Industrial Relations Commission. The respondent sought an order that the appellant pay the respondent's costs of the appeal. The appellant opposed this order. The court called for written submissions from the parties and directed that a decision on costs be made on the papers.

3 Section 86(2) of the *Industrial Relations Act 1979* (WA) (the Act) provides this court with the power to award costs:

> In the exercise of its jurisdiction under this Act the Court may make such orders as it thinks just as to the costs and expenses (including the expenses of witnesses) of proceedings before the Court, including proceedings dismissed for want of jurisdiction, but 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 Court, the proceedings have been frivolously or vexatiously instituted or defended as the case requires, by the other party.

4 The operation of s 86(2) was explained by this court in ***Matthews v Cool & Cozy Pty Ltd*** [2003] WASCA 136:

> It is clear that the policy envisaged by s 86(2) is that it will be on very rare occasions that a costs order will be made. Proceedings will have been 'frivolously or vexatiously' instituted where it can be said that the matter was 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; that it 'discloses a case which the Court is satisfied cannot succeed'; or that 'under no possibility can there be a good cause of action' … [9].

5 Section 86(2) was considered by this court in ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163(S). Buss J (with whom Pullin and Le Miere JJ agreed) made a number of observations about the court's power under s 86(2) to order the unsuccessful party to an appeal to pay the costs of any other party for the services of, relevantly, any legal practitioner of that party. First, the court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful party. Secondly, if the court is of the opinion, in a particular case, that the proceedings were frivolously or vexatiously instituted or defended, as the case may be, the formation of this opinion enlivens the court's discretion to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party. It does not, however, follow that where the test for enlivening the court's discretion to award legal costs has been satisfied that an order for the payment of those costs will necessarily be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs. Thirdly, the test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious. Fourthly, the ordinary meaning of 'frivolously', in relation to a claim, is, relevantly, having no reasonable grounds for the claim and the ordinary meaning of 'vexatious', in relation to a claim, is, relevantly, instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party. Fifthly, something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90. Not every appeal which is determined to be without merit, either because this court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously.

6 The respondent submits that the appellant's case was frivolously or vexatiously instituted. The appellant had one ground of appeal. The appellant alleged that the Full Bench erred in its interpretation of the term 'public interest' in s 27(1)(a)(ii) of the Act. The respondent submits that the appellant's particulars to the ground of appeal reveal why the matter was frivolous and vexatious. The respondent submits that despite the appeal ground being framed as being based

on an error of interpretation of the Act, the particulars to that ground make it obvious that the Appellant was trying to coerce the Court to engaged in a merit review of the Full Bench's decision.

7 The particulars to the appellant's ground of appeal were:

> The Full Bench erred in interpretation of the term 'public interest' by failing to properly consider the potential for conflict between the decision of His Honour McKechnie J in granting Mr M a spent conviction order and the continuation of the unfair dismissal claim brought on Mr M's behalf in circumstances where potential for conflict arose out of the following:
>
> (a) His Honour, in granting Mr M a spent conviction order, had considered whether Mr M would be likely to commit such an offence again, and had, not having been made aware of the unfair dismissal claim, relied on, as a fact, that Mr M would be unlikely to obtain employment in a position in which he may exercise lawful force over others;
>
> (b) His Honour, in granting Mr M a spent conviction order, had considered whether personal and general deterrence considerations would still be met if a spent conviction order was granted, and had, not having been made aware of the unfair dismissal claim, relied on, as a fact, that Mr M had lost his employment;
>
> (c) the continuation of the unfair dismissal claim would be in conflict with His Honour's decision as His Honour assumed the following and had no reason to not assume the following:
>
> i. that there were no proceedings on foot at the time of His Honour's decision that sought that Mr M be returned to his employment or otherwise compensated for the loss of his employment;
>
> ii. that Mr M would not be returned to his employment or otherwise compensated in relation to the loss of his employment as a result of proceedings on foot at the time of His Honour's decision;
>
> iii. that whether or not Mr M was re-employed by the appellant was a matter entirely for the appellant,
>
> when the facts were that,
>
> iv. an unfair dismissal claim was on foot;
>
> v. the claim had the potential to return Mr M to his employment, or otherwise compensate Mr M in relation to the loss of that employment; and
>
> vi. it was not, at the time His Honour made his decision, a matter entirely for the appellant whether Mr M would be employed by it in the future.

8 The respondent's characterisation of the appeal as an attempt to coerce the court to engage in a merit review of the Full Bench's decision is not a fair or accurate characterisation of the appellant's argument on appeal. The appellant argued that in deciding where the public interest lay, it is evident from a consideration of the reasons for decision of the Full Bench that the Full Bench acted on a wrong principle of law applying to s 27(1)(a)(ii) or, put another way, did not correctly understand the applicable law and thus erred in the construction or interpretation of s 27(1)(a)(ii). That argument required a consideration of the reasons for decision of the Acting President and the Chief Commissioner. The court held that an analysis of those reasons for decision did not disclose that the Acting President or the Chief Commissioner misunderstood the meaning of 'public interest' in s 27(1)(a)(ii). However, I am not satisfied that the appellant's case, when the appeal was instituted, was so obviously untenable that it could not possibly succeed or was manifestly groundless.

9 The appellant further argued on the appeal that there was only one conclusion reasonably open in relation to the matter of public interest and that as the Full Bench reached a different conclusion it must have misunderstood the statutory criterion imported by s 27(1)(a)(ii) and thereby erred in the construction or interpretation of s 27(1)(a)(ii). That argument also required a careful consideration of the reasons for decision of the Acting President and the Chief Commissioner. After analysing those reasons the court was not persuaded that the only conclusion reasonably open to the Full Bench was that further proceedings are not desirable in the public interest and, in any event, if the only conclusion reasonably open to the Full Bench was that further proceedings are not desirable in the public interest and the Full Bench reached a contrary conclusion, it may have done so because it made incorrect findings of fact or it incorrectly applied the facts to the law which it correctly understood. I am not persuaded that at the time it instituted the appeal, the appellant's argument was so obviously untenable that it could not possibly succeed or was manifestly groundless.

10 I find that the appeal was not instituted frivolously or vexatiously. The respondent's application for an order that the appellant pay costs to the respondent for the services of a legal practitioner should be dismissed.

11 **MURPHY J**: I agree with Le Miere J.

2015 WAIRC 00874

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 12 OF 2013 GIVEN ON 20 JUNE 2014

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPELLANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	BUSS J
	MURPHY J
	LE MIERE J
DATE	TUESDAY, 15 SEPTEMBER 2015
FILE NO/S	IAC 4 OF 2014
CITATION NO.	2015 WAIRC 00874

Result	Application dismissed
Representation	
Appellant	Mr D Matthews (Counsel), instructed by the State Solicitor for Western Australia
Respondent	Mr K Singh (Counsel), instructed by W.G. McNally Jones Staff Lawyers

Order

It is hereby Ordered that:

1. The Respondent's application for an Order for costs is dismissed.

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

[2015] WASCA 195

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION -v- UNITED VOICE WA [2015] WASCA 195
CORAM	**:**	BUSS J LE MIERE J MURPHY J
HEARD	**:**	9 SEPTEMBER 2015
DELIVERED	**:**	23 SEPTEMBER 2015
FILE NO/S	**:**	IAC 1 of 2015
BETWEEN	**:**	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Appellant AND UNITED VOICE WA Respondent

ON APPEAL FROM:

Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	J H SMITH ACTING PRESIDENT
		A R BEECH CHIEF COMMISSIONER
		S J KENNER COMMISSIONER
Citation	**:**	[2014] WAIRC 1361
File No	**:**	FBA 9 of 2014

Catchwords:

Extending time in which to institute appeal - Power of the Full Bench of the Western Australian Industrial Relations Commission to extend the time in which a party may institute an appeal - Statutory construction of s 49(3) of the *Industrial Relations Act 1979* (WA)

Legislation:

Conciliation and Arbitration Act 1904 (Cth)

Government and Related Employees Appeal Tribunal Act 1980 (NSW)

Industrial Relations Act 1979 (WA)

Result:

Section 27(1)(n) of the *Industrial Relations Act 1979* (WA) confers on the Full Bench the power to extend the time within which a party may institute an appeal under s 49 of the Act

Category: B

Representation:

Counsel:

Appellant	:	Mr D J Matthews
Respondent	:	Mr S A Millman

Solicitors:

Appellant	:	State Solicitor for Western Australia
Respondent	:	Slater & Gordon Lawyers

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

Patterson & James v Public Service Board of NSW [1984] 1 NSWLR 237

Re Coldham; Ex parte Australian Building Construction Employees' and Builders Labourers Federation (1985) 159 CLR 522

Saldanha v Fujitsu Australia Ltd [2009] WASCA 119

1 **BUSS J**: I agree with Le Miere J.

2 **LE MIERE J**: The question raised by this case is whether s 27(1)(n) of the *Industrial Relations Act 1979* (WA) (the Act) confers on the Full Bench of the Western Australian Industrial Relations Commission the power to extend the time within which a party may institute an appeal under s 49 of the Act to the Full Bench from a decision of the Commission.

Decision of Full Bench

3 Ms Spence, who is a member of the respondent union, is employed as an education assistant by the appellant, the Director General, Department of Education. The respondent contends that the duties carried out by Ms Spence are teaching duties. The appellant contends that Ms Spence is employed as an education assistant and not a teacher. The respondent initiated an application for a compulsory conference under s 44 of the Act. The industrial matter was not settled and the Commission heard and determined the dispute. The Commission dismissed the respondent's application. The respondent filed a notice of appeal.

4 Section 49(3) of the Act provides that:

> An appeal under this section shall be instituted within 21 days of the date of the decision against which the appeal is brought.

The respondent filed its notice of appeal to the Full Bench three days out of time and on the same day it filed the notice of appeal the respondent also filed an application seeking an order granting the respondent leave to file an appeal out of time. By a majority the Full Bench extended the time for the respondent to institute the appeal against the decision of the Commission, allowed the appeal, and remitted the case to the Commission for further hearing and determination. In dissent, Kenner C found that the Full Bench did not have power to grant an extension of time within which to institute the appeal.

This appeal

5 The appellant now appeals to this court under s 90 of the Act from the decision of the Full Bench. Section 90(1) provides that an appeal lies to this court on the grounds set out in subpars (a), (b) or (c) but upon no other ground. The appellant brings this appeal under s 90(1)(b), that is on the ground that the decision of the Full Bench is erroneous in law in that there has been an error in the construction or interpretation of the Act in

the course of making the decision appealed against. The appellant says that on its proper construction s 49(3) of the Act precludes an appeal to the Full Bench that is not instituted within 21 days of the date of the decision against which the appeal, and the Full Bench does not have power to extend that period.

The statutory provisions

6 Section 49(2) provides that subject to that section, an appeal lies to the Full Bench in the manner prescribed from any decision of the Commission. Section 49(3), which I have set out above, provides that an appeal shall be instituted within 21 days of the date of the decision against which the appeal is brought. The Full Bench, by a majority, found that s 27(1)(n) of the Act empowers the Full Bench to extend the time within which a party may institute an appeal under s 49 to the Full Bench from a decision of the Commission. Section 27(1) provides:

> Except as otherwise provided in this Act, the Commission may, in relation to any matter before it -
>
> …
>
> (n) extend any prescribed time or any time fixed by an order of the Commission;

Power of Commission 'in relation to any matter before it'

7 Section 27(1) of the Act provides that, except as otherwise provided in the Act, the Commission may, 'in relation to any matter before it' exercise any of the powers set out in subpars (a) to (v) which includes the power under (n) to extend time. The phrase 'in relation to any matter before it' has a wide and general application. In ***Re Coldham; Ex parte Australian Building Construction Employees' and Builders Labourers Federation*** (1985) 159 CLR 522, the High Court considered whether s 41(1)(m) of the *Conciliation and Arbitration Act 1904* (Cth) empowered the Australian Conciliation and Arbitration Commission to extend the time for instituting an appeal from the Commission to the Full Bench of the Commission. Section 41(1) gave the Commission wide powers in relation to an industrial dispute and s 41(2) provided that a reference in s 41(1) to an industrial dispute shall, unless the contrary intention appears, be read as including a reference to 'any other proceedings before the Commission'. The powers given to the Commission by s 41(1) included the power to 'extend any prescribed time'. In a unanimous judgment the High Court held that the power given by s 41(1)(m) to extend time applied to the hearing of an appeal at all its stages, including a hearing of the question whether the appeal has been properly instituted and the power given by s 41(1)(m) to extend time could be exercised after the prescribed time which it is sought to extend has expired. The court said:

> Section 41 applies 'in relation to' 'any … proceedings before the Commission'. The word 'proceedings' has frequently been said to have a wide and general application, and it would certainly include both an appeal and an application for an amendment or an extension of time. If a notice of appeal has been given, and, when the matter comes before a Full Bench, it appears that the notice is so defective in substance that it fails to institute the desired appeal, an application for an order allowing an amendment, or correcting the defect, or extending the time for lodging the notice of appeal, either forms part of, or in itself constitutes, proceedings before the Commission in which the powers given by s 41 to make an order of those kinds can be exercised, unless some other section of the Act indicates that the provisions of s 41 are inapplicable to the particular proceedings in question (528 - 529).

8 The words 'in relation to any matter before [the Commission]' are at least as wide as the words 'in relation to … any … proceedings before the Commission'. They extend to at least an application for an extension of time for instituting an appeal to the Full Bench from a decision of the Commission.

Power to extend 'any prescribed time'

9 The power conferred on the Commission by s 27(1)(n) includes the power to 'extend any prescribed time'. Any 'prescribed time' in subpar (n) refers to any time prescribed, that is laid down as a rule or a course to be followed, in the Act or the regulations made under the Act. The time laid down in s 49(3) within which an appeal is to be instituted is a 'prescribed time' within the meaning of s 27(1)(n) read with the definition of 'prescribed' in s 5 of the *Interpretation Act 1984* (WA).

10 The plain words of s 27(1)(n) of the Act empower the Full Bench to extend the time within which an appeal under s 49 to the Full Bench from a decision of the Commission may be instituted unless the provisions of the Act otherwise provide. Further, the power conferred on the Commission by s 27(1)(n) to 'extend any prescribed time' may be exercised after the 'prescribed time' has elapsed. See s 28 of the Act.

Appellant's argument - s 49(3) otherwise provides

11 The appellant submits that s 49(3), having regard to the objects and policy of the Act, 'otherwise provides'. That is, on the proper construction of s 49(3) of the Act, s 27(1)(n) does not empower the Full Bench to extend the time for a party to institute an appeal under s 49 from a decision of the Commission. The appellant submits it is clear, given the legislative policy of the Act, that the time limit in s 49(3) is a prescribed time that Parliament did not intend the Commission to have power to extend. The appellant's argument rests heavily on the decision of this court in ***Saldanha v Fujitsu Australia Ltd*** [2009] WASCA 119 and the analysis of the policy of the Act in the judgment of Wheeler JA, with whom Pullin JA and Le Miere J agreed.

Saldanha and the policy of the Act

12 ***Saldanha*** concerned an appeal from a decision of the Full Bench to the Industrial Appeal Court. Section 90(2) of the Act provides that an appeal from a decision of the Full Bench to the Industrial Appeal Court 'shall be instituted within 21 days from the date of the decision against which the appeal is brought'. Ms Saldanha filed a notice of appeal out of time and applied for an extension of time within which to appeal. It was common ground that the Act contains no express power to extend the time within which an appellant may appeal to the Industrial Appeal Court. Therefore, the question raised was whether any power to extend time may be implied from the Act. The court found that it cannot.

13 In the course of her judgment Wheeler JA referred to ***Patterson & James v Public Service Board of NSW*** [1984] 1 NSWLR 237, a decision of the Court of Appeal of New South Wales in which the court found that the provision of the *Government and Related Employees Appeal Tribunal Act 1980* (NSW) s 55 that an appeal on a question of law from the Tribunal to the Court of Appeal shall be made within 21 days after the Tribunal's decision is mandatory, and no jurisdiction exists to extend the time to bring such an appeal. In the course of referring to ***Patterson*** Wheeler JA said that in ***Patterson*** Moffitt P considered the subject matter of the Act to be of significance. The Act therein considered dealt broadly with aspects of public service organisation, including questions of circumstances in which an officer of the public service might be dismissed. Moffitt P considered that policy considerations suggested that there was a legislative policy of ensuring certainty in relation to decisions of that kind, once the time limit for appeal had passed. Wheeler JA said that similar policy considerations may be discerned in the Act. Her Honour said that the 'objects' section, s 6, places emphasis on negotiation and agreement as a means of settling disputes. Her Honour said that s 90, which invests the court with jurisdiction to hear appeals from the Full Bench, confers jurisdiction only in the very limited circumstances stated. Her Honour considered that, taken together, these provisions indicate a legislative policy that negotiation rather than litigation is preferable, and that resort to the Industrial Appeal Court is to be permitted only in strictly limited circumstances. Wheeler JA said it would be consistent with that policy that this court would not have power to extend time and the reasons in ***Patterson*** led to a conclusion that the appeal was incompetent.

14 The appellant says that the court in ***Saldanha*** interpreted the policy of the Act generally and for all purposes. The appellant submits that the court's decision in ***Saldanha*** in relation to the legislative policy of the Act is to the effect that Parliament intended time limits provided for in the Act in relation to appeals be strictly complied with and that appeals brought outside those time limits are incompetent.

15 In my opinion the observations of Wheeler JA about the policy of the Act do not assist the appellant in this appeal. First, the court in ***Saldanha*** was concerned with whether or not a power to extend time within which to appeal from the Full Bench to the Industrial Appeal Court may be implied from the Act. The question in this case is whether or not s 49(3) of the Act is a provision which excludes the application of s 27(1)(n). The present case is concerned with the proper construction of express provisions of the Act and not, as in ***Saldanha***, with whether a power may be implied.

16 Secondly, the legislative policy referred to by Wheeler JA is not inconsistent with the Full Bench having power to extend time for an appeal to the Full Bench. Wheeler JA referred to two aspects of the legislative policy of the Act. First, the objects section, s 6, places emphasis on negotiation and agreement as a means of settling disputes. The Commission, which includes the Full Bench, is constituted to give effect to those objects. Under s 49 an appeal lies to the Full Bench from any final decision of a single commissioner. Further, an appeal lies from a finding, that is a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate, if in the opinion of the Full Bench the matter is of such importance that in the public interest an appeal should lie. See s 49(2) and s 49(2a) read with the definitions of 'decision' and 'finding' in s 7(1) of the Act. An appeal under s 49 is an appeal by way of rehearing. By contrast, an appeal to the Industrial Appeal Court is confined to the very limited circumstances referred to and does not extend to an appeal concerning the merits of the decision of the Full Bench. The policy of the Act is that industrial matters should be dealt with and resolved by the Commission, including the Full Bench, and the only appeals which are to go to the Industrial Appeal Court are appeals on the ground that the matter the subject of the decision is not an industrial matter, or there has been an error in the construction of any Act, regulation, award, industrial agreement or order or that the appellant has been denied the right to be heard. The policy is to severely limit appeals to the Industrial Appeal Court but, in general, not to limit appeals to the Full Bench of the Commission.

Conclusion

17 Interpreting a statutory provision requires consideration of its text, its context and its purpose. The plain meaning of s 27(1)(n) of the Act is that in any matter before it, which includes an application for an extension of time to appeal from the decision of a single commissioner to the Full Bench, the Commission, which includes the Full Bench, may extend any prescribed time, which includes the time prescribed by s 49(3) for instituting an appeal to the Full Bench, unless the Act otherwise provides. Section 49(3) does not expressly otherwise provide. A consideration of the text, context and objects of the Act, including the policy of the Act in emphasising dealing with industrial matters by negotiation and agreement, does not lead to the conclusion that s 49(3) impliedly excludes the application of s 27(1)(n) to an appeal under s 49 such that the Full Bench does not have power to extend time for an appeal from a single commissioner to the Full Bench. Section 27(1)(n) of the Act confers on the Full Bench the power to extend the time within which a party may institute an appeal under s 49 of the Act. The power may be exercised after the prescribed time has elapsed: s 28. The appeal must be dismissed.

18 **MURPHY J**: I agree with Le Miere J.

2015 WAIRC 00909

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 9 OF 2014

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	APPELLANT
	-v-
	UNITED VOICE WA
	RESPONDENT
CORAM	THE HONOURABLE JUSTICE BUSS, PRESIDING JUDGE
	THE HONOURABLE JUSTICE LE MIERE
	THE HONOURABLE JUSTICE MURPHY
DATE	WEDNESDAY, 23 SEPTEMBER 2015
FILE NO/S	IAC 1 OF 2015
CITATION NO.	2015 WAIRC 00909

Result	Reasons published; Appeal dismissed
Representation	
Appellant	Mr D Matthews (Counsel), instructed by the State Solicitor's Office of Western Australia
Respondent	Mr S Millman (Counsel), instructed by Slater & Gordon Lawyers

Order

It is ordered that:

1. The Reasons are published.
2. The Appeal is dismissed.

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

FULL BENCH—Appeals against decision of Commission—

2015 WAIRC 00893

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR COMMERCE
	APPELLANT
	-and-
	AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS, PERTH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 22 SEPTEMBER 2015
FILE NO.	FBA 2 OF 2014
CITATION NO.	2015 WAIRC 00893

Result	Order issued
Appearances	
Appellant	Mr D J Matthews (of counsel)
Respondent	Ms B Burke (of counsel) and with her Ms V Loveridge

Order

This appeal having come on for a directions hearing before the Full Bench on 21 September 2015, and having heard Mr D J Matthews (of counsel) on behalf of the appellant, and Ms B Burke (of counsel) and with her Ms V Loveridge on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:—

THAT the appeal be discontinued by leave.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

2015 WAIRC 00936

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. CR 32 OF 2014 GIVEN ON 18 MAY 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2015 WAIRC 00936
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 21 AUGUST 2015
DELIVERED	**:**	MONDAY, 12 OCTOBER 2015
FILE NO	**:**	FBA 6 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 M Mayman**
Citation	**:**	**[2015] WAIRC 00389; (2015) 95 WAIG 762**
File No	**:**	**CR 32 of 2014**

CatchWords	**:**	Industrial Law (WA) - Appeal against decision of the Commission - Industrial matter - Finding made by the Commission that there were reasonable grounds for the employer to find an employee guilty of knowingly giving false accounts of an incident - Allegations among most serious an employer could make against an employee - Error demonstrated - Evidence and material before the Commission not analysed by applying the requisite standard of proof - Must be more than inconsistent accounts to support a finding of reasonable grounds to form the belief employee had knowingly given a false account
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 35(1), s 44(9), s 49
Result	**:**	Appeal allowed - Order made
Representation:		
Counsel:		
Appellant	**:**	Mr C A Fogliani
Respondent	**:**	Mr D J Matthews and with him Ms J E Rhodes
Solicitors:		
Appellant	**:**	W G McNally Jones Staff
Respondent	**:**	State Solicitor for Western Australia

Case(s) referred to in reasons:

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

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336

Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch (1985) 65 WAIG 2033

House v The King [1936] HCA 40; (1936) 55 CLR 499

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

Nominal Defendant v Owens (1978) 22 ALR 128

Pinker v Director General Department of Education [2014] WAIRC 01312; (2014) 94 WAIG 1928

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 990

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

Case(s) also cited:

Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch [2000] WASCA 386

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2014] WAIRC 01367; (2014) 95 WAIG 1

Reasons for Decision

SMITH AP:

Introduction

1 This is an appeal to the Full Bench pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against the decision of the Commission in CR 32 of 2014. CR 32 of 2014 was an industrial matter referred for hearing and determination under s 44(9) of the Act after The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the union) had referred the industrial matter to the Commission by an application for a compulsory conference under s 44 of the Act seeking to resolve an industrial dispute. The parties were in dispute about the termination of employment of a Ms Janet Vimpany, a member of the union, who was employed by the Public Transport Authority of Western Australia (the PTA) as a passenger ticketing assistant. This matter was the second matter referred to the Commission relating to disciplinary proceedings against Ms Vimpany.

2 The first matter was CR 3 of 2014. Both CR 3 of 2014 and CR 32 of 2014 arose from an incident that occurred on 27 April 2013 involving an exchange between Ms Vimpany with Mr David Hammon, who is employed by the PTA as a station coordinator and who was, at the time of the exchange, Ms Vimpany's direct line manager. Following the incident, Mr Hammon made a complaint about Ms Vimpany's conduct during the second of two interactions. After the complaint by Mr Hammon was investigated, Ms Vimpany was found to have committed a breach of discipline which was dealt with by the PTA by the imposition of a reprimand (the first disciplinary process).

CR 3 of 2014 and findings made in FBA 11 of 2014

3 As a result of accounts of the incident on 27 April 2013 given by Ms Vimpany during the course of the disciplinary proceedings, and elsewhere, the PTA also commenced a disciplinary process alleging that Ms Vimpany had deliberately given the PTA false accounts of the incidents on 27 April 2013.

4 Prior to the resolution of the second disciplinary matter, on behalf of Ms Vimpany, the union in C 3 of 2014 challenged the findings made in the first disciplinary process and penalty imposed in relation to the events of 27 April 2013 and sought an order restraining the PTA from continuing the second disciplinary process. The matter was not resolved and at a contested hearing in CR 3 of 2014 the following facts were agreed:

> 3. On the afternoon of 27 April 2013 between 1500 and 1600 hours, there were two interactions at Perth Railway Station between the Union's member, Ms Janet Vimpany, a Passenger Ticketing Assistant and Mr David Hammon, a Station Coordinator, in the presence of other employees of the Authority.
>
> 4. Following the second interaction, Mr Hammon emailed the Authority's Passenger Service Manager Perth, complaining about Ms Vimpany's conduct during their second interaction. Specifically, Mr Hammond [sic] alleged that Ms Vimpany abused his position with threatening behaviour by pointing her finger directly in his face and saying 'do not talk to me like that again and who do you think you are anyway?'
>
> 5. A memorandum dated 8 May 2013 sent on behalf of the Authority and received by Ms Vimpany on 10 May 2013 (the Memorandum);
>
> (a) notified Ms Vimpany of allegations that she:
>
> (i) 'Stormed' into the Station Coordinators' office area;
>
> (ii) Shook her finger in Mr Hammon's face from within approximately two feet; and
>
> (iii) Shouted at him in an intimidating and threatening manner; and
>
> (b) required Ms Vimpany to respond with a written statement explaining her actions.
>
> 6. Ms Vimpany booked off work on receipt of the Memorandum on 10 May 2013.

7. On 14 May 2013, Ms Vimpany submitted a Health and Safety Incident Report Form (the Form) in which she alleged that:
   (a) Mr Hammon was aggressive, threatening and abusive towards her and bullied and harassed her on 27 April 2013;
   (b) she felt anxiety, stress and tension headaches as a result of feeling vulnerable and powerless following her interactions with Mr Hammon on 27 April 2013; and
   (c) exposure to these mental stress factors, including receipt of the Memorandum, had resulted in psychological injuries.
8. On 17 May 2012, Ms Vimpany responded to the Memorandum stating that the allegations were false and not a true and correct account of what occurred.
9. Ms Vimpany lodged a workers' compensation claim with the Authority in relation to her absence commencing 10 May 2013.
10. On 24 May 2013, a representative of the Union raised a grievance with the Authority's Manager Human Resource Services relating to the conduct of Mr Hammon on 27 April 2013, alleging that Mr Hammon had humiliated, degraded and threatened Ms Vimpany and the Union's other member, Ms Jennifer Blake in delivering an instruction to them aggressively, by yelling and screaming at them in the presence of other staff.
11. On 29 May 2013, the Authority's Acting Manager Human Resource Services recommended that the grievance first be raised with Mr Hammon's Manager.
12. On 7 June 2013, following a meeting with a representative of the Union and Ms Vimpany, the Authority's Acting Manager Human Resource Services discontinued the grievance on the basis that the disciplinary investigation would take into consideration Ms Vimpany's account of the events on 27 April 2013, and on the basis that Ms Vimpany's workers' compensation claim was still pending.
13. On 11 June 2013, Ms Vimpany submitted a revised response to the Memorandum which alleged that:
   (a) During their first interaction, Mr Hammon 'stood and glared at us and shouted instructions regarding our finishing time in an aggressive, threatening, intimidating and completely unnecessary manner' such that she had 'never in (her) life been spoken to by a male in such a threatening way'; and
   (b) During their second interaction, Mr Hammon reacted once again in a threatening, loud and aggressive manner, becoming agitated and unreasonable and entered her personal space.
14. The allegations against Ms Vimpany were referred to the Authority's Acting Supervisor Customer Service for investigation under cl 2.6 of the Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011 (the Disciplinary Investigation). The Investigator stated in the introduction to his report that 'As both parties lodged allegations of inappropriate conduct, a formal investigation was deemed necessary, as a finding against either party would be considered a breach of the Authority's Code of Conduct and as such, may result in disciplinary action'.
15. An external investigator was also engaged by the Authority's insurer, Riskcover, to investigate Ms Vimpany's workers' compensation claim.
16. On 15 June 2013, Ms Vimpany returned to operational duties.
17. On 28 June 2013, the Union notified the Authority of a dispute under cl 8 of the Agreement contending that TTO management were not sufficiently capable, competent or independent to investigate the allegations between Ms Vimpany and Mr Hammon.
18. On 4 July 2013, the Union agreed to allow the Disciplinary Investigation to proceed.
19. During July 2013, interviews were conducted for the Disciplinary Investigation.
20. During the Disciplinary Investigation, Ms Vimpany stated to the Investigator that during their first interaction:
   (a) Mr Hammon seemed angry, and was very loud, abusive and threatening;
   (b) Specifically, Mr Hammon said loudly 'where do you think you are going, you are not off till 1600' and when she replied that the boss had said they could go home earlier, he screamed 'I'm the boss now, and you are rostered till 4 and you will stay till 4 so get back out there and don't come back until 4 o'clock'.
21. During the Disciplinary Investigation, Mr Hammon stated to the Investigator that during their second interaction:
   (a) He was sitting at his desk within his cubicle and stayed seated throughout;
   (b) Ms Vimpany confronted him in a threatening manner; and
   (c) Specifically, Ms Vimpany entered his area, leant over and pointed her finger at his face (within approximately 30 cm) and said 'don't ever shout like that to me again. Who do you think you are?'
22. During the Disciplinary Investigation, Ms Vimpany stated to the Investigator that during their second interaction:
   (a) She felt verbally abused and threatened by Mr Hammon; and
   (b) Specifically, Mr Hammon got up from his chair and stood face to face with her in her personal space and shouted 'I did not scream at you Jan' and then said in a very loud voice 'I suggest you leave Jan, leave now' with his arm outstretched and finger pointed to the door.
23. On 10 September 2013, Ms Vimpany's workers' compensation claim was declined by the Authority's insurer, Riskcover, though Ms Vimpany's wages during her absence have been paid due to the failure to meet the statutory 17 day time limit for notifying the decision as to the response.

24. On 11 September 2013, the Authority provided Ms Vimpany with the report from the Disciplinary Investigation and provided her with an opportunity to respond.

25. On 27 September 2013, Ms Vimpany responded again denying the allegations and alleging that the Disciplinary Investigation process had been a conspiracy.

26. On 17 October 2013, the Authority's General Manager of Transperth Train Operations found the allegations set out in the Memorandum were proved and reprimanded Ms Vimpany accordingly.

27. On 23 September 2013, the Authority's Manager Customer Service, notified Ms Vimpany of, and required a response to allegations that Ms Vimpany knowingly gave a false account of Mr Hammon's actions on the afternoon of 27 April 2013 in support of the conclusion that his behaviour was intimidating and bullying towards her.

5 The matters referred for hearing and determination in CR 3 of 2014 were as follows:

1. Whether during the first or second interaction between Mr Hammon and Ms Vimpany on 27 April 2013, Mr Hammon:
   (a) Conducted himself in an intimidating manner by shouting instructions to Ms Vimpany about her finishing time in an aggressive, loud, abusive, threatening or intimidating manner;
   (b) Behaved in an agitated or unreasonable manner, entering her personal space and speaking in a threatening, loud or aggressive manner during the second interaction and yelled or screamed at Ms Vimpany in the company of other staff;
   (c) Was aggressive, threatening or abusive towards Ms Vimpany and Ms Blake; or
   (d) Bullied, harassed, humiliated, or degraded Ms Vimpany.
2. Whether, during the second interaction between Mr Hammon and Ms Vimpany on 27 April 2013, Ms Vimpany:
   (a) Shouted at Mr Hammon;
   (b) Leaned over Mr Hammon or shook her finger in his face; and/or
   (c) Engaged in threatening or intimidating behaviour towards Mr Hammon in breach of the Authority's code of conduct.
3. Whether, in relation to the events of 27 April 2013, Ms Vimpany, Mr Hammon or any other employee of the Authority conducted themselves dishonestly by:
   (a) Initiating an allegation or claim that they knew to be false; or
   (b) Giving an account of those events to investigators that they knew to be false.
4. Whether the Authority abused its disciplinary procedures in relation to the events of 27 April 2013, in that the circumstances of the case did not warrant disciplinary action.

6 After hearing the evidence given by Ms Vimpany and her witnesses and the evidence given by the PTA's witnesses, the learned Commissioner hearing the matter, Kenner C, rejected the evidence given by Ms Vimpany about the two incidents. Commissioner Kenner in his reasons for decision ([2014] WAIRC 00824; (2014) 94 WAIG 1462) made the following findings of fact:

(a) On 27 April 2013, at the Perth train station office both Ms Vimpany and Ms Jennifer Blake entered the office at about 3.15 - 3.20 pm and prepared to leave for the day. Unaware of the prior arrangement with the station coordinator on the morning shift, Mr Avatar Singh, Mr Hammon questioned Ms Vimpany and Ms Blake and told them to continue working to their appointed finish time of 4.00 pm.

(b) Mr Hammon has a strong tone of voice, being Scottish and this, to some extent, was reflected in his evidence in the witness box (his evidence was supported by Mr Fabio Pontarolo). Mr Felix Geson was an impressive witness who no longer works for the PTA and therefore has no interest in the outcome of the proceedings. His recollection was that Mr Hammon spoke to Ms Vimpany and Ms Blake normally, when requesting that they resume their station duties as rostered. This was also generally confirmed by Mr Pontarolo and Mr Singh.

(c) Both Ms Vimpany and Ms Blake were not ambivalent about having to work to the end of their shift. They had been led to believe that they could finish work early by the previous station coordinator. It is only natural, that they would be somewhat disappointed that they could no longer leave early as planned. On leaving the office, both Ms Vimpany and Ms Blake may have 'muttered' something and they had facial expressions reflecting that they were less than pleased with the decision made by Mr Hammon. This was the evidence of both Mr Hammon and Mr Geson, which evidence is accepted.

(d) Consistent with this state of affairs, both Ms Vimpany and Ms Blake then had time, on their own testimony, to reflect on Mr Hammon's direction to continue to work to 4.00 pm, when they were on the platform outside the office. Both Ms Vimpany and Ms Blake were quite upset with Mr Hammon.

(e) Ms Vimpany entered the office at around 3.50 pm with the purpose of confronting Mr Hammon as to the earlier exchange.

(f) When she entered the office, Ms Vimpany made a 'beeline' for Mr Hammon, largely as described by the PTA's witnesses. Ms Vimpany did go up behind and to the side of Mr Hammon, and spoke to him in a strong and angry manner whilst pointing her finger at him. She spoke the words alleged and Mr Hammon was taken by surprise by Ms Vimpany's approach and responded to the effect that Ms Vimpany should leave the office.

(g) Mr Geson's testimony is accepted that Ms Vimpany did, on leaving the office, refer to Mr Hammon as an 'ass' or a word to that effect.

(h) Ms Blake's testimony that when Ms Vimpany emerged from the office to go home, she was not upset or overly concerned is not consistent with Ms Vimpany's allegation that she had just been verbally abused and bullied by Mr Hammon, moments earlier. It is, however, quite consistent with Ms Vimpany, having confronted Mr Hammon and having gotten her frustration and upset 'off her chest', by speaking to Mr Hammon as she intended to do.

(i) Importantly, however, to the assessment of credit, is that shortly after the incident on 27 April 2013, all three customer service assistant witnesses (in the office with Mr Hammon) recorded the events they witnessed in writing.

(j) In contrast, it is to be noted that Ms Vimpany was not going to do anything about the alleged bullying and intimidatory behaviour of Mr Hammon. It was only when she received the 'please explain' memorandum from the PTA of 8 May 2013, that matters seemed to take a different complexion for Ms Vimpany. It was not for a further one week after that, that Ms Vimpany put in writing her allegations against Mr Hammon. It is also to be noted, that there were some inconsistencies in the subsequent statements made by Ms Vimpany to the PTA, as to the events of 27 April 2013.

(k) Mr Hammon did not conduct himself in an intimidating, threatening and aggressive manner as alleged. When Ms Vimpany returned to the office shortly before 4.00 pm on 27 April 2013, she shouted at Mr Hammon and engaged with him in an inappropriate manner, pointing her finger at him and at his face while leaning towards him. Such conduct was not appropriate conduct towards a supervisor.

7 Importantly, for the resolution of the issues in this appeal, Kenner C in respect of the third issue that was referred for hearing and determination in CR 3 of 2014 made the following findings [64] - [65]:

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

8 The union sought to challenge the learned Commissioner's decision at first instance in FBA 11 of 2014. The Full Bench after hearing the parties made an order that the appeal be dismissed ([2014] WAIRC 01367; (2014) 95 WAIG 1).

9 One of the issues in FBA 11 of 2014 was whether Kenner C had made a finding that Ms Vimpany had conducted herself dishonestly by initiating an allegation or claim that she knew to be false or had given an account of those events to investigators that she knew to be false. This was the matter referred for hearing and determination as issue 3 in CR 3 of 2014.

10 Prior to the determination of FBA 11 of 2014, the PTA dismissed Ms Vimpany.

11 On 11 August 2014, shortly after Kenner C issued his decision in CR 3 of 2014, Mr Ian Luff, the manager of customer service at Transperth Train Operations, sent a letter to Ms Vimpany advising her that she would be stood down on full pay until the general manager had made a final determination on allegations that had been previously notified to her on 23 September 2013; that is that she had knowingly given false accounts and made a false allegation in relation to the events of 27 April 2013. Mr Luff stated in the letter that he was of the view that Kenner C's findings provided sufficient grounds for a conclusion that the allegations were proven. Mr Luff also stated in the letter that if the general manager is satisfied that the allegations are proven and decides to apply a disciplinary penalty, then it would be his recommendation that the general manager seriously consider applying the penalty of dismissal on the basis that:

- Your alleged conduct seriously breached the trust which the PTA is entitled to expect of any employee.
- That alleged breach was not a momentary aberration, but appears to have been sustained over a period of almost a year.
- In addition, the findings made against your credibility by the Commission mean that you have been demonstrated to no longer have the integrity required to fulfil the duties of your position as a Passenger Ticketing Assistant, which require you to be able to:
  - issue infringements and, if necessary, give evidence in court in support of your actions; or
  - work without supervision at locations spread across the network, and provide reliable feedback in relation to circumstances such as interaction with customers and other employees (e.g. in response to customer complaints or safety investigations).

12 On 7 October 2014, after receiving a written response from Ms Vimpany, Mr J Steedman, the acting general manager of Transperth Train Operations, sent a letter to Mr Vimpany advising her that he found the allegations to be proved insofar as they related to her account of the second interaction with Mr Hammon and advised her that her employment would be terminated effective from 5.00 pm on Wednesday, 8 October 2014. In the letter, Mr Steedman set out the following matters:

(a) In Ms Vimpany's response of 29 August 2014, she explained that she prepared a statement on 13 May 2013, that she had taken care at that time to ensure that it was truthful and accurate, that she believed it to be true to the best of her recollection and that she had since maintained the same account, presumably consistent with that statement.

(b) An appeal had been filed challenging whether Kenner C was entitled to make the findings he made on the evidence before him.

(c) Whilst Ms Vimpany had been invited to advise whether she wished to meet with him about her response, she did not seek such an opportunity.

(d) Having no previous background in this matter, he had reviewed documents which had either been generated from the disciplinary process or are transcript or exhibits from CR 3 of 2014. Those documents included statements made by Ms Vimpany, a transcript of evidence in CR 3 of 2014, statements, notes of interview and transcripts of evidence of Ms Blake, Ms Rebecca Johnston, Mr Geson, Mr Pontarolo, Mr Barinder Singh, Mr Avtar Singh and Mr Hammon.

13 Based solely on his review of these documents, Mr Steedman made the following findings (AB 14 - 15):

> [H]aving put to one side the outcome of the Commission hearing, I find that your account that David Hammon intimidated and bullied you during your second interaction with him by screaming (or shouting) at you, getting out of his chair and standing face to face with you in your personal space was false.
>
> I acknowledge that your account was similar on each occasion you gave it. However, your account was contradicted by the accounts of the other people present, in particular Felix Geson and Fab Pontarolo. While not absolutely identical, the other accounts of those present were broadly consistent. Also, I find Jen Blake's evidence that you were not upset after leaving the office on the second occasion more likely to be consistent with the other witnesses account of events during your second interaction with Mr Hammon than your own account.
>
> Having satisfied myself that your account was false, I now turn to consider whether it was knowingly false - whether at the time you gave your accounts prior to September 2013 you knew them to be false.
>
> Based on my review of the documents listed above, I conclude that you were aware and deliberately gave a false account of the relevant events.
>
> First, I can see no innocent explanation for the difference in your account compared to the others present. Initial accounts were recorded by all present very soon after the incident - each within about two weeks, so differences in recollection would not explain so great a difference in the accounts. Nor can exaggeration or differences in perspective or interpretation explain the extent of the difference between your accounts of what happened during the second interaction.
>
> I have to conclude therefore that one or other of the accounts was being given dishonestly.
>
> It is less likely that all of the other employees, some of whom are fellow wages employees and one of whom, by the time of the hearing, was no longer even employed by the PTA, colluded to give detailed false evidence contradicting your account. There was no evasiveness or vagueness in their accounts that might be expected if they had somehow been persuaded to not give a true account.
>
> I am satisfied that it is much more likely that:
>
> - after learning of the notification requesting a response about your alleged behaviour during the second interaction, you decided to respond by initiating a Grievance application and a OSH/Workers Compensation claim against your accuser, on the basis that attack was the best form of defence; and
> - you initiated those claims knowing - at least in so far as it dealt with the events of the second interaction - the account of David Hammon's actions upon which your claims were based was false.
>
> I therefore find the allegations against you proved in so far as they relate to your account of the second interaction with Mr Hammon.

14 In the letter, Mr Steedman noted Ms Vimpany's response that she remained committed to working with the PTA. He then found that it was a very serious matter for an employee to deliberately make false allegations against another employee and observed that integrity is one of the values of the PTA as an organisation. He then said the PTA is entitled to expect to be able to trust its employees to deal with it honestly. He then observed that in this case, if Ms Vimpany's account had been accepted it could have had significant negative consequences for another employee. He then noted that if she had taken the opportunity to withdraw the claims, her conduct to wrongly initiate deliberately false claims in June 2013 could have been characterised as a momentary lapse in judgment. However, she had persisted with the claim throughout and not taken the opportunity to diminish her conduct. In these circumstances, he decided to impose the penalty of dismissal.

15 Mr Steedman then had regard to the findings made by Kenner C and after observing that the learned Commissioner had all the evidence before him and had the opportunity to see the witnesses give oral evidence rather than just read the transcript, this reinforced his finding that the allegations were proved.

16 After considering the reasons for decision of the learned Commissioner, the Full Bench found that Kenner C did not determine the matters in issue 3.

17 The Full Bench in its reasons for decision made the following findings:

(a) The learned Commissioner did not find that Ms Vimpany had been dishonest. His finding of fact about her conduct in respect of the matters raised in issue 3 was vague [46].

(b) The learned Commissioner did not answer the questions referred for hearing and determination in issue 3 [47]. The two questions raised in issue 3 required findings of fact to be made whether Ms Vimpany, Mr Hammon or any other PTA employee conducted themselves 'dishonestly by', initiating a claim 'they knew to be false', or giving an account to investigators 'they knew to be false'. To make such findings, the learned Commissioner would have had to find that Ms Vimpany or any other employee of the PTA had formed an intention to give a false account and that in doing so their conduct was dishonest [48].

(c) Thus, the first matter raised in issue 3 was whether any employee of the PTA had intended to give a false account at any stage during the investigation, including initiating a claim. If the answer to the first matter was yes, the second matter was whether in circumstances the employee in question in doing so had conducted themselves dishonestly [49]?

(d) A finding that a person had formed a state of mind to give a false account, or, put another way, had subjectively determined to give a false account is a very serious matter which attracts a high standard of proof [50] (***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336).

(e) The issue before the learned Commissioner was not whether Ms Vimpany was honest in her account when giving evidence before the Commission. The PTA did not put to Ms Vimpany in cross-examination that at any time she had formed a state of mind to give a false account. In these circumstances, it was not open to the learned Commissioner to determine the matters raised in issue 3. Nor did he do so [51].

(f) It was open for issue 3 to be determined in any proceedings that flow from the determination of the secondary disciplinary action [52].

This appeal - matters referred in CR 32 of 2014

18 In an amended memorandum of matters referred for hearing and determination made by Mayman C on 10 February 2015, the union's issues for hearing and determination were as follows:

Oppressiveness of the dismissal

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

13. Did the respondent have an 'integrity test'? If the answer is yes, then:

    a. did the respondent inform Ms Vimpany of the content of that integrity test before it dismissed her?

    b. did Ms Vimpany fail the integrity test?

14. Was Ms Vimpany's dismissal oppressive?

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

Unreasonableness/unfairness of the dismissal

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

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

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

Harshness of the dismissal

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

20. Was Ms Vimpany's dismissal harsh?

19 The PTA's issues in the amended memorandum of matters referred for hearing and determination were as follows:

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

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

26. The only issues for determination before the Commission, as presently constituted, are as follows:

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

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

    c. what was the appropriate penalty?

20 The hearing of CR 32 of 2014 commenced on 9 February 2015. On that day, Ms Vimpany and the union's witnesses gave their evidence. The matter was then adjourned and continued on 13 April 2015. Prior to the matter continuing on 13 April 2015, Mayman C issued a decision after hearing an application by the PTA that the Commission ought to refrain from hearing part of the matter.

21 In reasons for decision delivered on 11 March 2015, Mayman C upheld the PTA's objection and made the following declaration and order on 13 March 2015 ([2015] WAIRC 00234; (2015) 95 WAIG 379):

1. DECLARES that Application CR 32 of 2014 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority is part dismissed on public interest grounds pursuant to s 27(1)(a) of the Act with the exception of those matters relating to:

    a. whether there were reasonable grounds for the respondent to hold the belief that the applicant's member was guilty of the misconduct alleged, having regard for the principles reflected in the Full Bench decision ***The Minister for Health v Drake-Brockman*** (2012) 92 WAIG 203;

    b. procedural fairness; and

    c. penalty.

2. ORDERS THAT the application, other than those aspects listed in the Declaration, be and is hereby dismissed.

3. ORDERS THAT the application be re-listed at the applicant's and respondent's convenience to hear submissions on the matters referred to in the Declaration.

22 It is important to note in these proceedings that there is no appeal against the decision given by Mayman C on 13 March 2015.

23 When the hearing of CR 32 of 2014 reconvened on 13 April 2015, Mr Steedman gave evidence on behalf of the PTA and the parties' representatives made closing submissions.

Reasons for decision of Commissioner Mayman given on 18 May 2015 in CR 32 of 2014

24 On 18 May 2015, Mayman C made an order which dismissed the balance of CR 32 of 2014.

25 In reasons given by Mayman C on 18 May 2015, the Commissioner gave her reasons for making the order. In her reasons she set out the union's outline of submissions dated 27 January 2015. Of importance to the resolution of this appeal those submissions set out not only the reasons why the union says the dismissal of Ms Vimpany was unfair, but the submissions also set out the basis on which the union contended the Commissioner should assess the evidence and make a determination as to whether the PTA had discharged its burden in an unfair dismissal where an employer relies upon the issue of misconduct.

26 The submissions of the union which are relevant to the disposition of this appeal which are set out in the reasons for decision are as follows:

(i) The union claimed the case of unfair dismissal of Ms Vimpany was made out for two reasons [6] (AB 74):

(a) Mr Steedman was the decision maker who, on behalf of the respondent, ultimately made the decision to dismiss Ms Vimpany. Mr Steedman did not have reasonable grounds for believing on the information available at the time, that Ms Vimpany was guilty of the alleged misconduct; and

(b) the discretionary decision of Mr Steedman to dismiss Ms Vimpany was harsh, oppressive and unfair.

(ii) The PTA's allegation is that Ms Vimpany [7] (AB 74):

> knowingly gave false accounts of a supervisor's actions on 27 April 2013, in the course of a disciplinary investigation and in support of claims in a grievance process and an OSH incident report that his behaviour was intimidating and bullying towards you.

(iii) The key findings of fact of Mr Steedman were found to be proved based on the review of documents. The key findings of fact by Mr Steedman were as follows [8] (AB 74):

> ... you were aware and deliberately gave a false account of the relevant events (page 3);
>
> ... to deliberately make false allegations against another employee (page 3); and
>
> ... acted dishonestly in the way alleged (page 4).

(iv) The test for establishing misconduct in this matter is as follows [10] - [13], [16] (AB 74 - 75):

> Where an employer is relying upon the issue of misconduct the applicant submits there is a burden upon the respondent to demonstrate there is sufficient evidence to find that the alleged incident did occur, ***Garbett v Midland Brick Co*** [2003] WASCA 36. The applicant submits whether or not the misconduct occurred is not a discretionary decision but a finding of fact giving rise to the right to dismiss ***Minister for Health v Drake-Brockman*** [2011] WAIRC 00150; (2011) 92 WAIG 203.
>
> The respondent is required to establish not that the employee was guilty of the misconduct but that following a proper inquiry there were reasonable grounds for a belief on the part of the employer that on the information available at the time that the employee, in this case Ms Vimpany was guilty of the alleged misconduct. In making the decision the respondent is required to take into account any mitigating circumstances that might be associated with the alleged misconduct or the employee's work record to determine whether the misconduct justified the dismissal, ***Minister for Health v Drake-Brockman***.
>
> The applicant submitted that what constitutes 'sufficient evidence' to establish the facts said to demonstrate misconduct will vary from case to case depending on the gravity of the alleged misconduct having regard for the decision in ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224. The allegation made by the respondent against Ms Vimpany was that she 'knowingly' gave false accounts of an incident to the respondent. As was recently found by the Full Bench in ***ARTBIU v PTA (FB)***:
>
> > A finding that a person had formed a state of mind to give a false account, or, put another way, had subjectively determined to give a false account is a very serious matter which attracts a high standard of proof.
>
> If the respondent discharges its burden in unfair dismissal matters of this nature the onus then shifts to the employee to demonstrate that the dismissal was indeed harsh, oppressive or unfair.
>
> …
>
> The allegation that the respondent made against Ms Vimpany was a serious one. The applicant suggests it was subjective in nature and that given the gravity of the allegation it is asserted by the applicant that the respondent did not have reasonable grounds to sustain that Ms Vimpany was guilty of the misconduct as alleged.

27 The remainder of the submissions referred to by Mayman C in her reasons for decision addressed the well-established test that applies to an employer when exercising their discretion to dismiss an employee. The union's submissions also dealt with the effect of cl 2.8.22 of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement*

2014 (the agreement) which requires that the type of penalty applied must be proportionate to the conduct which gave rise to the breach of discipline or must be reasonably suitable in consideration of all of the circumstances of the case.

28 The remainder of the union's submissions dealt with matters personal to Ms Vimpany, including a submission that she had worked for the PTA for more than eight years and apart from the incident that occurred on 27 April 2013, relating to Mr Hammon and the associated internal processes, her employment record was satisfactory.

29 Whilst the PTA in its outline of submissions put a position to the Commission that the application should be dismissed, the PTA put a submission to the Commissioner that the question to be answered by the Commission was whether the accounts given by Ms Vimpany relating to what actually happened on 27 April 2013 were knowingly false or more succinctly, whether it was reasonable for the PTA to conclude that they were knowingly false [28]. Commissioner Mayman in her reasons also recorded a submission made on behalf of the PTA that the Commission should apply a 'loss of confidence' test. This submission was [34] - [35] (AB 79):

> The respondent must have total confidence in the employee concerned. There is enough, in the view of the respondent, if the employer on reasonable grounds has 'lost confidence' in the employee. Relevant decisions in this regard relating to ***Police and PTA Transit Officers*** in the view of the respondent are ***Pantovic v PTA*** [2011] WAIRC 00876 and ***Kelly v PTA*** [2009] WAIRC 00238. The respondent is of the view that the test outlined in each of these decisions is a test that is significantly lower than the test in ***Briginshaw v Briginshaw***.
>
> In circumstances where an employee is required to exercise enforcement powers it would be contrary to accepted wisdom to apply a 'high standard of proof' of dishonesty on the part of the employee before the employer can be said to have reasonably lost confidence in the employee.

30 Commissioner Mayman then set out the evidence given by each of the witnesses for the union. The first witness was a polygraph examiner, Mr Charles Rahim. He carried out a polygraph test of Ms Vimpany in December 2014. His evidence is not material to this appeal. In any event, his evidence was given little weight by the Commissioner.

31 Nine employees of the PTA gave character evidence in support of Ms Vimpany. Each of those witnesses gave evidence to the effect that they had worked with Ms Vimpany for some time and found her to be trustworthy, honest, hardworking and good with customers.

32 Commissioner Mayman then set out the evidence of Ms Vimpany. Ms Vimpany gave evidence that she had carried out her job with honesty and integrity for eight years. Commissioner Mayman observed that Ms Vimpany said she had never been counselled or disciplined for anything relating to the issuance of infringements in the past nor about giving evidence in court. Also that she had been awarded a Certificate of Appreciation by her managers and had received a commendation for her work performance at the Perth underground during the Sky Show in 2014.

33 Commissioner Mayman also referred to evidence given by Ms Vimpany in cross-examination where she was taken to four documents in which she set out her account of what she said occurred in the incident in question on 27 April 2013 and it was put to Ms Vimpany that it was false to portray Mr Hammon as the aggressor. Ms Vimpany denied that to be the case and testified that each of the documents set out a true reflection of what had occurred. Further, she rejected the PTA's assertion that the information provided was false in that it portrayed Mr Hammon as the aggressor and herself as the victim of the aggression. It was also put to her that she did not suggest that her versions may have been affected in terms of their dependability or reliability by stress, overwhelmed feelings, intimidation by the employer, or anything else.

34 Commissioner Mayman then set out the evidence given on behalf of the PTA by Mr Steedman. Mr Steedman's evidence was that he had made his findings based on all of the documents set out in Ms Vimpany's letter of termination. When asked why he thought Ms Vimpany was being deliberately dishonest, Mr Steedman gave the following response [83] (AB 87):

> I read Ms Vimpany's account, I read Jen Blake's account, I read Felix and Fab and I noticed significant differences between all the versions. Hammon, Fab and Felix's were similar and were at odds with Jan Vimpany's.

35 When giving evidence, Mr Steedman indicated that no one had raised the issue of Ms Vimpany's ability to issue infringements or ability to give evidence in court, nor had he considered any of Ms Vimpany's performance reviews when making the decision to dismiss. He was of the opinion that the performance reviews were not relevant to his decision. Nor did Mr Steedman review Ms Vimpany's personnel file before making the decision to dismiss her, or consider any commendations or adverse findings that may have been contained in Ms Vimpany's personnel file. However, he did say he was not aware of any disciplinary action that had been taken with respect to Ms Vimpany prior to making the decision to dismiss.

36 After setting out the submissions made on behalf of the union and the PTA, Commissioner Mayman made the following findings:

(a) In respect of credibility of witnesses, she found that each of those persons who gave character references on behalf of Ms Vimpany was accepted as evidence given in good faith and was largely unchallenged [111] (AB 92).

(b) Ms Vimpany was insistent and unwavering that her version of events on 27 April 2013 remains a reality. From the actual day, that being 27 April 2013, through all of the documents in which she gave her version of events, those documents were consistent [113] (AB 92).

(c) She had closely observed Ms Vimpany throughout the giving of her evidence and rejected that aspect of her evidence that related to the events of 27 April 2013 and 'rather considers that with the passage of time that, sadly, for Ms Vimpany she has convinced herself that her version of what occurred on 27 April 2013 has become the reality' [114] (AB 92).

(d) After having regard to the relevant findings made by Kenner C and the relevant documents that were reviewed by Mr Steedman in the investigation process, she found that the principal tasks before the Commission for determination were [118] (AB 95):

- having undertaken a review of relevant materials associated with the investigation into Ms Vimpany were there reasonable grounds for Mr Steedman to consider Ms Vimpany was guilty of the misconduct as alleged. In other words, had Ms Vimpany continued to deliberately give false versions of the incident on 27 April 2013 to the respondent;
- in the process of investigating the misconduct as alleged by the respondent was the conduct by the respondent procedurally fair; and
- was the penalty of dismissal as determined by the respondent a proportionate or disproportionate response?

(e) The investigation of the alleged misconduct adopted a procedure that was fair and reasonable in the circumstances [122] (AB 97).

37 Under the heading 'Summary', Mayman C set out her reasons for making the finding that Ms Vimpany was not harshly or unfairly dismissed. These reasons addressed not only the reason why she found that the PTA had reasonable grounds to find that Ms Vimpany had given false accounts and done so knowing them to be false, but also set out the reasons why she was of the view that termination of employment was not harsh, oppressive or unfair. In making these findings, the Commissioner took into account [128] (AB 98):

- aspects of Ms Vimpany's JDF as a PTA. In particular, the responsibilities of the position which require her to:

> Monitor and assist Customers entering/leaving stations via fare gates. This duty includes checking validity of tickets, issuing of infringements, providing basic revenue protection and addressing fare evasion.
>
> (exhibit A1, tab 41)

- Much was made of the integrity test particularly by the applicant's counsel. It was submitted at the time of Ms Vimpany's dismissal no such test existed and therefore it is impossible for Ms Vimpany to fail to meet the needs of such a test. The Commission finds that Ms Vimpany in her position as a PTA is expected to undertake enforcement skills as part of the responsibilities of the position of a PTA.
- the continuing insistence by Ms Vimpany that she remains the victim and Mr Hammon the aggressor. Ms Vimpany continues to hold the view that Mr Hammon was the individual displaying antagonistic behaviours on 27 April 2013. This is in spite of the findings by Kenner C in ***ARTBUI*** [sic] ***v PTA*** and the view now held by the applicant regarding the Kenner C's findings:

> The second thing was to make a determination about whether the accounts were false, which have been dealt with by Commissioner Kenner, it is not in dispute in these proceedings. We're not going there and we're not - we have no intention of going there; never did. I know my learned friend said it's no longer a string in our bow, but it never was a string in our bow because we - at no point have we argued that the Commission should be looking to overturn the findings made by Commissioner Kenner or anything along those lines.
>
> (ts 145)

- Ms Vimpany in response to questioning from the respondent's counsel continues to insist she remains the victim and Mr Hammon the aggressor (ts 77,78);
- persons classified as a PTA have a higher than normal duty to be honest and trustworthy; and
- that the respondent on reasonable grounds 'lost confidence' in the employee.

38 Commissioner Mayman also had regard to each of the written accounts provided by Ms Vimpany and found that the views relating to the two incidents on 27 April 2013 established a course of conduct on the part of Ms Vimpany. Commissioner Mayman then found [130] (AB 99):

> The language used by Ms Vimpany is clear. Ms Vimpany states her memory of what occurred is clear and the Commission finds overall there was nothing to impair Ms Vimpany's judgement on the separate occasions she was required to recount events or indeed chose to submit her own views as to what occurred on 27 April 2013. The Commission is not of the view there was anything amiss that may have affected the reliability of the versions that were given on each occasion. The Commission is therefore of the view that the respondent was reasonably entitled to ground the view that Ms Vimpany had given false accounts and had done so knowing them to be false.

39 As to the review conducted by Mr Steedman, Mayman C found that having undertaken a review of the relevant materials associated with the investigation that there were reasonable grounds in those materials for the PTA to consider Ms Vimpany was guilty of the misconduct as alleged. Commissioner Mayman did, however, find that whilst the investigation conducted by Mr Steedman was thorough, Mr Steedman had failed to take into account the circumstances relating to Ms Vimpany's work history, her years of service and the record contained within her personnel file. She, however, found that that failure did not of itself result in Ms Vimpany being treated harshly, oppressively or unfairly by the PTA in its ultimate decision to terminate her employment.

40 Under the heading 'Penalty', the Commissioner set out cl 2.6.9 of the agreement which provides the employer reasonable opportunity to be heard and cl 2.6.10 which provides for a range of disciplinary options open to the PTA. These are [124] (AB 97):

a) a reprimand;

b) a transfer within the Employer;

c) a reduction in grade; or

d) dismissal.

41 After setting out the submissions made by the parties in respect of penalty, the Commissioner found that she was of the view that given the period of time over which false allegations were made by Ms Vimpany the penalty of dismissal was proportionate to the allegations as committed. She also observed that the failure to be honest in an investigation process is considered serious (***Pinker v Director General Department of Education*** [2014] WAIRC 01312; (2014) 94 WAIG 1928).

Grounds of appeal

42 The grounds of appeal in this matter are:

2.1 The Commissioner erred in dismissing CR 32 of 2014 (See [2015] WAIRC 00389) on the basis that she found:

a. "*The Commission is therefore of the view that the respondent was reasonably entitled to ground the view that Ms Vimpany had given false accounts and had done so knowing them to be false*"; (Reasons for Decision at 130) *and,*

b. "*The Commission considers that having undertaken a review of the relevant materials associated with the investigation into Ms Vimpany, there were reasonable grounds for the respondent to consider Ms Vimpany was guilty of the misconduct as alleged*." (Reasons for Decision at 131)

in circumstances where:

c. it was not reasonably open on the evidence for the Commissioner to make those findings; or,

d. it was unreasonable or plainly unjust for the Commissioner to make those findings.

2.2 The Commissioner erred in dismissing CR 32 of 2014 by failing to provide adequate reasons for her finding that:

"*The Commission considers that having undertaken a review of the relevant materials associated with the investigation into Ms Vimpany, there were reasonable grounds for the respondent to consider Ms Vimpany was guilty of the misconduct us alleged*." (Reasons of Decision at 131)

2.3 The Commissioner's decision to dismiss CR 32 of 2014 was unreasonable or plainly unjust in circumstances where the Commission accepted:

a. Ms Vimpany honestly believed that her recollection of the events was truthful; (Reasons of Decision at 114)

b. that Mr Steedman failed to take into account "*those circumstances relating to Ms Vimpany's work history, her years of service and the record contained within her personnel file*"; (Reasons of Decision at 133) and,

c. the character evidence of Ms Jennifer Blake, Mr Malcolm Heatherly, Mr Robert Hall, Mr David Scott, Mr Aleksander Sekulovski; Mr John Nobel, Mr Mark Counsel, Ms Helen Martin and Mr Barry Watts. (Reasons of Decision at 111)

The PTA's submissions in this appeal

43 The PTA points out that the union accepted that the question for the Commission at first instance was whether there were reasonable grounds for the PTA to believe on the information available to it that the union's member had committed the misconduct alleged (AB 32).

44 The PTA argues it was clearly within the bounds of a reasonable exercise of the Commissioner's discretion, on the evidence and argument before her, to find that reasonable grounds existed.

45 Thus, it says the only question for Mayman C was whether the PTA acted reasonably in determining that the several accounts given by the union's member to the PTA (which were plainly inconsistent with the material facts found in respect of the incident on 27 April 2013 by Kenner C), were made dishonestly.

46 The PTA contends that Mayman C's reasons for concluding that the several accounts given by Ms Vimpany to the PTA had been made dishonestly were clear and set out:

a) Her own impressions of the appellant's member ([114] of reasons for decision);

b) That the version of the appellant's member contained in her several accounts and the version of witnesses as to what happened on 27 April 2013 were diametrically opposed (adoption of Commissioner Kenner's findings [116]);

c) The clarity of the language used by the appellant's member in her accounts to the respondent ([130]);

d) That the appellant's member insisted that her memory of events was clear and unimpaired at all times, that is the appellant's member did not put forward an alternative explanation for the inconsistencies consistent with honesty ([130]); and

e) Most relevantly, that the respondent, having conducted an appropriate investigation and adopted an appropriate process, was reasonably entitled to come to the conclusion that it did in relation to the honesty of the appellant's member ([131]).

47 It says that one of the possibilities of why Ms Vimpany gave false accounts to the PTA was that Ms Vimpany had been dishonest in her accounts about the incident. Ms Vimpany maintained that her four accounts were true in the disciplinary process and Mr Steedman had before him accounts from four persons as to what happened on 27 April 2013, all of them consistent in their portrayal of Ms Vimpany as the aggressor and all of them diametrically opposed to the four accounts given by Ms Vimpany. Ms Vimpany simply maintained that her accounts were true. They, of course, were not true and Kenner C had so decided. Thus, it says that one possible conclusion reasonably open to Mr Steedman to explain the gulf between the versions was that Ms Vimpany had not been honest in the four accounts that she gave. He came to that conclusion after what Mayman C described as a thorough consideration of and careful weighing up of all the material before him. He also decided that in the face of this dedicated course of dishonesty that dismissal was an appropriate disposition of that matter.

48 The PTA argues that the conclusion of Mr Steedman was clearly possible and reasonable and all that Mayman C did was find that the decision made by Mr Steedman on behalf of the PTA was possible and reasonable. There are only two options or reasons for Ms Vimpany's conduct, one that Ms Vimpany was not being honest, or that Ms Vimpany was delusional. Thus, there was dishonesty or there was delusion and Mr Steedman found dishonesty.

49 It is conceded by the PTA that others may have found differently, but it says that is not to the point. Commissioner Mayman found that Mr Steedman had acted reasonably and others may have in turn decided differently to Mayman C, but again, that is not to the point; it was within the reasonable bounds of Mayman C's discretion to so decide on the material before her and she did carefully explain her reasons for doing so.

50 It is also conceded by the PTA that in the Commissioner's reasons under the heading 'Summary' to an extent she mixed together her findings in respect of misconduct and penalty. The PTA says, however, this is not material and does not produce any error because the two questions do bear upon each other.

51 It says that the Commissioner's reasons in relation to penalty are succinctly and clearly set out at [127] and [128] of her reasons for decision (AB 98). In particular, they say it is clear that in exercising her discretion Mayman C took account of the matters that the union argued that the PTA had not properly taken into account (ie the seven or eight years of service and Ms Vimpany's 'positive employment record' and the character and positive performance evidence led by the union in relation to its member). Commissioner Mayman noted the contents of Ms Vimpany's JDF and noted that there is an expectation of the person holding such a position to undertake enforcement duties. She also noted Ms Vimpany's intransigency in the face of the truth and that the intransigency continued in the hearing before her. In addition, Mayman C noted that persons classified as a passenger ticketing assistant have higher than normal duty to be honest and trustworthy and she found that on reasonable grounds the PTA had lost confidence in Ms Vimpany.

52 The PTA also argues that the reasons for decision of Mayman C are, with respect, more than adequate. It says the reasons are very thorough, clear and well expressed.

53 The PTA says that for the Full Bench to have jurisdiction to interfere with the decision of Mayman C it would need to find two things. It is required to find that it was unreasonable for Mr Steedman to find dishonesty on the part of Ms Vimpany and that Mayman C erred in her discretion in not interfering. In particular, it says that the Full Bench would have to find error in the reasons given by Mayman C at [131] in which she finds that having undertaken a review of relevant materials associated with the investigation into Ms Vimpany, there were reasonable grounds for the PTA to consider Ms Vimpany was guilty of the misconduct as alleged. It would have to find it was far more reasonable for Mr Steedman to find that Ms Vimpany was delusional rather than that she had deliberately lied.

54 The PTA also contends that for the Full Bench to have jurisdiction to interfere with the decision of Mayman C it would have to find error with the findings that Mr Steedman's review was thorough, detailed and just according to the circumstances.

55 Thus, the PTA says that the appeal should be dismissed.

Appeal against exercise of discretion

56 In determining the matter referred for hearing and determination, Mayman C was required to evaluate the decision of the PTA to dismiss Ms Vimpany and in doing so determine whether the PTA had reasonable grounds to find in effect Ms Vimpany had committed the alleged acts of misconduct. Thus making a finding that the PTA had reasonable grounds involved an exercise of discretion.

57 The Full Bench is empowered to set aside a discretionary decision in limited circumstances. A discretionary decision cannot be set aside because members of the Full Bench would have exercised the discretion in a different way.

58 In ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499, Dixon, Evatt and McTiernan JJ set out circumstances in which an appellate court should intervene to set aside a discretionary decision. At 504 - 505 their Honours observed:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

Conclusion

59 The misconduct alleged against Ms Vimpany was serious. The PTA alleged that Ms Vimpany knowingly (AB 260):

- [G]ave a false account of Mr Hammon's actions in his dealings with you on the afternoon of 27 April 2013 by claiming that he 'screamed' at you in front of your colleagues, during both interactions, and during the second interaction that he got out of his chair and stood face to face with you in your personal space - claims of fact which you relied upon in support of the conclusion that his behaviour was intimidating and bullying towards you.
- [P]rovided a similar false account in support of a 'grievance' raised by Ms Martin on your behalf on 24 May 2013.
- [M]ade a false allegation on 14 May 2013 in an OSH incident report of bullying and harassment by a male supervisor on 27 April 2013.

60 These allegations could be characterised as among the most serious allegations of misconduct an employer can make against an employee. Although the allegations refer to two interactions, the allegations were only found to be proved insofar as they related to Ms Vimpany's accounts of the second interaction with Mr Hammon (AB 15).

61 The allegations do not simply allege the making false statements; the allegations go further than that. By alleging Ms Vimpany did so knowingly, to be satisfied that the allegations were proved, the decision-maker must be satisfied that in making the false statements Ms Vimpany deliberately intended to deceive the PTA. Put another way, the decision-maker must be satisfied that the statements made by Ms Vimpany were made with specific intent; that is, at the time the statements were made, they were made deliberately, by her, with the knowledge they were untrue. Thus, the decision-maker must be satisfied that the statements were made in the absence of an honest belief that they were true.

62 The proceedings before Mayman C did not proceed on the basis of whether on a review of the material before Mr Steedman the allegations were proven. The parties in written submissions (filed prior to the hearing of evidence) put to Mayman C that what was to be arbitrated was whether the decision-maker, Mr Steedman, had reasonable grounds for believing Ms Vimpany was guilty of the alleged misconduct. However, the Commissioner did hear direct evidence from Ms Vimpany about what she said occurred on 27 April 2013. The basis for confining the Commissioner's task into enquiring whether Ms Vimpany had been harshly, oppressively or unfairly dismissed to whether the PTA had acted reasonably is reliance upon the reasons for decision of myself and Beech CC (with whom Harrison C agreed) in ***The Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203. In that matter the Full Bench was called upon to consider the onus of proof and the scope of the enquiry of the Commission of a matter referred under s 29(1)(b)(i) of the Act, which required a consideration of the assessment of evidence of misconduct where the onus lies upon the employer and the tests applied in ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677 and in ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224. It was found in ***Newmont*** that when an employee is summarily dismissed for misconduct there is an evidentiary onus cast upon the employer to prove the misconduct occurred (679). In ***Bi-Lo***, the test applied is that an employer will discharge the evidentiary onus in respect of the proof of misconduct, if after conducting a procedurally fair, full and extensive investigation, the employer honestly and genuinely believed, and had reasonable grounds for believing on the information available, that the employee was guilty of the misconduct alleged (229). In ***Drake-Brockman***, we observed that ***Bi-Lo*** deals with the test to be applied where the misconduct is theft, other acts of dishonesty or matters where the gravity is such that damage can be done to an employer's business [56].

63 Whether the ***Bi-Lo*** test should be applied to allegations of misconduct that allege specific intent to carry out an act of misconduct is not a matter open to be considered in this appeal because of the matters the parties put to the Commission, for hearing and determination in CR 32 of 2014.

64 In this matter the findings made by Mayman C going to whether the alleged misconduct had been established can be summarised as:

(a) The accounts given by Ms Vimpany in which she set out her version of the events of the two incidents on 27 April 2013 had clarity and established a course of conduct of giving false accounts.

(b) Contrary to the findings made by Kenner C in CR 3 of 2014 that Ms Vimpany had given false accounts of events, Ms Vimpany in the hearing in CR 32 of 2014 did not depart from her version of events and insisted she remained the victim and Mr Hammon the aggressor.

(c) There is no evidence that Ms Vimpany's judgment was impaired when she recounted the events in question, or that there was anything amiss that could have affected the reliability of the versions of events that were given on each occasion.

(d) Ms Vimpany's evidence about the events of 27 April 2013 is rejected.

(e) With the passage of time, Ms Vimpany has convinced herself that her version of what occurred on 27 April 2013 has become the reality.

65 Despite the findings made by Kenner C that Ms Vimpany's version of events is false and that this finding was accepted in the proceedings before Mayman C, Ms Vimpany has at all times maintained that she was the victim and Mr Hammon was the aggressor displaying antagonistic behaviour. One of the documents relied upon by Mr Steedman in finding Ms Vimpany had knowingly given false accounts was a letter from Ms Vimpany dated 29 August 2014 which was provided by her to the PTA after Kenner C delivered his findings on 1 August 2014 (AB 263 - 264) in which she stated that she maintained her version of events. Whilst this letter to the PTA was sent by Ms Vimpany prior to the hearing of the appeal against the decision of Kenner C in FBA 11 of 2014, the grounds of the appeal did not challenge the findings made by Kenner C that Ms Vimpany had on 27 April 2013 conducted herself in the manner complained of by Mr Hammon. Despite this Ms Vimpany refused to accept that she was the aggressor in the second incident.

66 When regard is had to the factual circumstances of the second incident, it cannot be said that there was sufficient similarity in the accounts of Ms Vimpany, Mr Hammon and the other employees of the PTA who witnessed the exchange between Ms Vimpany and Mr Hammon. Commissioner Kenner found there was a large gulf in the versions of events [64]. Commissioner Kenner accepted the evidence given by Mr Hammon and the other employees who witnessed the altercation and found that when Ms Vimpany returned to the office where Mr Hammon was seated she went up to the back and side of him, shouted at him, pointed her finger at him and his face whilst leaning over towards him [62]. Ms Vimpany, however, maintained that she approached Mr Hammon and asked why had he spoken to her and Ms Blake like that (referring to the first incident). After replying she says that Mr Hammon stood and pushed his chair up, came into her face and shouted at her.

67 It is apparent from the observations of Kenner C in his reasons for decision in CR 3 of 2014 that the second incident was very short.

68 It is notable that Ms Vimpany gave her first account in an email sent on 13 May 2013 (exhibit A4, AB 523) after being notified of Mr Hammon's complaint on 10 May 2013 (agreed facts, AB 266). Thus, for the allegation to be made out, it follows that Ms Vimpany must be found to have formed an intention to give a false account prior to or on 13 May 2013. Also in light of Mayman C's findings about the consistency of the version of events given by Ms Vimpany, it follows that Ms Vimpany must be found to have either formed that intention to give a false account or convinced herself that her version was real prior to providing the first account on 13 May 2013.

69 The finding that Ms Vimpany has over time convinced herself that her version of events is real is not challenged in this appeal by the PTA. Thus, when accepted, is the finding inconsistent with or provide grounds to disturb the finding made by Mayman C that there were reasonable grounds for the PTA to consider Ms Vimpany guilty of the misconduct as alleged?

70 When the finding by Mayman C that Ms Vimpany had convinced herself that her accounts of the events in question were truthful, is considered with the finding made by Mr Steedman that Ms Vimpany had knowingly given false accounts, these findings appear to be directly inconsistent. This is because Mr Steedman was required to be satisfied that Ms Vimpany had deliberately made a decision to give a false account yet the finding by Mayman C could be said to put that in doubt.

71 The task of Mayman C was not, however, to determine whether Ms Vimpany had in fact deliberately made a decision to give a false account, but to determine whether there were reasonable grounds for the PTA to hold the belief that Ms Vimpany was guilty of the alleged misconduct. This was the sole issue for her to determine pursuant to the terms of the declaration and order that she delivered on 11 March 2015 which otherwise dismissed the other matters the parties had referred for hearing and determination. Thus the terms of the declaration delivered on 11 March 2015, required Mayman C to review the material and matters taken into account by Mr Steedman and assess whether there was sufficient evidence for the PTA to reasonably hold the belief that Ms Vimpany was guilty of the misconduct.

72 Given the serious nature of the allegation made against Ms Vimpany, and given that the allegations could be said to be in a category of grave moral delinquency, Mayman C was required to be satisfied that the evidence and material before Mr Steedman could reasonably satisfy a standard of persuasion that established the allegations on the balance of probabilities, clearly, unequivocally, strictly or with certainty (see ***Briginshaw v Briginshaw*** (362 - 363) (Dixon J). There must be more than mere conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture (***Nominal Defendant v Owens*** (1978) 22 ALR 128, 132).

73 Although Mayman C set out the three principal tasks for determination in [118] as a consideration of whether there were reasonable grounds for Mr Steedman to consider Ms Vimpany was guilty of the misconduct alleged, which was separate from the issues of procedural fairness and the penalty of dismissal, when making her findings about these issues, Mayman C did not consider the first issue from the third.

74 Nor did she consider whether her finding, that Ms Vimpany had convinced herself that her version of events was real, stood with Mr Steedman finding that Ms Vimpany had given the accounts to the PTA knowing the accounts were false.

75 Mr Steedman based his decision solely on the review of documents, including the reasons for decision of Kenner C. He found that Ms Vimpany had knowingly given false accounts of the second incident solely because her version of events was different to Mr Hammon and the two other PTA employees who witnessed the incident (ts 126, AB 221).

76 In circumstances where the allegation of misconduct required not only proof of specific intent but is also a very serious allegation, I do not accept the submission that the task before Mayman C required her to only be satisfied that the inference drawn by Mr Steedman was one of two explanations open for giving false accounts.

77 To be satisfied that there were reasonable grounds for the PTA to hold the belief that Ms Vimpany was guilty of the alleged misconduct (by having regard to the evidence and material before Mr Steedman), in the absence of any direct evidence that Ms Vimpany had deliberately concocted her version of events of the incident in question, the most probable inference open on that evidence and material needs to be that Ms Vimpany had intended to give a false account.

78 Turning to the evidence given in the proceedings before Mayman C, the question to be answered is whether the most probable inference that could be drawn (if she stood in the shoes of Mr Steedman), was that Ms Vimpany had intended to give a false account; that is, she intended to conduct herself dishonestly. When regard is had to the following matters the answer must be, 'No', as:

(a) by alleging that Ms Vimpany knowingly gave false accounts, the PTA had cast a high bar of conduct that a reasonable decision-maker had to be satisfied of;

(b) Mr Steedman merely relied upon the fact that Ms Vimpany's accounts were inconsistent with the accounts given by Mr Hammon and the other witnesses. Yet there must be more than giving inconsistent accounts (or, put another way, accounts that were not substantially inconsistent between each account but inconsistent with accounts of other witnesses) to draw an inference that Ms Vimpany had knowingly given false accounts. Commissioner Kenner's findings do not assist as his findings left open the question whether Ms Vimpany had in giving her accounts formed an intention to give a false account (FBA 11 of 2014, [48] - [52]); and

(c) Mr Steedman had not himself interviewed Ms Vimpany (for which he cannot be criticised as Ms Vimpany declined an opportunity to speak to him). The consequence of this was that Mr Steedman had no direct evidence of Ms Vimpany's intentions at any material time.

79 In these circumstances, it could not be found by Mayman C with sufficient certainty that there were reasonable grounds for the PTA to hold the belief that Ms Vimpany was guilty of the misconduct alleged. This is particularly so when Mayman C herself had heard direct evidence on oath from Ms Vimpany and found that Ms Vimpany had with the passage of time convinced herself that her version of what occurred on 27 April 2013 has become the reality.

80 For these reasons, Mayman C erred in law by acting upon a wrong principle, in that she did not properly analyse the evidence and material before her by applying the requisite standard of proof as required by the test in ***Briginshaw v Briginshaw***.

81 The PTA's submission that the reasons for decision given by Mayman C are clearly adequate is correct. Ground 2.2 of the grounds of appeal has not been made out. Commissioner Mayman set out her reasons at length and adequately discloses her reasons for dismissing CR 32 of 2014. The findings made and the reasons deal with and set out clearly the relevant law, substantial issues and findings of fact upon which the decision turned as required by the mandatory duty cast upon a member of the Commission pursuant to s 35(1) of the Act (see the observations in ***Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Federated Clerks Union of Australia, Industrial Union of***

Workers, WA Branch (1985) 65 WAIG 2033, 2034 (Brinsden J) and ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1989) 69 WAIG 990, 996 - 999 (Nicholson J)).

82 I do not find it necessary to determine whether ground 2.3 of the grounds of appeal is made out. I do, however, make the observation that if the finding of misconduct in the specific terms alleged by the PTA were to be sustained, the serious nature of the proven misconduct is so incompatible with the enforcement duties required of a passenger ticketing assistant that any history of unblemished service and otherwise good character would not render the decision to dismiss Ms Vimpany unreasonable or unjust.

83 Consequently, I am of the opinion that ground 2.1(a), (b) and (c) of the grounds of appeal has been made out and that a decision should have been made by Mayman C in CR 32 of 2014 that the PTA did not have reasonable grounds to dismiss Ms Vimpany for the particularised alleged misconduct and in the circumstances the dismissal of Ms Vimpany for that alleged misconduct was unfair.

84 For these reasons, I am of the opinion that the operation of the decision should be suspended and the case remitted to the Commission for further hearing and determination as to whether Ms Vimpany should be reinstated as a passenger ticketing assistant, whether orders should be made to maintain continuity of employment and payment of any loss remuneration or alternatively whether Ms Vimpany should be paid compensation.

BEECH CC

85 I agree with Smith AP.

HARRISON C

86 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.

2015 WAIRC 00937

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 CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON
DATE	TUESDAY, 13 OCTOBER 2015
FILE NO	FBA 6 OF 2015
CITATION NO	2015 WAIRC 00937

Result	Order made
Appearances	
Appellant	Mr C A Fogliani (of counsel)
Respondent	Mr D J Matthews (of counsel) and with him Ms J E Rhodes (of counsel)

Order

This appeal having come on for hearing before the Full Bench on Friday, 21 August 2015, and having heard Mr C A Fogliani (of counsel) on behalf of the appellant and Mr D J Matthews (of counsel) and with him Ms J E Rhodes (of counsel) on behalf of the respondent, and reasons for decision having been delivered on Monday, 12 October 2015, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is allowed.
2. The decision made by the Commission on 18 May 2015 [2015] WAIRC 00389; (2015) 95 WAIG 762 is suspended.
3. The matter is remitted to the Commission for further hearing and determination.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Appeals against decision of Industrial Magistrate—

2015 WAIRC 00918

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NO. M 5 OF 2015 GIVEN ON 28 MAY 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2015 WAIRC 00918
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 27 AUGUST 2015
DELIVERED	**:**	TUESDAY, 6 OCTOBER 2015
FILE NO.	**:**	FBA 7 OF 2015
BETWEEN	**:**	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Appellant
		AND
		JUNGHEE YOON
		Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Magistrate's Court**
Coram	**:**	**Industrial Magistrate G Cicchini**
Citation	**:**	**[2015] WAIRC 00411; (2015) 95 WAIG 730**
File No.	**:**	**M 5 of 2015**

CatchWords	**:**	Industrial Law (WA) - Appeal against decision made by Industrial Magistrate's Court - Finding respondent entitled to payment for pro-rata long service leave - Issue of construction of *Long Service Leave Act 1958* (WA) - Whether respondent an employee for the purposes of the *Long Service Leave Act* on grounds respondent is entitled to, or eligible to become entitled to, long service leave under an industrial agreement that is at least equivalent to the entitlement to long service leave under the *Long Service Leave Act* - Appeal dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 84(2)
		Long Service Leave Act 1958 (WA) s 4(3), s 5, s 6, pt III, s 8, s 8(2), s 8(2)(a), s 8(3), s 8(4), s 8(5), s 8(7), s 8(8), s 8(9), s 10
		Industrial Relations Legislation Amendment and Repeal Act 1995 (WA) s 46
		Fair Work Act 2009 (Cth) pt 2-2, s 113, s 113(1), s 113(3), s 113(3)(a)(i), s 113(3A)(a)
		Industrial Arbitration Act 1912 (WA)
		Workplace Agreements Act 1993 (WA)
		Interpretation Act 1984 (WA) s 3, s 3(1), s 10, s 32
		Minimum Conditions of Employment Act 1993 (WA) s 2, s 5
		Long Service Leave Act 1987 (SA)
		Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011 (WA) cl 6.6, cl 6.6.1, cl 6.6.5, cl 6.7
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	Mr D J Matthews and with him Ms C M Rice
Respondent	**:**	Mr C A Fogliani
Solicitors:		
Appellant	**:**	State Solicitor for Western Australia
Respondent	**:**	W G McNally Jones Staff

Case(s) referred to in reasons:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27

Amcor Ltd v CFMEU (2005) 222 CLR 241

Barns v Barns [2003] HCA 9; (2003) 214 CLR 169

Bropho v Western Australia [1990] HCA 24; (1990) 171 CLR 1

Bull v Attorney-General (NSW) (1913) 17 CLR 370

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1981) 147 CLR 297

Cudby v Cockinos [2014] WASC 254

IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1

Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404

Maughan Thiem Auto Sales Pty Ltd v Cooper [2014] FCAFC 94; (2014) 244 IR 399

Nekros Pty Ltd v Baker [2006] WAIRC 05764; (2006) 86 WAIG 3361

Re Will and Estate of McComb [1999] 3 VR 485

Reasons for Decision

SMITH AP:

Introduction

1 This appeal is instituted under s 84(2) of the *Industrial Relations Act 1979* (WA) (the IR Act). The Public Transport Authority of Western Australia (the PTA) appeals a decision of the Industrial Magistrate's Court in M 5 of 2015 on grounds that the learned Industrial Magistrate erred in determining that Ms Junghee Yoon was an employee to whom the *Long Service Leave Act 1958* (WA) (the LSL Act) applies and that Ms Yoon was entitled to a payment under s 8(3) of the LSL Act.

2 Ms Yoon was employed by the PTA from 28 May 2007 until 26 July 2014, when Ms Yoon resigned from her employment. Ms Yoon's employment did not end because of misconduct or serious misconduct.

3 Ms Yoon was employed by the PTA continuously for more than seven years but less than 10 years.

4 At the time of Ms Yoon's resignation, she was employed in the classification of level 4 (passenger ticketing assistant). Clause 6.6.5 of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011* (the agreement) provides for pro-rata long service leave only in the limited circumstances contained in that clause. None of the circumstances contained in cl 6.6.5 of the agreement were applicable to Ms Yoon.

5 The matter before the Industrial Magistrate turned on whether the provisions of the LSL Act were excluded by operation of s 4(3) of the LSL Act as Ms Yoon's entitlement to long service leave under the agreement provided an entitlement to long service leave that was more beneficial than, or at least equivalent to, the entitlement to long service leave under the LSL Act.

6 It is agreed that if Ms Yoon was an employee of the PTA for the purposes of the LSL Act, then she is entitled to a pro-rata long service leave entitlement of 6.17 weeks; or $6,108.82. If Ms Yoon is not an employee for the purposes of the LSL Act, then she is not entitled to a pro-rata long service leave entitlement.

Relevant provisions of the *Long Service Leave Act 1958* (WA)

7 Section 4(3) of the LSL Act provides as follows:

> Where a person is, by virtue of —
>
> (a) an award or industrial agreement;
>
> (b) an employer-employee agreement under Part VID of the *Industrial Relations Act 1979* or other agreement between the person and his employer; or
>
> (c) an enactment of the State, the Commonwealth or of another State or Territory,
>
> entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of 'employee' in subsection (1).

8 The Industrial Magistrate correctly identified the issue to be determined and that is whether Ms Yoon, by virtue of the agreement, was entitled to, or eligible to become entitled to, a long service leave entitlement which is at least equivalent to the entitlement to long service leave under the LSL Act.

9 The entitlements to long service leave or to payment in lieu thereof are set out in s 8 of the LSL Act which provides as follows:

> (1) An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.
>
> (2) An employee who has completed at least 10 years of such continuous employment, as is referred to in subsection (1), is entitled to an amount of long service leave as follows —
>
> (a) in respect of 10 years so completed, 8 $^{2}/_{3}$ weeks;

(b) in respect of each 5 years' continuous employment so completed after such 10 years, 4 $^{1}/_{3}$ weeks; and

(c) on the termination of the employee's employment —

(i) by his death;

(ii) in any circumstances otherwise than by his employer for serious misconduct,

in respect of the number of years of such continuous employment completed since the employee last became entitled under this Act to an amount of long service leave, a proportionate amount on the basis of 8 $^{2}/_{3}$ weeks for 10 years of such continuous employment.

(3) Where an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —

(a) by his death; or

(b) for any reason other than serious misconduct,

the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8 $^{2}/_{3}$ weeks for 10 years of such continuous employment.

(4) If an employee has completed at least 9 but less than 15 years continuous employment prior to the commencement day, then, despite subsection (2)(a), the employee cannot take long service leave under subsection (2)(a) until after —

(a) if the employee has completed at least 14 years continuous employment prior to the commencement day — completing 15 years continuous employment; or

(b) in any other case — 12 months after the commencement day.

(5) Subsection (4) does not apply if the employee and his or her employer agree to that effect in writing.

(6) Subsection (4) does not apply in respect of a period of continuous employment prior to the commencement day in respect of which the employee has become entitled to take long service leave.

(7) An employee who becomes entitled to take long service leave under subsection (2)(a) in accordance with subsection (4) or (5) also becomes entitled to take long service leave under subsection (2)(b), in respect of the period of continuous employment that exceeds 10 years, pro rata.

(8) Subsection (7) does not apply to an employee if, before being granted the long service leave, the employee completes 15 years continuous employment.

(9) If an employee takes long service leave in accordance with subsection (7), the employee is entitled, after completing 15 years continuous employment, to take the remainder of his or her entitlement under subsection (2)(b) not already taken in accordance with subsection (7).

(10) In subsections (4) and (6) —

commencement day means the day on which the *Labour Relations Legislation Amendment Act 2006* Part 7 Division 2 came into operation.

10 The entitlement to long service leave under the terms of the agreement arises under cl 6.6. Clause 6.6 of the agreement provides as follows:

6.6.1 An employee shall be entitled to thirteen weeks paid long service leave on the completion of ten years continuous service and an additional thirteen weeks paid long service leave for each subsequent period of seven years of continuous service completed by the employee.

6.6.2 Where a public holiday falls within an employee's period of long service leave such day shall be deemed to be a portion of the long service leave and no other payment or benefit shall apply.

6.6.3 Long service leave may be taken in periods of 4 weeks or more, at a mutually agreed time.

6.6.4 Long service leave shall be paid at the employee's rate of pay as prescribed in the wages clause or as specified for rostered employees.

6.6.5 An employee will only be entitled to pro rata long service leave if his or her employment is terminated:

a) by the Employer for other than disciplinary reasons; or

b) due to the retirement of the employee on the grounds of ill health; or

c) due to the death of the employee, in which case the payment would be made to the employee's estate; or

d) due to employee's retirement at the age of 55 years or over, provided 12 months continuous service has been completed prior to the day from which the retirement takes effect; or

e) for the purpose of entering an Invitro Fertilisation Programme, provided the employee has completed three years service and produces written confirmation from an appropriate medical authority of the dates of involvement in the programme; or

f) due to employees resignation for pregnancy, provided the employee has completed more than three years and produces certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner.

6.6.6 For the purposes of determining long service leave entitlement, the expression 'continuous service' includes any period during which the employee is absent on paid leave but does not include any period exceeding two continuous weeks during which the employee is absent on parental leave or leave without pay.

6.6.7 Continuity of service shall not be broken by the absence of the employee on any form of approved paid leave or by the standing down of an employee under the terms of this Agreement.

6.6.8 The employer may direct an employee to take a long service entitlement that has been accrued for more than 3 years.

6.6.9 Where an employee is directed to take long service leave entitlement, it will be taken within 12 months of the direction, at a time agreed between the employer and the employee.

6.6.10 Where a time cannot be agreed within the 12 month period, the employer will determine the date on which the employee will be required to start long service leave. Provided that the Employer shall give at least 30 days notice to the employee of the day on which the long service leave is to commence.

11 Employees covered by the terms of the agreement have an entitlement under the terms of the agreement to cash out accrued long service leave under cl 6.7 of the agreement.

12 Employees who are covered by the terms of the LSL Act also have an entitlement to, in effect, cash out an entitlement to long service leave. Section 5 of the LSL Act provides as follows:

> An employer and an employee may agree that the employee may forgo his entitlement to long service leave under this Act if —
>
> (a) the employee is given an adequate benefit in lieu of the entitlement; and
>
> (b) the agreement is in writing.

13 Pursuant to s 10 of the LSL Act, an employer may by agreement with an employee allow an employee to take long service leave before the right thereto has accrued. Where leave has been granted to an employee in such circumstances and the employee's employment terminates the employer may deduct from remuneration payable upon the termination of employment, such amount as represents payment for any period for which the employee has been granted long service leave, to which he or she was not at the date of termination of employment, or prior thereto, entitled.

Industrial Magistrate's reasons for decision

14 The Industrial Magistrate found that to ascertain whether the terms of the agreement are at least equivalent to the LSL Act required an analysis of the circumstances of the person applying for long service leave and by having regard to a particular person's entitlement when it was necessary to do so. He found this was necessary as a particular person's entitlement will only crystallise once an applicable milestone is met. In making these findings, the Industrial Magistrate found as follows:

(a) An objective analysis of whether 'on the whole', the terms of the agreement are at least equivalent to the LSL Act, is very difficult, if not impossible to achieve.

(b) The significance of the benefit provided by any particular provision will be dependent upon individual circumstances. For some, it may be more important to reach the subsequent milestone in five years rather than seven years. Others may not want to cash out their long service leave entitlement and therefore such an entitlement is of no particular benefit. For others close to retirement age, reaching the pro-rata qualification will be of more importance than reaching the 10 year milestone which might be unachievable.

(c) Each benefit must be weighed against an employee's personal circumstances. No attempt can be made to weigh up, as a whole, the entitlement under the agreement in comparison to the entitlement under the LSL Act. The only practicable way equivalency can be determined is to weigh the competing applicable benefits relevant to the employee at the time that the milestone giving rise to the benefit is reached. The requirement for equivalency in s 4(3) of the LSL Act is a beneficial provision which imports the setting of minimum standards for each particular benefit.

(d) The entitlement to long service leave is personal and is dependent upon individual circumstances. On the event of a milestone being met or in contemplation of that happening, an assessment has to be made as to whether the particular entitlement to long service leave, under the applicable industrial agreement, is at least equivalent to that provided by the LSL Act. It is only then that consideration must be given to whether a person is an employee for the purposes of the LSL Act or not.

(e) Given that industrial instruments, particularly industrial agreements, may be finite it will be impossible for employers to determine whether a person is an employee for the purposes of the LSL Act until it is necessary to do so. That is, on or about the time that the milestone is met. That process is neither unwieldy nor onerous. Indeed, the employer can only assess each person's entitlement on a case-by-case basis. An analysis or comparison at any other time will be practically impossible.

(f) It follows that if an employer has two employees, one may be an employee within the meaning of the LSL Act and the other may not, dependent upon their circumstances. In the context of the agreement, if a person worked for more than seven years but less than 10 years, that person will be an employee within the meaning of the LSL Act, whereas, if the person worked more than 10 years they will not be an employee within the meaning of the LSL Act.

(g) The submission that the pro-rata provision in s 8(3) of the LSL Act should be read in the context of the less beneficial provisions as to the quantum of leave in s 8(2)(a) of the LSL Act is rejected. The entitlement under

s 8(3) of the LSL Act is a discrete benefit contextually different from s 8(2)(a) of the LSL Act. There is no dependency between one provision and the other. Indeed, there is no reason to consider the provisions together.

(h) When the circumstances of Ms Yoon are considered and the terms of the agreement, the pro-rata long service leave entitlement under the agreement is repugnant to, and not at least equivalent to, the entitlement to pro-rata long service leave under the LSL Act. Thus, Ms Yoon was an employee for the purposes of the LSL Act and is eligible to receive a pro-rata long service leave entitlement of 6.17 weeks, valued at $6,108.82.

The PTA's submissions

15 The PTA makes a submission that whether a person is employed for the purposes of the LSL Act or not should be assessed by applying the following principles:

(a) the person is either an 'employee' for the purposes of the LSL Act or they are not and that status does not change if the provisions of the relevant industrial instrument applying to them do not change;

(b) the determination of whether a person is an employee for the purposes of the LSL Act or not, is to be undertaken at the time both the LSL Act and a relevant industrial instrument may apply;

(c) the test to be applied when conducting the comparison is whether the relevant industrial instrument provides for an entitlement to long service leave at least equivalent to the entitlement under the LSL Act (and where it does the person is not an employee for the purposes of the LSL Act); and

(d) it is possible and indeed necessary to compare the provisions of the LSL Act to the provisions of the relevant industrial instrument relating to long service leave to determine whether the entitlement to long service leave in the relevant industrial instrument is at least equivalent to that under the LSL Act.

16 The essence of the PTA's argument is that the comparison of the entitlements to long service leave required the court in this matter to determine whether the entitlement to long service leave under the agreement, on the whole, is at least equivalent to the LSL Act. It says there is a single entitlement to long service leave and not entitlements to long service leave. Further, it says that whilst a comparison is a 'line-by-line' comparison, to determine which on the whole is better, the LSL Act does not allow the mixing and matching of entitlements under an industrial instrument and the LSL Act. That is, a person is either wholly within the provisions of the LSL Act or wholly outside the LSL Act.

17 The PTA also says that the assessment of entitlements is an objective assessment and cannot take into account a person's individual circumstances and does not take into account the subjective effect of the conclusion on the person in their individual circumstances.

18 Accordingly, the PTA submits that the learned Industrial Magistrate erred in holding that:

(a) a person's status under the LSL Act could change over time where there was no change to the provisions of the LSL Act or provisions relating to long service leave in the relevant industrial instrument;

(b) the comparison required by the LSL Act must be done from time to time for each particular employee during the course of their employment as and when 'milestones' are reached; and

(c) that it is 'very difficult if not impossible' to compare the entitlement to long service leave under the LSL Act to that under the industrial instrument relevant in this matter without regard to the particular circumstances of a particular employee as applying from time to time.

19 The PTA says that the comparison required by s 4(3) should take place for most people when their employment commences. Thus, the comparison is to be done before any entitlements actually crystallise or accrue. It says at this time, the entitlement under the LSL Act and the entitlement to long service leave under the relevant industrial instrument are to be compared and if that which persons are eligible to become entitled to under the industrial instrument is at least equivalent to that under the LSL Act, the industrial instrument applies to the exclusion of the LSL Act.

20 The relevant key to the interpretation of s 4(3) of the LSL Act is the term 'or eligible to become entitled to' long service leave. The PTA says while the reference to 'entitled to' was obviously necessary as some persons would have already had an entitlement to long service leave under a relevant industrial instrument when s 4(3) was introduced in 1995 (by the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA)), for those commencing employment after this time the term 'or eligible to become entitled to' had, and must be given, work to do.

21 The PTA argues that the error in the learned Industrial Magistrate's reasoning is that the comparison is to occur as and when milestones are met is revealed by the fact that, on this approach, the term 'or eligible to become entitled to' would never have any work to do. It also says that much of the learned Industrial Magistrate's reasoning flows from his Honour's conclusion that it is 'very difficult if not impossible' to objectively compare the entitlement to long service leave under the LSL Act to that under a relevant industrial instrument. For this reason, his Honour considered that there had to be a comparison when each milestone was reached. The PTA also points out it is not clear from his Honour's reasoning as to whether he is referring to a milestone under the LSL Act or a relevant industrial instrument.

22 The PTA concedes that it may be difficult to compare the entitlement to long service leave under an industrial instrument to an entitlement under the LSL Act to determine equivalency. However, such a comparison is required because the term 'or is eligible to become entitled to' requires it.

23 The result of the learned Industrial Magistrate's finding is that a person's status under the LSL Act may change over time without there being any change to the entitlement to long service leave under the LSL Act or relevant industrial instrument. The PTA says that it is clear that such a consequence could not have been an intended result of the proper interpretation of the provisions of the LSL Act. It says this is so given that Parliament must be taken to have been intending to introduce certainty in relation to the entitlement to long service leave for employers and employees, and those who represent employees in relation

to negotiations for relevant industrial instruments. In particular, it contends it is unlikely that Parliament intended to leave those parties in the position that they had to compare each entitlement as and when an entitlement under either the LSL Act or relevant industrial instrument was crystallised (what his Honour called 'milestones') to see whether a particular person, at a particular time, was an 'employee' for the purposes of the LSL Act or not.

24 By the use of the words in s 4(3) of the LSL Act 'or eligible to become entitled to', the intention of Parliament must have been that an objective analysis of the entitlement to the LSL Act and the entitlement to long service leave under a relevant industrial instrument is to be undertaken at the time both could potentially apply and a decision made whether a person is an employee under the LSL Act or not.

25 In support of its submissions, the PTA relies upon a recent decision of the Full Court of the Federal Court in ***Maughan Thiem Auto Sales Pty Ltd v Cooper*** [2014] FCAFC 94; (2014) 244 IR 399. This decision only came to the attention of the PTA after the decision in this appeal was delivered by the learned Industrial Magistrate.

26 The question in ***Maughan Thiem*** was whether the employee was entitled to long service leave under a state Act. The answer to the question turned on the construction of s 113 of the *Fair Work Act 2009* (Cth) (FW Act) and in particular whether there were 'applicable award-derived long service leave terms' at the time the National Employment Standards commenced. It was therefore relevant to decide what employees had been 'entitled to' under the relevant award at the time the National Employment Standards commenced. The Full Court had to consider whether it was necessary, or not, for a provision to have crystallised before it could be considered an 'entitlement'. The Full Court found the terms of the award would have entitled the employee to long service leave and not to an entitlement that would have actually accrued. Thus, the Full Court rejected a construction that would have the result that whether a person was covered by an industrial instrument or an Act would change over time depending on whether a milestone under one or the other was met.

27 The PTA also argues that the history of the legislative regime of long service leave supports its construction of the effect of s 4(3) of the LSL Act.

28 It points out that there are two regimes for long service leave in Western Australia which are the legislative regime and the industrial regime. It says that the two regimes operate side-by-side and either one or the other applies to employees, but not both. Until 1995, the LSL Act provided that a person was not defined as an employee for the purposes of the LSL Act if and while the person was employed under the terms of an award or industrial agreement in force under the *Industrial Arbitration Act 1912* (WA). (The *Industrial Arbitration Act* was the predecessor to the IR Act.)

29 By 1995, Parliament had enacted legislation governing workplace agreements which were given primacy over awards by the enactment of the *Workplace Agreements Act 1993* (WA). Pursuant to s 46 of the *Industrial Relations Legislation Amendment and Repeal Act* s 4(3) of the LSL Act was enacted in substantially the same terms to the provision as it now stands, except that the reference of workplace agreements has been deleted and employer/employee agreements substituted.

30 Whilst the PTA concedes that the enactment of s 4(3) of the LSL Act is effectively a safety net, it says that Parliament was saying when it enacted the amendment to s 4(3) of the LSL Act in 1995 that if an award, industrial agreement or workplace agreement gives no entitlement to long service leave, or makes provision for long service leave that is inferior to that provided for by the LSL Act, then and only then the LSL Act will apply. Thus, they say against that background, the notion of mixing and matching between the LSL Act and the industrial instrument to come up with the best compendium for an employee is clearly not an intended or sensible result.

Construction of the *Long Service Leave Act 1958* (WA)

31 Justice Allanson in ***Cudby v Cockinos*** [2014] WASC 254 [18] recently considered the wise words of Lord Steyn in 'The Intractable Problem of The Interpretation of Legal Texts' (2003) 25(1) *Sydney Law Review* 5, 8 wherein his Lordship said:

> Interpretation is not a science. It is an art. It is an exercise involving the making of choices between feasible interpretations.

32 This observation goes to the heart of this appeal. The approach of the Industrial Magistrate in construing the operation of s 4(3) of the LSL Act is to require an assessment from time to time, throughout the currency of and at the cessation of employment, of a person's entitlement, or eligibility to an entitlement, to long service leave under the LSL Act and an industrial instrument. The PTA says this construction of s 4(3) is wrong, that in the absence of any changes to entitlements under the LSL Act, an assessment is to be conducted by regard to whether objectively on the whole and without regard to personal circumstances a person is entitled or eligible to become entitled to long service leave under an industrial instrument that is at least equivalent to the entitlement of long service leave under the LSL Act.

33 It is well established that the point at which statutory construction should start is to ascertain the imputed purpose of Parliament: ***Bropho v Western Australia*** [1990] HCA 24; (1990) 171 CLR 1, 20; ***Kingston v Keprose Pty Ltd*** (1987) 11 NSWLR 404, 421 - 424. As Justice Allanson pointed out in ***Cudby*** [20] - [21]:

> The task of statutory construction begins and ends with consideration of the text of the written law: ***Australian Finance Direct Ltd v Director of Consumer Affairs Victoria*** [2007] HCA 57; (2007) 234 CLR 96 [34]; ***Commissioner of Taxation v Consolidated Media Holdings Ltd*** [2012] HCA 55 [39]. A construction that promotes the purpose or object underlying a statute is to be preferred to one that would not promote that purpose or object (*Interpretation Act 1984* (WA) s 18). But that cannot detract from the fundamental importance of the language used by the legislature. As Gageler and Keane JJ said in ***Taylor v The Owners - Strata Plan No 11564*** [2014] HCA 9 [65]:
>
> > The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

> The meaning of any statutory provision must be determined 'by reference to the language of the instrument viewed as a whole': ***Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*** [1981] HCA 26; (1981) 147 CLR 297 [23]; ***Project Blue Sky*** [69]. This requires close consideration of the text and structure of the provision, in the context of the Act as a whole, the general purpose and policy of the provision, and its consistency and fairness. Similar comments were made in ***Stevens v Kabushiki Kaisha Sony Computer Entertainment*** [2005] HCA 58; (2005) 224 CLR 193 [30].

34 The legislative purpose of the LSL Act is beneficial. As a beneficial enactment its terms are to be given a liberal interpretation, so as to give the fullest relief which the fair meaning of its language will allow: ***IW v City of Perth*** [1997] HCA 30; (1997) 191 CLR 1, 12; ***Barns v Barns*** [2003] HCA 9; (2003) 214 CLR 169 [42] - [44].

35 Thus, the LSL Act should be construed in a manner favourable to those whose benefit it applies to. It is clear the LSL Act creates a scheme of a minimum safety net entitlement, or alternatively entitlements, to long service leave which are to apply to employees when the pre-conditions of service set out in the LSL Act are met. Pursuant to the operation of s 4(3) of the LSL Act, the minimum entitlement or entitlements are ousted by the operation of an industrial instrument or an enactment of the state, Commonwealth or of another state or territory that entitles the person to, or provides for the person to become entitled to, long service leave at least equivalent to the entitlement to long service leave under the LSL Act.

36 Whilst s 10 of the *Interpretation Act 1984* (WA) provides that in any written law words in the singular include the plural, whether there is one 'whole entitlement' to long service leave or a bundle of rights or entitlements to long service leave turns on a construction of the intention of the whole of the LSL Act: s 3(1) of the *Interpretation Act*.

37 I am not persuaded that the history of the enactment of s 4(3) of the LSL Act reveals a statutory intention to establish two schemes that prohibit an assessment of a particular person's entitlements to long service leave by regard to the person's circumstances at different times and by regard to different events that trigger the fulfilment of specified conditions under the LSL Act and an industrial instrument.

38 Reliance on the scheme of agreements enacted by the *Workplace Agreements Act* does not assist the PTA's construction of s 4(3) of the LSL Act. When the *Workplace Agreements Act* came into operation on 1 December 1993, the *Minimum Conditions of Employment Act 1993* (WA) came into operation on the same day: s 2 of the *Minimum Conditions of Employment Act*, Government Gazette No 160, 30 November 1993, p 6439. Section 5 of the *Minimum Conditions of Employment Act* expressly contemplates 'mixing and matching' of conditions of employment that were in part (set out in a workplace agreement, or alternatively an award, or a contract of employment) and partly by operation of the *Minimum Conditions of Employment Act*. Section 5 when first enacted in 1993 provided as follows:

> (1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied -
>
> (a) in any workplace agreement;
>
> (b) in any award; or
>
> (c) if a contract of employment is not governed by a workplace agreement or an award, in that contract.
>
> (2) A provision in, or condition of, a workplace 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).

39 The appellant urges the Full Bench to adopt an interpretation of the words 'entitled to, or eligible to become entitled to' that applies the construction of a substantially similar phrase by the Full Court of the Federal Court in ***Maughan Thiem***. In that matter whether the respondent employee, Mr Cooper, was entitled to long service leave, turned upon the construction of s 113 of the FW Act. Section 113(1) provides:

> If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

40 Section 113(3) defines 'applicable award-derived long service leave terms', in relation to an employee as:

> (a) terms of an award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection (2)):
>
> (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and
>
> (ii) would have entitled the employee to long service leave; and
>
> (b) any terms of the award, or the State reference transitional award, that are ancillary or incidental to the terms referred to in paragraph (a).

41 Section 113(3A)(a) of the FW Act defines the 'test time' for the purpose of s 113(3)(a)(i) as immediately before the commencement of pt 2-2 of the FW Act. Part 2 commenced on 1 January 2010. Therefore, the 'test time' for the purposes of s 113 is 31 December 2009. Justice Katzmann, with whom Greenwood and Besanko JJ agreed, found:

> (a) An award, namely the *Vehicle Industry - Repair Services and Retail - (Long Service Leave) Award 1977* containing a right to accrue long service leave applied to Mr Cooper immediately before pt 2-2 of the FW Act commenced (the test time).

(b) The terms of the award 'would have entitled' Mr Cooper to long service leave at the test time (31 December 2009) even though at that time Mr Cooper had not accrued any long service leave pursuant to the terms of the award.

(c) The *Long Service Leave Act 1987* (SA) did not apply to Mr Cooper's long service leave claim.

42 Justice Katzmann found there were two conditions that had to be satisfied for there to be 'applicable award-derived long service leave terms' that applied to Mr Cooper. At [40] - [45] her Honour found:

> The first condition is that there is an award which would have applied to Mr Cooper at the test time if, at that time, he had been in his 'current circumstances of employment'. It was common ground that 'current circumstances of employment' referred to Mr Cooper's circumstances of employment just before his employment with Maughan ended (that being the relevant time for considering his long service leave entitlement).
>
> The second condition is that the terms of the award 'would have entitled' Mr Cooper to long service leave. This was the subject of the dispute. So what is meant by 'terms of an award ... that ... would have entitled'?
>
> The language here is awkward, the meaning ambiguous. On one possible interpretation the phrase refers to terms that provide for an entitlement to long service leave. Alternatively, as Mr Cooper argued, it may refer to an entitlement that would have actually accrued.
>
> In my view, the first interpretation is to be preferred. The second condition in s 113(3)(a) is satisfied if, at the test time, the employee would have had a right to long service leave under a relevant award (that is, an award satisfying the first condition in s 113(3)(a)), irrespective of whether at that time the employee would have accrued long service leave. If there was a federal long service leave award or terms in a federal award that provided for the payment of long service leave that would have applied to the employee at the test time, then they continue to apply. If not, then the State or Territory Act applied. If, under the terms of the award, Mr Cooper was not eligible for long service leave at the time of his redundancy, s 113 does not give him an entitlement under the State Act.
>
> When regard is had to the legislative context and purpose, Mr Cooper's construction of s 113 is untenable. If it were to be accepted, there would be 'applicable award-derived long service leave terms' in relation to an employee at the point at which an employee had worked sufficient years to accrue long service leave under the relevant award. From that point onwards, the award would govern the employee's long service leave, but before that point, the employee's long service leave would be governed by the State or Territory Act. This cannot be what Parliament intended. As Maughan submitted, s 113 is a transitional provision that is designed to preserve the effect of long service leave terms in awards as they stood before the commencement of the National Employment Standards.
>
> The industrial magistrate said (at [47]) that on the construction for which Maughan contended, the provision in s 113(3)(a)(ii) would be redundant: 'a superfluous restatement of s 113(3)(a)(i)'. I respectfully disagree. Paragraph (a)(i) says nothing about long service leave. It is concerned with whether there was an award in place at the relevant time that would have applied to the employee. Paragraph (a)(ii) is concerned with whether that award includes an entitlement to long service leave. The two paragraphs must be read together.

43 Her Honour was of the opinion that the words 'would have entitled' were not only awkward, and the meaning ambiguous but it is apparent that those words were capable of two interpretations. Thus, one interpretation of those words is that 'would have entitled' refer to terms that provide for an entitlement to long service leave. The other interpretation is those words only refer to an entitlement that would have actually accrued.

44 Whilst the reasoning in ***Maughan Thiem*** may be highly persuasive, interpretation of the words 'entitled to, or eligible to become entitled to' of the LSL Act requires a consideration of these words by regard not only to the words but the whole of the text of s 4(3) of the LSL Act and the LSL Act as a whole.

45 In my opinion, the reasoning in ***Maughan Thiem*** is distinguishable. Unlike s 113 of the FW Act, s 4(3) of the LSL Act does not set a time at which an assessment of an entitlement should be made. More importantly, no assessment of or comparison of entitlements under an award and the South Australian Long Service Leave Act is required by the operation of s 113 of the FW Act.

46 An entitlement under the LSL Act is something which someone has a right to: ***Nekros Pty Ltd v Baker*** [2006] WAIRC 05764; (2006) 86 WAIG 3361 [28] (Ritter AP), [90] - [92] (Kenner C).

47 The requirement of being 'entitled to, or eligible to become entitled to' cannot be read in isolation from the condition that the entitlement to long service leave under an industrial instrument be at least equivalent to the entitlement under the LSL Act.

48 If the use of the words being 'entitled to' are construed as an existing or actual entitlement and 'eligible to become entitled to' as an entitlement that can accrue if the conditions for eligibility are met, it is not material when an assessment is made of a person's entitlement under an industrial instrument and the LSL Act, as at any one time an entitlement to long service leave is capable of being characterised as actual or contingent. I use the word 'contingent' in the sense of an eligibility to become entitled to long service leave if the conditions specified for accrual are met. An actual entitlement is an entitlement that has vested, or to use the language used by the learned Industrial Magistrate, where a 'milestone' has been met which has the effect that the condition or conditions for accrual have been met.

49 For example, if a person, who is an 'employee' for the purposes of the LSL Act, resigns after completion of 10 years' continuous employment, on resignation, the entitlement to payment of 8⅔ weeks as pay for long service leave vests as an actual entitlement. If the person contemplates resignation after seven years' continuous employment, then they can be said to be eligible to become entitled to payment of pro-rata long service leave under s 8(3) of the LSL Act, if they resign. Also, at the commencement of employment this person could be said to be eligible for this entitlement which will vest in seven years providing their employment is continuous employment within the meaning of s 6 of the LSL Act.

50 It is apparent from the provisions of the LSL Act that 'long service leave' is comprised of a bundle of entitlements, or put another way as a bundle of rights to long service leave which can accrue in varying circumstances. As such it cannot be said that there is a singular or indivisible entitlement or right to long service leave.

51 Leaving aside some of the conditions affecting the entitlement to long service leave such as the circumstances pursuant to which employment will be deemed continuous employment in s 6 of the LSL Act, these entitlements are as follows:

(a) an entitlement to accrue 8⅔ weeks' long service leave after completion of 10 years' continuous employment on termination of employment: s 8(2);

(b) an entitlement to 4⅓ weeks for each five years' continuous employment completed after 10 years' continuous employment;

(c) on termination of employment an entitlement to pro-rata of 8⅔ weeks for 10 years, for each year of continuous employment completed after 10 years' continuous service by death or otherwise than by his or her employer for serious misconduct;

(d) an entitlement to a proportion of 8⅔ weeks' pro-rata long service leave after seven years' continuous employment on termination of employment by death or for any reason other than serious misconduct: s 8(3);

(e) an entitlement to take a proportion of 13 weeks' long service leave after 14 years' continuous service: s 8(4);

(f) by agreement between the employer and employee an entitlement to take 8⅔ weeks' long service leave after completion of 10 years' continuous service: s 8(5) and s 8(7);

(g) an entitlement to take 13 weeks' long service leave and any accrued pro-rata long service leave after 15 years' continuous service: s 8(2), s 8(8) and s 8(9).

52 This construction of the intention of the whole of the LSL Act, being to provide for a bundle of minimum standards of rights to long service leave, is consistent with the heading of pt III of the LSL Act which states 'Entitlements to long service leave or to payment in lieu thereof'. Pursuant to s 3 and s 32 of the *Interpretation Act* unless inconsistent with the intention of the whole of an Act, the headings of the parts of an Act form part of the written law.

53 Section 8 of the LSL Act starts with a legislative presumption that an employee has, subject to the provisions of the LSL Act, an entitlement to long service leave under the LSL Act. Section 4(3) renders the entitlement to long service leave inoperative where the conditions set out in s 4(3) apply.

54 In this matter, it is clear that s 4(3) of the LSL Act requires a comparison of the entitlement or entitlements to long service leave under cl 6.6 of the agreement and the LSL Act. Just as the LSL Act creates a bundle of rights or entitlements to long service leave, so too does cl 6.6 of the agreement. These are as follows:

(a) 13 weeks' long service leave on the completion of 10 years' service: cl 6.6.1;

(b) pro-rata long service leave (cl 6.6.5):

(i) on death after any period of continuous service;

(ii) on termination of employment by the employer for other than disciplinary reasons after any period of continuous service;

(iii) on retirement at the age of 55 or over after a period of 12 months' continuous service;

(iv) to enter Invitro Fertilisation Programme after a period of three years' continuous service;

(v) on resignation for pregnancy after a period of three years' continuous service.

55 On commencement of employment a person who is a woman of child bearing age would be eligible to become entitled to each of the entitlements in (a) and (b) of [54] of these reasons. Whether any of these entitlements would vest as actual entitlements or rights would depend upon the person's circumstances, including not only length of continuous service, their gender in the case of (b)(v) and perhaps (b)(iv) and their age in the case of (b)(iii).

56 Other variables that would require comparison are an assessment of what constitutes 'continuous employment' under s 6 of the LSL Act (which is not the same as 'continuous service' under cl 6.6 of the agreement) and what counts as a period of employment under s 6 of the LSL Act and cl 6.6 of the agreement. An assessment of these variables, however, is not material when regard is had to Ms Yoon's circumstances in this appeal.

57 Without regard to the circumstances of a person no assessment can be made as to whether a particular person is entitled to, or eligible to become entitled to, long service leave under an industrial instrument that is at least equivalent to the entitlement under the LSL Act.

58 For example, a male person whose age is 30 at the commencement of employment engaged by the PTA for a fixed term for a period of seven years in a classification to which the agreement applies, would at the expiry of the contract by effluxion of time have no entitlement to pro-rata long service leave under the agreement. Nor is it likely that they could be said to be eligible to become entitled to long service leave under the agreement at the commencement of the fixed term contract. In these circumstances, pursuant to s 4(3) of the LSL Act, at all material times that person would be an employee for the purposes of the LSL Act.

59 The issue whether a male employee employed on a permanent basis who is 30 at the commencement of their employment may or may not be an employee for the purposes of the LSL Act, depends upon the circumstances of when the conditions triggering a right or entitlement to long service leave arises. At the commencement of their employment they are eligible to become entitled to 13 weeks' long service leave after 10 years' continuous service under the agreement. However, if they choose to resign at the age of 39 after nine years' service they cease to be eligible to become entitled to long service leave, or pro-rata

long service leave under the agreement unless they die or their employment is terminated for reasons other than discipline. In those circumstances, on one of those events, they become entitled to payment of pro-rata long service leave under the agreement. If the person in question dies, their estate is entitled to payment of pro-rata long service leave under the agreement as the pro-rata entitlement under the agreement is greater than the entitlement under s 8(3) of the LSL Act. However, if those events do not occur at the point where the employee has been continuously employed for a period of nine years, the employee in question is an employee within the definition of 'employee' under the LSL Act and is entitled to payment of pro-rata long service leave as provided for in s 8(3) of the LSL Act.

60 The test to be applied pursuant to s 4(3) of the LSL Act, in this matter, required an assessment of whether:

(a) there is an industrial instrument that applies to Ms Yoon that provides for long service leave as a condition of employment;

(b) Ms Yoon is entitled to or eligible to become entitled to long service leave under the industrial instrument; and

(c) the entitlement to long service leave under the industrial instrument is at least equivalent to the entitlement to long service leave under the LSL Act.

61 It is not in dispute that the answer to the first question is, 'Yes'. The agreement provided that Ms Yoon was eligible to become entitled to long service leave whilst she was an employee of the PTA provided she met the conditions for accrual. At the time of termination of her employment she had not met any of the conditions required by the terms of cl 6.6 of the agreement for accrual of long service leave.

62 Thus, in circumstances where Ms Yoon on the termination of her employment had no accrued or contingent entitlement to long service leave under the agreement but had satisfied the pre-conditions for accrual of and payment of pro-rata long service leave under s 8(3) of the LSL Act, it cannot be said that she had any entitlement to long service leave that was at least equivalent to the entitlement to long service leave under the LSL Act.

63 For these reasons, the appeal should be dismissed as I am of the opinion the learned Industrial Magistrate did not err in determining that Ms Yoon was an employee to whom the LSL Act applies and that she was entitled to a payment under s 8(3) of the LSL Act.

BEECH CC:

64 I have read in advance the reasons for decision of her Honour the Acting President and agree that the appeal should be dismissed. Section 4(3) of the *Long Service Leave Act* (the LSL Act) has been set out in the reasons for decision of her Honour the Acting President and I need not repeat it here. In order to determine whether Ms Yoon is by virtue of the industrial agreement entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under the Act, it is necessary to establish what is the entitlement to long service leave under the Act. Once there is an entitlement to long service leave under the Act, s 4(3) requires an investigation whether a person is entitled to, or eligible to become entitled to, long service leave at least equivalent by virtue of the industrial agreement.

65 Contrary to the submissions of the PTA in this appeal, this does not involve an objective comparison to determine whether, on the whole, the agreement is at least equivalent to the LSL Act. The language of s 4(3) of the Act does not require such an approach.

66 Section 4(3) commences by referring to 'a person'. It concludes by saying that where a person is entitled to, or eligible to become entitled to, long service leave under an award, agreement, employer-employee agreement or an enactment that is at least equivalent to the entitlement under the LSL Act, it is that person who is not within the definition of 'employee' under the LSL Act. This suggests that the determination to be made is in relation to individual circumstances rather than by comparing the entitlements as a whole.

67 Section 4(3) also refers to where a person is ‘entitled to, or eligible to become entitled to’, long service leave under an award, agreement, employer-employee agreement or an enactment, but does not refer an eligibility to become entitled to long service leave under the LSL Act. In relation to the LSL Act, s 4(3) does not use the words 'or eligible to become entitled to'. The comparison required by s 4(3) is not of an entitlement or eligibility to become entitled under an award, agreement, employer-employee agreement or an enactment and an entitlement or eligibility to become entitled under the LSL Act; it is between:

- an entitlement or eligibility to become entitled under an award, agreement, employer-employee agreement or an enactment; and
- an entitlement under the LSL Act.

68 This, in my view, also suggests that the determination is not made by comparing the entitlements under an award, agreement, employer-employee agreement or an enactment as a whole with the entitlements under the LSL Act as a whole.

69 In order to see whether a person is entitled to, or eligible to become entitled to, long service leave under an award, agreement, employer-employee agreement or an enactment at least equivalent to the entitlement under the Act, it is necessary to determine what the person’s entitlement is under the Act. When that is answered, one then asks whether a person is entitled to, or eligible to become entitled to, long service leave under an award, agreement, employer-employee agreement or an enactment at least equivalent to that entitlement.

70 Thus, under s 8(2), an employee who has completed at least 10 years' continuous employment is entitled in respect of 10 years so completed, 8⅔ weeks of long service leave. At that time, the employee will have under the agreement, an entitlement to long service leave at least equivalent to that entitlement, namely 13 weeks of long service leave. Accordingly, the entitlement under the LSL Act does not apply to the employee and the source of the employee's entitlement to long service leave is the agreement.

71 Under s 8(2)(b) of the LSL Act, when an employee completes a further five years' continuous service, making a total of 15 years, the employee becomes entitled to a further 4⅓ weeks' long service leave under the LSL Act. At that time, the employee will not have an equivalent entitlement under the industrial agreement, however, under the industrial agreement the employee is eligible to become entitled to long service leave at least equivalent to that entitlement, namely 13 weeks' long service leave after a further two years' continuous service. Accordingly, when an employee completes a further five years' continuous service the entitlement under the LSL Act does not apply to that employee.

72 Under s 8(2)(c) of the LSL Act, on the termination of the employee's employment, whether by death or in any circumstances otherwise than by his employer for serious misconduct, the employee is entitled to an amount of long service leave calculated with regard to the number of years of continuous employment completed since the employee last became entitled under the Act. At that time, whether the employee is entitled, or eligible to become entitled, to long service leave under the industrial agreement that is at least equivalent to the entitlement in s 8(2)(c) of the Act needs to be determined. Given that the employee's employment has terminated, the employee either has an entitlement under the industrial agreement or not – the employee is not going to be eligible to become entitled to long service leave under the agreement at some future time because the continuous service has come to an end.

73 Similarly, under s 8(3) of the LSL Act, where an employee has completed at least seven years, but less than 10 years, of continuous service, and the employment is terminated by the employee's death or for any reason other than serious misconduct, there is an entitlement to long service leave which is a proportionate amount on the basis of 8⅔ weeks for 10 years of such continuous service. By s 9(2) of the LSL Act, in a case to which s 8(2)(c), or s 8(3) applies, the employee is deemed to have been entitled to, and to have commenced leave, immediately prior to the termination. The LSL Act makes provision for the manner in which payment equivalent to the amount which would have been payable in respect of the period of leave is made. Where s 8(3) of the LSL Act applies, it will be a matter of fact whether at that time there is an entitlement to long service leave under the agreement that is at least equivalent to the entitlement to long service leave under s 8(2)(c), or s 8(3) of the LSL Act.

74 It is not an objective comparison to determine whether, on the whole, long service leave entitlements under the agreement are at least equivalent to the entitlements to long service leave under the Act. Section 4(3) of the LSL Act does not, in its language, require such a comparison to be made. Neither does the language support the view that Parliament would have intended that an evaluation, on the whole, is to be made by an employer at the commencement of an employee's employment whether long service leave entitlements to long service leave under an applicable agreement are at least equivalent to the entitlements under the LSL Act.

75 It follows in my view, that the learned Industrial Magistrate was correct in rejecting the view of the appellant in this matter. When Ms Yoon's employment terminated, she had more than seven years', but less than 10 years', continuous service with the appellant. Her employment terminated in circumstances other than serious misconduct. She had an entitlement to long service leave under the LSL Act. As a matter of fact, at that time there was no corresponding entitlement to long service leave under the agreement. Nor was she eligible under the industrial agreement to become entitled to long service leave at least equivalent at some future time because her service had ended. Accordingly, she was an employee as defined under the LSL Act, and in my view his Honour was correct to so hold.

KENNER C:

76 The issue arising on the present appeal is a relatively narrow one of statutory interpretation. In the proceedings at first instance the learned Industrial Magistrate found that the respondent was an employee for the purposes of s 4(3) of the *Long Service Leave Act 1958* (WA) and was eligible to receive pro rata long service leave, despite not being entitled to that benefit under the industrial agreement covering her employment. The ultimate question for resolution before the Industrial Magistrate's Court was whether the respondent was "entitled to, or eligible to become entitled to, long service leave" under the industrial agreement "at least equivalent to the entitlement to long service leave" under the LSL Act. If so, the respondent was not covered by the LSL Act.

77 The learned Industrial Magistrate rejected the appellant's primary contention that on its proper construction, s 4(3) of the LSL Act requires a "holistic" comparison between the long service leave entitlements, objectively considered in total, under the relevant industrial agreement, compared to those under the LSL Act. This, according to the appellant, should be assessed logically, at the time of an employee's commencement in employment. Rather, the Court concluded that the time at which such an assessment is made, is when the specific entitlement of an employee to leave accrues, held by the learned Industrial Magistrate to be the relevant "milestone" giving rise to the benefit of leave. Thus, the assessment is one having regard to the individual circumstances of the employee, at the time the benefit accrues.

78 The appellant now appeals against the decision of the Industrial Magistrate's Court. The one ground of appeal is that the learned Industrial Magistrate was wrong to conclude that the respondent was covered by the LSL Act. A number of particulars of the ground of appeal are set out, which essentially take issue with those of his Honour's findings and conclusions, which were contrary to the appellant's argument put at first instance.

79 In a nutshell, the appellant contended on this appeal that an employee is either within the scope of the LSL Act for the purposes of long service leave benefits or they are not. An employee's status, as being either covered by the LSL Act or a relevant industrial instrument, does not vary during the course of an employee's period of employment. Having regard to the language of s 4(3) of the LSL Act, emphasis should be placed on the words "or eligible to become entitled to", in support of the proposition that if the learned Industrial Magistrate's reasoning is correct, these words would have no work to do because it is only when an entitlement actually accrues, in accordance with an individual's personal circumstances, that the relevant comparison between the entitlements is made. The appellant contended that this proposition is not correct.

80 The appellant complained that the effect of the decision at first instance is that an employee could effectively oscillate between being covered by the LSL Act and the relevant industrial instrument, depending upon his or her length of service and the point

in time at which the relevant long service leave benefit accrues. The contention of the appellant was this could not have been the intention of Parliament, having regard to the terms of the legislative scheme as a whole.

81 In aid of its argument as to the meaning of s 4(3), the appellant also referred to a recent decision of the Full Court of the Federal Court in ***Maughan Thiem Auto Sales Pty Ltd v Cooper*** (2014) 244 IR 399. In this case, the Full Court considered the terms of s 113 of the *Fair Work Act 2009* (Cth) which deals with the preservation of award based long service leave terms. The appellant sought to derive support from the Full Court's decision, in relation to what was said by the appellant to be in part, similar language to that used in s 4(3) of the LSL Act.

82 For the respondent, it was contended that the learned Industrial Magistrate reached the right decision in this case. It was submitted that there is no basis, construing the legislative scheme under the LSL Act in accordance with its terms, for an "on the whole" objective consideration of all of the terms of an industrial instrument, compared to the benefits arising under the LSL Act. Such a course would be, on the respondent's submissions, an unworkable and confusing approach, requiring the consideration of the entirety of the terms of the relevant industrial agreement each and every time the issue of comparability for long service leave purposes arises.

83 The key provision is s 4(3) of the LSL Act which is in the following terms:

> (3) Where a person is, by virtue of —
>
> (a) an award or industrial agreement;
>
> (b) an employer-employee agreement under Part VID of the *Industrial Relations Act 1979* or other agreement between the person and his employer; or
>
> (c) an enactment of the State, the Commonwealth or of another State or Territory,
>
> entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of "employee" in subsection (1).

84 As has been repeatedly said by the High Court, interpretation is a text based activity and the first point of consideration is the text of the statute concerned: ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27 per Hayne, Heydon, Crennan and Kiefel JJ at par 47; ***Amcor Ltd v CFMEU*** (2005) 222 CLR 241 per Kirby J at par 67. Furthermore, as the learned authors Pearce, D C and Geddes, R S in *Statutory Interpretation in Australia* (8th Ed, 2014) state at pars 2.26 and 2.38 respectively, all words in a statute should be given some meaning and effect, and it is presumed that words mean what they say, unless that may lead to an absurd or irrational result.

85 The LSL Act, when first made, provided that it was an Act to grant long service leave to employees whose employment was not regulated under the then *Industrial Arbitration Act 1912* (WA). The then s 4 of the Act set out a definition of "employee" which contained a number of exclusions, one of which in s 4(c)(iii), included a person whose terms and conditions of employment were regulated by an award or industrial agreement under the then *Industrial Arbitration Act 1912*. A number of other exclusions to the definition of "employee" applied to persons who were "entitled, or eligible to become entitled" to long service leave elsewhere, such as in employment in the public sector or those covered by Commonwealth awards etc.

86 In 1995 the *Industrial Relations Legislation Amendment and Repeal Act 1995* (WA), among other things, amended s 4 of the LSL Act to insert the current s 4(3). This amendment, which took effect on 16 January 1996, introduced for the first time, the concept of "equivalence" between entitlements under a relevant industrial instrument and those under the LSL Act, to determine who was to be covered by the legislation.

87 Section 4(3) is located in Part II of the LSL Act dealing with the "Construction and application of this Act". The entitlements to long service leave are set out in Part III which has the heading "Entitlements to long service leave or to payment in lieu thereof". Whilst s 4(3) refers to "the entitlement" to long service leave under the LSL Act, it is clear from the terms of Part III that there are in fact a number of entitlements prescribed. The two principal entitlements of course are a period of fully accrued long service leave after at least 10 years of continuous employment and a pro rata entitlement to long service leave after a period of at least seven years of continuous employment. In the present case, it was not in dispute that the respondent had at least seven years of continuous employment with the appellant and would therefore qualify for pro rata long service leave under the LSL Act if the legislation applied.

88 In my view what s 4(3) requires, construed in accordance with its ordinary and natural meaning, is that an employee has either an "entitlement" to long service leave accrued under an industrial instrument or has, prospectively, the "eligibility" for the same. In the case of the former, at the time of the entitlement arising under either a relevant industrial instrument, s 4(3) requires a simple comparison to be made between the provisions of the legislation or the industrial instrument, to determine the issue of equivalence. If the provisions of the industrial instrument and the LSL Act are of equal value, then the industrial instrument provision will apply. If not, the terms of the LSL Act will apply.

89 For example, in the present case, the Agreement provides that an employee is entitled to 13 weeks long service leave after 10 years of service. This is clearly a greater benefit than that provided by the LSL Act, which provides 8 2/3 weeks of long service leave for the same period of continuous service. Similarly, the same conclusion could be reached by a prospective assessment. That is, if and when an employee reaches 10 years of service, the question can simply be asked, what does the Agreement provide in such a case? Is it at least equivalent to that under the LSL Act? In the present circumstances it clearly would be, and provides a superior benefit. The LSL Act would therefore not apply in that circumstance.

90 In the case of a pro rata entitlement, again, the same comparison can be made. The question could be asked of a bystander, armed with the relevant information, "what about pro rata long service leave?" This would lead to a comparison between the terms of the LSL Act and the Agreement. As the terms of 6.6.5 of the Agreement (see AB 44) are far more restrictive in relation to pro rata long service leave, and do not provide for a pro rata benefit when an employee resigns in the ordinary

course, then, for the purposes of s 4(3), the answer must be that the Agreement is to be regarded as not "at least equivalent" to the pro rata entitlement under the LSL Act and the latter would apply.

91 This approach to s 4(3) does not necessarily require the crystallisation of the entitlement or a "milestone" event to be reached, as found by the learned Industrial Magistrate, but it may do. There is nothing precluding a prospective comparison, on the construction of the relevant provisions of the LSL Act, which I prefer. This gives the words "or eligible to become entitled" some work to do. In accordance with the ordinary meaning of the text in s 4(3), read with the terms of Part III dealing with entitlements to long service leave, there is no absurdity, capriciousness or irrationality in such a result: ***Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation*** (1981) 147 CLR 297.

92 Bearing in mind also that the LSL Act is to be construed beneficially, as remedial legislation, this approach to the interpretation of s 4(3) is to be preferred: ***Bull v Attorney-General (NSW)*** (1913) 17 CLR 370; ***Re Will and Estate of McComb*** [1999] 3 VR 485. It is for these reasons that in my view, the approach to the interpretation of s 4(3) advanced by the appellant should not be accepted. There is nothing in the language of the relevant provisions of the LSL Act that requires a global, objective assessment of all of the terms of a relevant industrial instrument concerning long service leave, compared to the entirety of the LSL Act, at the time of commencement of employment, to satisfy the "equivalence" criterion of s 4(3). Furthermore, given that the evident purpose of s 4(3), read with Part III of the LSL Act, is to ensure that employees covered by relevant industrial instruments are not disadvantaged in relation to their long service leave benefits, then the construction adopted above is consistent with that purpose: s 18 *Interpretation Act 1984* (WA).

93 Finally, in relation to the decision of the Federal Court in ***Maughan Thiem***, one can appreciate the initial attraction to the contention put by the appellant, that the words "would have entitled" in s 113 of the FW Act, provide some assistance to the appellant's argument in the construction of the words "eligible to become entitled" in s 4(3) of the LSL Act. However, I consider that the Federal Court decision is distinguishable. Firstly, the subject matter of s 113 of the FW Act is the preservation of award based long service leave terms, as part of the transitional arrangements under the National Employment Standards under the FW Act. Secondly, there is no notion of comparability or equivalence used in s 113 as there is in s 4(3) of the LSL Act. Thirdly, the language in s 4(3), unlike in s 113 of the FW Act, refers to both an entitlement and eligibility to an entitlement.

94 I would therefore dismiss the appeal.

2015 WAIRC 00919

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPELLANT
	-and-
	JUNGHEE YOON
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
DATE	TUESDAY, 6 OCTOBER 2015
FILE NO/S	FBA 7 OF 2015
CITATION NO.	2015 WAIRC 00919

Result	Appeal dismissed
Appearances	
Appellant	Mr D J Matthews (of counsel) and with him Ms C M Rice (of counsel)
Respondent	Mr C A Fogliani (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 27 August 2015, and having heard Mr D J Matthews (of counsel) and with him Ms C M Rice (of counsel) on behalf of the appellant, and Mr C A Fogliani (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 6 October 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.

By the Full Bench
(Sgd.) J H SMITH,
[L.S.] Acting President.

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

2015 WAIRC 00941

CHILD CARE WORKERS (EDUCATION DEPARTMENT) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 14 OCTOBER 2015
FILE NO/S	APPL 126 OF 2015
CITATION NO.	2015 WAIRC 00941

Result Award cancelled

Order

The Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on 26 August 2015 of an intention to make an order cancelling the award pursuant to s 47 of the *Industrial Relations Act 1979* (the Act).

The requirements of s 47(3) of the Act have been met.

As at 25 September 2015 there were no objections to the making of such an order.

NOW THEREFORE, the Commission, pursuant to the powers conferred by s 47 of the Act, hereby orders:

THAT the *Child Care Workers (Education Department) Award* be cancelled.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00942

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2015 WAIRC 00942
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	THURSDAY, 15 OCTOBER 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.
Instruments	**:**	General Retail Industry Award 2010 (MA000004)
Case(s) referred to in Reasons	**:**	***Timothy William Barlow v FWA Media Pty Ltd, Trading as Fishing Western Australia Protackle*** [2015] WAIRC 00869
Result	**:**	Quantum determined

REASONS FOR DECISION AS TO QUANTUM

1 On 10 September 2015, I delivered my reasons for decision (reasons) in this matter (see ***Timothy William Barlow v FWA Media Pty Ltd, Trading as Fishing Western Australia Protackle*** [2015] WAIRC 00869). In those reasons, I determined certain factual disputes and made a finding with respect to the proper classification of the claimant under the *General Retail Industry Award 2010 (MA000004)* (the Award).

2 As a consequence of that determination, it became necessary for the parties to reconsider their cases as to quantum. The parties were invited to provide me with further evidentiary material in that regard.

3 To facilitate that, I made the following programming orders:

> *"1. Within seven days of the date of this Order, the Claimant is to file with the Court and serve upon the Respondent his recalculations in relation to the quantum of his Claim.*
>
> *2. The Respondent shall, if it wishes to do so, file with the Court and serve upon the Claimant responding calculation seven days thereafter.*
>
> *3. If the Respondent complies with Order 2, the Claimant shall have a further seven days to lodge with the Court and serve upon the Respondent any reply to the Respondent's calculations.*
>
> *4. 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.*
>
> *5. The Trial is otherwise adjourned sine die"*

4 The parties have since complied with orders 1 and 2. The claimant however, has not replied to the respondent's calculations as permitted by order 3. Further, despite the opportunity given to be further heard, neither party has sought to be further heard. I will accordingly deal with the outstanding issue of quantum on the papers.

5 The claimant has recalculated his claim in accordance with the findings expressed in my published reasons. He has done so using the Fair Work Ombudsman's online calculator and has prepared a hard copy of those calculations which he has filed in compliance with order 1.

6 I accept that the claimant's calculations are accurate. Indeed, the respondent does not take issue with the accuracy of the claimant's calculations. It suffices to say that the claimant's calculations establish that the wages which were payable to him in accordance with the Award, in respect to the relevant period, amounted to $32,561.42.

7 In the pay calculations summary which accompanied his calculations, the claimant asserts that he was only paid $17,665.00 during the material period. The claimant therefore says that he is entitled to recover $14,896.42.

8 However, in evidentiary material that he has previously produced to this court (see exhibit 13), he had asserted that the total wages paid to him over the period of the claim was $32,414.97.

9 In responding to the claim, the respondent accepted the claimant's assertions as to what had been paid to him. Therefore, at trial the quantum of wages received by the claimant was never in issue. Indeed, the proceedings were conducted on the basis that the claimant had been paid $32,414.97. The claimant appears to have now taken a different stance. In the end, the claimant's initial concession that he was paid $32,414.97 binds him.

10 It follows from what I have said that the claimant is only entitled to the difference between what he has calculated to be owing to him under the Award, being $32,561.42, and what was paid to him which was $32,414.97. That difference is $146.45.

11 I propose to enter judgement in the claimant's favour for that amount. It will also be appropriate to make an order for interest to be paid on that sum at the rate of 6% per annum, from 27 September 2014 to judgement, fixed at $9.40.

12 Finally, the respondent contacted the court by e-mail on 11 September 2015, indicating that it was confused about my findings concerning the working of public holidays. I cannot see how such confusion arises. It is clear that I have included in the schedule to my reasons all public holidays which I have found to have been worked. If the public holiday is not within the schedule it means that I have treated the public holiday as not having been worked.

13 It was not my intention, as put by the respondent, that the public holidays in the schedule be excluded or that they be otherwise discounted. That view held by the respondent distorts my findings.

G. CICCHINI

INDUSTRIAL MAGISTRATE

2015 WAIRC 00925

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00925
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 2 SEPTEMBER 2015
DELIVERED	**:**	WEDNESDAY, 7 OCTOBER 2015
FILE NO.	**:**	M 183 OF 2014
BETWEEN	**:**	ANDREW FORSTER

CLAIMANT

AND

PAUL LONG

RESPONDENT

Catchwords	**:**	Alleged breach of the Transport Workers (General) Award No. 10 of 1961 and the *Minimum Conditions of Employment Act 1993* by reason of the failure to pay annual leave entitlements; Whether there was an agreement to pay annual leave payments as part of an "all-in rate".
Legislation	**:**	*Industrial Relations Act 1979* *Fair Work Act 2009* *Minimum Conditions of Employment Act 1993*
Instruments	**:**	Transport Workers (General) Award No. 10 of 1961
Result	**:**	Claim not proven
Representation:		
Claimant	**:**	Mr T. Jardine (Counsel) of Jardine & Associates
Respondent	**:**	Mr A. Dzieciol (Counsel) of the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

REASONS FOR DECISION

1 P&C Long is a partnership which operates a trucking business. Mr Paul Long (the Respondent) is one of its partners. From 21 January 2013 until 14 November 2014 the partnership employed Mr Andrew Forster (the Claimant) as a truck driver.

2 It is not is in dispute that the Claimant's employment was governed by the Transport Workers (General) Award No. 10 of 1961 (the Award) and that his classification under the Award was that of a Grade 7 Driver (see Clause 4.3 - Classifications). The Claimant drove a prime mover with a capacity of up to 42 tonnes. The Claimant was paid over the Award rate at $30.00 per hour for each hour worked. However, there is a dispute between the parties as to whether that hourly rate included an annual leave component.

3 The Claimant asserts that the payment of $30.00 per hour was exclusive of his annual leave entitlement, whereas the Respondent says his liability with respect to annual leave payments was included in that rate. The Respondent's position is that the $30.00 per hour included a $4.00 component in relation to annual leave.

4 The Claimant's pay rate was discussed by the Claimant and the Respondent prior to the Claimant commencing his employment with P&C Long. They agreed to the rate of $30.00 per hour but now have differing recollections of what the hourly rate was to include. Regrettably, the terms of their agreement was never reduced to writing.

5 The Claimant testified that he was offered payment of $30.00 per hour without mention of annual leave. He had just left a job identical to that which he was going into in which he had been paid $28.00 per hour plus a meal allowance, annual leave entitlements and an allowance for protective clothing.

6 When cross-examined about the agreement, the Claimant expressly rejected the contention that he was told that his hourly rate was $26.00 plus $4.00 per hour for his annual leave entitlements. He said that the Respondent did not say that the $30.00 per hour was for everything.

7 The Respondent testified that the Claimant informed him that he had been paid $26.00 per hour by his previous employer and consequently offered him $30.00 per hour as an "all-in rate" to include annual leave entitlements. When cross-examined about that, the Respondent did not resile from that position. Further, he denied that his evidence concerning the payment of $26.00 per hour plus $4.00 per hour for annual leave entitlements was a recent invention. The Respondent said this information was made quite clear to the Claimant at the time that he agreed to employ him.

8 In addition to what was discussed about the hourly rate, the parties are in conflict in their evidence about whether a complaint was made prior to the employment relationship ending about the non-payment of annual leave entitlements.

9 The Claimant alleges that he complained to the Respondent, who laughed off his demand for payment of annual leave entitlements. The Respondent denies having received any complaint in that regard.

10 It is not in dispute that the Claimant took leave during his employment, including approximately 5 weeks in May/June 2014 when he travelled to Europe. He was not paid during that time off.

The Claim

11 The Claimant seeks the payment of $9,685.29 which he alleges is owed to him pursuant to Clause 6.1.1 (within Clause 6.1 - Annual Leave) of the Award. The amount sought represents the value of his unpaid annual leave entitlements.

12 On 4 December 2014, the Claimant lodged a Claim in this Court under section 548 of the *Fair Work Act 2009*, seeking the payment of $9,685.29. It suffices to say that the Claimant initiated his action using the wrong form and under the wrong Act. However, the use of the incorrect form will not defeat his Claim.

13 Both parties have proceeded on the basis that the Claim is one that is brought pursuant to section 83 of the *Industrial Relations Act 1979*. Both parties agree that there is no impediment to my determining the Claim, despite the difficulty with its form.

14 In the end result, the Claimant alleges a failure to comply with Clause 6.1.1 of the Award.

15 Clause 6.1.1 of the Award provides that:

> "*… an employee (other than a casual employee) is entitled for each year of service, to 4 consecutive weeks annual leave with payment of ordinary wages, as prescribed by this Award. Such entitlement shall accrue pro-rata on a weekly basis*".

16 Clause 6.1.6 of the Award provides that:

> "*An employee whose employment terminates and they have not been allowed the leave prescribed under this clause they shall be give payment in lieu of that leave...*".

17 The Claimant contends that he has not been paid for leave taken and that which was due to him upon the termination of his employment.

18 The Respondent says that the payment of $4.00 per hour has covered all of the annual leave entitlements which were accrued by the Claimant.

19 Based on the evidence given for the Respondent by Mr Joshua Dalliston, Industrial Officer, Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (Mr Dalliston), which is accepted, I find that the Claimant, during his employment accrued 7.23 weeks of annual leave. He accrued four weeks in his first year of employment and 3.23 weeks in his second year.

20 On the Claimant's own testimony, there can be no doubt that he took three periods of leave including the approximate 5 week period taken in May/June 2014.

21 The issue to be determined is whether the Claimant has been paid for that leave and whether he was owed annual leave entitlements on termination.

22 The Claimant bears the onus of proving, on the balance of probabilities, that he has not been paid his annual leave entitlements. On the available evidence, I find it impossible to prefer one version of the evidence over the other in respect of what was agreed in relation to the hourly rate.

23 The Claimant and the Respondent each gave their evidence in a forthright and credible manner. Neither of them was found wanting under cross-examination. In my view, their evidence is equally weighted.

24 I am not satisfied that it is more probable than not, that the hourly rate was exclusive of payment for annual leave. That being the case, I proceed on the basis that annual leave taken was paid for by virtue of the $4.00 per hour component of the hourly rate attributable to annual leave.

25 Given my findings, the Claimant's contention that he was caused to forgo annual leave in contravention of section 8 of the *Minimum Conditions of Employment Act 1993* is not maintainable.

26 The Claimant did not forgo annual leave. It is open to conclude that he took it and was paid for it.

27 I am satisfied on the evidence produced by Mr Dalliston that the amount paid to the Claimant with respect to annual leave entitlements exceeds the amount the Claimant alleges is owing.

28 It follows that Claim is not proven.

G. CICCHINI

INDUSTRIAL MAGISTRATE

2015 WAIRC 00938

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2015 WAIRC 00938
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 2 SEPTEMBER 2015 AND WEDNESDAY, 7 OCTOBER 2015
DELIVERED	**:**	WEDNESDAY, 14 OCTOBER 2015
FILE NO.	**:**	M 183 OF 2014
BETWEEN	**:**	ANDREW FORSTER
		CLAIMANT
		AND
		PAUL LONG
		RESPONDENT

Catchwords	**:**	Alleged breach of the *Transport Workers (General) Award No. 10 of 1961* and the *Minimum Conditions of Employment Act 1993 (MCE Act);* Consideration of whether there was non-compliance with section 8 of the MCE Act.
Legislation	**:**	*Industrial Relations Act 1979* *Fair Work Act 2009* *Minimum Conditions of Employment Act 1993*
Cases referred to in these Supplementary Reasons	**:**	***James Turner Roofing Pty Ltd v Christopher Lawrence Peters*** (2003) 83 WAIG 427 ***Maslen v Core Drilling Services Pty Ltd and another*** [2013] FFCA 460
Instruments	**:**	*Transport Workers (General) Award No. 10 of 1961*
Result	**:**	Supplementary reasons provided
Representation		
Claimant	**:**	Mr T. Jardine (counsel) of Jardine & Associates
Respondent	**:**	Mr A. Dzieciol (counsel) of the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

SUPPLEMENTARY REASONS FOR DECISION

1 On 7 October 2015, I handed down my reasons for decision (reasons) in this matter (see ***Andrew Forster v Paul Long*** 2015 WAIRC 00925). When I did so, counsel for the claimant asked that I provide supplementary reasons concerning the matter and in particular with respect to the claimant's argument concerning s 8 of the *Minimum Conditions of Employment Act 1993* (MCE Act). Counsel for the respondent did not object to what was sought. In view of that I agreed to the request. These are those supplementary reasons.

2 At paragraphs 25 and 26 of my reasons, I said:

> *"25 Given my findings, the Claimant's contention that he was caused to forgo annual leave in contravention of section 8 of the Minimum Conditions of Employment Act 1993 is not maintainable.*
>
> *26 The Claimant did not forgo annual leave. It is open to conclude that he took it and was paid for it."*

3 The finding to which I referred in paragraph 25 of my reasons was that the claimant had failed to prove that the payments he received did not include his annual leave entitlements.

4 Clause 6.1.1 of the *Transport Workers (General) Award No. 10 of 1961* (the Award), which at the material time covered the claimant and the respondent, provides:

> *"6.1.1 Except as hereinafter provided, an employee (other than a casual employee) is entitled for each year of service, to 4 consecutive weeks annual leave with payment of ordinary wages, as prescribed by this Award. Such entitlement shall accrue pro-rata on a weekly basis"*.

5 There is no dispute that the respondent was obliged to pay the claimant his annual leave entitlements in accordance with cl 6.1.1 of the Award. The issue at trial was whether the respondent had done so. The respondent's position was that the hourly rate paid to the claimant included a component which included his annual leave entitlements, as had been agreed between them.

6 The respondent relies upon what was said by Anderson J in ***James Turner Roofing Pty Ltd v Christopher Lawrence Peters*** (2003) 83 WAIG 427 (***James Turner Roofing***), at page 430, to support his contention that the over-award hourly payment made to the claimant included a component which was specifically attributable to the respondent's liability with respect to annual leave. The respondent says that he has paid the claimant his annual leave entitlements in accordance with their agreement, and that such over-award hourly payments with respect to annual leave can be set off against the claimant's claim.

7 In submissions, counsel for the respondent referred to the decision of the Federal Circuit Court of Australia in ***Maslen v Core Drilling Services Pty Ltd and Another*** [2013] FFCA 460 (***Maslen***) to support his contention that not only does such payment have to be specifically agreed to between the parties, but that it can only be set off against an ordinary hourly payment and not an entitlement such as annual leave.

8 In that regard, I observe that such a view is not entirely consistent with what was said in ***James Turner Roofing***. In ***James Turner Roofing***, which binds this court, Anderson J said at paragraph 21, that the whole of an amount paid for work done can be credited against the award entitlement "whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award" (my emphasis added). I note that in this claim the claimant seeks a monetary entitlement.

9 Having made those observations I turn to comment about the claimant's principal argument in this matter, being that the agreement concerning the payment of annual leave entitlements (if made) contravenes s 8 of the MCE Act, thereby rendering such agreement void or unenforceable.

10 Before considering s 8 of the MCE Act it is necessary to consider how the claimant's entitlement to annual leave payments arises.

11 Section 5 of the MCE Act provides:

> *"**5. Minimum conditions implied in awards etc.***
>
> *(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)."*

12 The requirement to provide annual leave entitlements (s 23 MCE Act) and the terms in relation to how that is achieved (s 18, s 24 and s 25 MCE Act) is implied in the Award. It is obvious that those provisions have been picked up by the Award and that the respondent was obliged to comply with them. The respondent was unable to contract-out his annual leave obligations and the parties were unable to agree that the claimant forgo his annual leave entitlements.

13 Section 8 of the MCE Act provides:

> ***"8. Limited contracting-out of annual leave conditions***
>
> *(1) After the completion of any year of service by an employee, the employer and employee may agree that the employee may forgo taking annual leave to which the employee became entitled in relation to that year of service if —*
>
> *(a) the amount of annual leave forgone does not exceed 50% of the whole amount of annual leave to which the employee became entitled in relation to that year of service; and*
>
> *(b) the employee is given an equivalent benefit in lieu of the amount of annual leave forgone; and*
>
> *(c) the agreement is in writing.*
>
> *(2) An agreement referred to in subsection (1) is of no effect if the employer's offer of employment was made on the condition that the employee would be required to enter into the agreement.*
>
> *(3) The employer must not —*
>
> *(a) require the employee to forgo taking an amount of annual leave; or*
>
> *(b) exert undue influence or undue pressure on the employee in relation to the making of a decision by the employee whether or not to forgo taking an amount of annual leave.*
>
> *(4) A contravention of subsection (3) is not an offence but that subsection is a civil penalty provision for the purposes of section 83E of the IR Act."*

14 The claimant suggests that if there has been a contracting-out, such arrangement is of no effect. That is because the conditions required by s 8(1)(a) to (c) of the MCE Act have not been met. It is accepted that none of those conditions have been met.

15 As I understand it, the claimant argues that he has been caused to forgo his annual leave entitlements. I note however that s 8(a) of the MCE Act is not concerned with foregoing annual leave "*entitlements*" but rather foregoing the "*taking*" of annual leave to which an employee becomes entitled.

16 The claimant does not suggest that he has foregone the taking of leave. It is self-evident that there was no agreement reached that he would forego the taking of accrued annual leave. Indeed he acknowledges having taken about seven weeks' leave, including approximately five weeks, to travel to Europe. The leave taken was in the form of annual leave. The only issue between the parties is whether he has been paid his annual leave entitlements for those periods of leave taken and annual leave accrued at termination.

17 It appears that the claimant suggests that s 8 of the MCE Act is concerned with forgoing annual leave entitlements but that is not so. It relates solely to the "*taking*" of annual leave. In the circumstances, it has no role to play with respect to this claim in which he concedes that he has taken leave. What he claims is that he has not been "*paid*" his annual leave entitlements due to him. Section 8 of the MCE Act is of no relevance to that issue.

18 Whether he has or has not been paid his annual leave entitlements is a question of fact. In that regard, I have found against him by determining that he has not proven his claim.

G. CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00866

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00866
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 20 NOVEMBER 2014, WEDNESDAY, 18 FEBRUARY 2015, TUESDAY, 25 AUGUST 2015
DELIVERED	**:**	TUESDAY, 8 SEPTEMBER 2015
FILE NO.	**:**	U 207 OF 2014
BETWEEN	**:**	DONNA ANN MARIE BAKER
		Applicant
		AND
		DR J VANDENBERGH TRADING AS COLLIE VETERINARY SERVICES
		Respondent

Catchwords	**:**	Industrial law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Whether clinic premises were properly secured - Commission satisfied employee did not ensure the clinic premises were secure – Employee not put on notice of possible termination of employment – Not an act of serious or gross misconduct – Confusion as to line of responsibility for security of premises – Dismissal unfair – Compensation awarded – Order made
Legislation	**:**	*Industrial Relations Act 1979* (WA)
		Poisons Act 1964 (WA)
Result	**:**	Order issued and compensation awarded
Representation:		
Applicant	**:**	In person
Respondent	:	In person

Case(s) referred to in reasons:

Frank Scott v Consolidated Paper Industries (WA) Pty Ltd (1998) 78 WAIG 4940

Reasons for Decision

1 The applicant Ms Baker was employed as a veterinary nurse by the respondent Collie Veterinary Services from 15 December 2009 to 26 September 2014. Ms Baker was employed on a part time basis working at least three and up to 37 hours per week with the hours being somewhat variable. Ms Baker was paid at the hourly rate of $21.13 per hour.

2 On 30 July 2014 Ms Baker said she complained to Dr Vandenbergh, the principal of the veterinary practice, about how she was spoken to by another employee, Mr Edis, who was also the practice manager. An issue was raised by Mr Edis with Ms Baker as to the state of the clinic's level of cleanliness and its general order on 1 August 2014. Ms Baker contended that Mr Edis told her later on or about 4 September 2014, that if she decided to seek full time work elsewhere, that Dr Vandenbergh would support this.

3 Ms Baker then contended that shortly after, on 8 September 2014, without warning, she was given a letter of termination of employment by Mr Edis. The principal ground set out in the letter was that Ms Baker had left the clinic unsecured on 4 September 2014 following a similar incident on 1 August 2014. Ms Baker denied this. She now challenges her dismissal and says it was unfair. Whilst her original application as filed sought reinstatement, as she now has other employment, compensation is sought instead.

4 As is often the case in matters of this kind, Dr Vandenbergh's version of events is quite different. He contends that Ms Baker, on two separate occasions, left the veterinary clinic unsecured with the clinic's equipment, drugs and patients on the premises at risk. Furthermore, Dr Vandenbergh asserted that Ms Baker also left the respondent's drug cabinets unlocked. According to the respondent this constituted a dereliction of duty by Ms Baker and was unprofessional conduct, for someone in her position. Dr Vandenbergh also contended that these matters are viewed very seriously by the Veterinary Surgeons' Board of Western Australia and could have possibly led to his deregistration as the principal of the veterinary practice.

Evidence

5 Evidence was adduced from Ms Baker and also from Ms Dickinson and Ms Cork for the applicant. For the respondent, evidence was adduced from Dr Vandenbergh and Mr Edis.

6 Ms Baker testified that she worked as a veterinary nurse at both the Collie and Boyup Brook clinics of the practice. On or about 8 August 2014 Ms Baker said that she spoke with Mr Edis. He gave her a document with points on it headed "points for consideration after hospital check on Friday August 1st". Ms Baker said that Mr Edis told her that a similar document was given to all nurses and that in her case, "mine was by no means the longest list". One item on the list of points was "back door unlocked". Ms Baker testified that Mr Edis told her "not to be overly concerned" by the issues raised on the note.

7 Mr Edis, as Dr Vandenbergh's practice manager, testified that he did give the note to Ms Baker. In relation to the issue of securing the premises, Mr Edis said that when he spoke to Ms Baker about the list of issues, he emphasised the importance of nurses securing the premises of the clinic. Failing to do so, may lead to deregistration of the practice. Given that Ms Baker was a fully qualified veterinary nurse Mr Edis considered that Ms Baker should have been aware of the importance of clinic security. Mr Edis testified that while he considered his conversation on 1 August 2014 to be a form of verbal warning, he did not put this in writing. Mr Edis also emphasised that the practice has a small number of staff and he is aware that the job of a veterinary nurse is a demanding one. He did not want to take a "hard line" approach with staff. Rather, Mr Edis said that he chose to deal with such matters by way of a more positive approach.

8 The next significant event for Ms Baker was on 8 September 2014. She testified that she was working at the Boyup Brook clinic on this day. According to Ms Baker Mr Edis gave her a letter dated 5 September 2014. The letter referred to the clinic's decision to terminate Ms Baker's employment effective on 13 October 2014. Formal parts omitted, the letter, a copy of which was tendered as exhibit A3, read as follows:

> I am writing to inform you that the decision has been made to terminate your employment with Collie Veterinary Services as of Monday October 13th. This decision has not been taken lightly but is the result of an act of serious misconduct on your part on Thursday 4th September. On this date the premises of Collie Veterinary Services were left unsecured via the back door. As you are fully aware it is the responsibility of the nurse on late duty to make absolutely certain that the building is fully secure before it is left unattended after closing. This is the second time in the space of two months that you have failed to fulfil this most basic and important of tasks. The first occasion being on Friday 1st August, of which you received a verbal warning on your following shift, Friday 8th August.
>
> This is unfortunately the pinnacle in what can only be described as a considerable drop in overall performance over the past few months. You have received our full support throughout this time, with your immediate line manager discussing ways in which you could improve on several occasions. Due to this and your already lengthy service I therefore believe that further training would be ineffective at improving your performance to the standard of which we expect from our nursing team.
>
> Your notice period will include weekly shifts at the Boyup Brook Veterinary Clinic, your last shift being the Monday of October 13th. For legal reasons we will require all client information that you currently hold in your possession.
>
> I would like to take this opportunity to thank you for your effort and commitment while working at Collie Veterinary Services.

9 As to the principal issue of the security of the clinic, Ms Baker testified that she was aware of the importance of security of the premises and that the Veterinary Surgeons' Board may cancel the registration of a principal in cases of serious misconduct. On the day in question, on 4 September 2014, Ms Baker said at the end of the day, as she was preparing to leave the premises, she was aware that Mr Edis was still in the building. Another staff member, Ms Dickinson, the then receptionist, was with her at the time. Ms Baker testified that the rear door to the clinic has both a door lock and bolts to secure it. She said that she did lock the door, and shook it to make sure that it was secure. However, she admitted that she was not sure whether she also bolted the door and said she may not have.

10 Ms Dickinson confirmed that she was with Ms Baker on 4 September 2014 and they were leaving the premises at about 6pm. She was also aware that Mr Edis was still in the building. Ms Dickinson testified that she understood the practice in the clinic to be that it was the last person on the premises in the evening who was responsible for securing the rear door. She said that she saw Ms Baker lock the door and that Ms Baker tested it.

11 Ms Cork, the former practice manager for Collie Veterinary Services, also gave evidence. She said that up until 2006, the veterinary nurse was responsible for locking the rear door of the clinic. After that time, the practice changed, as she understood it, such that it was the last person on the premises who was responsible for clinic security.

12 The principal of the practice, Dr Vandenbergh, testified that on 4 September 2014 he had been out on a call. On returning to the clinic, he saw Ms Baker and Ms Dickinson in the car park outside. Mr Edis was also present on the premises. Dr Vandenbergh said that Mr Edis brought to his attention a mess in the rear yard of the clinic and also that the drug cupboard in the clinic was not properly secured, with the key still in the cupboard door lock. Mr Edis also pushed on the rear door of the clinic and the door opened. Both Dr Vandenbergh and Mr Edis said it was clear that the door was not bolted as it should have been.

13 Dr Vandenbergh also said that the issue of clinic security is emphasised at staff meetings. He testified that it is always the responsibility of the last nurse on duty to ensure the premises are properly secured. The exception to this is if a vet will be in the clinic after hours. Dr Vandenbergh said that the Veterinary Surgeons' Board performs audits of veterinary practices. Premises left unsecured may lead to breaches of the Poisons Act 1964, and constitute professional misconduct. As to the issue of whose responsibility it is to ensure that the premises are secure, Mr Edis emphasised that it is for the "late nurse" to do this. Other staff, including him have their own responsibilities and Mr Edis said he should not have to check the security of the perimeter of the premises.

Consideration

14 In terms of the approach of the Commission to claims such as the present matter, as I said in *Frank Scott v Consolidated Paper Industries (WA) Pty Ltd* (1998) 78 WAIG 4940 at 4943:

> The law in this jurisdiction is well settled in relation unfair dismissal. It must be demonstrated that there has been an abuse of the employer's right to dismiss an employee, such that the dismissal is rendered harsh or oppressive: *Miles v The Federated Miscellaneous Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1985) 65 WAIG 385. It is also established that it is not for the Commission to assume the role of the manager in considering whether the dismissal is or is not unfair. The test is an objective one in accordance with the Commission's duty pursuant to s 26(1)(a) and (c) of the Act.
>
> Moreover, contemporary standards of industrial fairness require in my view, that before an employee is dismissed, the employee be given some fair warning that his or her employment is at risk if his or her performance or conduct does not improve as required by the employer. This requires more than a mere exhortation to improve and should place the employee in the position of being in no doubt that their employment may be terminated, unless they take appropriate remedial steps: *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635. It should be emphasised that whether an employee is afforded procedural fairness is but one factor for the Commission to consider, however it may be a most important factor, depending upon the circumstances of the particular case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. It follows however, that a dismissal will not necessarily be unfair in the event of procedural unfairness alone, as all the circumstances need to be considered.

15 The principal issue of fact in this case is the allegation by the employer that Ms Baker failed, on two occasions, to secure the clinic premises. I accept that this is a serious issue, given the consequences for a veterinary practice and possible breaches of the Poisons Act. Whilst some other issues were referred to in the documentary evidence, alleging certain performance shortcomings in relation to Ms Baker, there was no direct evidence of these matters led in these proceedings. Moreover, it is clear from the letter of termination of Ms Baker's employment of 5 September 2014, that it was her alleged failure to secure the clinic premises that led to her dismissal. I therefore do not propose to take into account the other matters raised in correspondence from Collie Veterinary Services to Ms Baker.

16 On all of the evidence, I am satisfied that at least on 4 September 2014 Ms Baker did not properly ensure that the clinic premises were secured. To her credit, Ms Baker accepted that in addition to the rear door lock, bolts are fitted to the rear door of the clinic and she may not have secured them on this occasion. Ms Dickinson was not able to confirm this either way on her evidence. Both Dr Vandenbergh and Mr Edis were emphatic in their testimony that the door was not secured, and when it was pushed, it opened. I have no reason to doubt this evidence. I therefore accept that on 4 September 2014, Ms Baker did not, as alleged, ensure that the clinic premises were secure. As to the allegation that the same occurred on 1 August 2014, as set out in the note of 8 August 2014, given to Ms Baker by Mr Edis, Ms Baker did not dispute this specifically but referred to the day in question as being a busy one. There was otherwise little direct evidence as to this specific incident.

17 Mr Edis' testimony was that after the first occasion on 1 August 2014, he did speak to Ms Baker and told her of the importance of clinic security and the possibility of Dr Vandenbergh being deregistered by the Veterinary Surgeons' Board.

18 There was some contention on the evidence as to whose responsibility the security of the clinic premises was. It was Dr Vandenbergh's and Mr Edis' evidence that there is no doubt that it is the responsibility of the nurse last on duty to lock the premises. This matter was referred to in staff meetings. Whilst Ms Baker referred to it being the responsibility of the last person on the premises, this is somewhat inconsistent with what actually occurred on 4 September 2014. If, as Ms Baker maintained, it was the known practice that it was the responsibility of the person last on the premises to secure the rear door and Ms Baker was aware that Mr Edis was on the premises when she left, then it was for Mr Edis and not Ms Baker to secure the clinic. There would be no reason for Ms Baker to attempt to do so. The fact that Ms Baker did attempt to do so, but did not properly, and her defence of this matter that the rear door was secured, is inconsistent with her contention that it was not her responsibility.

19 All of the circumstances of the case need to be considered in matters such as these. It seems clear enough from the evidence, that exhibit A2, setting out a list of matters to be attended to by Ms Baker, was similar to a list of issues given to all staff, and not just Ms Baker. A number of shortcomings were identified in the list, following the clinic inspection on 1 August 2014, one of which was "back door unlocked".

20 It is also the case that Mr Edis, again to his credit, accepted that he did not tell Ms Baker at any time, that the issues raised in exhibit A2, if not remedied, may lead to her loss of employment. An employee is generally entitled to be put on notice that in cases of poor performance or conduct, unless the conduct or performance is remedied to the employer's satisfaction, termination of employment may be an outcome. An exception to this general approach is in the case of an act of serious or gross misconduct, which I do not, in all of the circumstances, consider to be the case in this matter. I also take into account that Ms Baker did attempt to lock the rear door of the clinic on 4 September 2014 and she believed she had done so. This was not a case where an employee simply chooses to ignore a responsibility in connection with their employment. Also, on the evidence, there did seem to be some confusion as to the line of responsibility for the security of the clinic premises. It is for these reasons only, that I consider the dismissal of Ms Baker to be unfair.

21 In terms of remedy, Ms Baker obtained new employment in November 2014. Whilst also a part-time position, and even though Ms Baker's evidence was somewhat sketchy on the matter, it seems that she now earns more than she did during her employment as a veterinary nurse.

22 Given the large variation in hours of work of Ms Baker, and hence income earned, it is difficult for the Commission to make findings as to loss in this case. Exhibit A8 is a PAYG statement for the year ended 30 June 2015. From 1 July 2014 to 26 September 2014, it seems that Ms Baker earned $4,221 gross. Given this represents a period of approximately 12.5 weeks, this gives an average income of $337.68 gross per week over this period. On the basis that Ms Baker was out of work according to her evidence, for the month of October 2014 after her dismissal, I would award five weeks compensation for loss in the sum of $1,688.40 gross.

23 An order now issues.

2015 WAIRC 00868

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONNA ANN BAKER
	APPLICANT
	-v-
	JULES JOSEPH VANDENBERGH T/A COLLIE VETERINARY SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 9 SEPTEMBER 2015
FILE NO/S	U 207 OF 2014
CITATION NO.	2015 WAIRC 00868

Result	Declaration and order issued
Representation	
Applicant	In person
Respondent	In person

Declaration and Order

HAVING heard Ms D Baker on her own behalf and Dr J Vandenbergh 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 applicant's dismissal by the respondent on 26 September 2014 was harsh, oppressive and unfair.

(2) ORDERS the respondent pay to the applicant the sum of $1,688.40 gross by way of compensation for loss within 21 days.

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

2015 WAIRC 00913

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY CSERMELYI
	APPLICANT
	-v-
	MR TREVOR HANKS / THE MANAGING DIRECTOR CASCARL PTY LTD T/A PERTH POWERLINES
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 1 OCTOBER 2015
FILE NO/S	B 51 OF 2015
CITATION NO.	2015 WAIRC 00913

Result	Application dismissed

Order

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

WHEREAS on 4 May 2015, 28 May 2015 and 17 July 2015 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the last such conference the parties sought time to consider their positions; and

WHEREAS by email on 29 July 2015 the parties advised that they had reached an agreement in principle; and

WHEREAS on 15 September 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00940

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DOROTHY HEATHER DEIGHAN
	APPLICANT
	-v-
	ACCORDWEST INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 14 OCTOBER 2015
FILE NO/S	U 73 OF 2015
CITATION NO.	2015 WAIRC 00940

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms M Ivanovski (of counsel)

Order

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

On 12 August 2015 the Commission convened a conference for the purpose of conciliating between the parties and an agreement was reached to settle the matter.

On 22 September 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.

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

2015 WAIRC 00888

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK FERNANDES
	APPLICANT
	-v-
	DUNEA GROUP LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 22 SEPTEMBER 2015
FILE NO/S	B 91 OF 2015
CITATION NO.	2015 WAIRC 00888

Result	Order issued
Representation	
Applicant	Mr M Fernandes
Respondent	no appearance

Order

WHEREAS the Commission has before it a claim by Mr M Fernandes that he has not been allowed by his former employer Dunea Group Ltd a benefit to which he is entitled under his contract of employment;

AND WHEREAS having heard Mr M Fernandes and having reasons for decision at the conclusion of the hearing;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act, 1979*, hereby order:

1. THAT the name of the respondent be changed by deleting “Prime Food Service Equipment (Operated by", ")" and "Christopher Berliat - Managing Director".
2. THAT Dunea Group Ltd forthwith pay Mark Phillipe Fernandes the sum of $7,911.13 gross, being wages for work performed but not paid for.
3. THAT Dunea Group Ltd forthwith pay Mark Phillipe Fernandes the sum of $269.00 gross, being payment of 1 day’s wages in lieu of notice.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2015 WAIRC 00898

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00898
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	TUESDAY, 22 SEPTEMBER 2015
DELIVERED	**:**	WEDNESDAY, 23 SEPTEMBER 2015
FILE NO.	**:**	B 91 OF 2015
BETWEEN	**:**	MARK FERNANDES
		Applicant
		AND
		DUNEA GROUP LTD
		Respondent

Catchwords	:	Employment law - benefit under a contract of employment - terms of employment - reasonable notice
Result	:	*Claim granted*
Representation:		
Applicant	:	Mr M Fernandes
Respondent	:	no appearance

Reasons for Decision

Given at the conclusion of the hearing as edited by the Commission

1 Mr Fernandes has lodged a claim that he is entitled to a benefit under his contract of employment which has been denied him by his employer.

2 He has requested that the name of the respondent be amended to Dunea Group Limited and an order has issued reflecting that.

3 I am satisfied from the documents and also from Mr Fernandes' evidence that he commenced employment on 16 March 2015 and he worked the hours of work which he should have done, that is at least 40 hours per week for the six weeks that he worked. However he has not received any payment at all.

4 I have no reason not to accept his evidence and in fact he pointed out a fact that was against him. This is that his contract of employment provides for a probationary period and it was proper of him to have pointed that out, so I accept Mr Fernandes' evidence.

5 He has, I think very properly, attached to his notice of application copies of payroll advice slips he has received but I accept his evidence that even though the payslips were given to him, they do not show that he has been paid. I accept his evidence that he has not received any of the salary that is set out in the payroll advice slips. I accept too that he has been advised that the company has ceased trading.

6 In my view Mr Fernandes has established that he is entitled to an order that Dunea Group Limited forthwith pay him the sum of $7,911.13 gross. Subject to that being the accurate sum, I propose to issue an order in those terms.

7 Mr Fernandes also has claimed one week's pay in lieu of notice. His contract of employment provides for one day's notice or payment in lieu during the period of probation and that is all that can be given to him in these proceedings. Accordingly an order will issue that Dunea Group Limited forthwith pay Mr Mark Fernandes that sum. I request that Mr Fernandes calculate what one day's pay is and that sum will be inserted into the order as being payment in lieu of notice.

8 An order will issue now reflecting these reasons for decision.

2015 WAIRC 00911

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00911
CORAM	:	CHIEF COMMISSIONER A R BEECH
HEARD	:	TUESDAY, 15 SEPTEMBER 2015
DELIVERED	:	WEDNESDAY, 30 SEPTEMBER 2015
FILE NO.	:	U 60 OF 2015
BETWEEN	:	ANNETTE TRACY GARLETT
		Applicant
		AND
		WIRNDA BARNA ARTISTS INC.
		Respondent

CatchWords	:	Termination of employment - Claim of harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Conduct outside working hours - Relevant principles to be applied - Commission satisfied applying principles that discretion should not be exercised - Application dismissed
Legislation	:	Industrial Relations Act 1979 s 29(3)
Result	:	*Claim of unfair dismissal made out of time dismissed*
Representation:		
Applicant	:	Ms A T Garlett
Respondent	:	Mr B Penzer

Case(s) referred to in reasons:

Rose v Telstra Corporation Ltd Print Q9292 (4 December 1998)

Reasons for Decision – Claim of unfair dismissal lodged out of time

Correct name of the respondent

1 It became apparent from the evidence given by Mr Penzer, who has been named personally by Ms Garlett as the respondent to her claim, that Ms Garlett had been employed by the Wirnda Barna Artists Inc. Mr Penzer had been her manager and was himself an employee of that body. Mr Penzer himself was not Ms Garlett's employer even if it was he who offered her the job.

2 It is important that the respondent to Ms Garlett's claim of unfair dismissal is her former employer. For that reason, I will order that the name of the respondent be changed to correctly name her former employer by deleting 'Brendan Penzer – Wirnda Barna Art Gallery'. This will leave 'Wirnda Barna Artists Inc' as the correct respondent to her claim.

Claim out of time

The length of the delay

3 Ms Garlett referred her claim of unfair dismissal to the Commission on 15 April 2015. Her evidence is that she was dismissed on 15 December 2014 when she spoke to Mr Penzer, the manager of the Wirnda Barna Art Gallery, in Mt Magnet. If her evidence is accepted, then she took 4 months to make her claim.

4 The Industrial Relations Act requires her to make her claim within 28 days of the day her employment terminated so her claim is three months out of time.

5 Mr Penzer's evidence is that he dismissed Ms Garlett on 25 November 2014 in a phone call, and that she accepted this. If his evidence is accepted then she took 4 months and 3 weeks to make her claim.

6 In either case, the delay is 3 times longer than the time the Parliament has allowed for bringing such a claim. That is a long delay.

The reason for the delay

7 Ms Garlett says she was unaware of the time limit of 28 days to file a claim of unfair dismissal and I accept that she did not know it. She says that she was unaware of the Commission and what she would have to do to challenge her dismissal. She says that no-one that she spoke to told her about making a claim in the Commission.

8 Her evidence is that she had an arrangement with Mr Penzer to meet her at Perth airport when she returned from a workshop in Alice Springs on 28 November 2014. Mr Penzer did not meet her. When she rang him, he did not answer his phone and she was very, very stressed and a witness she will call will give evidence to this effect. It meant that now she had no-where to live in Mt Magnet. She is responsible for her 2 grandchildren and has to look after them. She stayed in Perth until 14 December 2014 and made her own way back to Mt Magnet with her grandchildren. The next day she went to the Art Gallery. She asked Mr Penzer if she still had a job and he shook his head and ushered her out of the door without an explanation. That is the first time she knew she did not have a job.

9 At that time it was approaching Christmas and she had to make arrangements for her grandchildren for Christmas. At that time too everything is closed and she was living in someone else's house. It was not until 15 January 2015 that she rang Ms Scoggins of Aboriginal Art Centre Hub WA to ask who was Mr Penzer's boss. She waited for 2 weeks for Ms Scoggins to get back to her however she did not do so. She then went to the Aboriginal Legal Service in Geraldton who referred her to the Geraldton Resource Centre for an appointment on 20 January 2015. A letter tendered by Ms Garlett shows that during February 2015 Ms Garlett contacted the Arts Law Centre of Australia seeking legal advice in relation to an unfair dismissal claim against Wirnda Barna Artists and they referred the query to the Geraldton Resource Centre.

10 On 23 February 2015 she wrote to each of the respondent's Board members describing the circumstances and saying she intended to take Mr Penzer to court over harsh and unfair dismissal. She did not receive any reply. She made contact with the Equal Opportunity Commission and the WA Law Society. Ms Garlett contacted Wageline which told her of this Commission and she contacted the Commission on 18 March 2015. However even with this information, Ms Garlett took almost another month from then to make her claim. She says she was told she needed to know whether the Art Gallery was federally funded or state funded and she waited for an answer.

11 I make the following comments. Mr Penzer's evidence is that he told Ms Garlett in a telephone call with her on 25 November 2014 that her employment had ended. There is enough other evidence to suggest, at this preliminary stage, that Mr Penzer's evidence on this point is likely to be accepted if Ms Garlett's claim is accepted out of time.

12 First, the evidence of Ms Garlett's SMS message to Mr Penzer on that day says: 'I just want to stay in Perth with my family. Thanks for everything', and Mr Penzer's reply is 'yeah thanks see ya', which is evidence to suggest that Ms Garlett realised at that time that she no longer had a job.

13 Second, Ms Garlett's answer to question 20 in her application is that on that day she had asked Mr Penny to ring Mr Penzer, he had done so and asked Mr Penzer if she still had a job and Mr Penny had said to her that Mr Penzer told him she did not have a job.

14 Third, although she returned from Alice Springs on 28 November 2014 expecting Mr Penzer to meet her at the airport, she did not return to Mt Magnet until 14 December 2014 because she knew she did not have anywhere to live in Mt Magnet. This is because Ms Garlett had been living in the manager's house in Mt Magnet. Mr Penzer was the manager and therefore she had been living with, or in the same house as, Mr Penzer. As I understand it, she had been living there at the time Mr Penzer had

offered her the job. If she knew when she returned from Alice Springs she no longer had any accommodation there then it suggests that something had happened in relation to her job.

15 Fourth, on 2 December 2014 at Mr Penzer's request she posted back to him the Art Gallery's camera which she had taken with her to Alice Springs. She had offered to bring it with her when she returned but Mr Penzer wanted it posted. This is more consistent with Ms Garlett no longer having a job when she returned from Alice Springs than it is with her not being dismissed until 15 December 2014.

16 If Ms Garlett was in fact told on 25 November 2014 that she would no longer have a job when she returned from Alice Springs then she took even longer to commence the process of finding out about a claim of unfair dismissal.

17 Even if, as she says, it was not until 15 December 2014 that she knew that she did not have a job, the first thing she did about it was make a telephone call in early January 2015. Taking into account that Christmas was not far away and Ms Garlett had to make arrangements for it and her grandchildren in difficult circumstances, and her evidence that it was a very stressful time, I do not accept that she could not have made that phone call before early January. Many workplaces do close over the Christmas period but they are open until just before 24 December and the fact that they close over Christmas is as much a reason to make the call before then as it is to do nothing and wait for everything to open afterwards.

18 It is also significant that even when Ms Garlett was informed about this Commission, there is no satisfactory explanation why she did not make her claim for another month, other than she was waiting for information regarding the source of funding. That is a long time just to wait.

19 Overall, I am not persuaded that there is an acceptable explanation for the delay of 3 months.

The merits of the claim of unfair dismissal

20 Ms Garlett commenced at the Art Gallery in September 2014 as an art worker. She had been employed for 2½ months. In her claim, she says she was 'casual'. She also stated she was casual in the tax file number declaration (exhibit A). I am not sure much turns on this description. The time sheets show a continuing pattern of employment over the weeks even if they do not show a regular daily pattern of hours. Ms Garlett worked at least between 3-5 hours per day, and some days towards the end of her employment show her working close to full time hours.

21 What is of greater significance is Mr Penzer's evidence that Ms Garlett was employed on a trial or probation period of 3 months to train her and 'see how it goes'. Ms Garlett denies this and says a trial was never mentioned. On this issue, I note that in her own evidence Ms Garlett doesn't say her job was ongoing but that it was casual and may be for 3 months or 6 months. If this went to a full hearing it is at least open to conclude that Ms Garlett was employed on a trial basis.

22 Ms Garlett says everything was going well. She went to Alice Springs in November 2014 for a week to do an art worker course. She asks why would she have been sent there if everything was not going well?

23 She says Mr Penzer was supposed to pick her up from Perth Airport on her return. He didn't and he did not answer his phone, leaving her stranded not knowing what was going on. She asked someone else to ring Mr Penzer and that person said that Mr Penzer told him she did not have a job. When she finally returned to Mt Magnet Mr Penzer gave her no explanation whatsoever.

24 I make the following comments. If an employee is dismissed in such circumstances then there is at least an argument that the dismissal is harsh. However, Mr Penzer's evidence of what he will say if there is a full hearing into the dismissal shows there is more to the situation. Mr Penzer's evidence is that he told Ms Garlett's she would have no more employment at about the end of the trial period because she did not perform certain tasks and frequently she took extended breaks. At times after a long break she would return intoxicated. She would leave work early and on only half of these occasions would she ring him beforehand about doing so; he would allow her to leave early when the request was for family reasons.

25 Mr Penzer's evidence is that in October Ms Garlett brought alcohol into work. At lunchtime she was intoxicated when she returned to the Art Gallery and found the doors had been locked. Ms Garlett then went to the manager's house where Mr Penzer was in bed sick. He did not answer the door and she smashed the front window of the door with a beer bottle. His evidence is that he was going to dismiss her but she apologised profusely and he gave her a 'last chance'.

26 His evidence is that in late October at a Regional Arts Summit in Kalgoorlie there were 2 occasions when Ms Garlett became agitated and acted in a violent manner towards him in the presence of others. One was at the conference centre and he had to revert to 'harm minimisation' and curtail conversation with colleagues so as not to have an incident in public. The other was at the evening event and he had to cancel their attendance at the event and return to the motel.

27 Towards the end of her employment, she would call and text him day after day, even 16 times in a day, and speak to him, or text him, in a violent and intimidating manner which he described as harassment and stalking. On 25 November 2014 he told Ms Garlett that her behaviour was inappropriate, violent and threatening, and that after her return from Alice Springs there would be no more work for her.

28 On the evening of 15 December 2014, the date she had gone to the Art Gallery, Ms Garlett went to the manager's house and smashed all the windows, for which she was charged with unlawful damage. Her bail conditions, which continued to 24 May 2015, included not to contact Mr Penzer. Subsequently he has obtained a Violence Restraining Order against her and there are ongoing criminal proceedings against her.

29 I note that Ms Garlett does not accept Mr Penzer's evidence. She says she did not leave work early without first ringing Mr Penzer to obtain permission. She has never brought alcohol to work and if her claim of unfair dismissal goes to a full hearing, her two grandchildren will give evidence to that effect. The broken front window was nothing to do with work, it was personal issues, and it was an accident – that was why Mr Penzer had not reported it to the police. There was only one incident in Kalgoorlie, not two, she was not violent or agitated and it was after hours at 7.00 pm and it related to a non-work issue between her and Mr Penzer.

30 Her evidence is that she did not 'stalk' Mr Penzer but kept trying to contact him only because he would not answer his phone. She admits that some of her texts were violent and intimidating but it was to do with personal issues, not their working relationship. The smashed windows in the manager's house on 15 December 2014 happened after hours, and because her grandchildren's pet dog had died when she was in Alice Springs. Mr Penzer had buried the dog in the backyard but when she brought her grandchildren around to show them to give them closure, Mr Penzer wouldn't let them in the garden and other family members got angry.

31 It is open to find that the evidence which Mr Penzer would give if her claim went to a full hearing alleges serious misconduct by Ms Garlett. He says his evidence about Ms Garlett's alleged conduct in Kalgoorlie and at work would be supported by witnesses he will call.

32 Ms Garlett says that much of what Mr Penzer refers to occurred outside working hours. However I am not sure that is so at least in relation to the allegation that frequently she took extended breaks, on one occasion returning to work intoxicated, leaving work early, and, possibly, the breaking of the front window of the manager's house, all of which seem to be within working hours.

33 But even if these things had occurred outside working hours, and even if the Kalgoorlie incident, or incidents, and her violent and intimidating texts all occurred outside working hours, that doesn't mean, as she suggests, they are not relevant to her claim she was unfairly dismissed.

34 Generally, it is only in exceptional circumstances that an employer has a right to take into account what an employee does in their private life. However there can be conduct which would cause an employer legitimate concern even though it occurred outside working hours. Some examples are:

- conduct that, viewed objectively, is likely to cause serious damage to the relationship between the employer and employee; or
- conduct which damages the employer's interests; or
- conduct which is incompatible with the employee's duty as an employee.

(*Rose v Telstra Corporation Ltd* Print Q9292, 4 December 1998)

35 While the full circumstances are not known here, breaking the front window of the employer's property, behaving badly towards her manager at a conference or evening function which she is attending as an employee, and sending violent and intimidating texts to her manager are all matters of direct concern to the employer. Viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee and is incompatible with her duty as an employee.

36 While the full circumstances of Mr Penzer's relationship with Ms Garlett is not clear from the evidence, it is clear that Mr Penzer was her manager and she was an employee under his authority. That remains the case after hours. There may have been more to their relationship than that of manager and employee, at least because Ms Garlett was living in the manager's house where Mr Penzer also lived, when Mr Penzer offered her the job. She continued to live there until she went to Alice Springs. That does not mean Ms Garlett's conduct outside working hours, if it was as Mr Penzer described, does not provide grounds to support the decision to dismiss her.

37 Further, although Ms Garlett did not recall saying in a text to Mr Penzer on 25 November 2014 that she wanted to stay in Perth, and denied thanking him for everything, the copies of the text (exhibit A) show that she did. This considerably weakens her case that she was dismissed on 15 December 2014, and even suggests that at the time she accepted the ending of her employment.

38 For all of those reasons, in my view, Ms Garlett does not have a strong case that her dismissal was harsh. Even if she was dismissed in the manner she describes, the manner of her dismissal is only one factor to be taken into account and is somewhat overshadowed by what the balance of the evidence is likely to be.

Prejudice to the respondent

39 Mr Penzer's evidence is that he is in the habit of making notes about incidents which occurred. He did so about the incidents he has stated in his evidence. It is also his habit periodically to go through them, rip them out and throw them away. This he has done with his notes about Ms Garlett's behaviour and therefore he will be at a disadvantage if her claim of unfair dismissal is accepted and he has to give evidence.

40 Ms Garlett did not challenge this evidence. She asked him to state when he says she brought alcohol into work and his reply was that he does not remember because he no longer has his notes. I have no reason not to accept Mr Penzer's evidence on this point and I do so. I find that there will be a prejudice to the employer if Ms Garlett's claim is accepted which arises directly from the delay which has occurred. It goes against accepting her claim out of time.

Action taken by Ms Garlett to contest her dismissal other than making this claim

41 Ms Garlett did write to all of the Board members on 23 February 2015 placing them on notice that she believed she had been unfairly dismissed. It can be said therefore that the employer knew from that date at least that a claim was possible even if, as Mr Penzer says, none of the Board members told him and he himself did not know until months after it was written.

42 The fact that Ms Garlett wrote to the Board members means the employer did know of her intention 7 weeks before she filed her claim, but by the time she had written, more than two months had passed after 15 December 2014. The fact that Ms Garlett wrote to the Board does not, in this case, favour the granting of an extension of time.

Conclusion

43 The Act in s 29(3) allows the Commission to accept a claim of unfair dismissal out of time if it would be unfair not to do so. The time limit of 28 days to lodge the claim should be complied with unless there is an acceptable explanation for the delay which makes it fair to accept it. The Commission must be positively satisfied that the prescribed period should be extended.

44 I am not positively satisfied that it would be unfair not to accept the claim. The delay of 3 months is a long delay. Even taking into account she is resident in a remote location, and may not have ready access to appropriate advice, Ms Garlett did not act promptly: she did not even start her investigation by making the first phone call about it until 3 weeks afterwards. Even if Ms Garlett was dismissed in the manner she describes, her claim that her dismissal was unfair is not strong and there will be a prejudice to the employer if the claim is accepted. In all of the circumstances, I will dismiss her claim of unfair dismissal.

2015 WAIRC 00912

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNETTE TRACY GARLETT
	APPLICANT
	-v-
	WIRNDA BARNA ARTISTS INC.
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 30 SEPTEMBER 2015
FILE NO/S	U 60 OF 2015
CITATION NO.	2015 WAIRC 00912

Result	Name of respondent amended; Claim of unfair dismissal made out of time dismissed
Representation	
Applicant	Ms A T Garlett
Respondent	Mr B Penzer

Order

HAVING HEARD Ms A T Garlett, on her own behalf and Mr B Penzer on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

1. THAT the name of the respondent be amended by deleting "Brendan Penzer – Wirna Barna Art Gallery".
2. THAT this claim of unfair dismissal made out of time be dismissed.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2015 WAIRC 00824

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00824
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	THURSDAY, 20 AUGUST 2015
DELIVERED	**:**	WEDNESDAY, 26 AUGUST 2015
FILE NO.	**:**	U 123 OF 2015
BETWEEN	**:**	DORA FLORES GONZALEZ
		Applicant
		AND
		MR BEN BRYANT / MR THEIRRY BERARD (NEW FOCUS COMMERCIAL CLEANING)
		Respondent

CatchWords	:	Industrial law – Termination of employment – Claim of unfair dismissal – Whether former employer correctly named – Company as trustee of a trust – Business name – Whether Commission has jurisdiction – Hearing adjourned to allow applicant to seek legal advice
Legislation	:	*Fair Work Act 2009* (Cth)
Result	:	Hearing adjourned
Representation:		
Applicant	:	Ms D Flores Gonzalez and Mr Flores Gonzalez
Respondent	:	Mr S Edwards, as agent (via telephone) and Mr B Bryant

Case(s) referred to in reasons:

Brett Jones v Paldell Pty Ltd t/a Hatt Transport (2011) 91 WAIG 948; [2011] WAIRC 00344

Reasons for Decision – Correct name of former employer - Jurisdiction

1 On 22 July 2015, Ms Flores Gonzalez referred a claim of unfair dismissal to the Commission. She cited as the respondent Mr Ben Bryant / Mr Theirry Berard (New Focus Commercial Cleaning). The Notice of Answer filed by Mr Ben Bryant and Mr Theirry Berard states that they were not the employer of Ms Flores Gonzalez. Accordingly, the Commission listed the matter in order to determine the correct identity of her former employer.

2 At the hearing, Ms Flores Gonzalez tendered to the Commission a bundle of documents consisting of an employment separation certificate, PAYG payment summaries, individual non-business and payroll advice slips, a notice and numerous emails. From these, the Commission has extracted the separation certificate, PAYG payment summaries and payroll advice slips. These are now received as Exhibit A, Bundle of Documents. Copies of these have been made by the Commission and forwarded to Mr Edwards (who appeared for the respondent) and to Ms Flores Gonzalez. The balance of the documents tendered to the Commission will be returned to Ms Flores Gonzalez.

3 The employment separation certificate identifies the 'business/trading name' the employer as 'New Focus Commercial Cleaning' and has Mr Bryant's signature. The PAYG payment summaries show the payer's name as New Focus Commercial Cleaning and the payer's ABN. The payroll advice slips are headed 'New Focus Commercial Cleaning' and contain the ABN. Ms Flores Gonzalez therefore says that she believes she has correctly identified her former employer as the respondent to the application.

4 Mr Ben Bryant gave evidence that he is the managing director of a company Spanna Nominees Pty Ltd which is trustee for the Ben Bryant Family Trust which trades as New Focus Commercial Cleaning. His evidence is that New Focus Commercial Cleaning is only a trading name.

5 Ms Flores Gonzalez was given the opportunity to cross examine Mr Bryant however did not do so. In response to a question from the Commission, she knew of no reason why I should not accept Mr Bryant's evidence regarding the business structure of New Focus Commercial Cleaning.

6 I am conscious that Ms Flores Gonzalez is unrepresented and, in my view, does not properly understand the significance of the evidence which Mr Bryant has given. Although she knows of no reason why I should not accept Mr Bryant's evidence, I suspect she is not in an informed position to know. Mr Bryant's evidence, if accepted by the Commission, will mean that her claim of unfair dismissal must be dismissed for want of jurisdiction.

7 This is because her former employer will not be Mr Ben Bryant, nor Mr Theirry Berard. Neither was it New Focus Commercial Cleaning because that is merely a business name. It is not a legal entity. The legal entity is the trustee of the Ben Bryant Family Trust which trades as New Focus Commercial Cleaning. If Mr Bryant's evidence is accepted, Ms Gozalez's former employer was Spanna Nominees Pty Ltd.

8 Ms Flores Gonzalez could apply to amend the name of the respondent to Spanna Nominees Pty Ltd and if she did so, it would likely be granted however if Ms Flores Gonzalez's former employer was Spanna Nominees Pty Ltd, a different issue arises. Spanna Nominees Pty Ltd is a company and it is almost certain that it will be a trading corporation. A trading corporation is a national system employer under the Commonwealth *Fair Work Act 2009*. Previous cases have shown that if the trustee of a trust is a trading corporation, then this Commission does not have the jurisdiction to enquire into and deal with a claim of unfair dismissal made against it (see *Brett Jones v Paldell Pty Ltd t/a Hatt Transport* (2011) 91 WAIG 948; [2011] WAIRC 00344).

9 The significance of correctly identifying the employer is not well understood by employees, and some employers. It is, in my view, natural that confusion arises, as it has in this case where the documentation supplied to Ms Flores Gonzalez by her former employer, being the PAYG payment summaries and payroll advice slips in Exhibit A, do not, with respect, correctly identify the employer even though they correctly identify the employer's business name. There can be no fault attributed to Ms Flores Gonzalez for not being able to correctly identify her employer, which in turn has led to this hearing.

10 In the circumstances of this matter, I believe it is appropriate that I record my findings in these Reasons for Decision, and provide Ms Flores Gonzalez with time to seek legal advice on those findings and the consequences for her claim in this Commission, before I reach my conclusion and issue a final order. If, after seeking legal advice, Ms Flores Gonzalez wishes to make a submission that the Commission does have the jurisdiction to enquire into and deal with her claim of unfair dismissal, then she should ask for the proceedings to be relisted. If she does not seek to do so, then the hearing will be concluded and I

shall issue my decision which, as indicated, is likely to be an order dismissing her claim of unfair dismissal for want of jurisdiction.

11 Ms Flores Gonzalez is directed to advise the Commission, with a copy to Mr Edwards, by 4.00 pm on Friday, 18 September 2015 whether or not she wishes to make a further submission. The hearing remains adjourned until that time. I do not propose to make a formal order adjourning the hearing unless it is requested.

2015 WAIRC 00903

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00903
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	16 SEPTEMBER 2015 BY WRITTEN SUBMISSION
DELIVERED	**:**	THURSDAY, 24 SEPTEMBER 2015
FILE NO.	**:**	U 123 OF 2015
BETWEEN	**:**	DORA FLORES GONZALEZ Applicant AND MR BEN BRYANT / MR THEIRRY BERARD (NEW FOCUS COMMERCIAL CLEANING) Respondent

CatchWords	**:**	Industrial law – Termination of employment – Claim of unfair dismissal – Identification of employer – Trust – Trustee a company – National system employer
Result	**:**	Application dismissed for want of jurisdiction
Representation:		
Applicant	**:**	by written submission
Respondent	**:**	no appearance necessary

Reasons for Decision

1 On 26 August 2015, the Commission issued a preliminary decision which found as follows.

2 The persons named by Ms Flores Gonzalez as respondent to her claim of unfair dismissal, namely Mr Ben Bryant / Mr Theirry Berard (New Focus Commercial Cleaning), are not her former employer.

3 Her former employer was in fact and in law Spanna Nominees Pty Ltd as trustee for the Ben Bryant Family Trust trading as New Focus Commercial Cleaning.

4 There can be no fault attributed to Ms Flores Gonzalez for not being able to correctly identify her employer.

5 Ms Flores Gonzalez could apply to amend the name of the respondent however Spanna Nominees Pty Ltd is a company and it will be a trading corporation. A trading corporation is a national system employer under the Commonwealth *Fair Work Act 2009*.

6 This means that even if the name of the respondent was changed, this Commission will not have the jurisdiction to hear her claim – only the Fair Work Commission is able to do so.

7 The Commission has given Ms Gonzelez the opportunity to seek legal advice on these findings so that if she wishes to make a submission that the Commission does have the jurisdiction to deal with her claim of unfair dismissal, then the proceedings can be relisted.

8 Ms Flores Gonzalez wrote on 16 September 2015. Much of what she wrote is not relevant to the issue of correctly identifying her former employer and is, frankly, most inappropriate. There is nothing in the letter to show that Ms Gonzalez has obtained any legal assistance. That is unfortunate - there is nothing unusual in the evidence in this case which shows that the former employer was a trust, not an actual person.

9 What is relevant in the letter is that she says she is:

> '…entirely 100 percent sure that Mr Ben Bryant director of NFCC Company is the employer, who employed me in 2008 to 2015, which is the first offender in this case. Mr Thierry Berard who is one of supervisor who appears in 2015, as an Operator Manager of NFCC Company'.

10 The evidence in this case does not show that Mr Bryant himself was the employer. He may have been the person who actually interviewed or made the decision to employ Ms Flores Gonzalez in 2008 but that does not mean he himself was her employer. The evidence is that it was not him personally who was her employer.

11 As for Mr Thierry, Ms Flores Gonzalez describes him as a supervisor. That is what the evidence says as well. He was not personally her employer either.

12 It means that the finding in the 26 August 2015 decision that Mr Ben Bryant / Mr Theirry Berard (New Focus Commercial Cleaning), are not her former employer stands. Her former employer was a national system employer. This Commission does not have the jurisdiction to hear her claim.

13 An order will issue which dismisses her claim of unfair dismissal for want of jurisdiction.

2015 WAIRC 00904

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DORA FLORES GONZALEZ
	APPLICANT
	-v-
	MR BEN BRYANT / MR THEIRRY BERARD (NEW FOCUS COMMERCIAL CLEANING)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 24 SEPTEMBER 2015
FILE NO/S	U 123 OF 2015
CITATION NO.	2015 WAIRC 00904

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	by written submission
Respondent	no appearance necessary

Order

I, the undersigned, having given reasons for decision and pursuant to the powers conferred on me under s 27(1)(a) of the *Industrial Relations Act 1979*, hereby order -

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

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2015 WAIRC 00914

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00914
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	THURSDAY, 24 SEPTEMBER 2015
DELIVERED	**:**	THURSDAY, 1 OCTOBER 2015
FILE NO.	**:**	B 117 OF 2015
BETWEEN	**:**	LISA IRISSARRI
		Applicant
		AND
		RSM HOLDINGS INT PTY LTD
		Respondent

Catchwords	**:**	Industrial Law (WA) - Contractual Benefits Claim - Claim for Unpaid Wages - Costs
Legislation	**:**	
Result	**:**	Order issued
Representation:		
Applicant	**:**	Ms L Irissarri
Respondent	**:**	No appearance

Reasons for Decision

Given at the conclusion of the hearing as edited by the Commission

Proceeding in the absence of the respondent

1 This is a claim by Ms Irissarri that she has been denied a benefit under her contract of employment which was filed on 23 July 2015. Ms Irissarri has signed a statutory declaration saying that she has served a copy of the application on the person named as her former employer, the respondent RSM Holdings INT Pty Ltd/Stephen Mupfanochiya, and that she did so on 27 July 2015.

2 The respondent was obliged to file a notice of answer but no answer had been filed by 17 August 2015. The record shows that the Commission contacted the respondent on 1 and 2 September 2015 on three occasions; the telephone calls were not answered but went through to various answering machines.

3 On 4 September 2015 the Commission sent a letter to both Ms Irissarri and the respondent setting the matter down for conference. The letter was sent by both post and email. The letter elicited no response from the respondent and no mail was returned on that occasion. I record that there was no attendance by the respondent at the conference.

4 On 14 September 2015, by the same means, a letter was sent to both parties indicating the outcome of the conference and setting the matter down for this hearing. There was no response from the respondent however mail was returned on 17 September 2015 marked "not at this address". I note however that an email read receipt from the respondent's email address was received on 14 September 2015.

5 This matter having been set down for hearing at 3:30 pm on this afternoon. Ms Irissarri has attended. There is no appearance by or on behalf of the respondent and my Associate informs me that he has called the name of the respondent in the public area of the Commission at 3:30pm and there is no person outside in the public area waiting to come in.

6 I am satisfied on the information before me that the respondent has been notified at the email address provided of these proceedings this afternoon, and indeed of the claim and the earlier conference proceedings, and on that basis I shall proceed this afternoon to deal with Ms Irissarri's claim in the absence of the respondent. In the course of Ms Irissarri giving evidence I will confirm from her evidence that the name of the respondent and the address of the respondent is indeed that which she quotes in her notice of application and therefore which we have used to contact him.

Ms Irissarri's claim

7 I accept Ms Irissarri's evidence that she was employed by the company that she has named as the respondent, that she worked her last month which ended on 17 June 2015 and that she was entitled to be paid for that month's work. This is evidenced by the pay advice and also the cheque that she received. Those two things alone show me that so far as the respondent was concerned Ms Irissarri is entitled to the money she claims.

8 I also accept Ms Irissarri's evidence that notwithstanding what the respondent has promised to her the money has not yet arrived in her account, either by the cheque which is shown to have been dishonoured or by the direct transfer that is indicated in exhibit 5.

9 I am therefore satisfied that she has made out her claim for the salary for her last month's work and I will make an order requiring RSM Holdings Int Pty Ltd to forthwith pay Ms Irissarri the sum of $4,250.70 gross.

Costs

10 Ms Irissarri has given notice that she claims costs. The Commission has the power to order costs to be paid. However, the general rule is that an order for costs will be made only in special or perhaps extreme cases.

11 I consider the facts show this case to be different from the usual case. Ms Irissarri's entitlement to her final month's salary cannot be disputed – she has her employer's dishonoured cheque for the amount she is claiming. The respondent gives all the appearance of showing no intention to actually remedy the problem caused by its cheque being dishonoured. It appears to be ignoring Ms Irissarri and her claim and also this Commission. It has been shown in my view that Ms Irissarri has been put into an embarrassing situation through no fault of her own and has been obliged to incur costs which she should not have to incur merely to obtain her entitlement. I will therefore consider her claim for costs.

12 I order that the respondent pay Ms Irissarri the cost of the $50 filing fee. I am also satisfied she has incurred a $12 bank fee for the overdue rent payment not due to any action or inaction on Ms Irissarri's part but because the automatic deduction failed to occur which would have occurred but for the respondent's failure to put the money into her account.

13 I am not as persuaded by her claim for time spent on this application. In my view it would have been of assistance if Ms Irissarri could have quoted some dates and times. The most that I can draw from her evidence is that perhaps there has been four hours on two occasions spent that would not have been spent if the respondent had paid the money that was due and I will allow $88 for that.

14 In relation to item 5 the $40 claimed for telephone calls, I appreciate there is likely to be additional costs involved in pursuing this claim, however Ms Irissarri has frankly said that it is an estimate. I do not have anything before me that shows that $40 extra was incurred by her as a result of the non-payment to her by the respondent of the money. I accept that there would have been some cost but I am just not confident that an amount of $40 can be directly related to that non-payment, and I disallow the claim for costs for telephone calls. That concludes my decision on the claim for costs.

Claim for interest

15 Ms Irissarri has also claimed interest owed and whilst I appreciate the desirability of the amount owed being subject to interest, the *Industrial Relations Act* is silent in relation to a power for the Commission to order payment of interest. I do not believe the Commission has the power to order interest.

Conclusion

16 A minute of the order to issue reflecting these reasons will now be prepared and handed to Ms Irissarri and the Commission is now adjourned for that purpose.

2015 WAIRC 00906

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LISA IRISSARRI
	APPLICANT
	-v-
	RSM HOLDINGS INT PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 24 SEPTEMBER 2015
FILE NO/S	B 117 OF 2015
CITATION NO.	2015 WAIRC 00906

Result	Order issued
Representation	
Applicant	Ms L Irissarri on her own behalf
Respondent	No appearance

Order

WHEREAS the Commission has before it a claim by Ms Lisa Irissarri that she has not been allowed by her former employer RSM Holdings INT Pty Ltd a benefit to which she is entitled under her contract of employment;

AND WHEREAS having heard Ms Lisa Irissarri and having given reasons for decision at the conclusion of the hearing;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under s 23 and s 27(1)(c) of the *Industrial Relations Act, 1979*, hereby order:

1. THAT the name of the respondent be changed by deleting "Stephen Mupfanochiya".
2. THAT RSM Holdings (INT) Pty Ltd forthwith pay Lisa Irissarri:
   (a) $4250.70 gross being wages for work performed but not paid for; and
   (b) $150.00 gross being costs incurred by Ms Irissarri in making this claim.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2015 WAIRC 00921

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00921
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 20 AUGUST 2015
DELIVERED	**:**	TUESDAY, 6 OCTOBER 2015
FILE NO.	**:**	B 34 OF 2015
BETWEEN	**:**	AARON LOGAN
		Applicant
		AND
		MR, DAVE CALDWELL PEEL TINTING- (FORMALLY KNOWN AS AAA WINDSCREENS)
		Respondent

Catchwords	:	Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment - Claim for payment of pay in lieu of notice, annual leave accrual and superannuation on notice payment - No entitlement to benefits claimed - Application dismissed
Legislation	:	*Industrial Relations Act 1979* s 7, s 26(1)(a), s 27(1) and s 29(1)(b)(ii)
Result	:	Dismissed
Representation:		
Applicant	:	In person
Respondent	:	Mr F van Wyk (of counsel)

Case(s) referred to in reasons:

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

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Belo Fisheries v Froggett (1983) 63 WAIG 2394

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

Hotcopper Australia Ltd v David Saab (2001) 81 WAIG 2704

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

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

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 On 17 February 2015 Aaron Logan (the applicant) lodged this application claiming that he is owed benefits under his contract of employment with MR, Dave Caldwell Peel Tinting- (formally known as AAA windscreens) [sic].

2 The applicant is seeking the following payments:

1. $5,384 gross being four weeks' pay in lieu of notice ($1,346 x 4 weeks). This amount was calculated on the applicant's rate of pay prior to being demoted on 13 August 2014;
2. $410.53 gross in annual leave accrual over the four week notice period (3.05 hours per week x 4 weeks = 12.2 hours x $33.65 per hour = $410.53); and
3. $498 in superannuation entitlements for the four week notice period ($124.50 x 4 weeks).

Name of the respondent

3 During the hearing it became apparent that the respondent was incorrectly named. Given the Commission's powers under s 27(1) of the Act and as it is appropriate for the respondent to be correctly named, I will issue an order that MR, Dave Caldwell Peel Tinting- (formally known as AAA windscreens) be deleted as the named respondent in this application and be substituted with AAA Sunsmart (WA) Pty Ltd trading as AAA Windscreens and Tinting Mandurah (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).

Background

4 The applicant worked for the respondent as a window tinter from November 2009 until he was summarily terminated on 20 August 2014. The applicant's weekly rate of pay at termination was $1,118 gross. As second-in-charge to the respondent's Managing Director Mr David Caldwell, the applicant was required to open the respondent's premises and allocate work to the two other employees who worked for the respondent in Mr Caldwell's absence. The applicant was demoted from this position one week prior to his termination.

5 Mr Caldwell spoke to the applicant on a number of occasions about not turning up to work on time and the applicant was given written and verbal warnings about these absences. Exhibit R1.1 contains the dates of the applicant's absences without notice and with no reason, covering ten days between 4 October 2013 and 20 August 2014. Apart from the absence of one full day the other absences related to the applicant not turning up to work at his required start time of 8.00 am. Exhibit R1.1 reads as follows:

4th Oct 2013	-	Absent for 8 hours
31st Dec 2013	-	Absent for 2.30 hrs
18th Mar 2014	-	Absent for 2 hrs
5th May 2014	-	Absent for 30 mins
20th Jun 2014	-	Absent for 30 mins

10th Jul 2014	-	Absent for 55 Mins
16th Jul 2014	-	Absent for 1.55 hrs
23rd Jul 2014	-	Absent for 1.50 hrs
28th Jul 2014	-	Absent for 1 hr
20th Aug 2014	-	Absent for 25 mins

(Exhibit R1.1)

6 The applicant received three written warnings during his employment with the respondent (exhibits R1.2, R1.3 and R1.4). The first warning given to the applicant confirms a discussion held on 7 October 2013 between the applicant and Mr Caldwell about the applicant being absent from work without notice on 4 October 2013. This letter also refers to the applicant being absent without notice on 31 December 2013. Mr Caldwell told the applicant at the time that this was his second verbal warning and first formal warning and his employment may be terminated if his conduct did not improve and if he is again absent from the workplace without notice. On 16 July 2014 the applicant was given a second warning stating that on that date he had been absent from work without notice. Previous dates that he had been absent included in the letter were 10 July 2014, 20 June 2014, 5 May 2014, 18 March 2014, 31 December 2013 and 4 October 2013. The letter stated that the applicant was being given his fourth verbal warning and his second formal warning. The applicant was told his employment would be terminated if his conduct did not improve and he was again absent without notice. On 13 August 2014 the applicant received a further warning letter. The applicant was warned about lounging on the couch at the respondent's premises for 30 minutes when Mr Caldwell was not at work. The applicant told Mr Caldwell he had no explanation for this behaviour and Mr Caldwell told the applicant that this was his first verbal warning and first warning letter for this conduct and his employment may be terminated if his conduct does not improve.

7 On 20 August 2014 the applicant was terminated with immediate effect. The letter of termination given to the applicant reads as follows:

> I regret to inform you that your employment with AAA Windscreens and Tinting Mandurah is terminated, effective immediately.
>
> Due to being absent this morning for a period of 25 minutes, and continued absences from place of employment without notice, we are unable to continue your employment. We have extended our latitude for you to help improve in this area, however this is the 9th absence without notice in 10 months, and the 4th occasion since your 2nd written warning on the 16th July 2014 which clearly stated any further absences could terminate your employment (sic).
>
> We consider that your actions constitute serious misconduct warranting instant dismissal.
>
> It is unfortunate as your work ethic can be very good. However you are letting yourself, myself and our team down with being absent.
>
> All outstanding annual leave entitlements will be paid in full on the next payment cycle. A payslip will be mailed indicating any final payments.
>
> I regret any inconvenience caused and if I can be of any assistance please contact me directly.

(Exhibit R1.5)

Evidence

Applicant

8 The applicant stated that even though he had been late to work on nine occasions over ten months in 2013 and 2014 this only occurred in his last year of employment. Prior to that he was working the times and hours required of him and he was only occasionally late for work. The applicant gave evidence that after he finished working with the respondent he was diagnosed with an illness which may have contributed to not attending work on time.

Respondent

9 Mr Caldwell spoke to the applicant about his absences without notice and reason and he gave him a number of verbal and written warnings about his conduct. He also told the applicant that his ongoing absences may result in his termination. In the week before the applicant was terminated he was demoted from being second-in-charge of the respondent's operations and Mr Caldwell stated that the applicant's absences impacted on the respondent's business. If the applicant did not attend work Mr Caldwell was unable to plan the work to be done each day and the respondent's profitability was affected because it was hard to schedule jobs if he did not know when the applicant would be attending work. Mr Caldwell said that he gave the applicant several opportunities to remedy not turning up to work on time given his length of service however the applicant continued to be late for work. Mr Caldwell said the applicant was disappointed with his conduct and he told him he would improve but he did not do so. Mr Caldwell confirmed that the applicant was a good employee up to the last year of his employment with the respondent.

Submissions

Applicant

10 The applicant claims that he should have been terminated on notice. He was absent due to stress and illness and he was not attending work late because he did not want to attend work on time.

Respondent

11 The respondent argued that it had good reason to summarily terminate the applicant. The applicant repudiated his contractual obligations to the respondent on an ongoing basis by consistently being late to work and these absences impacted on the

respondent's profitability. The applicant was a senior employee and had responsibilities which were integral to the functioning and sustainability of the respondent's business. When the applicant did not come to work on time and gave no excuse to the respondent for not attending work on time his misconduct was wilful and deliberate and the applicant ignored the numerous opportunities he was given to improve his attendance. The respondent therefore had to bring the situation to a head by terminating the applicant in a summary manner.

Consideration

Witness Credit

12 The evidence given by the applicant and Mr Caldwell with respect to the facts relevant to this case was not in contest and in my view both witnesses gave their evidence honestly and to the best of their recollection. I therefore accept their evidence.

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

13 The claims before the Commission are for an alleged denial of contractual benefits. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to industrial matters contained in s 7 of the Act and the claimant must be an employee. The claimed benefits must be contractual benefits to which there is an entitlement under the applicant's contract of service, the benefits claimed must not arise under an award or order of this Commission and the benefits must have been denied by the employer: ***Hotcopper Australia Ltd v David Saab*** (2001) 81 WAIG 2704; ***Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)*** (1999) 79 WAIG 1867. The meaning of 'benefit' has been interpreted widely in this jurisdiction: ***Balfour v Travel Strength Ltd*** (1980) 60 WAIG 1015; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307.

14 In determining whether a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claims of benefits to which he is entitled arise under his contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claims constitute benefits which have been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts***).

15 I find that at all material times the applicant was an employee of the respondent employed under a contract of service. I find that his claims for the payment of notice and associated benefits are industrial matters under s 7 of the Act as they relate to payments the applicant claims are due to him arising out of his employment with the respondent. It is also common ground that the benefits the applicant is claiming do not arise under an award or order of this Commission. The issue to be determined therefore is what were the terms of the applicant's contract of employment with the respondent and whether it was a term of the contract of employment that the applicant is entitled to the payments he is seeking.

16 The applicant was summarily terminated without notice for serious misconduct. The onus is on the applicant to demonstrate that his dismissal was unfair on the balance of probabilities, however, there is an evidential onus upon the employer to prove that summary dismissal is justified (see ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677, 679).

17 I find that even though the applicant has an entitlement under his contract of employment to be terminated on notice the respondent has demonstrated that it had good reason to summarily terminate the applicant. I find that the applicant misconducted himself by consistently refusing to meet the obligations placed on him as a senior and trusted employee to turn up to work on time and ensure that the respondent's operations remained financially viable and I find that the applicant's unexplained and ongoing conduct compromised the respondent's capacity to plan daily work commitments and operate productively. Even though the applicant was demoted in the week prior to his termination he continued to attend work late without notice or reason on one more occasion.

18 During a 10 month period in 2013 and 2014 the applicant did not attend work on time on 10 occasions without notice or explanation. In one instance the applicant did not turn up to work for the entire day (see exhibit R1.1). The applicant's absences in some instances were lengthy and they occurred at the start of the day when the applicant may have been required to open the respondent's premises and organise the respondent's daily work schedule. I find that as a senior employee of the respondent he was an integral part of the respondent's business and its operations and the applicant was employed in a position of trust as second-in-charge of the respondent's business. In this role the respondent relied on the applicant to open the respondent's premises in Mr Caldwell's absence and the applicant was expected to allocate work to the respondent's two other employees at the start of the day and this work could not proceed if he did not turn up to work on time. Additionally, the respondent's customers were inconvenienced if the respondent's premises were not opened on time.

19 I find that the applicant was provided with procedural fairness given the manner of his termination. The applicant was given several warnings throughout 2013 and 2014 both written and verbal about not arriving late to work and he was told that his conduct was unacceptable. The applicant was also told by Mr Caldwell on at least two occasions that he was on notice that unless he improved his attendance his ongoing employment with the respondent was in jeopardy.

20 When taking into account s 26(1)(a) of the Act considerations and equity, good conscience and substantial merit I find that as the respondent had good reason to summarily terminate the applicant his claims for notice, annual leave and superannuation fail. An order will issue that this application be dismissed.

2015 WAIRC 00926

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AARON LOGAN
	APPLICANT
	-v-
	AAA SUNSMART (WA) PTY LTD TRADING AS AAA WINDSCREENS AND TINTING MANDURAH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 9 OCTOBER 2015
FILE NO/S	B 34 OF 2015
CITATION NO.	2015 WAIRC 00926

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr F van Wyk (of counsel)

Order

HAVING HEARD the applicant on his own behalf and Mr F van Wyk of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

1. THAT the name of the respondent be deleted and AAA Sunsmart (WA) Pty Ltd trading as AAA Windscreens and Tinting Mandurah be substituted in lieu thereof.
2. THAT this application otherwise be and is hereby dismissed.

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

2015 WAIRC 00939

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID MOORE
	APPLICANT
	-v-
	KIRA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 14 OCTOBER 2015
FILE NO/S	U 46 OF 2015
CITATION NO.	2015 WAIRC 00939

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Ms M Ivanovski (of counsel)

Order

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

On 28 April 2015 the Commission convened a conference for the purpose of conciliating between the parties and on 3 June 2015 the Commission was advised that the parties had reached an in principle agreement to settle the matter.

On 21 September 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.

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

2015 WAIRC 00920

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TERRANCE NETTO
	APPLICANT
	-v-
	CARPETS ETC
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 6 OCTOBER 2015
FILE NO/S	B 77 OF 2015
CITATION NO.	2015 WAIRC 00920

Result	Application discontinued

Order

WHEREAS this is a claim by Mr Netto for a benefit to which he is entitled under his contract of service;

AND WHEREAS after a conference on 23 June 2015, a settlement was reached between the parties;

AND WHEREAS on 9 September 2015 it was confirmed that all terms of the settlement have been met;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order:

THAT this claim be, and is hereby discontinued.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2015 WAIRC 00886

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YOSHIYASU YONEZUKA
	APPLICANT
	-v-
	DUNEA GROUP LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 22 SEPTEMBER 2015
FILE NO/S	B 90 OF 2015
CITATION NO.	2015 WAIRC 00886

Result	Order issued
Representation	
Applicant	Mr Y Yonezuka
Respondent	no appearance

Order

WHEREAS the Commission has before it a claim by Mr Y Yonezuka that he has not been allowed by his former employer Dunea Group Ltd a benefit to which he is entitled under his contract of employment;

AND WHEREAS having heard Mr Y Yonezuka and having reasons for decision at the conclusion of the hearing;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act, 1979*, hereby order:

1. THAT the name of the respondent be changed by deleting "Prime Food Service Equipment (Operated by", ")" and "Christopher Berliat - Managing Director".
2. THAT Dunea Group Ltd forthwith pay Yoshiyasu Yonezuka the sum of $6,000.00 gross, being wages for work performed but not paid for.
3. THAT Dunea Group Ltd forthwith pay Yoshiyasu Yonezuka the sum of $1,000 gross, being payment of 1 week's wages in lieu of notice.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2015 WAIRC 00897

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00897
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	TUESDAY, 22 SEPTEMBER 2015
DELIVERED	**:**	WEDNESDAY, 23 SEPTEMBER 2015
FILE NO.	**:**	B 90 OF 2015
BETWEEN	**:**	YOSHIYASU YONEZUKA Applicant AND DUNEA GROUP LTD Respondent

Catchwords	**:**	Employment law - benefit under a contract of employment - terms of employment - reasonable notice
Legislation	**:**	
Result	**:**	*Claim granted*
Representation:		
Applicant	**:**	Mr Y Yonezuka
Respondent	**:**	No appearance

Reasons for Decision

Given at the conclusion of the hearing as edited by the Commission

1 Mr Yonezuka has made a claim that he is entitled to a benefit under his contract of employment that has been denied him by his employer. I am satisfied from his evidence that his employer was Dunea Group Ltd and an order will issue correcting the name of the respondent accordingly.

2 I am also satisfied from his evidence that his salary was $52,000 per year gross. I accept his evidence that he was paid fortnightly at that rate of salary from the time that he commenced employment on 18 September 2014 until 15 March 2015. I accept a pay slip dated 26 February 2015 which is part of the documents he has attached to the notice of application shows that he received an amount of $2,000 for the fortnight covered by that payslip.

3 Mr Yonezuka's evidence is that he continued working in the normal way from 16 March onwards until 23 April 2015 however he has not been paid for that work. I accept that evidence because of the emails that he has attached which have been referred to in the course of his evidence. The first one which he read to me from his telephone on 20 April 2015 saying that it was from his manager and that indicated that his employer had ceased trading effective from 17 April 2015; and I also accept his evidence because of the emails that he has attached which are to the same effect from either Harmony Britton or from Chris Berliat indicating that they are aware that Mr Yonezuka is owed at least the salary that he claims.

4 On that basis I think Mr Yonezuka has made out his case. I accept that he worked for the period that he claims which is a period of six weeks for which he has not been paid. I find that he is entitled to an order that Dunea Group Ltd forthwith pay Yoshiyasu Yonezuka the sum of $6,000 gross being wages earned for work performed.

5 The second part of Mr Yonezuka's claim is his claim for one week's pay in lieu of notice. The employment document attached to his notice of application says that it is an offer of employment as a design and sales coordinator, and it says the terms and

conditions are set out below. None of these terms and conditions talks about the period of notice that his employer would have to give Mr Yonezuka if it terminated his employment.

6 Mr Yonezuka's evidence is that he believes that it is an entitlement that anybody must receive to be given one week's notice. In one respect Mr Yonezuka is correct. Generally where a contract of employment is silent as to whether notice or should be given or not in order to terminate employment, a period of notice will be implied. It is a period of reasonable notice. This would not apply if Mr Yonezuka had a term of his contract of employment that specified what the termination period is, but it seems from his evidence that there was no termination of employment period discussed or contained in writing.

7 I am therefore prepared to imply that there was a term of employment that if Mr Yonezuka wished to leave his employer he would not just walk out; he would have to give a period of notice, and correspondingly the employer would have to give a period of notice if it wished to terminate Mr Yonezuka's employment. From his evidence his employment has come to an end in part because his employer ceased trading but he has not been given any kind of payment in lieu of notice.

8 Mr Yonezuka was employed for less than one year and it would seem to me reasonable that if the respondent wished to terminate Mr Yonezuka's employment it would give him one week's notice, not longer but certainly not shorter. On that basis I find that it was a term of Mr Yonezuka's contract of employment that he would be given one week's notice of termination of employment and as that has not been given that he is entitled to payment in lieu of that notice.

9 Accordingly I find that Mr Yonezuka is entitled to a further order that Dunea Group Ltd forthwith pay Mr Yonezuka the sum of $1,000 gross being payment of one week's wages in lieu of notice.

10 An order will issue now reflecting these reasons for decision.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Amy Louise Bauer	The Roman Catholic Archbishop of Perth	B 103/2015	Commissioner J L Harrison	Consent Order issued
Edna Winmar	Department of Education	U 107/2015	Chief Commissioner A R Beech	Discontinued
Humphrey Graham Dodd	The Shire of Laverton	U 97/2015	Commissioner J L Harrison	Consent order issued
Isobelle Henry	Sail Inn	U 106/2015	Commissioner J L Harrison	Discontinued
Rino Iacusso	Zahel Pty Ltd T/as Deluxe Chauffeured Cars	B 76/2015	Commissioner S J Kenner	Discontinued

CONFERENCES—Matters arising out of—

2015 WAIRC 00875

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00875
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	WEDNESDAY, 12 AUGUST 2015
DELIVERED	**:**	WEDNESDAY, 16 SEPTEMBER 2015
FILE NO.	**:**	C 9 OF 2015
BETWEEN	**:**	STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	**:**	Refusal to employ – industrial matter – notation on employment file – jurisdiction – public sector standard – whether res judicata created – whether abuse of process – whether unreasonable delay
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7, s 23(1), s 23(2a), s 27(1)(a), s 44, s 44(9) *Public Sector Management Act 1994* (WA) s 97(1)(a) *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* reg 6(1)
Result	**:**	Application dismissed for want of jurisdiction

Representation:

Counsel:		
Applicant	:	Mr D Stojanoski
Respondent	:	Mr R Bathurst
Solicitors:		
Applicant	:	Slater & Gordon Lawyers
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Buckland v Palmer [1984] 3 All ER 554

Director General Department of Justice v Civil Service Association of Western Australia Incorporated [2005] WASCA 244; (2005) 86 WAIG 231

Fitzpatrick v Baulderstone Clough Joint Venture (1999) 79 WAIG 2310

Knight v Commissioner of Police [2011] WASC 93

Paul Appleton -v- Sharyn O'Neill, Director General, Department of Education [2012] WAIRC 00381; (2012) 92 WAIG 910

Perdaman Chemicals & Fertilisers Pty Ltd v Griffin Coal Mining Company Pty Ltd [2013] WASC 245

SSTU v Director General, Department of Education [2014] WAIRC 00753; (2014) 94 WAIG 1469 (the *Munforti* case)

The Civil Service Association of Western Australia Incorporated v Director General Department of Justice [2004] WAIRC 10979; (2004) 84 WAIG 869

The Civil Service Association of Western Australia Incorporated v Director General Department of Justice [2004] WAIRC 13300; (2004) 85 WAIG 60

The Civil Service Association of Western Australia Incorporated v Perth Theatre Trust (1997) 77 WAIG 1086

Willoughby v Clayton Utz [No 2] [2009] WASCA 29; (2009) 40 WAR 98

Reasons for Decision - Jurisdiction

1 This is an application made by the State School Teachers' Union of W.A. (Incorporated) (SSTU) on 21 April 2015 pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) for a conference. The grounds for making the application set out the circumstances of Mr Appleton who is a member of the SSTU and who had been employed by the respondent as a teacher on numerous fixed term and casual contracts of employment between 1990 and 2009. His last fixed term contract of employment with the respondent ended on 18 December 2009.

2 The grounds say that on 17 August 2010 (which should be '17 February 2010'), Mr Appleton was charged by the WA Police for an alleged assault against a student and, as a result of the then pending criminal charges, the respondent placed a caveat or notation on Mr Appleton's employment file on 17 February 2010 stating that should Mr Appleton in future seek employment with the respondent, his application is to be referred to the respondent's Standards and Integrity Directorate. At or around the same time, Mr Appleton's teacher identification number with the respondent was cancelled by the respondent. On 1 November 2010 the criminal proceedings against Mr Appleton were dismissed.

3 The grounds continue that between 2011 and 2014 Mr Appleton was employed as a teacher in a number of private schools. On 4 November 2014 Mr Appleton applied for employment as a teacher with the respondent. His application was acknowledged. On 7 November 2014, Mr Appleton received via email a letter from the respondent's Schools Recruitment, Staff Recruitment and Employment Services advising that he is not eligible to be rehired by the respondent, and in order to progress his application he will need to apply in writing to have the restriction on further employment lifted. This Mr Appleton has done, however he has not received a response from the respondent.

4 The SSTU alleges in the circumstances that the respondent has refused to employ Mr Appleton and it has made this application for a conference seeking the following outcomes or orders:

> That pursuant to the Objects of the IR Act (s. 6 (af)), the applicant seeks the Commission facilitate fairness to Mr Appleton as teacher in the industry and order the respondent remove any notations/caveats from the employment file of Mr Appleton and reinstate his Teacher Identification number.

5 On 13 May 2015, the respondent filed an answering statement responding in detail to the grounds of the application. It states that the application relates to the respondent's decision not to further employ Mr Appleton and the Commission has no jurisdiction to deal with it because the issues of recruitment, selection and appointment are the subject of a Public Sector Standard.

6 It states further, or alternatively, that –

(a) the issues raised and the relief sought are the same, or substantially the same, as in application numbered C 66 of 2012 which was dismissed by the Commission on 17 November 2014 and the doctrine of res judicata prevents the applicant from bringing the application;

(b) it is an abuse of process for the SSTU to bring this application and it should be dismissed under s 27(1)(a) of the Act; and

(c) this matter relates to actions taken in February 2010 and the decision not to offer Mr Appleton further employment taken in January 2012. Given the delay in again bringing these matters before the Commission, the application should be dismissed under s 27(1)(a) of the Act.

7 The Commission listed the conference application for hearing in order to deal with these preliminary issues.

Whether the matter is the subject of a Public Sector Standard

8 Both the SSTU and the respondent agree that the matter referred to in the conference application deals with the refusal of the respondent to employ Mr Appleton and that this is an industrial matter as defined in s 7 of the Act. The challenge to jurisdiction arises because although s 23(1) of the Act provides that, subject to the Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter, s 23(2a) provides as follows:

> Notwithstanding subsections (1) and (2), the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act.

9 It is agreed that there is a procedure referred to in s 97(1)(a) of the *Public Sector Management Act 1994* (the PSM Act). Section 97(1)(a) provides that the functions of the Public Sector Commissioner include making recommendations to the Minister on the making, amendment or repeal of regulations prescribing procedures whether by way of appeal, review, conciliation, arbitration, mediation or otherwise, for employees and other persons to obtain relief in respect of the breaching of public sector standards.

10 In turn, reg 6(3)(c) of the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* relevantly provides that a person who has applied unsuccessfully to be selected to form part of an appointment pool, and claims there has been a breach of the standard in relation to the process of selection, is able to make a claim for relief to the Public Sector Commission under reg (6)(1) of those regulations.

11 The relevant Public Sector Commission Standard is the Employment Standard (Statement of Agreed Facts, Attachment 25). The Employment Standard states as follows:

> The Employment Standard applies when filling a vacancy (by way of recruitment, selection, appointment, secondment, transfer and temporary deployment (acting)) in the Western Australian Public Sector.
>
> The Employment Standard requires four principles to be complied with when filling a vacancy:
>
> **Merit Principle**
>
> The Western Australia Public Sector makes employment decisions based on merit. Merit usually involves the establishment of a competitive field.
>
> In applying the merit principle a proper assessment must take into account:
>
> - the extent to which the person has the skills, knowledge and abilities relevant to the work related requirements and outcomes sought by the public sector body; and
> - if relevant, the way in which the person carried out any previous employment or occupational duties.
>
> **Equity Principle**
>
> Employment decisions are to be impartial and free from bias, nepotism and patronage. For secondment the employee consents. For transfer employment conditions are comparable.
>
> **Interest Principle (applies to secondments, transfers and acting)**
>
> Decisions about an employee's secondment, transfer or acting take account of the employee's interests and the work related requirements of the relevant public sector body.
>
> **Transparency Principle**
>
> Decisions are to be transparent and capable of review.

The respondent's submission

12 The respondent says that there is one overarching issue in this matter: the respondent's refusal to recruit, select or appoint Mr Appleton to a fixed term vacant position at a school. The purpose of the notation on Mr Appleton's employment record in 2010 was to deal with future issues, that is, a potential refusal to employ him in the future. The reason the SSTU seeks orders that the Department reinstate Mr Appleton's identification number and remove any notation/caveat on his file is to remove an impediment to him securing further employment with the Department. Mr Appleton himself has made clear that the purpose of his request to have his casual ID reinstated and the adverse caveat removed is because they are an impediment to him securing ongoing employment as a teacher with the respondent; that is the objective to which the conference application is directed.

13 For that reason, the matter before the Commission is a matter relating to the filling of a vacancy by way of appointment. That is a matter in respect of which a procedure is prescribed under the PSM Act and therefore the Commission does not have the jurisdiction to enquire into and deal with it. The respondent says that even if the notation or caveat is removed, it will make no difference because the respondent has decided it will not offer employment to Mr Appleton in the future and the notation or caveat is merely the administrative procedure to give practical effect to that decision.

The SSTU's submission

14 The SSTU says that the claim made in the conference application is not about whether the respondent will or will not appoint Mr Appleton according to the Employment Standard. It is about whether the respondent's action in making the notation is fair

in the circumstances and whether the notation constitutes a penalty against Mr Appleton. Accordingly the claim is not one that must be dealt with in accordance with a standard such as the Employment Standard.

15 Rather, the notation is a prohibition on employment, which is a refusal to employ, and it has a disbarring effect; it prohibits re-employment and is therefore an industrial matter and the Commission has the jurisdiction to deal with the matter.

16 The SSTU also makes the point that Mr Appleton's application for employment was not considered on its merits; the notation or caveat meant that his application was not dealt with, therefore the Employment Standard has no application. The Employment Standard will apply after the notation or caveat is removed, thus allowing Mr Appleton's application to be progressed.

Consideration

17 The agreed facts show that in 2014 the respondent advertised for suitably qualified teachers to apply to be part of a fixed-term teacher appointment pool. Its purpose is to have a list of suitably qualified teachers available to fill fixed-term vacant positions at schools. Applying for the pool does not guarantee appointment (AB 63) but it is an invitation for suitably qualified teachers to apply in order that they may be employed in fixed-term positions in primary and secondary schools across the State. In my view, the respondent was in the process of 'filling a vacancy' by way of recruitment, selection or appointment.

18 Mr Appleton's 4 November 2014 application for employment, which was received and acknowledged but not progressed and which ultimately was refused, was a part of that process. The refusal to employ him arises out of the process of filling a vacancy by way of recruitment, selection or appointment. The very act of the respondent upon which the SSTU relies to give jurisdiction to the Commission, i.e. the refusal to employ Mr Appleton, arose from the respondent's process of filling a vacancy by way of recruitment, selection, appointment and his application for employment. Even if the notation, as the SSTU's submission urges, is a 'penalty' against Mr Appleton, and also has a disbarring effect on his future employment with the respondent, this conference application is made because the respondent has refused to employ him.

19 The respondent was in the process of filling a vacancy by way of recruitment, selection or appointment which is a matter covered by the Employment Standard. The refusal of the respondent to employ Mr Appleton was an outcome of that process. It is difficult to see that is not a matter covered by the Employment Standard.

20 The SSTU submits that the matter the Commission is asked to deal with in the conference application is a stage prior to the application of the Employment Standard. It is whether the respondent's action in making the notation is fair in the circumstances and whether the notation constitutes a penalty against Mr Appleton; addressing only the application for an order to remove the notation and to reinstate Mr Appleton's teacher identification number is not part of the Employment Standard. However, the submission faces a number of difficulties.

21 First, the evidence shows that the notation on Mr Appleton's file has one purpose: it is to give effect in the future to the respondent's decision not to offer him further employment. The evidence is that the respondent found in May 2010 that he had acted in a manner which affects his suitability for future employment with the respondent (ex R1 att CW5). It made the decision after considering not only that he had been charged by the WA Police for an alleged assault against a student but also other circumstances over the course of his past employment with the respondent. The notation is an administrative part of the respondent's process for employing teachers. It is the means to an end because it ensures that Mr Appleton is not offered further employment in the respondent's schools unless his application is first approved by the Director, Standards and Integrity (ex R1 at 13).

22 If the notation is able to be separated from the employment process then a finding is more likely that it is not a matter relating to the Employment Standard. That was the case in *SSTU v Director General, Department of Education* [2014] WAIRC 00753; (2014) 94 WAIG 1469 (the *Munforti* case) where there was no evidence that Mr Munforti had applied for and been refused employment with the respondent or that he has any intention of applying in the future. In that matter, Scott ASC observed at 25:

> The issue before the Commission is not about whether the respondent will or will not appoint Mr Munforti according to the requirements of the Employment Standard. It is about whether the respondent's action in making the notation is fair in the circumstances and whether the notation constitutes a penalty against Mr Munforti. In those circumstances, it is not a matter to which s 23(2a) applies because it is not a matter, at this stage of the process, relating to the Employment Standard. Were Mr Munforti to apply for employment and the respondent rely upon the notation in a way which was not in accordance with the principles of merit, equity and transparency in particular, then that may be a matter which is beyond the jurisdiction of the Commission.

23 However the circumstances in this conference application are different from *Munforti* because Mr Appleton has applied for employment and the respondent, relying upon the notation, has refused to offer him employment. Paragraph 18 of the conference application says that the matter being brought to the Commission:

> Goes to the prospect of re-establishing the employment relationship, the essence of Mr Appleton's industrial matter.

24 For that reason, the *Munforti* case is distinguishable from this matter and is not of assistance to the SSTU's submission here.

25 Secondly, I turn to the SSTU's submission that Mr Appleton's application for employment was not considered on its merits because of the notation therefore the Employment Standard has no application. The SSTU in this matter does not allege that the respondent did so in a way which was not in accordance with the principles of merit, equity and transparency.

26 The scope of the Employment Standard was considered by the Industrial Appeal Court (IAC) in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244; (2005) 86 WAIG 231. In that case, a Mr Jones had been interviewed by a selection panel and considered to be the best candidate. A recommendation for his employment was sent to the appellant. Mr Jones was advised that he had been recommended for the position but was

subsequently told the position would not be filled and that the appellant felt that he was unable to meet the requirements of the vital aspects of the selection criteria.

27 A conference application had been made to the Public Service Arbitrator for an interim order that the respondent in that matter (who is the appellant before the IAC) not abolish the position, not appoint another person to it, and maintain adequate money in its budget to fund it. The conference application also sought orders that the actions of the respondent in that matter relating to the construction and forwarding of a memorandum be declared void; that any actions taken by persons in response to it be declared void; that the respondent complete the implementation of Mr Jones to the position; and that the respondent in that matter send a copy of the Commission's orders by email to all staff.

28 The respondent in that matter challenged the jurisdiction of the Arbitrator to deal with the matter on the basis of the Employment Standard. The Arbitrator held that she had jurisdiction in the matter 'as long as the matter the subject matter of the application does not fall within the ambit of the relevant public sector standard' and found in that case it did not do so:

> In my view this is an issue which does not relate to a breach of the Recruitment, Selection and Appointment Standard as it is a dispute about the lawfulness of the Director General's actions in intervening in the selection process relating to the Level 7 position after Mr Jones had been advised by the respondent that he had been recommended for appointment to this position (*Civil Service Association of Western Australia Incorporated v Director General Department of Justice* [2004] WAIRC 10979; (2004) 84 WAIG 869 at 24).

29 The Arbitrator then proceeded to deal with the matters and ordered that Mr Jones be appointed ([2004] WAIRC 13300; (2004) 85 WAIG 60 at 4). An appeal to the Full Bench against the Arbitrator's final decision was dismissed ([2005] WAIRC 01813; (2005) 85 WAIG 1907).

30 However, the Industrial Appeal Court found that the Employment Standard prevented the Arbitrator from dealing with the matter. It was held by Wheeler and Le Miere JJ at 54 that it was an error to hold that the jurisdiction of the Commission is excluded only where a breach of the public sector standard is alleged. Their Honours noted that the standard is not framed so narrowly:

> 54 As we understand it, the Full Bench considered that there were two reasons why s 80E(7) did not operate to exclude the jurisdiction of the Arbitrator in the present case. The first is to be found in [77] of the reasons of the President, with whom Senior Commissioner Gregor agreed. That was that the present case was not a matter "which related in any way to any Public Sector Standards, at least in the manner and in the way in which it came before and was required to be considered by the Arbitrator". That approach reads s 80E(7) as excluding the jurisdiction of the Arbitrator only where a breach of a public sector standard is the allegation made to the Arbitrator. However, the subsection is not framed so narrowly. Rather, it excludes jurisdiction in relation to any "matter" in respect of which a procedure is prescribed. That is, it excludes jurisdiction in relation to the "matter", not in relation to particular allegations. The matter in this case is the breach of a very broad standard relating to the appointment of employees.
>
> 55 If the Full Bench's reasoning were correct on this point, s 80E(7) on one view would never have any work to do, since the "matter" before the Arbitrator will always be an "industrial matter" as defined by the Act, being, in effect, a matter affecting or pertaining to the work of employees, rather than a matter relating directly to breach of a public sector standard. Since ss 7 - 9 of the PSM Act are so broad in their scope, it would invariably be possible to frame a claim so as to allege breach of those principles, rather than to rely directly on breach of a public sector standard.
>
> 56 While s 80E(7) is in some respects not happily phrased, and while we acknowledge that as a matter of legal principle, it is undesirable to construe too broadly provisions which limit the right of persons to approach courts and tribunals, it seems to us that, having regard to the statutory context, s 80E(7) must be read as excluding jurisdiction in respect of a matter, wherever there is a matter in respect of which a relevant standard has been prescribed and in respect of which procedures of the type described in s 97(1)(a) have been prescribed. In this case, as we have noted, a standard has been prescribed in relation to selection and appointment, and the result of the prescription of procedures pursuant to s 97 of that standard is that the jurisdiction of the Arbitrator is excluded in relation to the whole of that "matter", regardless of the precise allegations of misconduct or unfair conduct which may be made in respect of it.

31 It will be seen that the conference application made to the Public Service Arbitrator included matters to do with the conduct of that respondent in the construction and forwarding of a memorandum, and actions taken by persons in response to it which, seemingly, would not be matters covered by the Employment Standard. However, the jurisdiction of the Arbitrator is excluded in relation to the whole of the matter of selection and appointment, regardless of the precise allegations of misconduct or unfair conduct which were made in respect of it.

32 In this case, the SSTU does not allege that there has been a breach of the Employment Standard. Nevertheless, a standard has been prescribed in relation to selection and appointment, and the result of the prescription of procedures pursuant to s 97(1)(a) of the PSM Act for that Employment Standard is that the jurisdiction of the Commission is excluded in relation to the whole of the matter of selection and appointment, regardless of the precise allegations of unfairness to Mr Appleton, or the imposition of a penalty, which is made in respect of it. Even though Mr Appleton's application for employment in November 2014 was not considered on its merits because of the notation, he applied for employment and the respondent refused his application. It is a 'matter' in respect of which a procedure has been prescribed. The notation on his employment file, and the removal of Mr Appleton's teacher identification number, on the evidence in this case, do not have a purpose separate from the respondent's employment process.

33 Nor do they have a purpose separate from the respondent's decision not to further employ him. Addressing them separately as the SSTU urges here would not result in Mr Appleton being considered for future employment: on the evidence of

Ms Westland at [31], removal of the notation would merely mean that it would be more difficult to ensure that the respondent's decision not to further employ Mr Appleton is carried into effect.

34 For those reasons I uphold the respondent's submission and find on the facts of this case that the Commission does not have the jurisdiction to enquire into and deal with the subject matter of the conference because it is about a matter in respect of which a procedure referred to in s 97(1)(a) of the PSM *Act* is prescribed under that Act and as a result s 23(2a) of the Act applies. An order will issue dismissing this application for want of jurisdiction.

35 In the event that I am wrong in this conclusion, I now consider the other matters upon which submissions were made.

Res judicata

The respondent's submission

36 The respondent submits that the SSTU is prevented by the doctrine of res judicata from bringing this application insofar as it relates to the decision to put an annotation on Mr Appleton's employment record and to 'terminate' his casual identification number. The respondent refers to application C 66 of 2012 which was an application brought by the SSTU.

37 C 66 of 2012 was a conference application concerning Mr Appleton. It set out to the date of that application, being November 2012, the same background about Mr Appleton as is set out in this conference application. The outcomes sought in that conference application were that the respondent reinstate Mr Appleton's identification number, that the respondent remove any note/caveat on his personal employment file, that the respondent withdraw the order that Mr Appleton has committed misconduct and/or a breach of discipline, that the respondent acknowledge that the criminal proceedings referred to were discontinued by Police, and that no investigation will be required to be commenced by the respondent in respect of the incident.

38 As a matter of record, no agreement was reached at the conference in C 66 of 2012 and on 17 April 2013, a memorandum of matters referred for hearing and determination under s 44(9) of the Act was made showing that the SSTU sought the following orders:

(a) That the Department reinstate Mr Appleton's identification number.

(b) That the Department remove any note/caveat on the personal employment file of Mr Appleton.

(c) Further in the alternative, that the matters now be referred to the Professional Standards and Integrity of the Department of Education for investigation in accordance with the provisions of the PSM Act.

39 The matters referred for hearing and determination on 17 April 2013 became CR 66 of 2012.

40 On 30 October 2014, the respondent applied to have CR 66 of 2012 dismissed for want of prosecution. On 31 October 2014, the SSTU filed a Notice of withdrawal or discontinuance. The respondent did not consent to the applicant withdrawing or discontinuing and by order dated 17 November 2014, the Commission ordered that application CR 66 of 2012 be dismissed.

41 The respondent states that the fact that the application was dismissed, and not discontinued, is crucial because the effect of a final judgment dismissing, rather than discontinuing, is to create a res judicata ('a thing decided') which is a bar to further proceedings. In the submission of the respondent, the order of the Commission dated 17 November 2014 was a final judgment, there is an identity of parties as between the parties to that final order and the parties to this matter, and there is an identity of subject matter or 'cause of action'.

The SSTU's submission

42 In reply, the SSTU submits that res judicata arises only from a final order on the merits of a matter and that this has not occurred in this case. It says that application CR 66 of 2012 visited past disciplinary matters and sought orders from the Commission that the Commission revoke disciplinary action imposed by the respondent in respect of those past disciplinary matters. In contrast, the current application regards the notation acting as a penalty and a prohibition on employment constituting a refusal to employ and that the notation has a disbarring effect. This application is not an attempt to re-litigate a dispute already determined by the Commission.

Consideration

43 Whether the doctrine of res judicata applies in this case turns principally on the issue whether it is necessary for there to have been a prior decision on the merits of the matter. The respondent submits that it is not necessary, referring to *Perdaman Chemicals & Fertilisers Pty Ltd v Griffin Coal Mining Company Pty Ltd* [2013] WASC 245 at [8], a decision of Edelman J in Chambers.

44 In that matter, Edelman J was deciding whether the appropriate order to finalise the matter before him was an order that the action should be discontinued or an order of dismissal. The circumstances were that the dispute between those parties was compromised by an agreement reached between them. The only issue remaining between the parties was the manner in which the litigation should be terminated by the court. Edelman J noted that the defendant's promise was to compromise the whole of the claim brought by the plaintiff and that the terms of the compromise mean that if the plaintiff were to bring fresh litigation which sought to re-agitate any part of its claim, then it would be in breach of the compromise agreement. In that context, his Honour noted that discontinuance by itself does not prevent the plaintiff from re-litigating the issues in the proceedings, whereas dismissal creates res judicata which is a bar to further proceedings.

45 It is apparent from a reading of his Honour's decision that the issue which arises in this matter, that is whether an order of dismissal needs to have been made after a consideration of the merits to create res judicata, was not an issue in the proceedings before his Honour. I therefore do not regard his decision as bearing upon that issue.

46 In my view, the decided authorities, on balance, show that res judicata is created by a decision on the merits pronounced by a tribunal which is judicial in the relevant sense (*Knight v Commissioner of Police* [2011] WASC 93 per EM Heenan J at [48]).

In *Willoughby v Clayton Utz [No 2]* [2009] WASCA 29; (2009) 40 WAR 98, Pullin JA, with whom Wheeler JA and Miller JA agreed, examined the issue of res judicata. At [14], his Honour refers to Spencer Bower, Turner & Handley, *Res Judicata* (3rd ed, 1996) [19] stating that a party setting up res judicata as a bar to an opponent's claim must establish the following constituent elements, namely:

(a) the decision was judicial in the relevant sense;

(b) it was in fact pronounced;

(c) the tribunal or court had jurisdiction over the parties and the subject matter;

(d) the decision was:

(i) final, and

(ii) on the merits;

(e) it determined the same question as that raised in the later litigation; and

(f) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem.

47 In my view, in order to establish res judicata in this case, there will need to have been a decision on the merits.

48 However, the order in CR 66 of 2012 (Statement of Agreed Facts att 21) shows no consideration of the merits. The reasons for Scott ASC's decision are found in the preamble, or recitals, to the order. Although the respondent submits that the Commission cannot 'go behind' the order which issued, in my view it is not necessary to do so. It is consistent with the practice in this Commission for the preamble, or recitals, of the order to constitute the reasons for decision which s 35(1) of the Act obliges the Commission to hand down with the order (see *Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Director General, Department of Education and Training* [2010] WAIRC 00849; (2010) 90 WAIG 1517 at [58]).

49 The recitals to the order in CR 66 of 2012 show that –

(a) the SSTU, which was the applicant in CR 66 of 2012, had not attended to a number of matters the subject of directions which had issued and nothing further had been heard from the SSTU;

(b) the Commission had listed the matter for mention, however the SSTU did not even appear at that hearing;

(c) at a later, resumed hearing, the respondent had sought that CR 66 of 2012 be dismissed for want of prosecution; and

(d) the SSTU subsequently had filed a Notice of withdrawal or discontinuance in respect of the whole claim.

50 The operative part of the order is that the matter 'be, and is hereby dismissed'. There is some substance in the submission of the respondent that the recitals set out the chronology of what occurred, but do not give Scott ASC's reasons why the order which she issued was an order dismissing the matter, rather than an order that the matter be discontinued. However, in my view, nothing turns on that for the purposes of this matter. The significance of the recitals is that they show that there had been no consideration of the merit of the matters in CR 66 of 2012. Whilst the order which issued was, in its terms, a final order, it issued in circumstances where the SSTU had failed to attend to a number of matters the subject of directions and had failed to attend a hearing when the matter was listed for mention and where eventually it had filed a Notice of withdrawal or discontinuance.

51 In these circumstances, the respondent has failed to make out that the doctrine of res judicata applies in this case.

Abuse of process

The respondent's submission

52 The respondent submits that irrespective of the existence of res judicata, or another form of estoppel, an attempt to re-litigate a dispute which has been dealt with in earlier litigation is an abuse of process. As the present proceedings raise the same issue regarding the decision to put a notation on Mr Appleton's employment record and to 'terminate' his casual identification number that were dealt with in C 66 of 2012, it would be manifestly unfair and an abuse of process for this application to be allowed to proceed. The only new 'matter' is that, despite being notified by the Department on 3 February 2012 that it would not employ him again, on 4 November 2014 (four days after the SSTU had indicated to the Commission it did not wish to proceed with CR 66 of 2012) Mr Appleton created a further 'paper' dispute by applying for appointment as a fixed term teacher.

53 The respondent says the powers given to the Commission in s 27(1)(a) of the Act are wide and indicative of the special nature of the Commission's jurisdiction as a specialist tribunal whose primary task is to settle and prevent industrial disputes. That power can be exercised if further proceedings are not necessary or desirable in the public interest or that for any other reason the matter should be dismissed or the hearing thereof discontinued as the case may be.

54 The SSTU submits for the same reason that there is no res judicata that this conference application is not an attempt to re-litigate a dispute and there can therefore be no abuse of process.

Consideration

55 It is correct that the Commission has powers under s 27(1)(a) of the Act which permit it to discontinue a matter that is not in the public interest. It is also correct that it may be an abuse of process to bring two actions in respect of the same cause of action (*Buckland v Palmer* [1984] 3 All ER 554; *The Civil Service Association of Western Australia Incorporated v Perth Theatre Trust* (1997) 77 WAIG 1086 at 1090; *Fitzpatrick v Baulderstone Clough Joint Venture* (1999) 79 WAIG 2310).

56 However, the Commission should be slow to exercise this power where there has not yet been a hearing of the merits of the matter. Mr Appleton sought to argue the merits himself in a claim of unfair dismissal in 2012, however the Commission held that it was without jurisdiction to enquire into and deal with his claim because he had not been dismissed (*Paul Appleton -v- Sharyn O'Neill, Director General, Department of Education* [2012] WAIRC 00381; (2012) 92 WAIG 910) so the 'merits' of his claim were not considered. It is already established that the application brought by the SSTU in CR 66 of 2012 was not on that occasion considered on its merits. In the absence of any prior action in which the merits of the matter have been dealt with, it is difficult to find the abuse of process necessary for the Commission to use its powers in s 27(1)(a) of the Act.

Unreasonable delay

The respondent's submission

57 The respondent's final submission is that the Commission should dismiss the matter on the basis that the present proceedings substantially relate to the decision in February 2010 to put an annotation on Mr Appleton's employment record and to 'terminate' his casual identification number. Even though Mr Appleton applied for appointment as a fixed term teacher on 4 November 2014, an application the respondent states Mr Appleton must have known would be unsuccessful, the SSTU delayed five and a half months before filing the present application.

58 The respondent states that while s 44 of the Act does not place a time limit within which a dispute must be referred to the Commission, principles of industrial harmony and reasonableness suggest that disputes should be referred expeditiously. Given that the matter truly in question occurred in February 2010, and given that even if the notation was removed, the respondent would still not voluntarily employ Mr Appleton, the Commission should dismiss the matter.

The SSTU's submission

59 The SSTU states that there has not been an unreasonable delay in this matter. It submits that the respondent advised Mr Appleton on 7 November 2014 that he was not eligible to be rehired and on 10 November 2014, Mr Appleton wrote to the Director Staffing within the respondent requesting the removal of the restriction on his file that prevented re-employment. The SSTU submits that it is not unreasonable for there to have been time taken for Mr Appleton, and the SSTU, to seek the appropriate legal advice to bring this application.

Consideration

60 I accept the respondent's submission that the present proceedings substantially relate to the respondent's decision in February 2010. The orders sought demonstrate this. Mr Appleton has known since May 2010 that he was considered by the respondent not to be eligible to be rehired and it is now over five years since that time.

61 Mr Appleton has shown since 2012 that he either contests the decision or would like it to be reviewed. He applied for employment in November 2011 and correspondence to him in February 2012 and March 2012 (Statement of Agreed Facts, att 11 and 12) show that this was refused and he sought to contest this in his claim of unfair dismissal in 2012. The respondent has known since that time that Mr Appleton seeks to challenge or review the respondent's decision.

62 With his application dismissed, the SSTU on his behalf took up the issue in November 2012 with C66 of 2012. It was actively pursued by the SSTU at least until the issue of the Directions in July 2013, after which the SSTU's failure to observe them was followed by it filing a notice of withdrawal in November 2014, some 15 months later. It is open to conclude, and I do, that the respondent's decision of February 2012 was not actively pursued by the SSTU for perhaps 15 months. Without more, I would hold for that reason that the issue of the respondent's decision is stale and that the respondent's submission has merit.

63 There is more: on 7 November 2014 the respondent again refused to employ Mr Appleton. That has led to this present conference application. The respondent's submission describes Mr Appleton's application for employment as a 'paper dispute' made to allow this conference application. That may be so, but it does not alter the fact that there was a refusal to employ in 7 November 2014.

64 Further, and significantly, the respondent's email of 7 November 2014 did not just inform him that he was not eligible to be re-hired, which might have been expected given the respondent's 2010 decision; it went further. It informed him that in order to progress his current application he will need to apply in writing to have the restriction on his employment lifted. It suggests to me, at least initially, that from the respondent's viewpoint, and notwithstanding the submission that the respondent is not going to employ Mr Appleton again (ts 29), in November 2014 there was a process for him to have the respondent's 2010 decision revisited. Mr Appleton sought to commence that process.

65 The orders sought in the conference application are directed to that end. I am therefore not persuaded that the fact that the present proceedings substantially relate to the respondent's decision in February 2010 is itself a proper basis to now dismiss it.

66 Given that the SSTU had already been aware of Mr Appleton's circumstances since it had made the claim in C 66 of 2012, a delay of over five months before it filed the current application is a long time however that does not provide a proper basis to now dismiss the application. I note in *Munforti* that a period of at least two years between the respondent's decision in his case and the proceedings commencing in the Commission was not seen as a bar to the decision being dealt with by the Commission.

Conclusion

67 For the reasons given above, an order will now issue dismissing this application for want of jurisdiction.

2015 WAIRC 00876

DISPUTE RE PROCEDURAL FAIRNESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 16 SEPTEMBER 2015
FILE NO/S	C 9 OF 2015
CITATION NO.	2015 WAIRC 00876

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr D Stojanoski, of counsel
Respondent	Mr R Bathurst, of counsel

Order

I, the undersigned, having given reasons for decision and pursuant to the powers conferred on me under s 27(1)(a) of the *Industrial Relations Act 1979*, hereby order -

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

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	Minister for Health is incorporated as the board of the Metropolitan Health Services at PathWest Laboratory Medicine WA under s7 of the Hospitals and Health Services Act 1927 (WA) and has delegated all the powers and duties as such to the Director General of Health	Harrison C	PSAC 30/2012	26/11/2012	Dispute re alleged misconduct	Concluded
Independent Education Union of Western Australia, Union of Employees	Dr T McDonald Director Catholic Education Office, The Most Reverend Timothy Costelloe, Roman Catholic Archbishop of Perth, Acting Principal Ann Chew Chisholm Catholic College	Kenner C	C 20/2015	4/08/2015 21/08/2015	Dispute re appraisal process	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Department of Transport	Scott A/SC	PSAC 3/2015	27/01/2015 29/01/2015 6/02/2015	Dispute re fixed term contracts	Discontinued
The WA Country Health Service	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Harrison C	C 29/2009	9/09/2009 24/09/2009 21/11/2011 15/12/2011 10/08/2012 6/09/2012 6/11/2012	Dispute re duties required of PSA/Orderlies at Geraldton Hospital	Concluded
United Voice WA	The Minister for Health in his incorporated capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the WA Country Health Service	Harrison C	C 3/2015	11/02/2015	Dispute re ongoing use of casual employment	Concluded
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	Harrison C	C 215/2013	15/08/2013 19/11/2013 31/01/2014	Dispute re public holiday payment	Consent
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	Harrison C	C 210/2013	2/07/2013 8/07/2013	Dispute re movement of staff member to other position	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2015 WAIRC 00877

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00877
CORAM : CHIEF COMMISSIONER A R BEECH
HEARD : THURSDAY, 3 SEPTEMBER 2015
DELIVERED : THURSDAY, 17 SEPTEMBER 2015
FILE NO. : B 29 OF 2015
BETWEEN : DR MARK GRANITTO

Applicant

AND

RSC DENTAL PTY LTD T/AS KEYS DENTAL CENTRE

Respondent

Catchwords	:	Practice and procedure – Discovery, inspection and production of documents – Relevant principles – Orders made
Legislation	:	*Industrial Relations Act 1979* (WA) s 27(1)(o)
Result	:	Application for production of documents granted in part
Representation:		
Counsel:		
Applicant	:	Mr S Millman and Mr D Stojanoski
Respondent	:	Mr B Jackson
Solicitors:		
Applicant	:	Slater and Gordon Lawyers
Respondent	:	DLA Piper

Case(s) referred to in reasons:

ALHMWU v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Reasons for Decision – Production of Documents

1 This claim for compensation by way of damages for non-payment of a benefit to which the applicant says he is entitled under his contract of employment is opposed in its entirety on a number of bases. It is listed for hearing before Scott ASC commencing on 23 November 2015.

2 The applicant seeks an order for the production of certain documents set out in numbered paragraphs in a letter dated 15 July 2015 from the applicant's solicitors to the respondent's solicitors. The reply from the respondent's solicitors of 5 August 2015 is such that the documents in paragraphs 7, 8 and 9 are not in dispute. There remains disagreement regarding the remaining documents sought. The parties' submissions refer to their letters. The letters were not formally tendered, but handed to the Commission for ease of reference. It is convenient to refer to the letter from the applicant's solicitors as A1, and that from the respondent's solicitors as R1.

Applicable Principles

3 The discovery, production and inspection of documents is not available as of right. The Commission has the power under s 27(1)(o) of the *Industrial Relations Act 1979* (the Act) to make such orders as may be just regarding the discovery, inspection or production of documents. Discovery is limited to those documents that relate to what is issue in the proceedings, which is defined by the notice of application and the notice of answer filed in the matter (*ALHMWU v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801 at 1805).

4 In general terms, the applicant contends that the documents sought arise from matters put into contest by the respondent in its notice of answer. In turn, the respondent says that the reasons why it dismissed the applicant, and the issues it relies on, are quite narrow and the requests for documents are broader than are necessary. With that general background I turn to consider the documents sought. It is convenient to refer to the paragraph numbers used in the letters.

Paragraph 3

5 The first part seeks the names of 'the dentists and all other staff that were employed/contracted and subsequently left the respondent or its related entity between 1 January 2010 to the present.' This is not a request for a document and for that reason I do not propose to consider it further.

6 It also requests under "a" the 'termination or resignation letters in relation to these former employees'. The applicant refers to paragraph 29a of the notice of answer which states that "during the employment the applicant engaged in the following conduct" and there then follow under the heading of "dealings with staff" a list of incidents numbered i to ix. The concluding sentence of vii says: "In addition this conduct caused existing staff to leave the practice". The applicant submits that if this is correct then it will be reflected in their letters of termination or resignation.

7 The respondent emphasises that the applicant commenced employment on 16 December 2013 and was dismissed from his employment on 13 January 2015 after little more than one year's service. The reasons for his termination are quite narrow yet documents are sought as far back as 1 January 2010; this is an example of fishing. The concluding sentence of paragraph 29a vii refers to allegations involving specific people who are named, and resignation letters have no relevance to this. The resignations could only relate to the persons named.

8 I find from paragraph 29a vii that the respondent intends to show that the applicant's conduct caused existing staff to leave the practice. This will be a matter of evidence but the point is that it is to be an issue in the proceedings. Whether or not a letter of resignation from one or more of those members of staff gives the applicant's conduct as a reason for the resignation may bear upon the weight of any evidence. I order that the respondent produce for inspection any letter of resignation received by it during the applicant's employment from the persons it mentions in paragraph 29a. I will allow a liberty to the respondent to apply to vary the order and this will enable the respondent to apply to vary the order in the event that a letter to be produced contains information personal to the person resigning which, for reasons of the privacy of that person, ought to be obscured.

9 Although the claim is also for letters of termination, which I take to be from the respondent to an employee terminating their employment, I am not persuaded that a letter of termination has the same relevance to the issue and decline to order their production.

Paragraphs 1, 2, 4, 5 and 6

10 The applicant states that paragraphs 1, 2, 4 and 5 relate to the respondent's financial performance. Paragraphs 4, 5 and 6 relate to paragraph 29e of the notice of answer. The applicant states that it ought be expected that if the respondent makes the assertions that it does against the applicant, the respondent provide the relevant documents upon which those assertions are founded. The way 29e is pleaded means that the applicant needs to request the documents in the manner which he has.

11 The respondent is critical of the way paragraph 1 is worded, pointing to the date range between 1 January 2012 to "the current day" as being so broad as to be almost incomprehensible. The respondent also does not know what "the working account" refers to, or why it is relevant. The only matter put in issue by the respondent is to do with the sale of the business, not the respondent's financial performance.

12 In relation to paragraph 2, the respondent does not refer to 'creditors' or the 'creditors' listings' as an issue, and the request is for a period before the applicant was employed. In relation to paragraph 4, the respondent submits that it does not even know what documents are referred to or whether any are within its possession, custody or power. As to paragraph 5 the respondent sees this as a broad brush request for financial documents and paragraphs 4, 5 and 6 should not be upheld.

13 I find as follows. Paragraph 29e puts in issue whether the applicant, without notifying anyone, took steps to adjust an annual amount drawn by Scott and Corina Dorey. This does not put in issue the 'respondent's financial performance' as the applicant submits. I cannot see that 'statements of the working account of the respondent' relate to paragraph 29e. Paragraph 1 is refused.

14 I find similarly in relation paragraphs 2, 4, 5 and 6. In relation to paragraph 4, I add that any withdrawals which may have been made by Scott and Corina Dorey are not placed in issue by 29e. What is placed in issue is what steps the applicant may have taken, and whether he did so without notifying anyone, not what Scott and Corina Dorey may have done by way of withdrawals or, in the case of paragraph 6, Ms Dorey by way of her credit card. Paragraphs 2, 4, 5 and 6 are refused.

Paragraphs 10, 11 and 12

15 The applicant asks for paragraphs 10, 11 and 12 to be dealt with together and he relies on paragraphs 29f, g and h to support the request in these paragraphs. The applicant states that 29f, g and h accuse him of acting in a way that jeopardised the sale of the business. He submits that these documents will assist him to answer the accusation. The applicant also says that the respondent states that the applicant interfered in the financial performance of the business; paragraph 10 relates to the financial performance of the respondent.

16 The respondent states that the extent of paragraph 29f is that during the negotiations for the possible sale of the business the applicant made statements to the potential buyer without authorisation. That is the extent of the notice of answer. The respondent has accordingly agreed with paragraph 9 but the balance sought the applicant is irrelevant and embarrassing. The person mentioned in paragraph 10 is not mentioned in the notice of answer; neither is the sum of money mentioned.

17 In relation to paragraph 12, the respondent accepts that any communications between the applicant and Dr Khoury and Shaun Preston are relevant; it regards the general category of documents sought as irrelevant.

18 I find as follows. Paragraph 29f puts in issue whether the applicant, without authorisation, made statements to the potential buyer of the business. Paragraph 29g states this led to a situation where the potential sale was put into jeopardy. Paragraph 29h states this conduct has been destructive of the working relationship between the applicant and the respondent.

19 There is nothing in those paragraphs which places in issue the whether the sum of money mentioned paragraph 10 was returned to the person mentioned. The significance of whether it was returned is said to go to the financial performance of the business, however I am far from convinced that paragraphs 29f, g or h put into issue the respondent's financial performance. Paragraph 10 is refused.

20 Paragraph 11 seeks merely names and not a document and is for that reason refused.

21 In relation to paragraph 12, it seeks any documents including notes and correspondence relating to the negotiations of the sale of the respondent to Dental Corporation Pty Ltd or to Mr Trinder and/or Mrs Trinder and/or any other entity. I accept the respondent's submission that this seeks a broad category of documents.

22 What the respondent places in issue is not the sale of the business as such but only whether the applicant's alleged conduct led to a situation where the potential sale was put into jeopardy. That will be a matter of evidence. The weight of such evidence may be tested by whether there is correspondence showing whether a potential sale was, or was not, in jeopardy and if it was, whether the applicant's conduct was responsible for that position.

23 However, I am not persuaded on the submissions made that the Commission should order the production to the applicant of all correspondence 'relating to the negotiations of the sale of the respondent to Dental Corporation Pty Ltd or to Mr Trinder and/or Mrs Trinder and/or any other entity' just because there may be such correspondence within it. Its breadth compared with the narrow basis of the respondent's paragraphs 29g means that I am not persuaded it is necessary for fairly disposing of the case. Paragraph 12 is refused.

24 This does not relieve the respondent in my view from the general obligation on a party to provide discovery of any document in its possession, custody or power that relates to a matter in issue, in this case any document showing that statements made by the applicant to the potential buyer of the business led to a situation where the potential sale was put into jeopardy, however, neither party has requested an order for general discovery and I take the matter no further here. In this context, I note the respondent's concession in R1 in relation to paragraph 12. In my view, the concession means that it is not necessary for it to

be included in the order to issue, however the submissions are not, to my recollection, clear upon this point. It may be revisited at a speaking to the minutes.

Paragraph 13

25 The applicant submits that paragraph 13 relates to 29e – h or 29j in the notice of answer. He states that the correspondence sought goes to reasons why the respondent's business was performing poorly that cannot be laid at the door of the applicant. In particular, it seeks the letter of termination of the named ex-employee because of his belief that it will contain information saying that the actions of that person have left the respondent in a difficult financial state.

26 The respondent's submission is that the person mentioned in 13 is not mentioned in the response and it relates to matters arising prior to the applicant being employed. It is merely fishing.

27 I find as follows. The reason put forward by the applicant, namely, that the respondent's business was performing poorly for reasons which cannot be laid at his door, is not put in issue by the notice of answer. The respondent does not say in paragraphs 29e – h or 29j, or elsewhere, that the respondent's business was performing poorly for reasons which can be laid at the applicant's door. Paragraph 13 is refused.

28 A minute of proposed order issues reflecting the decisions in this matter.

2015 WAIRC 00881

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DR MARK GRANITTO
	APPLICANT
	-v-
	RSC DENTAL PTY LTD T/AS KEYS DENTAL CENTRE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 21 SEPTEMBER 2015
FILE NO/S	B 29 OF 2015
CITATION NO.	2015 WAIRC 00881

Result	Application for production of documents granted in part
Representation	
Applicant	Mr S Millman, of counsel and Mr D Stojanoski, of counsel
Respondent	Mr B Jackson, of counsel

Order

HAVING HEARD Mr S Millman, of counsel and Mr D Stojanoski, of counsel for the applicant, and Mr B Jackson, of counsel for the respondent I, the undersigned, pursuant to s 27(1)(o) of the Industrial Relations Act, 1979 hereby order –

1. THAT the respondent produce for inspection by the applicant any letter of resignation received by it during the applicant's employment from the persons it mentions in paragraph 29a of the notice of answer filed 9 March 2015 excluding any part showing personal details or financial matters relating to the person.
2. THAT liberty is reserved to the respondent to apply to vary order 1.
3. THAT the applicant's request for an order for the production of documents is otherwise dismissed.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Carey Baptist College (Enterprise Bargaining) Agreement 2014 AG 17/2015	18/09/2015	The Independent Education Union of Western Australia, Union of Employees and Carey Baptist College Inc.	(Not applicable)	Chief Commissioner A R Beech	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Murray (Administration Staff) Enterprise Bargaining Agreement 2015 AG 10/2015	25/09/2015	Western Australian Municipal Administrative, Clerical and Services Union of Employees	Shire of Murray	Chief Commissioner A R Beech	Agreement registered
W A Health - United Voice - Hospital Support Workers Industrial Agreement 2015 AG 18/2015	2/10/2015	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel	United Voice WA	Chief Commissioner A R Beech	Agreement registered

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
Ron and Julie Burnett t/as Ron Burnett Cartage	Kings Transport (WA) Pty Ltd	Kenner C	RFT 10/2015	4/08/2015	Dispute re alleged termination of contract	Discontinued