



# Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 8

WEDNESDAY 25 NOVEMBER, 2015

Vol. 95—Part 2

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

95 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

## FULL BENCH—Procedural Directions and Orders—

2015 WAIRC 00970

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES	<b>APPELLANT</b>
	<b>-and-</b>	
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA	<b>RESPONDENT</b>
<b>CORAM</b>	FULL BENCH	
	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
	CHIEF COMMISSIONER A R BEECH	
	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	WEDNESDAY, 28 OCTOBER 2015	
<b>FILE NO.</b>	FBA 4 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 00970	
<b>Result</b>	Order made to substitute the name of the appellant	
<b>Appearances</b>		
<b>Appellant</b>	Mr M T Ritter SC (of counsel)	
<b>Respondent</b>	Mr D J Matthews (of counsel)	

### *Order*

This appeal having come on for hearing before the Full Bench on 28 October 2015, and having heard Mr M T Ritter SC (of counsel) on behalf of the appellant and Mr D J Matthews (of counsel) 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 name of the appellant be deleted and that be substituted therefor the name, The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.

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

[L.S.]

2015 WAIRC 00971

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
 THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES  
**APPELLANT**

**-and-**  
 PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA  
**RESPONDENT**

**CORAM** FULL BENCH  
 THE HONOURABLE J H SMITH, ACTING PRESIDENT  
 CHIEF COMMISSIONER A R BEECH  
 ACTING SENIOR COMMISSIONER P E SCOTT

**DATE** WEDNESDAY, 28 OCTOBER 2015

**FILE NO.** FBA 5 OF 2015

**CITATION NO.** 2015 WAIRC 00971

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**Result** Order made to substitute the name of the appellant

**Appearances****Appellant** Mr M T Ritter SC (of counsel)**Respondent** Mr D J Matthews (of counsel)*Order*

This appeal having come on for hearing before the Full Bench on 28 October 2015, and having heard Mr M T Ritter SC (of counsel) on behalf of the appellant and Mr D J Matthews (of counsel) 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 name of the appellant be deleted and that be substituted therefor the name, The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch.

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

[L.S.]

2015 WAIRC 00999

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

**-and-**  
 THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION  
**RESPONDENT**

**CORAM** FULL BENCH  
 THE HONOURABLE J H SMITH, ACTING PRESIDENT  
 CHIEF COMMISSIONER A R BEECH  
 ACTING SENIOR COMMISSIONER P E SCOTT

**DATE** WEDNESDAY, 11 NOVEMBER 2015

**FILE NO.** FBA 12 OF 2015

**CITATION NO.** 2015 WAIRC 00999

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**Result** Order made

**Appearances****Appellant** Mr M Amati**Respondent** Mr D J Matthews (of counsel)

*Order*

This appeal having come on for hearing before the Full Bench on Wednesday, 11 November 2015, and having heard Mr M Amati on behalf of the appellant and Mr D J Matthews (of counsel) on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

This appeal be adjourned sine die.

[L.S.]

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

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**PRESIDENT—Unions—Matters dealt with under Section 66—**

2015 WAIRC 00957

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	GEORGE TILBURY	<b>APPLICANT</b>
	<b>-and-</b>	
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS	<b>RESPONDENT</b>
<b>CORAM</b>	THE HONOURABLE J H SMITH, ACTING PRESIDENT	
<b>DATE</b>	FRIDAY, 23 OCTOBER 2015	
<b>FILE NO.</b>	PRES 1 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 00957	
<b>Result</b>	Order made	
<b>Appearances</b>		
<b>Applicant</b>	Mr P Hunt, as agent	
<b>Respondent</b>	Mr P Hunt	

*Order*

WHEREAS an order was made on 19 May 2015, wherein order 1 of the order established an Interim Board of Directors: [2015] WAIRC 00390; (2015) 95 WAIG 708 (the order);

AND WHEREAS on 11 June 2015, order 1 of the order made on 19 May 2015 was amended to add two additional Directors to the Interim Board of Directors: [2015] WAIRC 00436; (2015) 95 WAIG 710;

AND WHEREAS on 16 October 2015, the Commission received an application on behalf of the applicant to further amend order 1 of the order on grounds that an election to fill Executive, Office Bearer and Federal Council Delegate positions of the counterpart Federal body of the respondent, the Police Federation of Australia – Western Australia Police Branch (PFA Branch) had been conducted by the Australian Electoral Commission (AEC) on 7 October 2015 and 16 October 2015;

AND WHEREAS the applicant seeks that order 1 of the order be amended by deleting the list of Directors and substituting the following with effect from 24 November 2015 which is the date the current officers of the Executive of the PFA Branch cease to hold office:

1. President  
Mr George TILBURY
2. Senior Vice President  
Mr Brandon SHORTLAND
3. Vice President  
Mr Harry ARNOTT
4. Treasurer  
Mr Michael KELLY
5. Metropolitan Region Director  
Mr Ward ADAMSON

6. Metropolitan Region Director  
Mr Lindsay GARRATT
7. Metropolitan Region Director  
Mr Mark JOHNSON
8. Metropolitan Region Director  
Mr Michael PATERSON
9. Metropolitan Region Director  
Mr Kevin McDONALD
10. Metropolitan Region Director  
Mr Peter McGEE
11. Metropolitan Region Director  
Mr Peter POTTHOFF
12. Metropolitan Region Director  
Mr Harry RUSSELL
13. Central (Midwest/Gascoyne) Region Director  
Mr Michael GILL
14. East (Goldfields/Esperance) Region Director  
Mr David CURTIS
15. North (Kimberley/Pilbara) Region Director  
Mr Michael HENDERSON

AND WHEREAS I have reviewed copies of the Declarations of Results for Contested and Uncontested Offices for offices of the PFA Branch declared by the Returning Officer of the AEC on 7 October 2015 and 16 October 2015;

AND WHEREAS I am satisfied that order 1 of the order should be amended for the reasons set out in reasons for decision given on 21 May 2015; [2015] WAIRC 00392; (2015) 95 WAIG 705;

NOW THEREFORE as Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, by consent, I hereby order that:

- (1) order 1 of the order be varied by deleting paragraphs 1. to 15. of order 1 and substitute the following:

1. President  
George Bradley Tilbury
2. Senior Vice President  
Brandon Chad Shortland
3. Vice President  
Harry Sean Arnott
4. Treasurer  
Michael Craig Kelly
5. Metropolitan Region Director  
Ward Adamson
6. Metropolitan Region Director  
Lindsay Bryan Garratt
7. Metropolitan Region Director  
Mark Wayne Johnson
8. Metropolitan Region Director  
Michael James Paterson
9. Metropolitan Region Director  
Kevin McDonald
10. Metropolitan Region Director  
Peter McGee
11. Metropolitan Region Director  
Peter John Potthoff
12. Metropolitan Region Director  
Harry Anthony Russell
13. Central (Midwest/Gascoyne) Region Director  
Michael Robert Gill
14. East (Goldfields/Esperance) Region Director

- David Harold Wright Curtis  
 15. North (Kimberley/Pilbara) Region Director  
 Michael Joseph Henderson  
 (2) order (1) of this order is to take effect on and from 24 November 2015.

[L.S.]

(Sgd.) J H SMITH,  
Acting President.

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## INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00990

### WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2015 WAIRC 00990  
**CORAM** : INDUSTRIAL MAGISTRATE G. CICCHINI  
**HEARD** : WEDNESDAY, 14 OCTOBER 2015, THURSDAY, 15 OCTOBER 2015  
**DELIVERED** : THURSDAY, 5 NOVEMBER 2015  
**FILE NO.** : M 123 OF 2014  
**BETWEEN** : MAURICE CZARNIAK

CLAIMANT

AND

STOCKBRIDGE (WA) PTY LTD

RESPONDENT

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**Catchwords** : Alleged breach of the Community Pharmacy Award 1998 and the Pharmacy Industry Award 2010 [MA000012] by failing to pay the correct hourly rate, overtime, meal break allowance, holiday pay and public holiday pay; Alternate claim alleging breaches of the Community Pharmacy Multiple Business Agreement (Western Australia) constituted by the same alleged failures; Claim for pro-rata long service leave pursuant to the *Long Service Leave Act 1958*

**Legislation** : *Workplace Relations Act 1996*  
*Fair Work Act 2009*  
*Long Service Leave Act 1958*  
*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

**Instruments** : Community Pharmacy Award 1998  
 Pharmacy Industry Award 2010 [MA000012]  
 Community Pharmacy Multiple Business Agreement (Western Australia)

**Result** : Preliminary issues determined

**Case(s) referred to in Reasons** : *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union*  
 [2013] FWCFB 2434  
*Williams v MacMahon Mining Services Pty Ltd*  
 [2010] FCA 1321  
*Melrose Farm Pty Ltd t/as Milesaway Tours v Milward*  
 [2008] WASCA 175  
*Fair Work Ombudsman v Devine Marine Group Pty Ltd & Others*  
 [2014] FCA 1365  
*Il Migliore Pty Ltd T/A Il Migliore v McDonald*  
 [2013] FWCFB 5759  
*Hamzy v Tricon International Restaurants trading as KFC*  
 [2001] FCA 1589

**Representation:**

Claimant : Mr B W Duckham (counsel) of B W Duckham & Co.  
 Respondent : Ms N Young (counsel) of HHG Legal Group

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## REASONS FOR DECISION

### Introduction

- 1 Mr Maurice Czarniak (the claimant) is and was at all material times a qualified pharmacist. Between 31 January 2007 and on or about 7 January 2014, he worked for Stockbridge (WA) Pty Ltd (the respondent) at its Friendlies Pharmacy in Oxford Street in Leederville (the pharmacy).
- 2 The claimant's employment ended when he resigned from his employment. His resignation was a condition of the settlement of his worker's compensation claim against the respondent which was with respect to the post-traumatic stress disorder he developed following a number of armed hold-ups at the pharmacy.
- 3 Subsequent to the settlement of his worker's compensation claim, the claimant, then unrepresented, instituted this claim to recover money allegedly owed to him by reason of the respondent's failure to pay him his correct entitlements under the Community Pharmacy Award 1998 (CP Award) and the Pharmacy Industry Award 2010 [MA000012] (PI Award). He also sought the payment of long service leave entitlements which he says is payable to him pursuant to s 8(3) of the *Long Service Leave Act 1958*.
- 4 He initially claimed \$39,565.28, but later increased his claim to \$126,048.55. Subsequently he 'modified' his claim and now seeks payment of either \$193,254.70 or \$201,575.40, dependent upon which industrial instrument covered his employment.
- 5 The claimant contends that during the entire period that the respondent employed him, he worked on a part-time basis rather than as a casual and was therefore entitled to the benefits payable to a part-time employee.
- 6 The respondent says that the claimant was engaged and paid as a casual employee, and therefore was not entitled to the various benefits payable to a part-time employee. It denies breaching the applicable award and/or agreement.

### Preliminary Issues

- 7 After the claim had been listed for trial the claimant made an application seeking that the following preliminary issues be determined:
  - a. whether the PI Award covered the claimant's employment as from 1 January 2010; and
  - b. whether his employment with the respondent was part-time or casual.
- 8 The respondent did not oppose the claimant's application but given the lateness of the application it was not possible to hear and determine the preliminary issues prior to the listed trial date. Consequently, on 1 October 2015, I made an order that the trial dates of 14 and 15 October 2015 not be vacated but rather be utilised to hear and determine the preliminary issues. I further ordered that all other matters in issue were, if required, to be addressed and determined following the decision on the preliminary issues.
- 9 On the 14 and 15 October 2015 I heard evidence and received submissions on the preliminary issues. These reasons are with respect to those preliminary issues.

### Facts

- 10 I find the following facts established.
- 11 In about the year 2000, the claimant sold his pharmacy. Thereafter, he worked as a pharmacist at various pharmacies, sometimes on a permanent part-time basis and sometimes on a full-time basis, but more commonly as a locum on a casual basis. By early 2007, the claimant was unhappy with the irregular nature of his employment and was looking to obtain more regular employment.
- 12 In early 2007, Mr Don Phillips, the locum officer at Sigma Pty Ltd, informed the claimant that Mr Craig Wedd (Mr Wedd), who was unknown to the claimant, was looking for a pharmacist to work at his pharmacy for three days per week on an ongoing basis. Mr Wedd was looking for a pharmacist to work from 2.30 pm to 8.30 pm on Tuesdays, from 8.30 am to 8.30 pm on Wednesdays and from 8.30 am to 8.30 pm on Sundays.
- 13 Consequently, the claimant contacted Mr Wedd and arranged to meet him.
- 14 The claimant and Mr Wedd discussed the position over coffee at Giardini's coffee shop near the pharmacy. During their meeting, Mr Wedd told the claimant that he particularly wanted someone to work every Sunday. The claimant told Mr Wedd that he was unprepared to work every Sunday, but would be available to work every second Sunday. In addition he was prepared to work Saturdays. Mr Wedd accepted that and offered the claimant employment in accordance with the terms of a written contract of employment which was to be supplied to him.
- 15 When the contract was eventually produced, the claimant noted that his employment was to be with Mr Wedd's company, Stockbridge (WA) Pty Ltd. The claimant signed the contract on 29 January 2007 being the first day of his employment notwithstanding that the contract indicated that his employment was to commence on 31 January 2007.
- 16 The claimant was engaged to work every Tuesday from 2.30 pm to 8.30 pm, every Wednesday from 8.30 am to 8.30 pm, every Saturday from 8.30 am to 8.30 pm, and alternate Sundays from 8.30 am to 8.30 pm. In the end result, the claimant agreed to work 42 hours one week and 30 hours the following week, which averaged 36 hours per week on a fortnightly basis. As it turned out, those hours varied from time to time although any variance was the exception rather than the rule. The claimant's hours were reasonably regular and consistent.
- 17 The contract of employment provided that the claimant was to be paid a flat rate of \$35 per hour as a casual employee in accordance with the CP Award, and that on Sundays and public holidays, the claimant would be paid a casual flat rate of \$45 per hour.
- 18 The contract of employment also provided, on the first page:

*\*Casual employment is by the hour and there is no sick leave, holiday pay or personal leave etc. To allow for this, casual rates have a 20% loading.*

- 19 The written contract of employment contained various other conditions, including a requirement for both parties to give notice of termination or resignation, in accordance with the scale set out on page 3 at [7]. The conditions relating to leave entitlements were expressly declared not to be applicable to casuals.
- 20 At the commencement of his employment, the claimant was given the keys to the pharmacy which he, with the consent and knowledge of the respondent, kept throughout his employment. His duties included locking up the pharmacy at closing and setting the alarm. Invariably when the claimant worked at the pharmacy he was the only pharmacist on duty and was legally responsible for the dispensary. Over and above that it was the claimant's responsibility also to ensure that whilst he was in attendance the pharmacy operated in an orderly fashion.
- 21 The claimant worked continuous hours without breaks. He was never given a break to eat his lunch and usually ate his lunch 'on the run'.
- 22 In about mid-2008, Mr Wedd offered to increase the claimant's Sunday pay rate to \$50 per hour and offered him an incentive payment being a percentage of the profits in the event that the Sunday turnover exceeded \$3,000. Despite achieving that target he never received the incentive payment.
- 23 Although unhappy about his pay rate, the claimant, for various reasons, found it difficult to approach Mr Wedd about it and consequently did not do so. He feared that any such approach might lead to his employment being terminated or that it might detrimentally affect Mr Wedd's already fragile psychological state.
- 24 During the period of Mr Wedd's psychological infirmity, Mr Wedd's wife contacted the claimant and asked him whether he could work for the respondent every day but he declined to do so. Consequently another pharmacist was employed to cover Mr Wedd's absence.
- 25 From time to time the claimant took time off working for the respondent. In about 2008 he went on a touring holiday with his wife. He made all the necessary arrangements and then told Mr Wedd that he would be taking time off for that purpose. He did not request leave as such. He simply informed Mr Wedd that he would be taking such leave at a time that suited him. Mr Wedd did not take issue with that, and the time the claimant took off was without pay.
- 26 During the course of his employment with the respondent, the claimant was able to work, and did work, for other pharmacies. He was not exclusively committed to the respondent. Indeed Ms Brennan, the pharmacy manager, who from 2009 was responsible for staffing arrangements, would often remind the claimant that he was employed as a casual.
- 27 Sometime after 2010 the claimant told Mr Wedd that as he had been on the same wage for four or five years, an adjustment to his pay rate was necessary. Mr Wedd declined to increase his pay rate and told the claimant that he was being paid the correct amount under the award.
- 28 Following the relocation of the pharmacy from the east side to the west side of Oxford Street in Leederville, criminal behaviour within the store became prevalent. Shoplifting became a significant issue and Mr Wedd brought pressure to bear upon the claimant to stop or reduce the incidents of shoplifting.
- 29 Further, between June 2010 and March 2013, the pharmacy was the subject of three armed robberies. On each occasion, the claimant was alone in the pharmacy and was traumatised by his assailants. Despite complaining about what he felt was a lack of security at the premises, the respondent did nothing about it. The Claimant, in part, attributes the continued incidents of offending to that lack of security.
- 30 In the end, the cumulative affect of the armed robberies caused him to be unfit for work. He was absent from work following the armed robbery on 31 March 2013, and was unable to return to work at any time leading up to his resignation.

### **Determination**

#### **Applicable Award/Agreement**

- 31 It will be necessary in due course to consider the meaning of 'casual employee' but before doing so, it is important to determine the awards and/or agreements that covered the parties during their employment relationship.
- 32 When the parties entered into the written contract of employment, it was an express term thereof that the CP Award governed their employment relationship. That term will be of no effect if their actual position at law was different, however, that was not the case in this instance.
- 33 The CP Award was an award that had force pursuant to the operation of Part 10 of the *Workplace Relations Act 1996* (WR Act). The coverage provisions in cl 2.1 of the CP Award clearly included the claimant and respondent and therefore governed the employment relationship. It follows that the express term of the contract of employment was an accurate statement of the parties' legal position at that time and neither party has sought to argue otherwise.
- 34 In about March 2009, the Pharmacy Guild of Australia, Western Australian Branch (the Guild) invited employees of its members in Western Australia, including those of the respondent, to enter into an employee collective agreement (as defined by s 327 of the WR Act). The employee collective agreement was to be known as the Community Pharmacy Multiple Business Agreement (Western Australia) (the CPMB Agreement).
- 35 As part of the process for registration of the proposed CPMB Agreement pursuant to the WR Act, the affected employees were given the opportunity to take part in a ballot to indicate their acceptance or otherwise of that agreement. Mr Anthony McAnuff, the Executive Manager of the Western Australian Branch of the Guild, testified that the majority of affected employees voted in favour of CPMB Agreement. Consequently the agreement was lodged for registration. The CPMB Agreement became operative on 1 September 2009 after the Workplace Authority had given notice pursuant to s 346M of the WR Act, that the CPMB Agreement had passed the 'no disadvantage test' (see Division 5A of Part 8 of the WR Act).

- 36 Schedule A of the CPMB Agreement provides a list of employers covered by the agreement. The respondent is included in that list. In accordance with cl 3 of the CPMB Agreement, both the claimant and the respondent were bound by the agreement.
- 37 When the WR Act was repealed, the CPMB Agreement became a 'collective agreement-based transitional instrument', in accordance with s 5(c)(i) of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Clause 4.3 of the CPMB Agreement states:
- Subject to law this agreement operates to the exclusion of any industrial agreement or award that may otherwise apply.*
- 38 In accordance with cl 4.3 of the CPMB Agreement, it operated to the exclusion of any other industrial agreement or award that may otherwise apply.
- 39 On 1 January 2010, the PI Award, being a modern award which was made under the Fair Work Act 2009 (the FW Act), commenced. However, it did not apply to the claimant and the respondent because cl 4.3 of the CPMB Agreement operated to exclude it.
- 40 It follows that the claimant's employment was initially governed by the CP Award, and that from on or about 1 September 2009 until the claimant resigned, his employment was governed by the CPMB Agreement.

### **Validity of the CPMB Agreement**

#### **Voting Irregularity**

- 41 The claimant said that he was never made aware of the proposed CPMB Agreement and that he never participated in the requisite ballot because he did not receive ballot papers. He seemingly infers that the agreement is somehow vitiated by that. However there is nothing of which I am aware, nor has anything been brought to my attention which would tend to indicate that CPMB Agreement is rendered invalid because the claimant's inability to participate in the ballot.

#### **Failure to Post CPMB Agreement at the Pharmacy**

- 42 Clause 5.1 of the CPMB Agreement requires that the agreement be posted in a convenient location at the employer's premises for easy access by an employee who wishes to access it. The claimant alleges that by reason of the respondent's failure to comply with that requirement he never became aware of its existence.
- 43 It is unclear as to why this issue has been raised in the context of the determination of these preliminary issues. I observe that even if such a failure were to be established, it cannot have any bearing on my decision on the preliminary issues. It would not invalidate the CPMB Agreement. At best the alleged failure may give rise to a separate claim with respect to a breach of the agreement.

#### **Compliance with s 871(2) WR Act**

- 44 The claimant submits that if his status as a casual employee emanates from the CPMB Agreement, then the same is undermined by the fact that the agreement is void under s 871(3) of the WR Act because it fails to comply with the requirements of s 871(2) of the WR Act. Section 871(2) provides that the CPMB Agreement is required to contain an express term to the effect that, 'for so long as the casual employee is subject to the agreement, the casual loading that is payable to the employee must not be less than the default casual loading percentage (within the meaning of Division 2 of Part 7)'.
- 45 The default casual loading percentage is found in s 186 of the WR Act, which provides that the casual loading is 20%, subject to the power of the Australian Fair Pay Commission to adjust the percentage.
- 46 If the claimant's submission in that regard is correct, then the claimant's status would emanate from the PI Award because that is the modern award which replaced the CP Award. If the PI Award covered the claimant and the respondent, then the claimant would fall outside the meaning of a casual employee and arguably, fall within the meaning of a part-time employee.
- 47 Clearly, whether or not the CPMB Agreement is void is critical to the outcome in this matter.
- 48 Clause 8.1 of the CPMB Agreement provides that a casual employee who is a pharmacist is to be paid at the appropriate rate of pay prescribed in cl 13.1, plus an additional loading of 20%. That provision is an express term which indicates that an employee, who is subject to the CPMB Agreement, during the term of the agreement, will not be paid less than the default casual loading percentage. Clause 8.1 of the CPMB Agreement complied with the requirements of s 871(2) of the WR Act when the agreement came into force because it expressly provided that the casual loading payable was not less than the default casual loading percentage of 20%. It follows that s 871(3) of the WR Act does not operate. The CPMB Agreement is not void.
- 49 Consequently the claimant's status as a casual employee must be determined from the meaning given to that term by the CPMB Agreement.

### **Validity of the Contract of Employment**

- 50 As I understood his submissions it was suggested in closing by counsel for the claimant that the individual contract of employment between the claimant and the respondent dated 29 January 2007 is also void. With respect, I did not understand his submission in that regard and am unaware of any reason as to why contract of employment is either void or voidable.

### **Was the Claimant a Casual Employee?**

- 51 The FW Act is silent on the meaning of a casual employee however cl 13.1 of the PI Award defines the term as follows:
- A casual employee is an employee engaged as such and who does not have an expectation or entitlement to reasonably predictable hours of work.*
- 52 Clause 12.1 of the PI Award defines part-time employee. It states:

**12.1** A part-time employee is an employee who:

- (a) works less than 38 hours per week; and
- (b) has reasonably predictable hours of work.

53 It is clear therefore that if the PI Award applied to the claimant's employment he would have been a part-time employee within the meaning given to that term by cl 12.1 of the PI Award. However as indicated earlier, cl 4.3 of the CPMB Agreement operates to exclude the operation of the PI Award and accordingly whether the claimant was a casual or part-time employee is to be discerned from the meaning given to those terms by the CPMB Agreement.

54 Clause 6.6 of the CPMB Agreement provides:

**6.6** *Casual employee means an employee who is engaged and paid as such but does not include employees within the definition of part time employee as defined in this clause, but may include an employee who is employed to replace the proprietor or other permanent employee for a fixed period of employment.*

55 Relevantly, part-time employee is defined in cl 6.5 of the CPMB Agreement as follows:

**6.5** *Part-time employee means a permanent employee who is engaged by an employer on a regular and systematic basis for a sequence of periods of employment and who is engaged to work an average of less than 38 hours per week and receives entitlements pro-rata.*

56 The CP Award defined a casual employee in cl 6.5 thereof, in identical terms to cl 6.6 of the CPMB Agreement. The definition of part-time employee in cl 6.5 of the CPMB Agreement is almost identical to the meaning given to that term in cl 6.4 of the CP Award.

57 The claimant says that the meaning attributed to a casual employee by the CP Award and the CPMB Agreement is not helpful. He suggests that the court must resort to the relevant common law principles to properly determine whether he was a casual employee.

58 In *Telum Civil (Old) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434 the Full Bench of the Fair Work Commission (FWC) was asked to consider the meaning of a 'casual employee' within the NES with respect to s 123(1)(c) of the FW Act, which provides that notice of termination and redundancy do not apply to a casual employee.

59 The Full Bench in *Telum* said that the Commissioner at first instance fell into error by not addressing the proper construction of s 123(1)(c) of the FW Act, because the Commissioner proceeded on the basis that the expression 'casual employee' in s 123(1)(c) referred to casual employment as defined by the common law.

60 The Full Bench said, at [58] and [59]:

[58] *In summary, the FW Act provides for the regulation of terms and conditions of employment of national system employees through an interrelated system of the National Employment Standards, modern awards, enterprise agreements (and, in some cases, workplace determinations or minimum wage orders). Having regard to the objects and purpose of the legislation, it is obvious that the legislature intended that those components should interact consistently and harmoniously. We conclude that on the proper construction of the FW Act the reference to "casual employee" in s.123(3)(c) and the rest of the NES - and, indeed, elsewhere in the FW Act - is a reference to an employee who is a casual employee for the purposes of the Federal industrial instrument that applies to the employee, according to the hierarchy laid down in the FW Act (and, if applicable, the Transitional Act). That is, the legislature intended that a "casual employee" for the purposes of the NES would be consistent with the categorisation of an employee as a "casual employee" under an enterprise agreement made under Part 2-4 of the FW Act (or under an "agreement based transitional instrument" such as a workplace agreement or certified agreement made under the WR Act) that applies to the employee or, if no such agreement applies, then consistent with the categorisation of an employee as a "casual employee" within the modern award that applies to the employee. Subject to any terms to the contrary, a reference to a "casual employee" in an enterprise agreement (or agreement based transitional instrument) will have a meaning consistent with the meaning in the underpinning modern award (or pre-reform award/NAPSA).*

[59] *The CFMEU placed particular reliance on the decision of Barker J in Williams v MacMahon Mining Services Pty Ltd (2010) 201 IR 123. That case was relevantly concerned with the meaning of "casual employee" in s.227 of the Workplace Relations Act 1996. Barker J noted (at [31]) that "[t]he parties accept that the WR Act does not define the expression "casual employee" and so the expression should be given its ordinary common law meaning." This case is concerned with a different statutory context and Barker J's decision does not assist in the proper construction of the expression "casual employee" in s.123(1)(c) of the FW Act.*

61 Paragraph 58 of *Telum* instructs that where there is an enterprise agreement, that agreement applies in defining what a casual employee is. Where there is no such agreement the modern award will define a casual employee. In any event there is no room for the common law to play a role in the proper construction of the term 'casual employee'. For my purposes in this matter I note that the CPMB Agreement operates under the FW Act because it is a 'collective agreement-based transitional instrument', under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Having regard to what was said in *Telum*, it is to be considered in the same way as an enterprise agreement made under the FW Act.

62 Relevantly, in *Telum* the Full Bench said at [22]:

[22] *The language of s.123(1)(c), like any other provision, must be construed in the context of the FW Act as a whole and with the purposive approach mandated by s.15AA of the Acts Interpretation Act 2001. There is*

*no rule of construction that dictates that an expression such as “casual employee” must have its general law meaning.*

63 At [49] to [51], the Full Bench had observed:

*[49] Other uses of the expression “casual employee” or the word “casual” in the FW Act support the conclusion that they refer to the characterisation of the employee under the applicable modern award or enterprise agreement.*

*[50] The FW Act defines the expression “long term casual employee” in s.12 to mean long term casual employee: a national system employee of a national system employer is a long term casual employee at a particular time if, at that time:*

- (a) the employee is a casual employee; and*
- (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.*

*[51] This very definition suggests that legislature did not intend the expression “casual employee” to call up the general law approach. If the criterion in (b) is satisfied then the employee would likely not be a “casual employee” under the general law approach but the definition presupposes that an employee who satisfies the criterion in (b) can still be a “casual employee” within the meaning of (a).*

64 In *Telum* (at [51] and [57]), the Full Bench noted that a long-term casual employee, as defined by the FW Act, is still a casual employee. Such an employee employed on a regular and systematic basis with a reasonable expectation of continuing employment is protected from unfair dismissal but is still a casual employee under the FW Act. Notwithstanding that, such employees are disentitled to redundancy pay (s 123 of the FW Act) and annual leave (s 86 of the FW Act).

65 The claimant submitted that if the *Telum* decision is to be followed and the wording of the relevant award provisions are to be considered, then this court should nonetheless, in construing the relevant provisions, consider the authorities which have, at common law, considered the definition of casual employment. He says that I should particularly have regard to the decision of the Federal Court in *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321 and other decisions, including *Hanzly v Tricon International Restaurants trading as KFC* [2001] FCA 1589 and *Melrose Farm Pty Ltd T/As Milesaway Tours v Milward* [2008] WASCA 175. With respect that approach appears to run contrary to that taken in *Telum*.

66 Indeed, the approach adopted in *Telum* is supported by later decisions of the Full Bench of the FWC in *Il Migliore Pty Ltd T/A Il Migliore v McDonald* [2013] FWCFB 5759, in which it was said at [48] to [54]:

*[48] The Commissioner referred to a number of authorities dealing with casual employment at common law and concluded that Ms McDonald was a permanent employee as at 3 February 2013. It appears that the Commissioner considered this conclusion to be necessary for the events of 3 February 2013 to constitute a dismissal at the initiative of the employer. That reasoning was affected by error.*

*[49] The concept of casual employment at common law is not well defined. The main authorities and the difficulties of characterisation are usefully identified by Boland P in Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales v Department of Justice and Attorney General (Corrective Services NSW) [2010] NSWIRComm 148. However, those authorities had no proper application in the present case.*

*[50] A modern award, the Food, Beverage and Tobacco Manufacturing Award 2010, applied to the applicant in her employment by Il Migliore. The provisions of a modern award operate by force of statute and displace the common law to the extent of such operation. The modern award defines casual employment. Clause 13 provides:*

*‘13.1 A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of 1/38th of the minimum weekly wage prescribed in clause 20.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee’s all purpose rate.*

*13.2 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours’ work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum of four hours.*

*13.3 An employer when engaging a casual must inform the employee that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required.’*

*[51] If an employee covered by this modern award is employed as a casual (that is, the employment is characterised by the parties in that way) (my emphasis) and paid as a casual, then the employee is a casual under the modern award. The modern award applies by operation of statute and displaces the common law for the purposes of determining whether an employee covered by that modern award is a casual employee.*

*[52] The characterisation of an employee’s type of employment supplied by an applicable modern award (or enterprise agreement) is the characterisation of that employee’s type of employment for the purposes of the Fair Work Act 2009 (FW Act): see the discussion in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434.*

*[53] There was no scope for the application of the common law authorities relied upon by the Commissioner in the consideration of the s.394 application before him. Nevertheless, the FW Act confers unfair dismissal protection on casual employees whose work has been regular and systematic for a sufficient period: see s.384(2)(a).*

- [54] *The evidence was unanimous that Ms McDonald was engaged and paid as a casual at all material times. That was the case with all of Il Migliore's employees. For the purposes of the Fair Work Act 2009, Ms McDonald was a casual employee and not a permanent employee.*
- 67 *Telum* and *Il Migliore* are clear in their application. They require that in determining the issue of whether the claimant was a casual employee, given that the PI Award does not apply, I must look to the applicable agreement, being the CPMB Agreement, to see how it defines a casual employee. The CPMB Agreement provides that a casual employee is an employee who is engaged and paid as such, but does not include employees falling within the definition of a part-time employee as defined in cl 6.5 thereof, but may include an employee who is employed to replace the proprietor or other permanent employee for a fixed term.
- 68 At [51] of *Il Migliore*, the Full Bench found that to be engaged as a casual required the employment to be characterised by the parties in that way. Therefore, if the parties characterise the employment as casual, then the employee will be a casual employee under the relevant award or agreement.
- 69 What is meant by the phrase 'engaged as a casual' has been considered by the Federal Court of Australia in *Fair Work Ombudsman v Devine Marine Group Pty Ltd & Others* [2014] FCA 1365.
- 70 At [137], his Honour White J noted:
- The FWO submitted that both Mr James and Mr Kouka should be characterised as casual employees and that they had not been paid the casual loading. The submissions of the Ombudsman proceeded on the basis that the status of the men as casuals or otherwise was to be determined by the general law. In this respect, the FWO referred to Reed v Blue Line Cruises Ltd (1996) 73 IR 420 and to Hamzy v Tricon International Restaurants [2001] FCA 1589; [2001] 115 FCR 78.*
- 71 At [138], his Honour White J went on to say:
- However, in my opinion, the approach for which the FWO contended is not the correct approach. Regard must be had instead to the definition of "casual employment" in cl 14.1, namely, that a "casual employee is one engaged and paid as such". That definition is to be understood in the context of the Award as a whole and, in particular, in the context of its provisions concerning full-time and part-time employment.*
- 72 At [141] and [142], his Honour also said:
- 141 *The word "engaged" in cl 14.1 of the Award is capable of more than one meaning. On one view, it can refer to the way in which the parties themselves identified their arrangement at its commencement. On another view, it can be a reference to the objective characterisation of the engagement, as a matter of fact and law, having regard to all the circumstances. Support for the former construction is seen in the decision of the Full Bench of the Fair Work Commission in Telum Civil (Qld) Pty Ltd v Construction, Forestry, Mining and Energy Union [2013] FWCFB 2434. The Full Bench said at [38]:*
- [38] *All of the modern awards contain a definition of casual employment. Those definitions, notwithstanding some variation in wording, have the same core criteria:*
- (i) *That the employee was "engaged" as a casual - that is, the label of "casual" is applied at the time of time of engagement; and*
- (ii) *That the employee is paid as a casual, and specifically, the employee is paid a casual loading (set at 25% in all of the modern awards, subject to transitional arrangements), which loading is paid as compensation for a range of entitlements that are provided to permanent employees but not to casual employees.*
- (Emphasis added)*
- 142 *The second construction is seen in the decision of Industrial Relations Commission of Western Australia in Loves Bus and Taxi Service v Zucchiatti [2006] WAIRC 5758; (2006) 157 IR 348. Ritter AP, with whom Beech CC and Mayman C agreed, said at [45]:*
- [45] *I also do not think that the Commissioner was in error in not finding the respondent was engaged as a casual, pursuant to clause 14(5) of the award. This definition refers to a "worker engaged and paid" as a casual worker. This definition means that just because somebody is paid as a casual employee does not mean that they are a casual employee under the award. This is because they must also be "engaged as such". The reference to the engagement of the worker in my opinion directs attention to the basis upon which the worker was employed as a matter of law and fact. It does not simply direct attention to the label placed upon the status of the worker by the parties. ...*
- (Emphasis added)*
- 73 His Honour then concluded, at [144] and [145]:
- 144 *It is sufficient in my opinion to state that, in the present case, the former construction draws support from two considerations and should be adopted. First, the term "specifically engaged" in cl 12 indicates that the focus is on the agreement of the parties at the commencement of the employment as*

*to the character of the employment. Secondly, the requirement in cl 14.3 for the observance of formality at the time of engagement of a casual employee suggests that the word “engaged” is directed to the agreement made between the parties rather than to the manner and circumstances in which the employee does in fact carry out his or her work.*

145 *In my opinion, neither Mr James nor Mr Kouka can be regarded as casual employees on this understanding of the definition in cl 14.1. Nothing was said to them at the time of their engagement about being casuals. It cannot be concluded therefore that they were “engaged” as casuals. They gave no evidence that they had, subjectively, regarded themselves as casuals. Further, and in any event, they were not paid as casuals.*

74 The decision in *Devine* followed *Telum* and supports the conclusion that if, at the commencement of the employment the parties agree that the employee is to be employed as a casual, then the employee is a casual. They together with *Il Migliore* make it clear that the status of an employee is to be determined in accordance with the applicable industrial instrument and not common law principles. The claimant’s submission that the common law applies is against those authorities.

#### **Was the Claimant a Casual Employee Within the Meaning of the CPMB Agreement?**

75 The contract of employment that the claimant signed is unequivocal. It provides that the claimant was engaged as a casual employee and that he would be paid a flat rate as his casual rate of pay. The contract of employment states that the casual rate includes a 20% loading and that he would not be entitled to sick leave, holiday pay or annual leave.

76 There can be no doubt that the claimant was engaged as a casual and that he was paid as such (see exhibits 3 and 7). The issue of the claimant’s engagement is not in dispute and has in any event, in submissions lodged, been conceded. Notwithstanding that, the claimant says that in reality he was a part-time employee.

77 The claimant’s employment status cannot be determined on common law principles, but rather, by the application of the definitions in cl 6 of the CPMB Agreement.

78 The claimant asserts that he was a part-time employee and not a casual employee. He bears the onus of proving, on the balance of probabilities that which he asserts.

79 In order to come within the definition of a ‘part-time employee’ in cl 6.5 of the CPMB Agreement, the claimant must prove the following:

1. that he was a permanent employee; and
2. that the respondent engaged him on a regular and systematic basis for a sequence of periods of employment; and
3. that he was engaged to work an average of less than 38 hours per week; and
4. that he received entitlements pro-rata.

80 Clause 6.2 of the CPMB Agreement defines a permanent employee to mean an employee other than a casual. Clearly, ‘permanent’ and ‘casual’ are mutually exclusive concepts.

81 The claimant’s evidence is that he was paid a flat rate hourly rate which included a casual loading and was not paid when he took time off. Overwhelmingly, the evidence establishes that he has never received entitlements on a pro-rata basis. The receipt of entitlements pro-rata is a requisite element that the claimant has to prove in order to enable him to fit the definition of a part-time employee. Having failed to establish that he received entitlements pro-rata he cannot come within the definition of a part-time employee despite having met the other requisite criteria which would otherwise have brought him within that definition.

82 The claimant was engaged and paid as a casual employee and he did not come within the meaning of part-time employee under the CPMB Agreement. It follows that he was a casual employee. The fact that the claimant worked on a regular and systematic basis for an ongoing period of employment, is not inconsistent with the concept of casual employment within the context of the CPMB Agreement. Such is recognised in cl 27.3.1 of the CPMB Agreement with respect to parental leave.

83 The contract of employment that the claimant and respondent entered into was explicit and clear in its terms. Although the claimant may have desired ongoing permanent employment, what he agreed to was casual employment with the benefit of being paid a flat rate which included a 20% loading.

84 The claimant is an intelligent and articulate man who previously ran his own business. It is inconceivable in light of the contract of employment that he signed, that he considered his employment was anything other than casual. Indeed, he was constantly reminded by the pharmacy manager, Ms Brennan, that he was a casual employee and never challenged her about that. He never took issue about not being paid when he took time off from work, nor did he, during the course of his employment, complain that he was not receiving his correct entitlements. That was so because he knew that he had been engaged as a casual employee and was being paid as such.

#### **Conclusion**

85 On the preliminary issues I find that:

- a. The PI Award has never been applicable to the claimant’s employment; and
- b. The claimant was a casual employee.

**G. CICCHINI**

**INDUSTRIAL MAGISTRATE**

2015 WAIRC 00953

## WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

**CITATION** : 2015 WAIRC 00953  
**CORAM** : INDUSTRIAL MAGISTRATE G. CICCHINI  
**HEARD** : THURSDAY, 6 AUGUST 2015, THURSDAY, 10 SEPTEMBER 2015  
**DELIVERED** : THURSDAY, 22 OCTOBER 2015  
**FILE NO.** : M 153 OF 2014  
**BETWEEN** : DAYLE SOMERS

CLAIMANT

AND

S.E.T.S ENTERPRISES PTY LTD

FIRST RESPONDENT

KEVIN JAMES BROADBENT

SECOND RESPONDENT

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**Catchwords** : Alleged non-payment of annual leave entitlements payable pursuant to s 87(1)(a) of the *Fair Work Act 2009* - Whether the claimant's engagement was as a "casual" employee

**Legislation** : *Fair Work Act 2009*

**Instruments** : Mining Industry Award 2010 [MA000011]  
Miscellaneous Award 2010 [MA000104]

**Result** : Claim dismissed

**Case(s) referred to in Reasons** : *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434  
*Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321  
*Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* [2008] WASCA 175  
*Fair Work Ombudsman v Devine Marine Group Pty Ltd & Others* [2014] FCA 1365  
*Il Migliore Pty Ltd T/A Il Migliore v McDonald* [2013] FWCFB 5759  
*Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589

**Representation**

Claimant : Mr A. Stewart (counsel) of Chapmans Barristers and Solicitors

Respondent : Ms C. Tsang (counsel) of Lavan Legal

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**REASONS FOR DECISION**

- 1 The claimant alleges that his former employer, S.E.T.S Enterprises Pty Ltd (the first respondent), has in breach of s 44 of the *Fair Work Act 2009* (the FW Act), failed to pay him his annual leave entitlements as required by the Mining Industry Award 2010 [MA000011] (Mining Award) and s 87(1)(a) of the FW Act. The claimant also alleges that Mr Kevin James Broadbent (the second respondent) who is the first respondent's director, was involved in the breach and therefore is also liable.
- 2 The claimant says that he is owed \$24,432.24 in unpaid annual leave entitlements as follows:
  - 12 February 2010 to 18 August 2011 in the sum of \$11,546.15 (first period); and
  - 11 November 2011 to 30 June 2013 in the sum of \$12,886.09 (second period).
- 3 He seeks payment of \$24,432.24 together with pre-judgement interest thereon plus his costs. The imposition of a penalty for the contravention of s 44 of the FW Act is also requested.
- 4 The first respondent and the second respondent deny that the Mining Award governed the claimant's employment. They say that his employment was governed by the Miscellaneous Award 2010 [MA000104] (Miscellaneous Award). In any event, they deny that the claimant was entitled to the annual leave payments that he seeks. They maintain that the claimant was at all material times employed as a casual employee, and therefore not entitled to annual leave.

### **Undisputed Facts**

- 5 Apart from being the first respondent's director, the second respondent is a qualified emergency services officer, trainer and assessor, industrial paramedic, restricted quarry manager and security officer, holding a security agent's licence.
- 6 The first respondent operates a personnel hire service. The type of personnel it provides to various industries includes emergency service officers, nurses, medical officers and qualified safety management officers. Such qualified employees are, sometimes at very short notice, drawn from the first respondent's pool of available employees and supplied to external businesses for short to medium terms, dependent upon client needs.
- 7 On 12 February 2010 the second respondent, on behalf of the first respondent, interviewed the claimant and offered him employment as an emergency services officer. That same day, the claimant signed a fixed term contract of employment which was to commence immediately and end on 30 December 2010. The contract made reference to "casual" employment and the absence of paid leave.
- 8 The claimant's initial work engagement under the contract commenced on 12 February 2010 when he was sent to work as an emergency services officer on a BHP Billiton Limited (BHP) project in Western Australia's north. That engagement required him to work on a fly-in, fly-out basis, generally two weeks on and two weeks off. Whilst on-site, the claimant was required to follow the directions of the external contractor to which he was assigned. The days and times he worked were entirely dictated by the operational requirements of the contractor. His rosters were created by the contractor.
- 9 On 30 December 2010, when the claimant's fixed-term contract came to an end he was not asked to enter into a new contract. Rather, the first respondent continued to employ him as though the pre-existing contract continued to have effect. The claimant's pay (save a CPI increase), employment conditions and other arrangements remained unaltered until 18 August 2011, when he resigned from his employment in order to take up a position with Fortescue Metals Group Ltd (FMG).
- 10 The claimant's job with FMG did not last long, and as it was coming to an end, the claimant contacted the second respondent with a view to the first respondent re-employing him. The second respondent, on behalf of the first respondent, had no hesitation in re-employing him. The second respondent was particularly impressed by the claimant's previous excellent performance and in particular by the fact that he had made himself available to work outside of his rostered requirements. His ready availability had been of significant benefit to the first respondent.
- 11 When the first respondent re-employed the claimant on 11 November 2011, a fresh written contract of employment was not prepared and the terms and conditions of his new engagement were not discussed. Indeed, both parties proceeded on the basis that the previous pay rate and conditions of employment applied.
- 12 Following his re-engagement, the claimant initially worked on an FMG project for a short period before moving to the Redmont Camp on a BHP project. He also continued to make himself available to work outside his roster.
- 13 In or about July or early August 2013, the claimant noticed an annual leave accrual printed on his payslip and made immediate enquiries as to why the accrual of annual leave had not been recorded on his previous pay slips. Consequently, a meeting was arranged to discuss the issue. At that meeting, held on 5 August 2013, the claimant was informed that the leave accrual printed on his pay slip had occurred in error. The claimant did not accept that and asserted that he was a permanent employee and therefore entitled to annual leave entitlements. It follows that the issue remained unresolved at that stage.
- 14 On 22 August 2013 Ms Jodie Beeson, of Beeson HR Consulting on behalf of the first respondent, wrote to the claimant stating inter alia that on 1 June 2011 the claimant had been provided with another fixed term employment agreement which contained a clause which stated that an allowance for annual leave had been built into his hourly rate, and the hourly rate was \$50.00 per hour. She suggested that the conditions of his employment were governed by that agreement. The claimant subsequently sought a copy of that contract and on 27 August 2013 Ms Beeson provided the claimant with a copy of an email, containing a copy of an unsigned contract, which had been sent by the first respondent to the claimant's old email address. It suffices to say that the agreement was never signed or adopted and was of no effect.
- 15 The second respondent was, at that time concerned that the dispute could lead to the claimant withdrawing his services to the first respondent and was keen to ensure that did not occur. The claimant's ready availability to work at short notice and outside of his rostered employment was crucial to the first respondent's ability to meet its client's needs. This was at a time when workforce resources were scarce. In an attempt to resolve the impasse, a mediation meeting attended by the claimant and Ms Beeson was held on 4 September 2013. At that meeting the first respondent offered the claimant a new contract of employment which contained a provision for the payment of annual leave entitlements back-dated to 1 July 2013. His hourly rate and other conditions were, however, to remain the same.
- 16 On 12 September 2013 the claimant accepted that offer and signed the new contract.
- 17 On 5 December 2013, the claimant resigned his employment with the first respondent. He subsequently received his termination pay which included his annual leave entitlements from 1 July 2013 until the termination. He did not however, receive annual leave payments for any preceding period of employment.

### **Issues**

- 18 For reasons which follow it is apparent that the outcome in this matter turns on whether, at the material times, the claimant's employment was on a casual basis. If it was, then his claim will be defeated. In order to determine this pivotal issue, a consideration of the following is required:
  - a. the award that covered his employment; and
  - b. whether his employment was on a casual basis within the meaning of that award; and
  - c. if not, whether at common law his employment could be regarded as being on a casual basis.

**Applicable Award**

- 19 The claimant asserts that the Mining Award governed his employment, whereas the first respondent and the second respondent say that it was governed by the Miscellaneous Award.
- 20 Clause 4.1 of the Mining Award states:  
*“This industry award covers employers throughout Australia who are engaged in the mining industry in respect of work by their employees in a classification in this award and their employees engaged in the classifications listed in clause 13—Classifications and minimum wage rates, of this award, to the exclusion of any other modern award.”*
- 21 “Mining industry” is defined in cl 4.2 of the Mining Award as including:  
*“For the purposes of this clause **mining industry** means:*  
 (a) *extracting any of the following from the earth by any manner or method including exploration, prospecting, development and land clearing, preparatory work and rehabilitation during the life of the mine:*  
 (i) *any metals, minerals or ores;*  
 (ii) *phosphates and gemstones;*  
 (iii) *mineral sands;*  
 (iv) *uranium and other radioactive substances;*  
 (b) *the processing, smelting and refining of the metals, minerals, ores or substances covered by clause 4.2(a);*  
 (c) *the transportation, handling and loading of any of the metals, minerals, ores or substances covered by clause 4.2(a) on a mining lease or tenement;*  
 (d) *the transportation, handling and loading of any of the metals, minerals, ores or substances covered by clause 4.2(a) by the mine operator, a related company or an entity principally engaged by the mine operator to do such work, using the plant or infrastructure (including rail and/or ports) of the mine operator or a related company;*  
 (e) *the servicing, maintaining (including mechanical, electrical, fabricating or engineering) or repairing of plant and equipment used in the activities set out in clauses 4.2(a) to (d) by employees principally employed to perform work on an ongoing basis at a location where the activities described above are being performed; or*  
 (f) *the provision of temporary labour services used in the activities set out in clauses 4.2(a) to (e), by temporary labour personnel principally engaged to perform work at a location where the activities described above are being performed.”*
- 22 Whilst the first respondent provides temporary labour services to clients who are involved in the activities discussed in cl 4.2(a) to (e) of the Mining Award, the temporary labour services provided by the first respondent to those clients are not directly used in the activities set out in cl 4.2(a) to (e). The services provided by the first respondent are emergency services officers, security officers, nurses, medical officers and safety management personnel.
- 23 Clause 4.3(d)(ii) of the Mining Award provides that it does not cover employees in respect of their operations or activities in industries or occupations of:  
*“catering, accommodation, cleaning and incidental services (unless employed by a mine operator or a related company)”.*
- 24 The claimant worked as an emergency services officer, providing incidental services to the mining industry but not direct services in mining. Given that the claimant was not employed by a mine operator or a related company, cl 4.3(d)(ii) of the Mining Award appears to exclude the type of services provided.
- 25 For the purposes of cl 4.1 of the Mining Award, cl B2 of *Schedule B - Classification and Structure* of the Mining Award provides that it covers the following classifications:
- B.2.1 Mining Industry Services Employees;
  - B.2.2 Mining Industry Surface Mining and Haulage Employees;
  - B.2.3 Mining Industry Processing Employees;
  - B.2.4 Mining Industry Underground Mine Employees; and
  - B.2.5 Mining Industry Maintenance Trades Employees.
- 26 Clearly, none of the descriptions contained in cl B.2.2 to cl B.2.5 (inclusive) can have any application. The only possible coverage might arise from what is said in cl B.2.1, which states:  
**“B.2.1 Mining Industry Services Employees**  
*A Mining Industry Services Employee is designated as such by their employer and performs all tasks as directed by their employer which include but are not limited to: labouring; assisting work crews and tradespersons; operation of plant and equipment (including mobile plant); maintenance work on plant, equipment or buildings; performance of general plant, stores, workshop, warehouse, packaging, and marine interface tasks, resource assessment (including prospecting, drilling and exploration); preparing and cleaning equipment and materials; and on site catering cleaning and security.*

*This classification group also encompasses work performed by Laboratory Assistants, who do not hold tertiary qualifications.”*

- 27 The first respondent and the second respondent submit that the services provided to their clients (including the claimant’s services as an emergency services officer) do not fall within cl B.2.1 of the Mining Award.
- 28 Clause B.2.1 of the Mining Award refers to services provided at mines and includes catering, cleaning and security. It is self-evident that the clause does not contain an exhaustive list of services falling within the classification. The question which arises therefore is whether the type of service provided by the claimant falls within cl B.2.1 for the purposes of cl 4.1 of the Mining Award.
- 29 The claimant’s role was to be available for emergency situations at the places at which he worked. He was required to respond in the case of fire or vehicle accident.
- 30 If I find that the first respondent was engaged in the mining industry and if the first respondent had designated the claimant to be a Mining Industry Services Employee then it could be found that the service the claimant provided, which was not dissimilar to services provided by site catering, cleaning and security staff, fell within cl B.2.1 of the Mining Award. I say that because the type of service the claimant delivered is clearly covered and contemplated by what is provided in cl B.2.1 of the Mining Award. Although the clause does not contain an exhaustive list of services and does not specifically refer to emergency services officers, it nevertheless would apply to such services provided at a mining site because such services are integral to a mine’s operations, and are akin to other services such as security services at a mine site.
- 31 However, the classification clause cannot be invoked because the claimant has failed to prove, as is required by cl 4.1 of the Mining Award, that the first respondent was engaged in the mining industry. The temporary labour services the first respondent provided to its clients were not used in the activities set out in cl 4.2(a) to cl 4.2(e) of the Mining Award and therefore not within the mining industry.
- 32 I find that the Mining Award does not apply.
- 33 The Miscellaneous Award covers employers throughout Australia and their employees in the classifications listed in *Clause 14 - Minimum wages*, who are not covered by any other modern award.
- 34 Clause 4.7 of the Miscellaneous Award provides:
- “This award covers any employer which supplies on-hire employees in classifications set out in Schedule B and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award.”*
- 35 Given that none of the exclusions had application and that no other modern award covered the claimant and the first respondent, it follows that the Miscellaneous Award was the applicable award.

#### **Annual Leave Entitlements**

- 36 Clause 23.11 of the Miscellaneous Award prescribes that annual leave is provided for in the National Employment Standards (NES) found in s 61 to s 131 of the FW Act. The entitlement to annual leave is in s 87 of the FW Act. For my purposes the claimant asserts that he was, pursuant to s 87(1)(a) of the FW Act, entitled to four weeks’ paid annual leave for each year of service.
- 37 Section 87 of the FW Act is part of *Division 6 - Annual leave*. Within Division 6, s 86 provides:
- “This Division applies to employees, other than casual employees”* (my emphasis).
- 38 The first respondent and the second respondent submit that by virtue of s 86 of the FW Act, the claimant was not entitled to annual leave because he was a casual employee. A finding that the claimant was a casual employee will obviously defeat his claim.

#### **Was the Claimant a Casual Employee?**

- 39 Clause 10.4 of the Miscellaneous Award states:
- “A casual employee is one engaged as such. Casual employees must be paid a loading of 25% in addition to the relevant minimum wage in clause 14. This loading is instead of the leave to which full-time employees are entitled under the NES and this award.”*
- 40 Clause 10.3 of the Mining Award contains a similar provision. It states that a casual employee is one engaged and paid as such. If the issue is to be determined by virtue of an award definition alone, as is suggested by the first respondent and the second respondent, then it will matter little for that purpose which award applies. That is because in each case, the definition of a “casual employee” is substantially the same.
- 41 The claimant’s position is that the FW Act is silent on the meaning of a “casual employee”, and the modern awards provide no more than a statement that a casual employee is one who is “engaged as such” which is not helpful in determining the matter. It is submitted, therefore, that the court must consider the relevant common law principles to properly determine the issue.
- 42 In *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFCB 2434 (*Telum*) the Full Bench of the Fair Work Commission (FWC) was asked to consider the meaning of a “casual employee” within the NES with respect to s 123(1)(c) of the FW Act, which provides that notice of termination and redundancy do not apply to a casual employee.

43 The Full Bench in *Telum* said that the Commissioner at first instance fell into error by not addressing the proper construction of s 123(1)(c) of the FW Act, because the Commissioner proceeded on the basis that the expression “casual employee” in s 123(1)(c) referred to casual employment as defined by the common law.

44 The Full Bench said, at [58] and [59]:

*[58] In summary, the FW Act provides for the regulation of terms and conditions of employment of national system employees through an interrelated system of the National Employment Standards, modern awards, enterprise agreements (and, in some cases, workplace determinations or minimum wage orders). Having regard to the objects and purpose of the legislation, it is obvious that the legislature intended that those components should interact consistently and harmoniously. We conclude that on the proper construction of the FW Act the reference to “casual employee” in s.123(3)(c) and the rest of the NES - and, indeed, elsewhere in the FW Act - is a reference to an employee who is a casual employee for the purposes of the Federal industrial instrument that applies to the employee, according to the hierarchy laid down in the FW Act (and, if applicable, the Transitional Act). That is, the legislature intended that a “casual employee” for the purposes of the NES would be consistent with the categorisation of an employee as a “casual employee” under an enterprise agreement made under Part 2-4 of the FW Act (or under an “agreement based transitional instrument” such as a workplace agreement or certified agreement made under the WR Act) that applies to the employee or, if no such agreement applies, then consistent with the categorisation of an employee as a “casual employee” within the modern award that applies to the employee. Subject to any terms to the contrary, a reference to a “casual employee” in an enterprise agreement (or agreement based transitional instrument) will have a meaning consistent with the meaning in the underpinning modern award (or pre-reform award/NAPSA).*

*[59] The CFMEU placed particular reliance on the decision of Barker J in Williams v MacMahon Mining Services Pty Ltd (2010) 201 IR 123. That case was relevantly concerned with the meaning of “casual employee” in s.227 of the Workplace Relations Act 1996. Barker J noted (at [31]) that “[t]he parties accept that the WR Act does not define the expression “casual employee” and so the expression should be given its ordinary common law meaning.” This case is concerned with a different statutory context and Barker J’s decision does not assist in the proper construction of the expression “casual employee” in s.123(1)(c) of the FW Act.”*

45 Paragraph 58 of *Telum* instructs that where there is an enterprise agreement, that agreement applies in defining what a casual employee is. Where there is no such agreement as in this case, the modern award defines a casual employee, and there is no room for the common law to play a role in the proper construction of the term “casual employee”, as defined in the FW Act.

46 Relevantly, in *Telum* the Full Bench said at [22]:

*[22] The language of s.123(1)(c), like any other provision, must be construed in the context of the FW Act as a whole and with the purposive approach mandated by s.15AA of the Acts Interpretation Act 2001. There is no rule of construction that dictates that an expression such as “casual employee” must have its general law meaning.”*

47 Then at [49] to [51], the Full Bench went on to say:

*[49] Other uses of the expression “casual employee” or the word “casual” in the FW Act support the conclusion that they refer to the characterisation of the employee under the applicable modern award or enterprise agreement.*

*[50] The FW Act defines the expression “long term casual employee” in s.12 to mean*

*long term casual employee: a national system employee of a national system employer is a long term casual employee at a particular time if, at that time:*

- (a) the employee is a casual employee; and*
- (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.*

*[51] This very definition suggests that legislature did not intend the expression “casual employee” to call up the general law approach. If the criterion in (b) is satisfied then the employee would likely not be a “casual employee” under the general law approach but the definition presupposes that an employee who satisfies the criterion in (b) can still be a “casual employee” within the meaning of (a).”*

48 In *Telum* (at [51] and [57]), the Full Bench noted that a long-term casual employee, as defined by the FW Act, is still a casual employee. Such an employee employed on a regular and systematic basis with a reasonable expectation of continuing employment is protected from unfair dismissal but is still a casual employee under the FW Act. Notwithstanding that, such employees are disentitled to redundancy pay (s 123 of the FW Act) and annual leave (s 86 of the FW Act).

49 The claimant submits that if the *Telum* decision is to be followed and the wording of the relevant award provisions are to be considered, this court must nonetheless consider the authorities which have, at common law, considered the definition of casual employment. In particular, the decision of the Federal Court in *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321 and others, including *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 and *Melrose Farm Pty Ltd T/As Milesaway Tours v Milward* [2008] WASCA 175. That approach, however, appears to run contrary to what was said in *Telum*.

50 Indeed, the approach adopted in *Telum* is supported by later decisions of the Full Bench of the FWC in *Il Migliore Pty Ltd T/A Il Migliore v McDonald* [2013] FWCFCB 5759 (*Il Migliore*), in which it was said at [48] to [54]:

[48] The Commissioner referred to a number of authorities dealing with casual employment at common law and concluded that Ms McDonald was a permanent employee as at 3 February 2013. It appears that the Commissioner considered this conclusion to be necessary for the events of 3 February 2013 to constitute a dismissal at the initiative of the employer. That reasoning was affected by error.

[49] The concept of casual employment at common law is not well defined. The main authorities and the difficulties of characterisation are usefully identified by Boland P in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Department of Justice and Attorney General (Corrective Services NSW)* [2010] NSWIRComm 148. However, those authorities had no proper application in the present case.

[50] A modern award, the Food, Beverage and Tobacco Manufacturing Award 2010, applied to the applicant in her employment by Il Migliore. The provisions of a modern award operate by force of statute and displace the common law to the extent of such operation. The modern award defines casual employment. Clause 13 provides:

13.1 A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of 1/38th of the minimum weekly wage prescribed in clause 20.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee's all purpose rate.

13.2 On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours' work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum of four hours.

13.3 An employer when engaging a casual must inform the employee that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required.'

[51] If an employee covered by this modern award is employed as a casual (that is, the employment is characterised by the parties in that way) (my emphasis) and paid as a casual, then the employee is a casual under the modern award. The modern award applies by operation of statute and displaces the common law for the purposes of determining whether an employee covered by that modern award is a casual employee.

[52] The characterisation of an employee's type of employment supplied by an applicable modern award (or enterprise agreement) is the characterisation of that employee's type of employment for the purposes of the Fair Work Act 2009 (FW Act): see the discussion in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434.

[53] There was no scope for the application of the common law authorities relied upon by the Commissioner in the consideration of the s.394 application before him. Nevertheless, the FW Act confers unfair dismissal protection on casual employees whose work has been regular and systematic for a sufficient period: see s.384(2)(a).

[54] The evidence was unanimous that Ms McDonald was engaged and paid as a casual at all material times. That was the case with all of Il Migliore's employees. For the purposes of the Fair Work Act 2009, Ms McDonald was a casual employee and not a permanent employee."

51 *Telum* and *Il Migliore* are clear in their application. They require that in determining the issue of whether the claimant was a casual employee, given that an enterprise agreement does not apply, I must look to the applicable modern award to see how it defines "casual employee". In this instance, the applicable award is the Miscellaneous Award which provides that a casual employee is one engaged as such.

52 At [51] of *Il Migliore*, the Full Bench found that to be engaged as a casual required the employment to be characterised by the parties in that way. Therefore, if the parties characterise the employment as casual, then the employee will be a casual employee under the relevant award.

53 What is meant by the phrase "engaged as a casual" has been considered by the Federal Court of Australia in *Fair Work Ombudsman v Devine Marine Group Pty Ltd & Others* [2014] FCA 1365 (*Devine*).

54 At [137], his Honour White J noted:

"The FWO submitted that both Mr James and Mr Kouka should be characterised as casual employees and that they had not been paid the casual loading. The submissions of the Ombudsman proceeded on the basis that the status of the men as casuals or otherwise was to be determined by the general law. In this respect, the FWO referred to *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420 and to *Hamzy v Tricon International Restaurants* [2001] FCA 1589; [2001] 115 FCR 78."

55 At [138], his Honour White J went on to say:

"However, in my opinion, the approach for which the FWO contended is not the correct approach. Regard must be had instead to the definition of "casual employment" in cl 14.1, namely, that a "casual employee is one engaged and paid as such". That definition is to be understood in the context of the Award as a whole and, in particular, in the context of its provisions concerning full-time and part-time employment."

56 At [141] and [142], his Honour also said:

"141 The word "engaged" in cl 14.1 of the Award is capable of more than one meaning. On one view, it can refer to the way in which the parties themselves identified their arrangement at its commencement. On another view, it can be a reference to the objective characterisation of the engagement, as a matter of fact and law, having regard to all the circumstances. Support for the former construction is seen in the decision of the Full Bench of the Fair Work Commission in *Telum Civil (Qld) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434. The Full Bench said at [38]:

[38] All of the modern awards contain a definition of casual employment. Those definitions, notwithstanding some variation in wording, have the same core criteria:

(i) That the employee was “engaged” as a casual - that is, the label of “casual” is applied at the time of time of engagement; and

(ii) That the employee is paid as a casual, and specifically, the employee is paid a casual loading (set at 25% in all of the modern awards, subject to transitional arrangements), which loading is paid as compensation for a range of entitlements that are provided to permanent employees but not to casual employees.

(Emphasis added)

142 The second construction is seen in the decision of Industrial Relations Commission of Western Australia in *Loves Bus and Taxi Service v Zucchiatti* [2006] WAIRC 5758; (2006) 157 IR 348. Ritter AP, with whom Beech CC and Mayman C agreed, said at [45]:

[45] I also do not think that the Commissioner was in error in not finding the respondent was engaged as a casual, pursuant to clause 14(5) of the award. This definition refers to a “worker engaged and paid” as a casual worker. This definition means that just because somebody is paid as a casual employee does not mean that they are a casual employee under the award. This is because they must also be “engaged as such”. The reference to the engagement of the worker in my opinion directs attention to the basis upon which the worker was employed as a matter of law and fact. It does not simply direct attention to the label placed upon the status of the worker by the parties. ...

(Emphasis added)”

57 His Honour then concluded, at [144] and [145]:

“144 It is sufficient in my opinion to state that, in the present case, the former construction draws support from two considerations and should be adopted. First, the term “specifically engaged” in cl 12 indicates that the focus is on the agreement of the parties at the commencement of the employment as to the character of the employment. Secondly, the requirement in cl 14.3 for the observance of formality at the time of engagement of a casual employee suggests that the word “engaged” is directed to the agreement made between the parties rather than to the manner and circumstances in which the employee does in fact carry out his or her work.

145 In my opinion, neither Mr James nor Mr Kouka can be regarded as casual employees on this understanding of the definition in cl 14.1. Nothing was said to them at the time of their engagement about being casuals. It cannot be concluded therefore that they were “engaged” as casuals. They gave no evidence that they had, subjectively, regarded themselves as casuals. Further, and in any event, they were not paid as casuals.”

58 The first respondent and the second respondent submit that the decision in *Devine* followed *Telum* and it supports the conclusion that if, at the commencement of the employment the parties agree that the employee is to be employed as a casual, then the employee is a casual. I agree with their submissions in that regard.

59 The authorities in *Telum* and *Il Migliore* make it clear that there is no room for a consideration of the common law approach as suggested by the claimant.

#### **Was the Claimant Engaged as a Casual Employee?**

60 There is no dispute that a written contract was signed by the parties in February 2010 at the commencement of the first period. Further, there is no dispute that no other written contract was entered into with respect to the second period. There is no dispute that the parties entered into the second period on the basis that it was an extension of the first period or alternatively, that there was another employment contract between the parties which was unwritten but on the same terms and conditions as the contract for the first period.

61 The question remains as to whether the claimant was engaged as a casual employee. The first respondent and the second respondent assert that the claimant was employed as a casual, and therefore the onus is on them to prove that fact on the balance of probabilities.

62 In his submissions, the claimant says that he was not a casual employee because he was not engaged as a casual and was not paid as such. Further, at [36] of the claimant’s written submissions, he says that the fixed-term contract signed on 12 February 2010 makes no reference to casual engagement, other than a statement outlining a mandatory requirement to state the date that he was advised that the employment is of a casual nature with no entitlement to annual leave. It is asserted that the requirement was not complied with and no date appears where required.

63 With respect, the evidence before this court does not support that submission.

64 The contract of employment which is annexed to the claimant’s witness statement (exhibit 1) indicates the following:

- a. the contract of employment was for a fixed period from 12 February 2010 to 30 December 2010; and
- b. the claimant was to be paid \$48.00 per hour plus nine per cent superannuation; and
- c. the claimant’s performance would be reviewed in three months; and
- d. that his engagement was casual with no entitlement to paid leave.

65 If the written contract gives rise to any ambiguity on its face, with respect to the nature of the claimant’s engagement, such is quickly dispelled by what the claimant said at [16] of his witness statement (exhibit 1). The claimant said:

*“I was told by Kevin (Broadbent) I was not entitled to annual leave as I was a casual.”*

66 In his witness statement, the second respondent said the following concerning the claimant’s initial engagement (exhibit 6, [10]):

*“10. At the time I had discussions with him and told him that due to the nature of our contracts with the clients he was employed as a casual employee and that his hourly rate specified at \$48 an hour was a flat rate for all casual employees and there would be no entitlement to paid leave.”*

67 There can be no doubt that at the time the claimant took up employment with the first respondent, he was engaged as a casual and was told that he would not be entitled to paid leave, including annual leave. By executing the contract of employment, the claimant accepted those terms of engagement. Those terms of engagement and conditions of employment thereafter remained unchanged (save CPI increases in the rate of pay) until such time as the claimant executed his second written contract of employment on 12 September 2013.

68 The definition of casual employee in cl 10.4 of the Miscellaneous Award is limited to one of being engaged as such with no more being required.

#### **Was the Claimant Paid as a Casual?**

69 It will be appropriate to consider the payments made to the claimant in the event that I am wrong in my interpretation of cl 10.4 of the Miscellaneous Award, or if I am wrong about the coverage of the Mining Award.

70 It may be argued that the definition of a casual employee in the Miscellaneous Award requires that the court be satisfied not only that the claimant was engaged as a casual, but that he was paid a 25% loading in addition to the relevant minimum wage in cl 14 of the Miscellaneous Award.

71 With respect to the Mining Award, the definition of casual employee requires not only that an employee be engaged as a casual but also paid as such.

72 The second respondent’s evidence is that the hourly rate paid to the claimant was comparable to rates paid to other casual employees doing the same job in the same industry. Indeed, the claimant’s hourly rate was market driven (see exhibit 6, [19]). I accept that evidence.

73 The documentary evidence before this court (exhibit 3) establishes that the claimant was paid as follows:

<u>Pay Periods</u>	<u>Hourly Rate</u>
12 February 2010 - 3 June 2010	\$48.00
18 June 2010 - 18 August 2011	\$50.00
24 November 2010 - 5 July 2012	\$50.00
19 July 2012 - 20 June 2013	\$51.50

74 On any account, the hourly rate paid to the claimant was well above the base hourly rate and loading required to be paid under either the Miscellaneous Award or the Mining Award. The claimant was therefore a casual employee for all purposes under each award. There was never any complaint made by the claimant that the first respondent had failed to pay him a casual loading. It was implicit in any event by his engagement as a casual, that his hourly rate included a casual loading.

75 I am satisfied, on the balance of probabilities, that at all material times, the claimant was paid a casual loading as part of his hourly rate of pay. The fact that on 12 September 2013, the first respondent agreed to pay him leave entitlements does not mean that it accepted that the claimant had previously been underpaid or that he had not been paid his casual loading. Rather, the first respondent was prepared to change the terms of his engagement in order to retain claimant’s services. In so doing it agreed to pay him an hourly rate comparable to the casual rate even though he was no longer a casual. That was a commercial decision based on the law of supply and demand.

#### **Common Law**

76 For the sake of completeness, I will address the claimant’s position at common law in the event that I may be wrong concerning the application of *Telum*.

77 The claimant was initially engaged under a written contract of employment, which indicated that he was a casual employee. The claimant also clearly acknowledged being told by the second respondent that he was employed as a casual. Although that alone is not determinative, it is a factor to be considered.

78 The claimant asserts that his employment was permanent, ongoing, regular and systematic which is inconsistent with a casual employment relationship. The claimant points out that he worked 10 or 12 hour shifts and that he was rostered on a regular fly-in, fly-out pattern of two weeks on followed by two weeks off throughout his employment.

79 The first respondent and the second respondent, on the other hand say that the claimant’s weekly hours were erratic as indicated by the fact he would fill-in for other employees at various places. In addition, they observe that he was engaged as and when required by the client and was moved from site to site at the client’s request. There was no system or regularity in his employment.

80 At [23] of his witness statement the second respondent asserts that the claimant was entitled to “knock back” assignments or swings at any time (see exhibit 6). I accept that was the case. Indeed, he was able to leave work for two days to attend an FMG induction and then returned for one week’s work before leaving to commence work for another employer. The claimant advised on 8 August 2011 that he would be leaving site on 10 August 2011 and returning to site on 13 August 2011 (see exhibit 6, [34], [35] and [36]). That sort of conduct is consistent with the informality associated with casual employment.

81 With respect to the regularity of the claimant’s working hours, what is clear is that he generally worked a pattern of two weeks on, followed by two weeks off. Notwithstanding that, from time to time his work pattern would change, either to cover for

other employees, or alternatively, to enable him to do other things he wanted to do. In that regard he behaved as a casual employee would, in that he was able, to a significant extent, to determine his own working arrangements.

- 82 The claimant was prepared to work for other employers if the opportunity arose and was “on the books” of other employers. In that regard, he acted as a casual employee would, in that he could change from one employer to another at a moment’s notice.
- 83 The claimant took unpaid leave for a holiday (exhibit 6, [23]) which is consistent with the fact that he did not accrue annual leave or personal leave of which he knew from the commencement of his employment. Notwithstanding that he never complained about it until mid-2013.
- 84 The first respondent did not guarantee the claimant’s employment. The claimant’s employment was project-based and dependent upon the first respondent’s clients’ needs, as is evidenced by the end date on the contract (see exhibit 6, [58]). It cannot be said that the claimant’s employment was ongoing in nature. Indeed, his engagement following the ending of the fixed term contract was determinable at very short notice. That applied to both the claimant and the first respondent.
- 85 In my view, the claimant was contracted as a casual employee, paid as such and behaved as a casual employee would. His working arrangements were flexible, notwithstanding the fact that he followed a reasonably regular pattern of work. The claimant could effectively come and go as he pleased and was not bound to the first respondent.
- 86 For those reasons I find that at common law, the claimant was a casual employee.

### **Conclusion**

- 87 The claimant did not accrue annual leave entitlements as provided by s 87(1)(a) of the FW Act because s 86 of that Act precluded him from doing so.
- 88 It follows that his claim against his employer, the first respondent, is not made out.
- 89 The basis for the claim against the second respondent has been unclear throughout the proceedings.
- 90 Counsel for the claimant was unable to identify, at trial, the statutory provision that he says draws the second respondent’s liability. I must say that I suspected that he was referring to s 550 of the FW Act, which provides that a person involved in the contravention of a civil remedy provision (which includes s 44(1) of the FW Act) is taken as having contravened that provision.
- 91 In the event that was so, the claimant could not have succeeded given my findings with respect to the first respondent. However, late yesterday afternoon counsel for the claimant wrote to the court to advise that the relevant provision is s 546 of the FW Act.
- 92 I observe that s 546 of the FW Act empowers the court to order a person to pay a pecuniary penalty, if satisfied that the person has contravened a civil remedy provision. However, in this instance, I cannot be satisfied of that. The second respondent was never the claimant’s employer and I cannot see how, in the circumstances or otherwise, liability could attach to him. Even if it could be said that he was the claimant’s employer, the claimant cannot succeed for the very same reasons appertaining to the first respondent.

### **Costs**

- 93 Counsel for the first respondent and the second respondent suggested that I make a finding that the claim in relation to the second respondent had been instituted either vexatiously, without reasonable cause, or had caused him to unnecessarily incur costs. The application for costs is made pursuant to s 570(2)(a) and s 570(2)(b) of the FW Act.
- 94 Given that the claimant has not addressed the issue of costs in any meaningful way I do not propose to determine that issue within these reasons. It will be appropriate, following the delivery of these reasons, for the parties to further specifically address the issue of costs and make their submissions in that regard.

**G. CICCHINI**

**INDUSTRIAL MAGISTRATE**

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

**2015 WAIRC 00399**

**REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 20 APRIL 2015**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

RCR RESOURCES PTY LTD

**APPLICANT**

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

**RESPONDENT**

**CORAM**

COMMISSIONER S J KENNER

**DATE**

TUESDAY, 26 MAY 2015

**FILE NO/S**

APPL 120 OF 2015

**CITATION NO.**

2015 WAIRC 00399

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<b>Result</b>	Extension of time granted
<b>Representation</b>	
<b>Applicant</b>	No appearance
<b>Respondent</b>	No appearance

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*Consent Order*

HAVING reviewed the papers herein and there being no requirement for the parties to appear, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 and by consent, hereby orders –

THAT the time for the filing of the notice of review be and is hereby extended to 22 May 2015.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2015 WAIRC 00481**

**REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 20 APRIL 2015**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

RCR RESOURCES PTY LTD

**APPLICANT**

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

**RESPONDENT**

<b>CORAM</b>	COMMISSIONER S J KENNER
<b>DATE</b>	WEDNESDAY, 1 JULY 2015
<b>FILE NO.</b>	APPL 120 OF 2015
<b>CITATION NO.</b>	2015 WAIRC 00481

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<b>Result</b>	Direction
<b>Representation</b>	
<b>Applicant</b>	Mr A Vucak of counsel
<b>Respondent</b>	Ms S Walker of counsel

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*Direction*

HAVING heard Mr A Vucak of counsel on behalf of the applicant and Ms S Walker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the parties file an agreed statement of facts within 14 days.
- (2) THAT the parties prepare an agreed bundle of documents and that the bundle be filed no later than 7 days prior to the date of the hearing.
- (3) THAT the parties file and serve written submissions no later than 7 days prior to the date of the hearing.
- (4) THAT the matter be listed for a hearing on a date to be fixed.
- (5) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 00984

## REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 20 APRIL 2015

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2015 WAIRC 00984  
**CORAM** : COMMISSIONER S J KENNER  
**HEARD** : WEDNESDAY, 1 JULY 2015, THURSDAY, 10 SEPTEMBER 2015  
**DELIVERED** : TUESDAY, 3 NOVEMBER 2015  
**FILE NO.** : APPL 120 OF 2015  
**BETWEEN** : RCR RESOURCES PTY LTD  
 Applicant  
 AND  
 THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD  
 Respondent

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**Catchwords** : *Industrial Law (WA) - Review of decision of The Construction Industry Long Service Leave Payments Board - Whether employer required to make contributions on behalf of employee in receipt of workers' compensation payments - Interpretation of s 34(1) "ordinary pay" - Reference to "ordinary pay" is not to be taken to be payments actually made to an employee, but those which are "payable" - Employees' period on workers' compensation does not absolve the employer from making contributions to the Board - Application for review dismissed*

**Legislation** : *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)*  
*Fair Work Act 2009 (Cth)*  
*Workers Compensation and Injury Management Act 1981 (WA)*  
*Interpretation Act 1984 (WA)*

**Result** : Application dismissed

**Representation:**  
**Counsel:**  
**Applicant** : Mr A Vucak and with him Ms R Defreitas of counsel  
**Respondent** : Mr S Kemp of counsel and with him Ms J Alilovic of counsel  
**Solicitors:**  
**Applicant** : Jarman McKenna  
**Respondent** : Jackson McDonald

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**Case(s) referred to in reasons:**

*Kirfield Engineering Pty Ltd v Construction Industry Portable Paid Long Service Leave Payments Board* (1993) 73 WAIG 2670

*Taylor v Owens – Strata Plan No 11564* (2014) 88 ALJR 473

*Construction Industry Long Service Leave Payments Board v Precision Corp Pty Limited* (unreported 20 September 1991 Library No. 920130)

**Case(s) also cited:**

*Department of Education v Kenworthy* (1990) 3 WAR 1

*Department of Education and Training v Kenneth Adrian Ducker* C27-2007

*Glenn v Compass Group (Australia) Pty Ltd* [2014] WADC 86

*NSW Nurses and Midwives' Association v Anglican Care* [2014] FCCA 2580

*Anglican Care v NSW Nurses and Midwives' Association* [2015] FCAFC 81

*Reasons for Decision*

- 1 Mr Thomson was an employee of RCR Resources and his employment was covered by the RCR Resources Pty Ltd Solomon Ore Processing Facilities Project Greenfields Agreement 2011 (Cth). It was common ground in these proceedings, that RCR Resources and Mr Thomson were registered as an employer and an employee under the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)* administered by the Board.
- 2 Mr Thomson suffered a workplace injury in February 2013. As a result of the workplace injury, Mr Thomson was in receipt of workers' compensation payments under the *Workers Compensation and Injury Management Act 1981 (WA)*. Mr Thomson underwent a rehabilitation program which involved him performing office based duties for a period of time.

- 3 During the time Mr Thomson was receiving workers' compensation payments, RCR Resources did not include Mr Thomson on its quarterly returns required to be submitted to the Board under the LSL Act, nor did it make any contributions in respect of Mr Thomson, under s 34 of the LSL Act. Mr Thomson remained an employee of RCR Resources throughout this period of time.
- 4 In late April 2015 the Board informed RCR Resources that it was required to make contributions under s 34 in relation to Mr Thomson, whilst he was off work on workers' compensation. RCR Resources now seeks a review of the Board's assessment, under s 50 of the LSL Act. The question arising in the application for review is the assessment of "ordinary pay" under s 34. Specifically, whether a person in Mr Thomson's position, whilst in receipt of workers' compensation payments under the WC Act, should have contributions made on his behalf to the Board, in respect of such a period. RCR Resources said that it should not have to make such contributions. The Board disagreed and said that the reference to "ordinary pay" in s 34(1) is a measure by which such contributions are to be calculated. It does not refer to an employee's actual payments received over any particular period of time. The contentions put by both RCR Resources and the Board in relation to their respective positions on the review are as follows.

#### Contentions of the parties

- 5 For RCR Resources it was contended that having regard to the terms of s 34 of the LSL Act, when read with s 21 and the meaning of "ordinary pay" in s 3, it is clear that Mr Thomson, suffering a compensable injury and in receipt of worker's compensation, was not entitled to receive "ordinary pay" over the relevant period. The relevant period for these purposes was from 27 March 2013 to 7 August 2013. During this period, Mr Thomson was absent from the site, not performing his normal duties as a rigger, and was engaged in office duties in RCR Resources' Perth office, as a part of a return to work program.
- 6 Because of this, as RCR Resources' submissions went, Mr Thomson, over this period, was not in receipt of wages as he was being paid workers' compensation payments. He was not performing his pre-accident duties as a rigger and he was not engaged in duties on site in the construction industry, to which the Agreement had application. Given that Mr Thomson was in receipt of workers' compensation payments from 1 April 2013 to 7 August 2013, the Board should not have assessed contributions payable on his behalf. This is because, as RCR Resources submitted, workers' compensation payments are a statutory entitlement under the WC Act, and are not wages or ordinary pay.
- 7 Furthermore, RCR Resources referred to s 130 of the *Fair Work Act 2009* (Cth). It was submitted that when read with s 113 of the FW Act, and cl 31 of the Agreement, it is clear that there is no term in the Agreement requiring the employer to make contributions for long service leave whilst an employee is in receipt of workers' compensation payments.
- 8 For the Board, a number of submissions were made. First and foremost, the Board contended that the relevant provisions of the LSL Act, for present purposes at least, establish a statutory scheme for employers in the construction industry to make contributions to the Board, for employees engaged in the industry. The Board is empowered, from the fund which it administers, to make payments to employees in the construction industry in respect of long service leave, once employees meet the required qualifying periods of service.
- 9 In accordance with the key provision for the purposes of these proceedings, that being s 34, the Board contended that the statutory scheme contemplates two broad obligations. The first obligation is on employers to make contributions to the fund administered by the Board. The second obligation, relates to payments made by the Board to employees, who meet the qualification requirement for long service leave. The submission of the Board was that those obligations are independent of each other.
- 10 Specifically as to s 34(1), the Board submitted that the first part of the subsection obliges an employer, in respect of persons employed by the employer under a current contract of employment, to make contributions. This only requires the existence of a contract of employment, and is not dependent on the actual performance of work under it. The second part of s 34(1), which is the controversial part for present purposes, deals with the manner by which contributions are calculated for employees of employers in the construction industry. The reference to "ordinary pay", as defined in s 3, gives it a special meaning, and that is a meaning based on what an employee is entitled to be paid, not what they are actually paid.
- 11 In relation to these submissions, the Board referred to a decision of the Commission in Court Session in *Kirfield Engineering Pty Ltd v Construction Industry Portable Paid Long Service Leave Payments Board* (1993) 73 WAIG 2670. In this case, which dealt with a similar issue, although under a somewhat different former definition of "ordinary pay" in the legislation, the conclusion was reached that a period of service on workers' compensation does not mean an employer is absolved from the obligation to make contributions on an employee's behalf, under s 34(1).
- 12 As to RCR Resources' reference to s 21 of the LSL Act, the Board submitted that this section of the Act, and in particular its reference to "days of service", is only for the specific purposes of calculating an entitlement of an employee to long service leave benefits under the legislation. It is not relevant for the purposes of assessing an employer's obligation to make contributions. Finally, the Board submitted that s 130(1) of the FW Act is not relevant to the issue to be determined in these proceedings. In all the circumstances the Board submitted that its assessment of RCR Resources' obligations to pay contributions in respect of Mr Thomson, whilst he was on workers' compensation, was correct.

#### Consideration

- 13 The application for review turns largely on the proper construction of the relevant provisions of the LSL Act, in particular s 34(1). The interpretation of legislation is a text based activity and it is to the text of the statute or other instrument, that primary regard must be given. An interpretation consistent with the purpose and object of the legislation should be preferred to one that is not: s 18 *Interpretation Act 1984* (WA). Recently, in *Taylor v Owens – Strata Plan No 11564* (2014) 88 ALJR 473, Gageler and Keane JJ said at par 65:

[65] Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always."<sup>112</sup> Context sometimes

- favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation.<sup>113</sup> 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.
- 14 By its long title, the LSL Act is “an Act to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes.”
- 15 By Part II the Board is established as a body corporate. The Board amongst other things is to maintain a register of employers and employees under the legislation and to administer the scheme of payment to employees for long service leave established under the LSL Act. For that purpose amongst its functions in s 15, the Board is to have a fund, which is comprised of contributions made to it under s 34 and proceeds from investments and other monies which the Board may borrow or raise. From the funds, the Board is to make payments to employees in accordance with the terms of the legislation.
- 16 Part III deals with entitlements to long service leave and pay. In particular, s 21 sets out the long service leave benefits which apply to an employee in relation to service in the construction industry. By s 21(2) there is set out a method of calculating such entitlements, which is based on a prescribed number of days of service with an employer or employers. Notably, given the nature of the construction industry, service is not required to be continuous with one and the same employer, and even with the same employer there can be more than one period of service. This Part also makes provision for lump sum payments, the taking of leave and additionally, pro rata leave after a minimum period of service. There are powers enabling the Board to remove an employee from the register of employees where they have not been engaged in the construction industry for a prescribed period of time. On this event, any entitlement to long service leave is extinguished, and there is no apparent mechanism within the legislation for an employer to recover any contributions so made.
- 17 By Part IV, provision is made for the registration of both employers and employees who are engaged in the construction industry as defined in s 3. Under this Part also, a registered employer is required to furnish a return to the Board for each prescribed period with the appropriate amount required to be paid to the Board in respect of persons employed by it.
- 18 The key provision for present purposes is s 34(1) which is in the following terms:
- 34. Contribution by employer and assessment by Board**
- (1) On and from the appointed day an employer shall pay to the Board in respect of a person employed by him as an employee and in respect of each week or part of a week during which that person is so employed such amounts by way of contributions as are calculated by reference to the ordinary pay payable to that employee as is prescribed.
- 19 Furthermore, the definition of “ordinary pay” in s 3 is also relevant and it provides:
- ordinary pay*, of a person, means the rate of pay (disregarding any leave loading) to which the person is entitled for leave (other than long service leave) to which the person is entitled;
- ...
- (3a) For the purposes of the definition of *ordinary pay* in subsection (1), if the person is not entitled to paid leave (other than long service leave), the ordinary pay of the person is the rate of pay to which the person is entitled for ordinary hours of work.
- 20 From the terms of the LSL Act as a whole, it is apparent that the overall scheme is to establish a fund from contributions made by employers in the construction industry. The Board administers the scheme payments for long service leave from the fund for the benefit of employees engaged in the construction industry, irrespective of by whom they may be employed at the time that the long service leave accrues. It seems from this scheme that contributions made by employers in accordance with the LSL Act, is the principal means by which the scheme is funded. Such contributions are not made for the purposes of paying for an employer’s own employees’ long service leave entitlements, but they may do.
- 21 In *Construction Industry Long Service Leave Payments Board v Precision Corp Pty Limited* (unreported 20 September 1991 Library No. 920130) Owen J said at pp 3-4:
- The Scheme of the Act
- The Act embodies the concept of providing long service leave based on service to an industry rather than service to a single employer. Instead of being eligible for long service leave after fifteen years of service to one employer, employees in the construction industry become eligible after fifteen years service in the industry.
- The legislation provides for a portable long service leave scheme for employees who may move from one employer to another or others but who remain within the construction industry.
- To be eligible for benefits under the scheme, employees must be registered (s 21). All employers in the construction industry must be registered (s 30). To meet the costs of the scheme each employer pays a contribution to the plaintiff based on a percentage of their employees’ ordinary pay (as defined in s 3) except in the case of apprentices, for whom no contribution is made (ss 31 and 34(1)). The scheme enables registered employees to carry their long service leave entitlements from employer to employer as the responsibility for payment for long service leave rests with the plaintiff rather than the individual employer.
- 22 From s 34(1) set out above, it provides for a contribution by an employer to the Board, “in respect of a person employed by him as an employee”. The contributions seemingly are required to be made during the course of employment. Such contributions are to be made, and are to be calculated “by reference to the ordinary pay payable to that employee”. It was common ground that there is a percentage rate of contribution prescribed by the relevant regulations. That is not necessary to

consider for the purposes of this review. The reference to “ordinary pay” under s 34(1), refers to that which is “payable”, and not that which is “actually paid”, on the ordinary and natural meaning of the words used in the subsection.

- 23 In s 3, set out above, “ordinary pay” makes reference to a rate of payment “to which a person is entitled” for leave. Whilst the definition is not elegantly drafted, again, there is no reference to any actual payment of wages, salary or other benefits. Furthermore, by s 3(a) if the person has no entitlement to leave, then the relevant “ordinary pay” for such a person is the rate the person is “entitled to for ordinary hours of work”. Again no reference is made to actual payments made for the purposes of determining ordinary pay. Thus in both cases, in ss 3 and 34(1) when read together, which they must be, the reference to “ordinary pay” is not taken to be payments actually made to an employee, but those which are “payable”.
- 24 Section 21 of the LSL Act, to which RCR Resources made extensive reference, deals with the entitlements of employees to long service leave and how those entitlements are to be calculated. So much is clear by the heading to Part III. Section 21(1) prescribes the entitlement to an employee based on “service in the construction industry (as defined in s 3)”. By s 21(2), how service is to be calculated is then set out. Consistent with the mobility of labour in the construction industry, service does not need to be continuous with the same employer. Service will however exclude breaks in service with the one and the same employer.
- 25 In my opinion, having regard to the scheme of the LSL Act, I consider that the issue of the calculation of entitlements to long service leave under Part III and the calculation of contributions employers are required to make to the Board, as being separate and distinct from one another. The contributions by an employer are to be made in respect of persons who are employed in each week or part of a week. That is the trigger for the making of a contribution to the Board. The rate of contribution, which is the second part of s 34(1) is to be determined in the manner prescribed. The words “are calculated by reference to”, when read in their ordinary and natural sense, are consistent with requiring an employer to work out how such contributions are to be determined. The use of the words “ordinary pay payable” require, consistent with the meaning of “ordinary pay” in s 3, an employer to work out what a person would be paid if they were to go on for example, annual leave or sick leave. It enables an employer to make an objective assessment as to how that calculation should be performed.
- 26 In the case of Mr Thomson, while on workers’ compensation, he remained an employee of RCR Resources. His rate of pay for the purposes of the determination of his “ordinary pay payable”, on which the company would be required to make contributions, would be presumably that set out in the Agreement, otherwise payable to him whilst on leave. I do not consider that Mr Thomson’s period on workers’ compensation, absolved RCR Resources from making contributions to the Board. To the extent that the same view was reached in *Kirfield*, albeit under the previous definition of “ordinary pay” in s 3, which referred to the relevant prescribed award and prescribed classification, then the same result applies in this case. In both the former and current definition of “ordinary pay”, a method of calculation was and is provided, based on an objective assessment of what payments would be payable in respect of an employee and not payments actually made to an employee.
- 27 In my view, the reference to “service”, and the provisions in relation to entitlements of employees in s 21 of the LSL Act, referred to by RCR Resources, are separate and distinguishable from the obligation to make contributions in s 34(1) contained in Part IV of the legislation. The construction of the legislation which I prefer is consistent with the overall legislative scheme to provide a common fund for contributions from all employers engaged in the construction industry in respect of those persons they employ, administered by the Board, and from which fund entitlements are paid to employees as and when they fall due under the legislation.
- 28 The final issue raised, concerns s 130 of the FW Act. It provides as follows:

**130 Restriction on taking or accruing leave or absence while receiving workers’ compensation**

- (1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a *compensation period*) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a *compensation law*) of the Commonwealth, a State or a Territory that is about workers’ compensation.
  - (2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.
  - (3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.
- 29 Section 130 falls within Part 2-2 of the FW Act that deals with National Employment Standards, including leave. The section only applies to leave which accrues “under this Part”. In this case, the entitlement to long service leave is taken or accrues under the LSL Act and not the FW Act. Whilst the Agreement refers to long service leave in cl 30.0, it is plainly a reference, as a statement, to the contributions payable by RCR Resources on behalf of employees as required by the LSL Act. Also, there is no applicable award or agreement based long service leave terms, to which s 113 of the FW Act, could have application in this particular case. In my opinion, the terms of s 130 of the FW Act, and the cases referred to in argument, do not assist in relation to the issue of contributions required for or the entitlements of employees to, long service leave for employees engaged in the construction industry under the LSL Act.

**Conclusion**

- 30 Therefore for the foregoing reasons, I consider that the Board was correct in its assessment. The application for review must be dismissed.
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2015 WAIRC 00985

**REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 20 APRIL 2015**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

RCR RESOURCES PTY LTD

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

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** TUESDAY, 3 NOVEMBER 2015  
**FILE NO/S** APPL 120 OF 2015  
**CITATION NO.** 2015 WAIRC 00985

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**Result** Application dismissed  
**Representation**  
**Applicant** Mr A Vucak and with him Ms R Defreitas of counsel  
**Respondent** Mr S Kemp of counsel and with him Ms J Alilovic of counsel

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*Order*

HAVING heard Mr A Vucak and with him Ms R Defreitas of counsel on behalf of the applicant and Mr S Kemp of counsel and with him Ms J Alilovic of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,  
 Commissioner.

[L.S.]

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## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

PETA BROWN

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

CITIZEN ADVOCACY SOUTH METROPOLITAN (INC)

**RESPONDENT**

**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT  
**DATE** THURSDAY, 29 OCTOBER 2015  
**FILE NO/S** B 86 OF 2015  
**CITATION NO.** 2015 WAIRC 00975

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**Result** Consent Order Issued  
**Representation**  
**Applicant** Mr K Trainer as agent  
**Respondent** Ms L Hannett as agent

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*Consent Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and  
 WHEREAS on 6 October 2015 the Commission convened a conference for the purpose of conciliating between the parties; and  
 WHEREAS at that conference the parties reached agreement in respect of the application and that the agreement be reflected in an order of the Commission;

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

1. THAT the respondent pay to the applicant an amount of \$5,257.76 as a redundancy payment subject to any amount due to the Australian Taxation Office.
2. THAT the respondent pay to the applicant an amount of \$475.57 for annual leave loading subject to any amount due to the Australian Taxation Office.
3. THAT the payments be made within 7 days of the date of this Order.
4. THAT the agreement is in full and final settlement of all matters related to the employment.
5. THAT the application be, and is hereby otherwise dismissed.

[L.S.]

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

**2015 WAIRC 00972**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

LINDA FORD

**APPLICANT**

-v-

METROPOLITAN HEALTH SERVICE

**RESPONDENT**

**CORAM** CHIEF COMMISSIONER A R BEECH

**DATE** WEDNESDAY, 28 OCTOBER 2015

**FILE NO/S** U 134 OF 2015

**CITATION NO.** 2015 WAIRC 00972

**Result** Application discontinued

*Order*

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

AND WHEREAS on Monday, 21 September 2015, the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS the conference adjourned on the basis that the parties would enter into discussions and the applicant would contact the Commission if agreement was reached or a further conciliation conference is required;

AND WHEREAS by written correspondence on Tuesday, 13 October 2015, the applicant informed the Commission that the parties have reached agreement in full and final settlement of the matter;

NOW THEREFORE, I, the undersigned, pursuant to the powers conferred on me under s 27(1)(a) of the Act, hereby order:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) A R BEECH,  
Chief Commissioner.

**2015 WAIRC 00954**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2015 WAIRC 00954  
**CORAM** : COMMISSIONER J L HARRISON  
**HEARD** : FRIDAY, 14 AUGUST 2015  
**DELIVERED** : THURSDAY, 22 OCTOBER 2015  
**FILE NO.** : B 226 OF 2014  
**BETWEEN** : KEITH HUDSON

Applicant

AND

DERBY MEDIA ABORIGINAL CORPORATION

Respondent

Catchwords	:	Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment - Claim for payment of balance of contract, time off in lieu and rental subsidy - Application upheld in part - Counter claim that any monies owed be offset against personal purchases made on respondent's credit card - Counter claim dismissed - Order issued
Legislation	:	<i>Industrial Relations Act 1979</i> s 7 and s 29(1)(b)(ii)
Result	:	Order issued
<b>Representation:</b>		
Applicant	:	In person
Respondent	:	Mr T Savu (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

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

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

*Waroona Contracting v Usher* (1984) 64 WAIG 1500

*Reasons for Decision*

- 1 On 11 November 2014 Keith Hudson (the applicant) lodged this application claiming he is owed benefits under his contract of employment with Derby Media Aboriginal Corporation (the respondent). The applicant is seeking the following:
1. \$70,979.94 in wages from 1 October 2014 to 30 June 2015 being the balance of what the applicant claims is the duration of his employment contract with the respondent;
  2. \$11,518.33 for Time Off In Lieu (TOIL) owed to him as at 30 September 2014; and
  3. \$960 in rental subsidies (\$80 per week from 1 July 2014 to 30 September 2014).

**Background**

- 2 The applicant was employed by the respondent as the Manager of its radio station in Derby between 25 May 2013 and 16 October 2014. The applicant managed seven employees as well as volunteers. Approximately 90% of the funding given to the respondent to operate the radio station came from federal government grants. The applicant's employment was subject to a written contract of employment which was signed by the applicant and the respondent on 23 July 2013. This contract expired on 20 December 2013 or 20 December 2014 (exhibit R1 – see handwritten change) (Contract 1). The respondent claims that Contract 1 was the only written contract which applied to the applicant during his employment as the respondent's manager. The applicant claims that another employment contract was signed by him and the respondent which applied from 1 July 2014 to 30 June 2015 (Contract 2). Contract 2 contained virtually the same terms and conditions of employment as Contract 1.
- 3 The applicant's letter of termination dated 2 October 2014 refers to the applicant being terminated due to constraints on the respondent's finances. This letter is as follows:

RE: "TERMINATION OF EMPLOYMENT"

On behalf of the DMAC Board Of Directors I take this opportunity to inform you that at a Special Directors Meeting held on the 30<sup>th</sup> September, 2014 a decision was made to address matters of the Organisation pertaining to its current financial status.

Due to major financial constraints that DMAC finds itself in, we have no option but to terminate your employment in order to keep the Radio Station afloat on a Volunteer Basis ! (sic)

DMAC therefore gives you two (2) x weeks notice of termination as per your Contract Of Employment and will endeavour to have all your Leave Entitlements paid on Friday – 17<sup>th</sup> October, 2014. **Your last day of employment will be Thursday – 16<sup>th</sup> October, 2014.**

The Board Of Directors thank you for your service & contribution during your period of employment and we wish you well in all your future endeavours ! (sic)

(Exhibit R3)

- 4 Clause 7. – Termination of Contract 1 and Contract 2 provides that the applicant's contract of employment may be terminated before the expiry of the contract and sets out the reasons for this occurring. Clause 7(e) provides that the applicant can be terminated based on operational requirements, economic considerations or financial circumstances. Clause 7(e) reads as follows:

e) **Operational Requirements and Economic Considerations**

The Corporation may terminate your employment because of reasons associated with operational requirements, economic consideration, or financial circumstances, as for example reduced funding received from the various funding entities, which funding may or may not be related to your employment.

(Exhibit R1)

- 5 Contract 1 and Contract 2 contain a provision that entitles the applicant to be paid TOIL for overtime hours worked by him if these hours are not taken as leave. Clause 6. – Overtime of Contract 1 reads as follows:

**6. Overtime**

You may be required to perform a reasonable level of overtime. Paid overtime will not be worked without the prior approval of the DMAC Board of Directors. Daily overtime shall be compensated for in the following manner:

- a) The first two hours of overtime will be paid at time and a half and thereafter double time except that you may, by mutual agreement with the Board of Management of the Corporation, or opt to take overtime as time off in lieu at the rate of single time within the following calendar month. Such agreement will be recorded in writing.
- b) Any overtime taken as time off in lieu, but not given within the period, shall have the overtime paid at single time. This shall be paid within the fortnight period following the end of the period.
- c) Any time allowed off duty in lieu of overtime shall be deemed to be ordinary rostered hours for the day or days on which the time off in lieu is taken.

(Exhibit R1)

- 6 A document prepared by the respondent's external bookkeeper Ms Angela Bourne confirms that the applicant's TOIL accrual as at 30 September 2014 was 253.15 hours which equates to \$11,518.33 in wages. This summary was based on hours worked by the applicant submitted to Ms Bourne by the applicant each fortnight (exhibit A1).
- 7 Schedule B of Contract 1 provides that the respondent may, when applicable, pay the applicant a rental subsidy of \$80 per week to assist with local rental rates and air-conditioning costs.
- 8 The respondent claims that tax invoices in the amount of \$3,371.35 were missing for a range of personal purchases made by the applicant (see exhibit R6). Clause 24. – Monies Owed to Corporation in Contract 1 and Contract 2 allows this amount to be offset against any monies owing to the applicant. Clause 24 reads as follows:

**24. Monies Owed to Corporation**

On the termination of this contract you shall repay to the Corporation any monies that you owe to the Corporation. Any debt that you have to the Corporation that remains outstanding at the time of the termination of the contract may be offset by the Corporation from any monies that it owes you, or otherwise recovered by the Corporation.

(Exhibit R1)

- 9 Contract 1 contains a provision that the terms of this contract will continue to apply to the applicant if no other contract of employment is signed between the applicant and the respondent. Clause 27 of Contract 1 reads as follows:

**27. Continuation of Employment after Expiry Contract Term (sic)**

If for any reason you or the Corporation fails to discuss, or agree on, the negotiation (sic) of a new contract or the termination of your contract and you continue to work beyond the expiry date or (sic) this contract with the permission of the Corporation this additional service will not be regarded as an actual or intended engagement of you as a permanent employee or an actual or intended entering into of a new contract. Any such employment after the expiry of this contract shall be on a monthly basis, which may be terminated by 4 weeks' notice of (sic) payment in lieu of notice.

(Exhibit R1)

**Evidence**

**Applicant**

- 10 The applicant stated that he gave the hours worked by staff members to Ms Bourne to pay the wages due to each employee every fortnight. These hours included overtime worked by each employee. The applicant gave evidence that he accrued TOIL so that he could take time off when his wife was due to have an operation and the applicant stated that he raised this issue many times with the respondent's Board of Management (the Board) at Board meetings.
- 11 The applicant gave evidence that he believed funding was available to allow the radio station to continue operating from 1 July 2014 to 30 June 2015. The respondent was therefore not experiencing financial difficulties when he was terminated.
- 12 The applicant claimed that he and Mr Bradley Spring signed Contract 2 and this contract was witnessed by the respondent's administration officer Ms Teena Taylor. The applicant tendered an unsigned copy of this contract and he claimed that the respondent held the original copy (exhibit A2). The applicant was adamant he signed Contract 2 and he stated that this contract was put in place because the respondent's funding had been approved to 30 June 2015. As this contract expired on 30 June 2015 and as it applied to the applicant when he was terminated he is seeking payment of the balance of the term of this contract be paid out.
- 13 The applicant gave evidence that he never received a rent subsidy nor did he request that the respondent pay him a rent subsidy.
- 14 Under cross-examination the applicant confirmed that he attended the special Board meeting held on 30 September 2014 (see minutes exhibit R2). The applicant agreed that the respondent's financial position was discussed at this meeting as well as TOIL owed to employees. The applicant stated that he told the Board at this meeting that the number of hours owed to other

employees as TOIL was incorrect and that he would forego the TOIL owed to him. The applicant stated that he did not keep written records of the TOIL taken by each employee but he knew that no TOIL was owed to any other employee. The applicant denied that he made up his claim for the TOIL hours owing to him and the applicant disputed that he attended his son's wedding in Fiji using his TOIL entitlements and that he continued to be paid wages as though he was at work. He stated that the Board approved this absence.

- 15 The applicant was aware that the respondent was experiencing financial difficulties in September 2014 but he believed that Ms Bourne was not properly accounting for the respondent's finances and the applicant disputed that the respondent's financial situation was the reason for his termination as he believed that in September 2014 the respondent was due to receive further funding. The applicant gave evidence that he became aware at the meeting held on 30 September 2014 that all of the respondent's staff except one were going to be terminated and he understood this was because of funding problems faced by the respondent. The applicant said he did not agree with the conclusions of Ms Bourne and the auditor about the respondent's financial situation but he accepted the Board's decision to terminate all but one employee.
- 16 The applicant denied that he did not provide tax invoices to the respondent for purchases amounting to \$3,371.35 and he stated that invoices were provided to Ms Bourne for these purchases. The applicant stated that none of the purchases were for his personal use including the Bravo flights which were not used. The applicant said that occasionally invoices went missing and on one occasion Ms Bourne's office flooded so some invoices may have been misplaced.

#### Respondent

- 17 Mr Spring is currently employed as the respondent's manager and he was a member of the Board when the applicant was terminated. Mr Spring said he had not seen Contract 2 that the applicant claims he signed and he said the respondent would have a copy of this contract if he had signed it.
- 18 Mr Cyril Archer is a founding member of the respondent and he is currently the Board's secretary. Mr Archer prepared the minutes of the Board's special meeting held on 30 September 2014 (exhibit R2). Mr Archer said that in August 2014 he became aware that the respondent was suffering financial problems so he invited representatives of the Department of the Prime Minister and Cabinet and the Office of the Registrar of Indigenous Corporations to the special meeting of the Board held on 30 September 2014 as they were either involved in providing funding for the respondent to operate or they had oversight of its operations. Mr Archer said that because of overspending the first six months of funding for the financial year had been spent in three months and the respondent was running out of money to keep operating. The audit report covering the financial year ending 30 June 2014 confirmed this. Mr Archer said that the respondent only had sufficient funds to operate for a further two weeks after September 2014. After 30 September 2014 the respondent operated with volunteers and one employee and the Board worked on a recovery plan.
- 19 Mr Archer stated that during the Board meeting held on 30 September 2014 the applicant did not dispute the information contained in the financial reports. Mr Archer confirmed that at this meeting the applicant said that he would not take payment for the TOIL hours owed to him and that he had kept a record of TOIL taken by employees.
- 20 Mr Archer said that Contract 1, which was signed by him on behalf of the respondent on 23 July 2013, had two changes that he was aware of and he had acknowledged in the contract. Mr Archer could not recall making the third change to the contract which resulted in the contract being extended to 20 December 2014. Mr Archer said that a meeting was held with four staff members after they were terminated and they agreed they were not entitled to any payment for TOIL (exhibit R4). Mr Archer believed that the applicant was not due the TOIL payment he is seeking because he took TOIL leave on many occasions without recording it on his timesheet. Mr Archer based this on the applicant sometimes not being present at the radio station when Mr Archer visited. Mr Archer also stated that there was no record of the applicant taking leave when he went to Fiji.
- 21 Mr Archer gave evidence that the applicant never requested any rent assistance and the higher rate of pay paid to him as the respondent's manager was to assist him with rental payments. Mr Archer stated that the applicant was not entitled to be paid the balance of his contract because he was terminated due to the financial problems the respondent was experiencing and his contract allowed for his termination in these circumstances.
- 22 Mr Archer confirmed that the Board met monthly and a summary of the respondent's finances prepared by Ms Bourne was presented at these meetings.
- 23 As the respondent's external bookkeeper Ms Bourne prepares monthly financial reports for the Board and these reports do not contain the TOIL owing to employees. Ms Bourne stated that the record of hours worked by each employee given to her by the applicant showed that TOIL hours were being accumulated for employees and that no TOIL had been taken by any employee. Ms Bourne had regular contact with the applicant about the respondent's finances.
- 24 Mr Archer invited Ms Bourne to attend the Board meeting on 30 September 2014 as he told her he was concerned about the state of the respondent's finances. Ms Bourne stated that at the time the respondent's financial situation was dire and if employees were not terminated the respondent would have traded whilst insolvent. Ms Bourne said that over half of the funds secured by the respondent for the 2014/2015 financial year had been spent by September 2014. Ms Bourne stated that a small amount of funding was made available to the respondent in December 2014, another release was made in February 2015 and the remainder in April 2015. Ms Bourne said that the \$3,371.35 the respondent claimed was owed to it by the applicant related to expenditure authorised by the applicant which the respondent could not acquit because tax invoices had not been provided by the applicant. Ms Bourne said she held a copy of the signed contracts of employment for each employee and she gave evidence that she did not have any copies of any employee contracts, including one for the applicant, covering 2014/2015. Ms Bourne said that no documentation was lost as a result of her office being flooded in January 2014.

#### Submissions

##### Applicant

- 25 The applicant maintains that he was not terminated due to the respondent experiencing financial problems and he claims that the respondent's financial difficulties were due to poor management and mishandling of the respondent's projected income. The respondent was still receiving income in September 2014 and the respondent should have focused on continuing to trade and seeking further funding. The applicant claims that he signed Contract 2 which expired on 30 June 2015. He is therefore due to be paid wages for the balance of this contract up to 30 June 2015.
- 26 The applicant submits that he worked the extra hours he is due as TOIL and he planned to take this time off at a future date and the Board was aware of this. The rent subsidy was included in his contract of employment so he is entitled to this payment. The applicant claims that it was difficult to obtain information about a number of the items the respondent claims no tax invoices were provided by him.

#### Respondent

- 27 The respondent claims that Contract 1 was the only signed contract of employment in place for the applicant and Contract 2 which the applicant claims he signed did not exist. The respondent had good reason to terminate the applicant because it was experiencing severe financial problems as at 30 September 2014 and if the respondent continued to trade after this date it would have been trading whilst insolvent. As Contract 1 allowed the applicant to be terminated in these circumstances he is not entitled to the payment of the balance of his contract of employment.
- 28 The respondent submits that the applicant was only entitled to TOIL if it was approved by the Board. The respondent also disputes that any monies are owed to the applicant for the TOIL he is claiming as there was no independent proof that the applicant accrued these hours. The minutes of the Board meeting on 30 September 2014 confirm that the applicant agreed that the TOIL hours showing in the Entitlement Balance summary provide by Ms Bourne were incorrect. Furthermore, the applicant had already taken this TOIL as leave as at 30 September 2014.
- 29 The payment of a rent subsidy to the applicant was never raised by the applicant as an issue during his employment with the respondent. This subsidy is therefore not owed to him.
- 30 The respondent submits that the applicant owes it money for personal items he charged to the respondent's credit card in the amount of \$3,371.35. If the Commission finds the applicant owes the respondent any monies, this debt should be offset as there is a provision in the applicant's contract of employment which allows this to occur.

#### Consideration

##### Witness Credit

- 31 In my view the evidence given by all of the witnesses for the respondent was given honestly and in a forthright manner. Much of their evidence was also supported by relevant documentation. I therefore accept the evidence given by witnesses for the respondent.
- 32 I find that evidence given by the applicant about signing Contract 2 was not convincing. In my view the applicant's evidence about the existence of this contract was vague and his evidence was not corroborated by any documentation or by any of the other witnesses who gave evidence in these proceedings. I find that the applicant gave clear and forthright evidence about the TOIL owed to him and his evidence about this issue was not broken down during cross-examination. His evidence about the TOIL he had accrued was also corroborated by a summary of TOIL owed to him prepared by Ms Bourne (exhibit A1). I therefore accept the applicant's evidence about the TOIL he claims is owed to him. I accept the applicant's uncontested evidence that the invoices relating to the quantum of \$3,371.35, which the respondent claims is owed to the respondent by the applicant, did not include any items for his personal use.
- 33 There was no dispute between the parties with respect to the evidence about the rental subsidy being claimed by the applicant.

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

- 34 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.
- 35 In determining whether a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claims he is seeking are benefits to which he is entitled under his contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under the contract of employment, having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (*Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts*).
- 36 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 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.

#### **1. Claim for payment of the balance of the contract of employment up to 30 June 2015**

- 37 I find that the applicant was lawfully terminated under the terms of clause 7(e) of Contract 1 and he is not due the payment he is seeking for the balance of what he claims to be his fixed term contract of employment with the respondent up to 30 June 2015.
- 38 I find that the applicant was terminated by the respondent under clause 7(e) of Contract 1 due to the respondent experiencing financial difficulties. Clause 7(e) of Contract 1 provides that the respondent can terminate the applicant due to financial circumstances or economic considerations and the applicant was advised in his letter of termination that he was being terminated due to the respondent experiencing constraints on its finances. I find that the respondent had sufficient reason to terminate the applicant. I find that the respondent was experiencing financial difficulties in September 2014 and that sufficient future funding was not being made available to the respondent for it to continue to operate its radio station and employ eight employees after the end of September 2014. I accept the evidence of Mr Archer and Ms Bourne that the respondent was unable to continue trading and fund the wages of its eight employees for any more than two weeks after 30 September 2014. Their evidence was also corroborated by documentation related to the respondent's financial status at the relevant time (see exhibits R5 and R7). I also accept Ms Bourne's evidence that there was no guarantee that the respondent would receive further funding for the radio station to continue operating after the end of September 2014. In the circumstances I find that it was appropriate for the respondent to review its financial commitments to reduce expenditure and in doing so terminate the applicant and six other employees on 2 October 2014.
- 39 There was a dispute between the parties as to whether Contract 2 was signed by the applicant and the respondent and therefore formed part of the applicant's contract of employment when he was terminated. I find that even if Contract 2 was in place, it contains a clause in the same terms as clause 7(e) of Contract 1 and this clause could therefore have been relied on by the respondent to lawfully terminate the applicant if Contract 2 applied to the applicant at termination. In any event, I find that a signed copy of Contract 2 did not exist as the weight of evidence that Contract 2 was finalised and applied to the applicant's employment is against the applicant. Furthermore, a signed copy of Contract 2 was not submitted as evidence in these proceedings.
- 40 There was uncertainty as to the exact date Contract 1 expired. Mr Archer could not recall initialling the change to Contract 1 confirming that Contract 1 applied to the applicant's employment up to 20 December 2014 instead of 20 December 2013. If Contract 1 expired on 20 December 2014 the terms of this contract applied at the time the applicant was terminated on 2 October 2014. If Contract 1 expired on 20 December 2013 the terms and conditions of this contract continued to apply to the applicant after this date given the terms of clause 27 of Contract 1 which provides that in this situation the applicant is entitled to four weeks' notice of termination instead of the two weeks' notice he was given when he was terminated. However, the applicant did not claim an additional two weeks' notice as he maintained Contract 2 applied to him at the time he was terminated.

## **2. Claim for TOIL**

- 41 The respondent concedes that clause 6 of Contract 1 provides that the applicant is entitled to be paid TOIL owed to him which has not been taken as leave and a document prepared by Ms Bourne confirms that the applicant was owed \$11,518.33 in TOIL as at 30 September 2014 based on hours worked by the applicant which he submitted to Ms Bourne on a fortnightly basis.
- 42 As I accept the applicant's evidence with respect to TOIL accumulated by him I find that the applicant did not take any of the TOIL he accrued during his employment with the respondent. I therefore find that the summary prepared by Ms Bourne accurately reflects the TOIL owed to the applicant at the time he was terminated. Mr Archer claimed the applicant had taken TOIL owed to him because he was sometimes not at work when he visited the radio station but no evidence was given that the applicant was required to be at the radio station's premises at all times when working. No documentation confirming the applicant's TOIL leave dates was tendered by the respondent to contradict the applicant's claim that he did not take any of his accrued TOIL nor was any evidence given by the respondent confirming the dates the respondent claimed the applicant took the TOIL owed to him. There was also no evidence that the applicant falsely claimed that he had worked the additional overtime hours he had accumulated as TOIL.
- 43 The minutes of the Board meeting held on 30 September 2014 confirm that the applicant proposed that he forgo the payment of TOIL owed to him contained in Ms Bourne's summary and I accept the applicant's evidence that he made this offer to assist other employees to retain their employment with the respondent. There was no evidence that the respondent agreed to this offer which could have resulted in a variation to the terms of the applicant's written contract of employment and there was no written agreement between the applicant and the respondent confirming that no TOIL was owed to the applicant in the same terms which the respondent concluded with four other former employees (see exhibit R4).
- 44 I reject the respondent's claim that the applicant required the Board's approval to be paid the TOIL owed to him at termination as I find that clause 6 of Contract 1 does not provide that the Board is required to approve the payment of TOIL owing to the applicant. Clause 6 of Contract 1 provides that overtime worked by the applicant and paid at penalty rates can only occur with the prior approval of the Board which does not apply in this instance. Clause 6(a) provides that TOIL can be taken by the applicant at single time rates within the following calendar month after working such overtime by mutual agreement with the Board. When this TOIL is taken the agreement with the Board to do so will be recorded in writing. Clause 6(b) provides that TOIL not taken within a specified period will be paid to the applicant. Clearly the terms of clause 6(b) do not require the Board's approval for the applicant to be paid TOIL owed to him if not taken within a specified period. In any event the applicant gave uncontested evidence, which I accept, that the Board was regularly kept informed about his accumulated TOIL and there was no evidence that the Board contested his ongoing accrual of TOIL or his plan to take this leave at a future date to deal with a personal matter.
- 45 As clause 6(b) of Contract 1 provides that the applicant is entitled to the payment of outstanding TOIL owed to him the applicant is to be paid \$11,518.33.

## **3. Claim for payment of a rent subsidy**

46 The applicant did not request the payment of the rental assistance available to him in Schedule B of Contract 1 during his employment with the respondent. It is also the case that Contract 1 specifies that the payment of rent assistance may be paid to the applicant 'when applicable' which Mr Archer described as being a situation where the circumstances warranted this payment being made to the applicant. As the applicant did not request rental assistance, nor did he demonstrate that it was necessary for this payment to be made to him or that circumstances existed whereby this entitlement should be paid to him I find that the applicant is not entitled to the payment of the rent subsidy he is seeking.

Respondent's counterclaim of \$3,371.35

47 The respondent argues that it is unable to reconcile purchases made by the applicant charged to the respondent's credit card amounting to \$3,371.35 and that these items were purchased for the applicant's personal use. This quantum should therefore be offset against any money owing to the applicant given the terms of clause 24 of Contract 1.

48 I find that the amount of \$3,371.35 should not be offset against the monies I have found are owed to the applicant. I accept the applicant's evidence that these expenses were all work related and no evidence was given to dispute this claim. I also find that this quantum relates to an accounting issue with respect to this expenditure and does not constitute monies owed to the respondent by the applicant.

49 An order will issue that the applicant be paid \$11,518.33.

**2015 WAIRC 00959**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
KEITH HUDSON

**PARTIES**

**APPLICANT**

-v-

DERBY MEDIA ABORIGINAL CORPORATION

**RESPONDENT**

**CORAM** COMMISSIONER J L HARRISON  
**DATE** MONDAY, 26 OCTOBER 2015  
**FILE NO/S** B 226 OF 2014  
**CITATION NO.** 2015 WAIRC 00959

**Result** Order issued  
**Representation**  
**Applicant** In person  
**Respondent** Mr T Savu (of counsel)

*Order*

HAVING HEARD the applicant on his own behalf and Mr T Savu of counsel on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. DECLARES that the respondent denied the applicant a benefit under his contract of employment.
2. ORDERS that the respondent pay the applicant \$11,518.33 gross, within 21 days of the date of this order.
3. ORDERS that the respondent's counterclaim be and is hereby dismissed.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

**2015 WAIRC 00805**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MARTIN FRANCIS JEPSON

**PARTIES**

**APPLICANT**

-v-

MOSAIC COMMUNITY CARE INC.

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** FRIDAY, 14 AUGUST 2015  
**FILE NO.** U 102 OF 2015  
**CITATION NO.** 2015 WAIRC 00805

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<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Applicant</b>	Mr S Edwards as agent
<b>Respondent</b>	Mr R Dalton

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*Direction*

HAVING heard Mr S Edwards as agent on behalf of the applicant and Mr R Dalton on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely no later than 24 August 2015.
- (2) THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely no later than 2 September 2015.
- (3) THAT the matter be listed for hearing on the question of jurisdiction on a date to be fixed.
- (4) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.**2015 WAIRC 00833**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARTIN FRANCIS JEPSON	<b>APPLICANT</b>
	<b>-v-</b> MOSAIC COMMUNITY CARE INC.	
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	THURSDAY, 27 AUGUST 2015	
<b>FILE NO/S</b>	U 102 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 00833	

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr S Edwards as agent
<b>Respondent</b>	Mr R Dalton

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*Order*

HAVING heard Mr S Edwards as agent on behalf of the applicant and Mr R Dalton on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

The applicant's agent Mr S Edwards be and is hereby granted leave to appear by video link from the Busselton Court Complex.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.**2015 WAIRC 00859**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MARTIN FRANCIS JEPSON	<b>APPLICANT</b>
	<b>-v-</b> MOSAIC COMMUNITY CARE INC.	
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	FRIDAY, 4 SEPTEMBER 2015	
<b>FILE NO.</b>	U 102 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 00859	

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**Result** Directions issued  
**Representation**  
**Applicant** Mr S Edwards as agent  
**Respondent** Mr R Dalton

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*Directions*

HAVING heard Mr S Edwards as agent on behalf of the applicant and Mr R Dalton on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the Commission's directions of 14 August 2015 be and are hereby revoked;
- (2) THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely by no later than 11 September 2015;
- (3) THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely by no later than 18 September 2015;
- (4) THAT the matter be listed for hearing on the question of jurisdiction on a date to be fixed;
- (5) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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**2015 WAIRC 00917**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MARTIN FRANCIS JEPSON

**APPLICANT**

**-v-**  
MOSAIC COMMUNITY CARE INC.

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** FRIDAY, 2 OCTOBER 2015  
**FILE NO/S** U 102 OF 2015  
**CITATION NO.** 2015 WAIRC 00917

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**Result** Order issued  
**Representation**  
**Applicant** Mr S Edwards as agent  
**Respondent** Ms E Jones of counsel

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*Order*

HAVING heard Mr S Edwards as agent on behalf of the applicant and Ms E Jones of counsel on behalf of the respondent the Commission, by consent, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the herein application be and is hereby adjourned and the hearing date of 6 October 2015 be and is hereby vacated.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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**2015 WAIRC 00935**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MARTIN FRANCIS JEPSON

**APPLICANT**

**-v-**  
MOSAIC COMMUNITY CARE INC.

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** MONDAY, 12 OCTOBER 2015  
**FILE NO/S** U 102 OF 2015  
**CITATION NO.** 2015 WAIRC 00935

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<b>Result</b>	Discontinued by leave
<b>Representation</b>	
<b>Applicant</b>	Mr S Edwards as agent
<b>Respondent</b>	Ms E Jones of counsel

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*Order*

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 00986

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

<b>CITATION</b>	:	2015 WAIRC 00986
<b>CORAM</b>	:	ACTING SENIOR COMMISSIONER P E SCOTT
<b>HEARD</b>	:	WEDNESDAY, 19 AUGUST 2015, THURSDAY, 20 AUGUST 2015, FRIDAY, 21 AUGUST 2015, WEDNESDAY, 7 OCTOBER 2015

WRITTEN SUBMISSIONS  
FRIDAY, 11 SEPTEMBER 2015,  
FRIDAY, 2 OCTOBER 2015

<b>DELIVERED</b>	:	TUESDAY, 3 NOVEMBER 2015
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<b>FILE NO.</b>	:	U 99 OF 2014
<b>BETWEEN</b>	:	PAUL RALPH KENDALL

Applicant

AND

GOVERNMENT OF WESTERN AUSTRALIA  
DEPARTMENT OF EDUCATION

Respondent

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CatchWords	:	Unfair dismissal – Teacher – Breaches of discipline – Department of Education Code of Conduct – Breaches of the Code of Conduct – Maintaining professional boundaries with student – Teacher-Student relationships – Standards and Integrity Directorate – Application to receive new evidence – Whether to re-open the hearing – Rules of evidence
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Legislation	:	<i>Industrial Relations Act 1979</i> s 26(1)(b) <i>Public Sector Management Act 1994</i> s 80(b) <i>School Education Regulations 2000</i> reg 38
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Result	:	Application dismissed
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**Representation:**

Applicant	:	Mr P Kendall on his own behalf
Respondent	:	Mr D Anderson of counsel

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*Reasons for Decision***Background**

- 1 The applicant, Mr Paul Ralph Kendall, claims that he was harshly, oppressively or unfairly dismissed from his employment with the respondent as a teacher. He worked for over 18 years, mainly at Kalamunda Senior High School, teaching English. He is now in his early 60s.
- 2 Mr Kendall was dismissed following allegations, an investigation and findings that he had breached discipline, contrary to s 80(b) of the *Public Sector Management Act 1994* (the PSM Act) by contravening the Department of Education Code of

Conduct (the Code), in particular that he had failed to maintain professional boundaries with a student. The findings all relate to Mr Kendall's conduct in relation to a Year 12 female student, who I will refer to as 'the student'.

- 3 The first finding was that Mr Kendall exchanged mobile telephone numbers and personal email addresses with the student and engaged in subsequent contact with her by mobile phone and email in relation to non-school related matters.
- 4 The second finding was that Mr Kendall developed a close personal relationship with the student, in which they spent a large amount of time together, during and outside of school hours, and spoke at length about non-school related matters. On several occasions, he was alone in his classroom with her, at times with the door closed. On occasions, he hugged her in his classroom where he was alone with her. He allowed her to engage in regular physical contact with him and also kiss him on the forehead. On a number of occasions outside of school hours, he attended coffee shops in Kalamunda with her, meetings that predominantly involved just the two of them. On many occasions, he drove her in his private vehicle to evening debating contests involving a drive of approximately 30 minutes each way, and he was alone in his vehicle with her. Once again, this is said to be contrary to the Code in that he failed to maintain professional boundaries by spending an inordinate amount of time alone with the student in addition to engaging in inappropriate physical contact with her.
- 5 The third finding was that on the evening of Friday, 14 September 2012, Mr Kendall attended an Upper School Performance Night held at the Kalamunda Performing Arts Centre (KPAC). At the end of the evening, he was in the company of the student and had arranged to drive her home. She was quite upset at the time due to an altercation with another person. Once in the vehicle with her he locked the doors and then approached her, placing an arm around her and kissing her on the lips. He used his hand to touch her on the breasts. This caused her to feel very awkward, uncomfortable and upset towards him. The respondent says that these actions are contrary to the Code in that Mr Kendall failed to maintain professional boundaries with a student, by engaging in inappropriate physical and sexual contact.

#### **The Grounds**

- 6 The grounds of the application as filed, allege bias in the investigation and oppression based on the length of time the investigation took, and on procedural matters. However, at the commencement of the hearing, those grounds were amended. Mr Kendall now challenges the findings themselves. He acknowledges that he exchanged private phone numbers and email addresses and had contact with the student by mobile phone and email about non-school related matters, that he had been alone in his classroom with the student at times with the door closed, that he had regular physical contact with her, attended coffee shops with her, predominantly just the two of them, and was alone with her in his vehicle in the evenings as he drove to and from debating contests. He says, though, that the context in which these things occurred provides mitigation and that there was nothing inappropriate or improper in that conduct. He denies the third allegation.

#### **The Investigation and Decision Process**

- 7 Members of the respondent's Standards and Integrity Directorate investigated the allegations. They interviewed the student; her mother; a number of former students; teachers Ms Kylie Ogg, Ms Jane Sayer-Henderson and Ms Denise Hewitt, his head of department; the school Principal, Ms Kathleen Ritchie, and the school psychologist Ms Jennifer Edmonds. The student was interviewed on both 23 April 2013 and 6 June 2013. The other witnesses were interviewed in April, May and June 2013. Mr Kendall was interviewed on 23 July 2013.
- 8 An investigation report was prepared and submitted to the Director General with recommendations that it was open to the Director General to find that there was sufficient evidence to support each of the allegations and to find that Mr Kendall had committed breaches of discipline. The Investigation Report was provided to Mr Kendall and he was given an opportunity to respond to the Investigation Report, its findings and to the respondent's proposed penalty of dismissal.
- 9 Mr Kendall responded by letter dated 28 March 2014 of two pages in length, attaching a response to each of the interviews recorded in the Investigation Report, totalling 49 pages of responses.
- 10 The respondent then wrote to Mr Kendall by letter dated 11 April 2014, advising him that consideration had been given to his written submission, maintaining that termination of employment was the most appropriate action and terminating his employment. Attached was a document addressing his written response.
- 11 Nearly six months after the dismissal, at her instigation, the student provided a further statement to the investigators.

#### **The Evidence**

- 12 Mr Kendall called evidence from a number of parents and former students about his teaching and support of those students, and whether they felt comfortable with his interaction with the students, particularly dealing with them alone. This evidence was supportive of him and was to the effect that he had made a real contribution to their education and the parents and students felt comfortable with him.
- 13 One of those former students, K, also gave evidence that she was instrumental in getting the student involved in the debating team. However, the student's and her paths had diverged over time. She said that she did not believe the allegations against Mr Kendall, that the student was a bored teenager who was attention seeking. She also said that the student and another student 'used to go get high all the time in the bathrooms at school', that she would tell her friends she was high.
- 14 Desiree Anne Chapman, the school chaplain, gave evidence of an altercation between the student and a parent on 14 September 2012 at the KPAC hall, in which there were loud, raised voices. Ms Chapman also gave evidence that Mr Kendall's relationship with the student in school helped the student get through school – that the student had changed and was more settled and actually working.
- 15 Mr Kendall gave evidence essentially affirming the contents of his responses to the allegations contained in record of interview of 27 July 2013 and correspondence with the investigators and the Director General.

- 16 Mr Kendall described how he had been the student's English teacher. He said his relationship with the student was a friendship, an innocent friendship. They exchanged personal mobile telephone numbers and personal email addresses so as to make arrangements regarding the debating team. Any incidental personal exchanges were quite innocent. Mr Kendall says he does not send emails with non-school related content to any other students, although he did to the student.
- 17 Mr Kendall says he also gave his mobile phone number to another student in 2012 as she was the debating captain.
- 18 Mr Kendall also acknowledges that firstly, he and the student visited Dome coffee shop 'which is situated virtually opposite the school' (exhibit 1, tab 2), half a dozen times and Merchant coffee shop twice. He said Dome was a very public place, and was visited by staff and students of the school. On one occasion they attended the coffee shop in the presence of the school librarian, and on another occasion, another teacher and another student. It was essentially to discuss debating and other matters, 'just simply conversation' (exhibit 1, tab 4).
- 19 He acknowledged being alone with the student in his vehicle, driving approximately 30 or 40 minutes from her house, approximately four to five times. Mr Kendall said that he took the student in his car to interschool debating events because she had no other way of getting there.
- 20 He said at the end of the interview on 27 July 2013, 'I have not had contact with [the student] since I haven't been at school', and he was excluded from the school from 20 May 2013.
- 21 Mr Kendall does not remember giving the student permission to engage in regular physical contact with him but suggests that there were 'the essential hugs that sometimes she did' ... '[the student] is a very tactile person by nature. She hugs everybody ... [students] and other teachers that she gets on with and likes' ... 'hugs were the extent of her physical contact with me. I don't know how many times she hugged me, I didn't initiate the hugs' (exhibit 1, tab 4).
- 22 In cross-examination, Mr Kendall said that the student would launch herself on people. He said that she hugged him and others, but that when she hugged him, he did not reciprocate (ts 122). He said he told her that she could not do that. He says that 'I would have spoken to her about it. I don't recall what I said. The hugs did not cease as a result of my conversation with her'. He says, '[t]hey didn't happen very often, I didn't think about it' (exhibit 1, tab 5).
- 23 He says that on the evening of 14 September 2012 at KPAC, the student was 'terribly distraught' and he comforted her. In the interview on 23 July 2013 he said:

...

- After a while, I can't remember who or what pacified the situation. I said to [the student] '*Come on, let's get you home.*'
- My car was parked in the school car park by the school exit, facing the road – if I was a metre more I would have been on the pavement, under a street light.  
(Diagram drawn)
- On entering the car park, [the student] burst into a torrent of tears. She was in a terribly distraught state.
- She then put her arm on my arm and we walked to the car.
- It's a difficult situation for anyone to be in, when you see somebody you are friendly with and you care about in that situation, all you can do is offer them some degree of comfort.
- What I did was say '*Look, let's get in the car now.*'
- I opened the door, she got in the car, we sat there for about a couple of minutes.
- She calmed down, I said '*Are you alright now?*' and her answer was in the positive.
- I can't remember if we discussed the incident because logic would have it that it wouldn't have been any use to calming her down.
- She was in a state of calm, so another couple of minutes and I said '*Right, we are off, lets go.*' That was it.
- What really annoyed me, I don't even want to say some of this to be honest because it makes me feel horrible, but '*you have locked the doors.*'
- I didn't lock the doors of the car, I didn't do that. I just sat her in there and calmed her down and drove home.
- Another dot point '*This has caused [the student] to feel very awkward, uncomfortable and upset towards you her teacher.*' My answer to that is '*Balderdash.*'
- This occurred on 14 September which was a long, long time ago and since then [the student] and I have been good friends without any awkwardness on her part.

Exhibit 1, tab 4, 'Allegation 3'

- 24 In his letter dated 28 March 2014, Mr Kendall also said:

...

- [The student] states that I gave her a hug as she was upset. She was very upset outside the PAC but was not crying at that time. She was being pacified by some friends when she hugged me in front of lots of people including the drama teacher and the chaplain. No one thought it was unusual as she was very upset.
- We then went to my car which was parked in the school car park and she took my arm and started to cry about six or seven steps away from the car. It was a torrent of tears and was the release for all the night's emotions and tensions associated with a drama production of this kind. Add this to the fight with [another student's] mother and it was a very emotional night. She berated me for not coming to her support when she was involved

in the fight between her and [another student's] mother. She was very annoyed with me for not siding with her. I did not tell her that I thought she was in the wrong as I did not want to upset her further. However, she knew she was in the wrong and I would say that this was one of the causes of her anger.

- We talked for a few minutes in the car, I pacified her a bit, and I then drove her straight home. We did not stop on the way.
- When asked about what happened in the car [the student] replied that 'Nothing happened.' This is correct.

...

Exhibit 1, tab 7, 47

- 25 In his evidence, Mr Kendall denies that when they got into his car he locked the doors, that he placed his arm around the student, that he kissed her on the lips and that he touched her on the chest and on the breast.
- 26 Mr Kendall denies the student's statement that prior to her second interview, they arranged to meet and that he picked her up in his car. He denied this meeting happened. Accordingly, he denies urging the student to say that nothing happened between them and that it would finish him – he would lose his job and that it would cause him to commit suicide.
- 27 He also says that when he received emails from the student dated 20 March and 24 March 2014, asking how he was doing, and if they were still friends, he did not respond. He says that the student did not finish their friendship by her subsequent email of 13 May 2014 (KW1 to her statutory declaration 31 July 2015), but that he ended the situation by going to the student at her work sometime between 24 March and 13 May 2014. He was dismissed by letter dated 11 April 2014, which he says he received some weeks later.
- 28 The respondent approached the evidence in chief of its witnesses by each of them merely affirming the truth of the records of their interviews with the investigators contained in the Investigation Report. They were cross-examined by Mr Kendall.
- 29 As set out in [7] and [11], the student was interviewed three times. The first two interviews were part of the investigation. In these interviews, the student denied that what is set out in the third finding occurred. The third interview occurred some six months after Mr Kendall was dismissed and in this interview she recanted on what she said in the first two interviews regarding that incident and claimed to be now telling the truth. This interview was at her instigation.
- 30 In her statement to the investigators on 23 April 2013, the student gave detailed information about her relationship with Mr Kendall. She said that it started in around March 2012, when she was in Year 11. A friend got her to join the Debating Team, which was organised and run by Mr Kendall. Students would attend Mr Kendall's room at lunchtime to practise and learn debating. Separate teams would go on separate days. Although she was not actually a member of the Debating Team, the student helped Mr Kendall with the organisation. She would be in his classroom every lunchtime to help. Prior to this, she said her relationship with Mr Kendall had simply been that of teacher and student. However, once she started helping him with the debating team, they started talking and became friends. They exchanged personal information, including that he told her that he had been diagnosed with depression and that he took pills. He also told her about his wife and children, parents and siblings, and his relationships with them, what he was like as a younger man and the effect of his depression on him. She called him either Kendall or Paul. The only other teacher she called by their first name was Ms Kylie Ogg, who she also described as a friend.
- 31 She and Mr Kendall exchanged telephone numbers to enable them to contact each other regarding the debating team. They would send text messages to each other quite often. The latest text message she received from Mr Kendall was about 11 pm and the earliest about 8 am.
- 32 The student said that she and Mr Kendall would 'talk all the time at school; during recess, lunch, before school, after school, just whenever' (exhibit 1, tab 5, 4). She said it was just the two of them that talked to each other. The student said that she would 'wag classes and go to his class and talk to him'. 'He would usually have a free lesson each day or sometimes I would just sneak into his class and sit at the back'. She memorised his timetable and matched it against her own. She went to his class nearly every day from second term onwards, 'apart from a few months around the time of the year when we'd had a fight'.
- 33 The student said that quite often she would be alone with Mr Kendall in his classroom while they were talking, sometimes the door would be closed and other times it would be open. She knew that other students and teachers saw them together in his classroom, alone. She said that they probably thought that it was weird, just like all the students did. She said that whilst none of the teachers spoke to her about her being with Mr Kendall all the time, they used to give them looks in the hallways and Mr Kendall knew they used to talk behind his back all the time. She said it was a bit annoying that everyone was talking about her and Mr Kendall. She said '[i]t did make me think that they were worried about what might happen sexually between Mr Kendall and me'. She did think it was weird from the beginning but also only saw it as a friendship. She said she also knew that other students thought that Mr Kendall was molesting her. She and Mr Kendall talked a bit about the rumours but Mr Kendall did not really want to talk about them and just said to downplay them.
- 34 When asked about the fight she had had with Mr Kendall in early November 2012, she said it was a lot of misinterpretations but that she just could not remember pretty much any of it. They did not talk about what had happened or the fight, and they both thought the other did not 'want to be friends anymore, so we just didn't talk for ages'. She spoke to her friend J, and probably Ms Ogg and her friend S, about the fight, although she said S did not like her relationship with Mr Kendall because she thought it was weird and that she, the student, agreed that the relationship was weird.
- 35 When asked about what had happened in Mr Kendall's car on the night after a debate, she said nothing happened, he drove her home and she went to bed. She said that over the Christmas holidays in 2012, they kept in contact mainly by email and text, and both had a hotmail account.

- 36 She explained the circumstances of them going for coffee at Dome in Kalamunda after school and how he would drive them in his car. They would go about once a week and be there from 4 pm to 6 pm.
- 37 She said they were still friends in 2013 and she was still helping with the debating team, that she just did not see or speak with Mr Kendall as much as she used to because she was busy. They had exchanged emails regarding the investigation.
- 38 When asked if Mr Kendall would get into trouble as a result of what the fight was about, she said '[p]robably'. She said she felt safe around Mr Kendall.
- 39 While the student says that her mother was aware of her having coffee with Mr Kendall and of his driving her to debating events, she said she knew they saw each other in his class in addition to seeing him briefly after school before she picked her up.
- 40 In the first two interviews as part of the investigation, the student denied the details of the third allegation, saying that Mr Kendall had not misconducted himself and explained, too, that after the performance at KPAC she was angry with him because they had had a fight, he had isolated her for a number of weeks and was not talking to her. She had stopped emailing him, so he decided that they were not friends anymore and stopped talking to her and ignored her.
- 41 The student said that Mr Kendall had never tried to kiss her at any time and had never alluded to wanting to kiss her or touch her. They had physical contact at school – sometimes they would hug, probably about three times a week on average, usually just as a greeting. She says she kissed him only once, on the cheek, because he was feeling down.
- 42 In the interview on 23 April 2013, the student also said that during the year she had been suicidal and 'when you're feeling like killing yourself, you don't want to go to class'. Mr Kendall was a teacher and friend to her. She said he told her that she should not be skipping her classes, but she said that if she did not go to his class, she would just go somewhere else.
- 43 In the interview of 6 June 2014, the student said that she had told lies to one of her friends, J, about what had occurred on the evening of the performance at the KPAC. She said she did so because she was angry with Mr Kendall because they had had a fight, Mr Kendall 'had isolated me for a number of weeks and wasn't talking to me, which pissed me off' (exhibit 1, tab 5, 29). She says she told J 'because [J] was getting close to Mr Kendall as friends. I guess I was jealous'. She said that as time went by, the lie got bigger, including that he had kissed her, touched her around the breast region and that the car doors were locked. She provided a rationale for various aspects of the story.
- 44 On 2 October 2014, around six months after Mr Kendall's dismissal, the student was again interviewed by officers of the Standard and Integrity Directorate of the Department. She says that the information she provided at this interview was to correct, to change, some of the information she had provided at the previous two interviews in which she had denied that anything had occurred in respect of Mr Kendall's conduct in his vehicle after they had attended the KPAC. This is the information provided by the student to the investigators.
- 45 On 16 April 2012, the student turned 16 years of age. She remembered the incident following the visit to the KPAC, that it occurred in September/October 2012 because it was two years ago and at the time of the interview it was October 2014. (The school calendar indicates that this event occurred on 14 September 2012 (exhibit 1, tab 5, attachment F)).
- 46 The student's mother dropped her at the KPAC. She and Mr Kendall had an understanding they would meet each other there. The student went back stage to see some of her friends and then she sat next to Mr Kendall during the performance.
- 47 At the end of the performance, the student went back stage to see her friends. She was upset from watching her friend, S, perform a piece which was quite emotional for S. The student then had a heated argument with the foster mother of another friend, about the whereabouts of her friend. This argument occurred about 9.30 – 10.00 pm, after the performances had finished, and in the backstage area of the KPAC.
- 48 When the student went to the front of the KPAC, she relayed to S and Mr Kendall the argument she had had and she started crying. She became quite emotional. There were others milling about then dispersing.
- 49 It was understood that the student would be taken home by Mr Kendall. S asked the student if she was going home with her, S, and the student indicated that she understood that S was probably going to have friends around for a while and that as she, the student, was tired, she wanted to go home. S went home with her mother. As Mr Kendall drove past the student's home to go to his own home, she was going to get a ride with him.
- 50 The student and Mr Kendall walked to his car in the car park, some short distance from the front of the KPAC. She was crying. When they reached the car, he gave her a hug. She described how they put their arms around each other and the hug lasted for between 10 and 20 minutes. They stayed that way while she stopped crying. She thinks she pulled away. She felt uncomfortable that it had gone on for so long. She said it felt like it went on for ages.
- 51 By this time, the student noticed that everyone else had left. She and Mr Kendall got into Mr Kendall's car. She put on her seatbelt. He did not put his on. He looked at her and hugged her again, leaning over with his left arm around her shoulders and the other above her waist, on her ribcage. She wrapped her left arm under his. This lasted for a couple of minutes.
- 52 During this time, according to the student, Mr Kendall kissed her once on the cheek and two to three times on the forehead, then on the cheek again, each kiss she described as a peck. He then asked if it was okay for him to be doing that and she did not respond. He kissed her on the lips, for a longer time, possibly 30 seconds. He asked her if it was okay, and she said yes, and he kissed her again. She then remembered that his hand had come up from her ribcage to her left breast. She felt nauseous. He asked her again if it was okay and she said yes, and he was caressing her breast.
- 53 The student says that she sat stationary, frozen with shock. She cannot remember what happened from that point.
- 54 The student says she arrived home about 12.30 am. She had a shower, which she would not normally do but would normally go straight to bed. She said she remembered feeling dirty. She had a shower for about half an hour and described herself as 'zoned out' and sitting on the floor and feeling really sick.

- 55 The student says she undertook counselling, and a therapist had said she had blocked out what had occurred.
- 56 A week or so after the incident, Mr Kendall began ignoring her. She says she later initiated them talking again. By this time, an investigation into the incident had commenced.
- 57 The student said that after Mr Kendall had been suspended from work, during the course of the investigation, she had been interviewed once by the Standards and Integrity investigator and was to be interviewed again. She wanted to speak to Mr Kendall about it. She contacted him and he picked her up. They discussed the situation, including that he indicated to her that they should say that nothing happened between them and that he would be in some difficulty otherwise; if she told the truth, it would finish him. He said that he would lose his job and that it would probably cause him to commit suicide. She says he kissed her briefly.
- 58 The student says that at some later date, possibly in February 2014, Mr Kendall called into her work and asked her to support him in a case against the Department, that he was paying a lawyer, that he wanted her to say that nothing had happened and she thinks that he said something about suicide.
- 59 The student said that she now felt able to tell the investigators these things because she was free of Mr Kendall's manipulation, that she had previously said things to protect him. At the end of the interview, she said 'Thanks for hearing me and believing me after I lied twice'.
- 60 At the interview, the student provided to the investigators a copy of an email she had sent to Mr Kendall on 13 May 2014 to a private email address he had previously provided to her:

This will probably be the last you hear of me. I'm saying goodbye after 2-3 years of being friends. I apologize for the abrupt email to end this, but I couldn't do this another way.

A part of my morals tell me that leaving this friendship at this time of unfortunate circumstances is wrong, but then a lot of me wants to break free of you. I have come to realize over the past year that there was not as much friendship as I thought there was between us. I have realized that you are manipulative, very persuasive and selfish and that I can not be in any type of contact with you for my own sake. You have caused me a lot of pain and despite you trying to convince me that what happened was no big deal; I feel that it was morally wrong of you to do what you did. I was 16, a child Paul. You must have known that it wasn't going to sit right with me, but I suppose you thought you could keep me under your wing until I accepted it. Admittedly you succeeded for a long time. I am curious though, what did you think was going to happen once I was out of high school? I guess I'll never know. Just for the record, I never thought of you as a monster or a sick man and I still don't. You did nothing that god won't let you into heaven for.

You've always been one step ahead, but today I end this. I heard that you have done something like this before. Maybe you haven't, maybe you have. I don't care. But if I find out that you have done this sort of thing again, I will take what I have, what I know and I will tell them the truth. I will not hesitate. The pressure that you put me under to protect you, to lie for you was selfish. You were willing to let me take the blame while you took no responsibility.

There are a lot of unspoken thoughts between us and all of it is probably better left unsaid.

As I said the other night, I wish for you to let the case go, for your sake. This has ended for me, I will not support you if you decide to take it further because I have already let it go and in the process of moving on.

I wouldn't want you to get angry about this email but it is my way of ending it and finally explaining how I feel. I have stood by you and stood up for you all this time. I have supported you, lied for you and been there. So please do me this courtesy and don't reply back to me, let me go. I really do hope you find some happiness. I hope you stay with your wife and I hope you can beat this spiral and find a better future not in teaching but in something new.

Exhibit 1, tab 9, KW1

- 61 There were suggestions in the evidence that the student used marijuana. The student was asked in examination in chief if she had taken any kind of drugs in the past and she acknowledged smoking marijuana a few times. She was asked if she recalled if she took any type of drugs on the night of 14 September 2012 and she said no (ts 224).
- 62 The student's mother was interviewed on 23 April 2013. She noted that the student related well to Mr Kendall and to Ms Kylie Ogg. She was not aware, though, of anything being weird or blatantly obvious that there was something not right in the relationship. Mr Kendall came to see them at home one day after school and asked if it would be all right if he drove the student to events at Perth College. He said that 'other kids had to go in as well as their parents couldn't take them' (exhibit 1, tab 5, 8). She could not recall signing a permission slip. She thought that the student and Mr Kendall had met a couple of times for coffee but thought that there were a couple of the student's friends with them. She was not aware of it just being the two of them going for coffee, however if it was the case, it did not bother her. As long as her daughter was home by a reasonable time then she was not concerned. She knew that they had each other's phone numbers, which was expected because of the debating team. She said that towards the end of the previous year, the student said that he, Mr Kendall, had started going a bit strange, 'as far as weird in class and had a few meltdowns.'
- 63 She said that her daughter had received an A in English. She thought that Mr Kendall understood her daughter better than other teachers.
- 64 The student's mother was not called to give evidence.
- 65 One of the student's friends, J, was interviewed on 10 May 2013. She said that she had been a friend of the student's since Year 9. She described the situation of the student being involved in the debating team and that Mr Kendall would sometimes drive the student to debating. J said that she did not think that it sounded right when the student told her that she and Mr Kendall had gotten really close; she said that she 'thought he liked her.' 'Mr Kendall would hug her, call her baby and all relationship type stuff that you do and flirting'. She referred to them having fights and stopping talking.

- 66 J also gave details about Mr Kendall's private life, and said that 'one time I found [the student] with Mr Kendall, who was having a mental breakdown because of some dramas with his wife' (exhibit 1, tab 5, 10).
- 67 J told the investigators that about half way through 2013, the student told her something had happened between her and Mr Kendall relating to the performance night at the KPAC. The student was very upset after an argument with another student's mother. She described what the student told her had happened in Mr Kendall's car, that he had 'molested her', that he 'started kissing her' and she asked him to stop and she had to push him away. J said that 'I know she didn't want to do on him and get him into trouble or fired or anything'. She said the student first began telling her about the incident after school had finished for the year, and told her more about it in 2013.
- 68 J also described how on J's birthday, the student organised for herself, the student, Ms Ogg and Mr Kendall to have coffee at Dome. Mr Kendall drove them in his car. She said that '[t]his was the first time I'd seen his car, although [the student] had described his car to me before, when she told me about the incident after the drama performance night.' She described how at Dome they sat at a booth, with Mr Kendall and the student sitting next to each other on one seat, and J and Ms Ogg on the other. She said that Mr Kendall and the student were literally leaning on each other and mucking around. She said that the student kept kissing Mr Kendall's forehead and Mr Kendall had his arm around the student, and they sat back leaning on each other. 'They were like teenagers'. She said Mr Kendall did not seem too bothered that Ms Ogg and she, J, were sitting on the other side of the table. She said that it appeared to her that Mr Kendall and the student were instigating the interaction with each other. Mr Kendall hugged the student after she had kissed him on the forehead. '[The student] had her hands on his chest and Mr Kendall put his arms around her, like they were in a relationship.' At one stage, she believed she saw the student had her hand on Mr Kendall's leg.
- 69 J said that she went to coffee with the student and Mr Kendall on another occasion, in March of that year, and that they had behaved in the same way.
- 70 J said that after the coffee at Dome, Ms Ogg spoke with her about what was going on between the student and Mr Kendall because of how they were interacting with each other, then immediately said 'No, I don't want to know'. She then said that the following day at school, Ms Ogg spoke to her and said that she should not have said that she does not want to know about the relationship between Mr Kendall and the student, so she asked J to tell her what she knew. J told Ms Ogg what she knew about that relationship, including what the student had told her about what had occurred in Mr Kendall's car. According to J, after that, Ms Ogg went straight to the principal and told the principal.
- 71 J said she also went to the principal and told her that this was a very delicate thing and to take care how she approached the student otherwise the student would lockdown and lie to her.
- 72 J's cross-examination was limited to the comments she made to the investigators about Mr Kendall having a mental breakdown. She conceded that it was not actually a mental breakdown but that he was having what she described as a 'nasty ... paddy' (ts 221-2). She was not cross-examined about her description of what the student told her about the incident after the KPAC event, about the visit to the coffee shop with Ms Ogg, Mr Kendall and the student, or about her conversation with Ms Ogg.
- 73 Ms Kylie Ogg gave a statement to the investigators on 14 May 2013. She had been a relief teacher at KSHS in term 1 of 2013. She had worked closely with Mr Kendall and she referred to Mr Kendall's relationship with his wife and his depression. Ms Ogg described the student, as a vulnerable girl whom she knew had depression. She had worked closely with her and talked to her a lot and she, the student, became engaged in school and was going well. She says that when she finished up at the school, the student was upset because she said she was the first person she had been able to talk to for a while. Ms Ogg referred the student on to Mr Kendall and told her that he was a good guy and would recognise her potential.
- 74 Ms Ogg described Mr Kendall as an exceptional teacher who could challenge and relate to students.
- 75 Ms Ogg told the investigators that when she had been at coffee with Mr Kendall and the student, she saw the student leaning up against Mr Kendall and leant her head on his shoulder at one stage. Mr Kendall had seemed quite comfortable with it and the student had been leaning against him for about a minute. She said she knows that the student can be a little forward and that you need to draw boundaries with her, and that she, Ms Ogg, figured that Mr Kendall had not drawn his boundaries with her.
- 76 Ms Ogg said that several weeks later, J and the student were both in her classroom after class and they mentioned something about the student dating a particular boy, and there was a comment to the effect that Mr Kendall was feeling insecure or jealous. She said immediately that she did not want to hear it, that Mr Kendall was a friend of hers, that if they continued to discuss the matter, she would need to report it, and discouraged them from discussing the matter. She said that the matter kept gnawing at her and she went back to J and told her that she should not have stopped them from telling her things. She also spoke to the student and became more concerned. The student asked what would happen to Mr Kendall if he had done something inappropriate, to which she responded that it would depend upon what had happened. The student then denied that she could remember anything happening between them, that she did not want to talk about it because she was afraid Mr Kendall would lose his job. Ms Ogg did not push the student further. She said that she did see that the student and Mr Kendall were still seeing and talking to each other, and it appeared as though they were arguing at times. J told her that Mr Kendall was 'playing with her head again' (exhibit 1, tab 5, 16).
- 77 Ms Ogg then reported the matter to Denise Hewitt, Mr Kendall's head of department at the school, who took it further and reported it to Ms Ritchie.
- 78 Ms Ogg says that the student would say things in her presence such as Mr Kendall was ignoring her in class, that she was going to confront him and ask whether or not they were friends. She says that the student said to her at one time 'I don't want him to lose his position, teaching is the world to him ... that he'd probably fall into depression and could kill himself' (exhibit 1, tab 5, 16).

- 79 Ms Ogg also says that the student told her, after her interview with the investigators, that she had lied to the investigators. Ms Ogg told her that she would tell the investigators that the student had lied, and the student did not seem upset about this. She also told Ms Ogg that it was not important, 'it was silly, it was my fault anyway, I didn't stop him'.
- 80 S was interviewed by the investigators on 18 June 2013. At the time, she was a Year 12 student and had been friends with the student since Year 8. She said that once the student and Mr Kendall became friends, the student 'kind of blew me off a bit'. She saw Mr Kendall and the student interacting with each other mainly because of the debating sessions. She said that they would sit next to each other a lot and the student would touch him, putting her hand or arm on his shoulder. They were acting like close friends.
- 81 S described how after the drama performance night towards the end of 2012, the student had called her because she was upset. She said it was when the Year 11s were doing their monologues and RSP's, which would have been 14 September 2012. She said that towards the end of the night the student was really upset and had been crying because she had been in an argument with someone else's mum. S described what happened during the course of the evening and said that:
- Later that night, [the student] called me at home from her mobile phone and she was really upset and crying. This was a few hours after I had got home. I think I was watching TV at the time when she called.
  - She told me that Mr Kendall gave her a lift home.
  - She said that before leaving the PAC, Mr Kendall was comforting her. [The student] also told me that she was feeling really upset about her dad as well. [The student] said Mr Kendall gave her a hug.
  - At that moment, [the student] said she was thinking Mr Kendall was kind of being like a father to her, so she was feeling a lot more comfortable.
  - [The student] said that he drove her home, but they stopped on the side of the road, not far from her house and she was pretty upset still. I don't think [the student] wanted him to pull up in her driveway.
  - She said that Mr Kendall gave her a hug, then he kind of leaned over and kissed her and put his hand up her shirt.
  - I asked her where he kissed her and she said on the lips. She said it felt like it went for ages.
  - [The student] said she just froze when it happened.
  - [The student] did not say any more about how Mr Kendall put his hand up her shirt.
  - Once it stopped, [the student] said she got out of the car and walked home.
  - [The student] said that she did not stop what happened and that is the main thing and why she feels like it was her fault.
  - She said she could have got out of the car but she did not.
- 82 S then described that for some time afterwards, the student and Mr Kendall did not even look at each other or talk for ages, for several months, and that the student was really depressed. After some time, they started talking again. She said that the student was getting angry with Mr Kendall because he was ignoring her and completely blanking her in class. She said she thought the student confronted him about it and they started talking again.
- 83 S says that since the phone call on the night of 14 September 2012, she and the student had spoken about what happened a few times, that the student said she really could not remember any more and she just blocked it out of her memory, and she just wants to move on and pretend it did not happen. The student also told her that she had lied to people by saying that nothing had happened because she did not want people to get into trouble, such as J and Ms Ogg. The student subsequently told her that she is now lying about the matter. 'She told me that I probably won't be interviewed, because she told people and SID that she made it up. I got really angry at her and asked her why she would say that. [The student] said that she just doesn't want it to go on anymore.' 'She told me not to say anything, because she didn't want to seem like she's telling another lie.'
- 84 S's evidence was largely unchallenged, particularly her evidence as to what the student told her in the phone call which S said occurred late at night on the night of the incident following the concert at the KPAC.
- 85 Ms Jane Elizabeth Sayer-Henderson gave evidence of a hug she observed between Mr Kendall and the student in the classroom. She described it as 'a complete hug' and her demonstration of it was of Mr Kendall enfolding the student in his arms. She used the term 'embrace' but then withdrew that word (ts 180), however, it seems to be a very apt description, that it was reciprocated.
- 86 Ms Sayer-Henderson acknowledged that while she saw Mr Kendall and the student through the glass in the classroom door, she did not see the whole of the classroom and it may be that there were other students working at the back of the class who she did not see.
- 87 A student, T, gave evidence of seeing Mr Kendall and the student alone in the classroom two or three times.
- 88 Denise Hewitt, Mr Kendall's head of department, described her observations of him as a teacher and his interactions with students. She said that he does extra activities and students respond particularly well to him.
- 89 Ms Hewitt said that approximately a week before Easter, Ms Ogg approached her and raised a concern about a discussion relating to Mr Kendall's friendship with the student. Ms Ogg was concerned that the student was about to make some kind of disclosure, and said to the student that if she did, Ms Ogg would have to report it. From then, the student said nothing further.
- 90 Ms Ritchie advised Ms Hewitt to raise with Mr Kendall the issue of appropriate boundaries. She did not approach Mr Kendall because in the meantime J spoke with the psychologist who advised Ms Hewitt that the matter was being reported to Standards and Integrity.

- 91 Ms Hewitt had previously witnessed the student in Mr Kendall's classroom chatting frequently, and saw no reason to be concerned.
- 92 Ms Hewitt also said she was unaware of Mr Kendall transporting students except for Mr Kendall having told her he took the student home from debating one night and that her parents approved of him doing so.
- 93 Ms Hewitt also described Mr Kendall as reciprocating in a hug from the student. She said she saw the student standing further down the room while Mr Kendall was standing in his classroom near his desk. She said the student walked towards Mr Kendall and gave him a hug. 'She placed both arms around him and he did the same – placing his hands on her back.' 'It wasn't a lingering hug, it was just a big hug' (exhibit 1, tab 5, 20). She did not perceive it to be untoward or sexual. However, she said that if a student is hugging a teacher, the teacher should not allow it to happen and should call a halt to it to discourage it, rather than reciprocate. The teacher is the one in control of the situation (ts 192-3).
- 94 Ms Hewitt said she would be shocked if the complaint was proven, but is 'not shocked that someone has started to talk in this way, because it happens when you set yourself up in a friendship with a student' (exhibit 1, tab 5, 21).
- 95 Kathleen Ritchie, the Principal of the school, was interviewed on 14 May 2013. Ms Ritchie says that within a period of a few days, she received a number of reports from staff members seeing Mr Kendall hugging the student when they were in a classroom alone. It was subsequently brought to her attention that they were having coffee together after school hours. Ms Ogg then reported that she had received a partial disclosure from the student. The school psychologist, Jennifer Edmonds, then reported that J had spoken to her about her concerns in relation to an incident that occurred between the student and Mr Kendall in a car in 2012. J also went to Ms Ritchie.
- 96 In respect of her comments about Mr Kendall's support for the student and of that support being important for her at the time, Ms Ritchie makes it clear that it was better for the student to be talking to someone than to have no one to talk to. The student did not want to have access to the chaplain, to counselling or to the psychologist, but it was important for her to have someone to talk to and he was that someone.
- 97 Ms Ritchie said that the staff are aware that they are not qualified to deal with what I take to mean students' personal issues and should refer particular difficulties to those with proper training. In this case, she says that had she known that Mr Kendall was involved with the student to such an extent, including having her in his classroom alone, taking on a counselling-type role with her and going for coffee with her, she would have had his line manager speak with him about the wisdom of those things or she would have spoken to him herself. She says that these are things that staff cannot do, that it was common sense that it was not wise for a man of Mr Kendall's age to develop a close relationship with a 16 year old girl, that particularly given his age and experience, he should have known better. She would also be strongly opposed to a teacher transporting a child in their car, particularly alone, even if the parents consented. If she had known, she would have said it was not to happen.
- 98 Ms Ritchie said each staff member should be acutely aware of what is appropriate and what is not, and that the Code addresses those issues. She went on to say that Mr Kendall 'is an intelligent and articulate man, who would be aware of that, whether he chose to take advice or not. He sees himself exterior to the rules, so to speak,' not that he is oblivious to the rules. The rules about having distance with students are important and Mr Kendall was not listening to the rules such as not having students in his car etc. She clarified that he is not an indiscriminate rule breaker.

#### **Application to re-open**

- 99 Mr Kendall filed his closing submissions on 2 October 2015. They included a statutory declaration of Donna Vaughan, his own account of an encounter with the student following the conclusion of the hearing on Friday 21 August 2015, and comments regarding the purported views of the Teachers Registration Board of Western Australia (the Board).
- 100 I heard from the parties about whether to re-open the hearing for the purpose of this new evidence being received.
- 101 The test for re-opening a case after the close of evidence to admit new evidence is:
- (a) When the material interests of justice require it;
  - (b) Where the new evidence would probably produce a different result; and
  - (c) Where the evidence could not have been discovered before the trial.

*(Watson v Metropolitan (Perth) Passenger Transport Trust*  
[1965] WAR 88 per Wolff CJ at 89)

#### **Consideration and conclusions regarding new evidence**

##### **1. Ms Vaughan's statutory declaration**

- 102 The statutory declaration of Donna Vaughan relates to the altercation between herself and the student on the night of 14 September 2012 at the KPAC. This evidence was not able to be produced at the hearing because, according to Mr Kendall, Ms Vaughan was difficult to contact as a result of her having moved and now apparently living in Queensland. Mr Kendall says her statutory declaration demonstrates 'the almost febrile atmosphere which evolved during the evening of the school presentation on 14<sup>th</sup> September 2012 and which was the cause of much anger and malevolence later in the evening'.
- 103 Firstly, I note that there was no suggestion that Mr Kendall wished to have Ms Vaughan called so that her evidence, if it is relevant, could be tested. Secondly, there is no dispute that the student and Ms Vaughan had an altercation that night. Nor is there any dispute that the student was very upset that evening as a consequence of both S's performance and the argument. In her interview of 6 June 2013, the student said '[t]he argument shook me up a bit, especially after having watched [S's] osp ... I was a bit of a mess that night actually'. 'I cried this night, because I was upset'.
- 104 In her interview on 2 October 2014, the student again acknowledged that both S's performance and the fight with Ms Vaughan were 'very' and 'quite' emotional respectively. She said 'I was distraught, crying', and that when she and Mr Kendall walked to his car, 'I was still emotional' (exhibit 1, tab 9, KW2, P3 and later).

105 During cross-examination, the student acknowledged that she had been upset and cried. She had cried on Mr Kendall's shoulder, making his jacket quite moist (ts 235).

106 Therefore, as there is no dispute about the matter the subject of Ms Vaughan's statutory declaration, the material it covers is not new, and there is no intention to call Ms Vaughan to test the evidence should it be necessary, there is no need for the hearing to be re-opened to receive it.

## 2. The student approaching Mr Kendall after the hearing

107 The second piece of evidence relates to the student approaching Mr Kendall after the hearing, and, according to Mr Kendall, saying 'Paul, I'm so sorry'. They are said to have talked for some 30 minutes. He does not seek to recall the student to deal with this evidence.

108 I conclude that it is not necessary to re-open the hearing to receive this evidence. As Mr Kendall acknowledges, the meaning of the words is a matter of interpretation. The student has already given clear, unequivocal evidence. There is nothing to suggest that this new evidence, particularly without her being recalled, might produce a different result.

## 3. The views of the Board

109 The job the Commission is required to perform in this case is to assess the evidence and decide whether Mr Kendall has conducted himself in the manner alleged and whether he has been unfairly dismissed. Therefore, the views of the Board and its officers are not relevant and will have no effect on the result of this matter.

110 In the circumstances, the hearing will not be re-opened to receive the new evidence contained in the applicant's closing submissions.

## Consideration

111 The Commission must act only on material that is logically probative and relevant to issues raised in the proceedings (*Mr Cesare Violanti and Mrs Somsri Violanti Trading as Kwinana Pizza v Liam Christopher Porter* [2014] WAIRC 01246; (2014) 94 WAIG 1840 [47]).

112 Mr Kendall argues that the evidence he has presented to the Commission about his approach to teaching, his dedication to his students and how they responded to his teaching is relevant. At one stage in the hearing, he referred to it as 'advertising' whilst recognising that it is not strictly relevant.

113 The relevant issues in this case are about his conduct towards one particular student, not to students generally. The issues do not relate to whether he is a good, successful, inspirational teacher. They do not relate to whether he had behaved appropriately to the multitudes of students he has taught over his career. There is no suggestion in the allegations made against him that he has a propensity to conduct himself inappropriately towards students generally or towards a particular group of students. Therefore, much of the evidence he sought to elicit from a number of parents and students about his teaching and behaviour towards students is irrelevant to whether he conducted himself in the manner alleged and found in respect of the student.

114 The Commission is not bound by the rules of evidence (*Industrial Relations Act 1979* s 26(1)(b)). That is not to say it may ignore those rules. It may receive hearsay evidence and give it appropriate weight. However, where evidence of a statement to a witness by a person is received into evidence, not to establish the truth of the statement, but to establish the fact that the statement was made is not hearsay and is admissible (*Subramanian v Public Prosecutor* [1956] 1 WLR 965, 969 (PC)).

115 The evidence of Ms Ogg, J and S as to what occurred between Mr Kendall and the student on 14 September 2012 is not firsthand evidence. However, the student told each of them aspects of what occurred and denied certain things in a way which suggested that the third finding was true. This is of significance. Whilst those witnesses cannot attest to the truth of what she told them, the fact of the student telling them enables inferences to be drawn and supports her own direct evidence to the Commission.

## Assessment of witnesses

116 The rule in *Browne v Dunn* (1893) 6 R (HL) 67 provides that a cross-examiner of a witness must put to the witness the nature of the case which the cross-examiner's client proposes to rely on in contradiction to that witness (see also *Singh v Dhaliwalz Pty Ltd* [2013] WAIRC 00133; (2013) 93 WAIG 197 [31]). In considering the way in which the case was conducted, I have taken account of Mr Kendall representing himself and that he has attempted, in difficult circumstances, to cross-examine witnesses. However, he is intelligent and articulate. I advised him on a number of occasions of the need and the reason for him to cross-examine witnesses by challenging the evidence that they had given in examination in chief which was contrary to the case he was putting. Yet he failed to challenge significant parts of J's and S's evidence, other than a very small amount which was peripheral. When it came to the student's evidence, he needed to be urged to cross-examine her beyond very limited matters.

117 I have carefully considered all of the evidence. The seriousness of the allegations and the consequences flowing from any findings, particularly allegation 3, requires clear, unequivocal proof (*Briginshaw v Briginshaw* (1938) 60 CLR 336). There is much that is not in contention, but is a matter of context. The main matters of contention relate to whether Mr Kendall reciprocated in hugging the student and what did or did not happen between Mr Kendall and the student after the performance at the KPAC on 14 September 2012.

118 Having observed the witnesses as they gave evidence and having examined that evidence, where there is conflict between the evidence of Mr Kendall and that of the student, I prefer the evidence of the student. I do so taking full account of her initially denying the incident in the car on 14 September 2012 and of subsequently saying that she had lied to the investigators in both of the first two interviews. The reasons for her doing so are clear – they had been friends; she was fully aware of the damage her revelations would do to Mr Kendall's teaching career; knowing that teaching was very important to him and that he was

- subject to depression; that he might harm himself, and she felt a sense of responsibility for him and was afraid of what the effect on him might be. She left it until after he had been dismissed and their relationship was over to be truthful because by then, it was not her statement that would bring consequences for him. There was no other obvious purpose in her providing the information at the third interview.
- 119 Also, the student indicated that she felt a sense of responsibility for what had happened between them because she did not stop him. This, too, is highly likely to be part of the reason why initially she did not want to acknowledge to the investigators what had happened. However, it must be clear that it is not her conduct that is the cause for concern, it is that of the teacher.
- 120 When Mr Kendall put to the student the details of the allegations as to his conduct on 14 September 2012 as he was obliged to do, she looked him in the face and clearly gave answers, maintaining her version of events given after the dismissal in the third interview, and being forthright about drug use. I was impressed with her self-assurance even though it was quite clearly a difficult experience for her to be confronted in this way and that she chose to give evidence in open court, facing the man she had accused, latterly, of inappropriate conduct. She was quite open in acknowledging that in her first two interviews she had denied any inappropriate conduct on Mr Kendall's part because she wanted to protect him and herself. She said they were friends back then and 'I wanted to protect him and me'. She said I should prefer her most recent interview as to what had occurred, and I do so.
- 121 The student's statement to the Investigators on 2 October 2014 that she spoke with Mr Kendall after the investigation had begun is also consistent with Ms Ogg's statement that the student became aware of the issue of Mr Kendall's behaviour towards her being reported after J was called out of class to see the counsellor, and that she heard that Mr Kendall and the student later had coffee, talking about the fact that the nature of their relationship had been reported. Although the timing does not match the student's evidence, nor does the fact of it being a meeting over coffee as opposed to a meeting in his car, it is highly likely that Mr Kendall and the student met and discussed the issue of the reporting and investigation of his relationship with and conduct towards her. He picked her up in his car and they drove to a street not far from her home. That the student told Mr Kendall that they should tell the truth and his response that to do so would finish him, is consistent with Ms Ogg's evidence that the student had said to her that she did not want Mr Kendall to lose his job, that teaching was everything to him, that he would 'probably fall into depression and could kill himself' (exhibit 1, tab 5, 16).
- 122 It is also clear that Mr Kendall spoke to the student about his personal life, about his relationship with his wife and his children, and that it was not merely as part of life experiences in lessons that he was providing to her as teacher to student, but as a friend.
- 123 She also told S on the night of the incident at KPAC of what had occurred.
- 124 There is no evidence to suggest that the student is inclined to make up stories.
- 125 I also accept Ms Ogg's evidence as being truthful. As with S and J, I accept Ms Ogg's evidence of what the student told her about the circumstances involving Mr Kendall, not for the truthfulness of the student's statements to them, but that the student made those statements to them. However, I also accept as truthful the student's evidence of what occurred between herself and Mr Kendall.
- 126 Mr Kendall's body language and tone towards Ms Ogg was quite hostile and was the only witness he treated like this. I conclude that he treated her this way because she had been a friend and he now saw her as betraying that friendship. He sought to diminish her by referring to her as being 'only' a relief teacher (ts 260), as if that in some way diminished the significance of her evidence. Other witnesses such as the school principal, Ms Ritchie, and his head of department, Ms Hewitt, who were not friends with him, he treated with respect and some distance.
- 127 I also found Mr Kendall's evidence self-serving, pedantic, in some cases misleading and others to be untruthful. He allowed the student's mother to believe that other students may be travelling with him when it was only ever her daughter. He pointed out that Dome café was 'very nearly opposite the school' (exhibit 1, tab 5, 36) but drove the student and himself there. The Investigation Report refers to it being some 350 metres away from the school and not within sight of the school. He downplayed the significance of the student and he regularly having coffee together by saying that they saw other people from school there, yet only twice did others join them. When they did, both Ms Ogg and J described the physical contact between them, which Mr Kendall not only allowed but seemed comfortable with. While Ms Ogg did not describe the level of contact between Mr Kendall and the student as being of the same magnitude as described by J, even the conduct described by Ms Ogg was of the student leaning on him as being cause for her to be concerned that he was not maintaining professional boundaries.
- 128 Mr Kendall said in his interview on 23 July 2013 that since the evening of 14 September 2012, the student and he 'have been good friends without any awkwardness on her part' (exhibit 1, tab 4, Allegation 3). However, the evidence of the student and S, in particular, was that Mr Kendall and the student did not talk to each other for some time, had a fight, a misunderstanding, did not want to be friends for some time after the incident. The student said that they had a fight, he had isolated her for a number of weeks and was not talking to her. She had stopped emailing him. S said that the student and Mr Kendall did not even look at each other or talk for ages, like several months.
- 129 When the allegations were originally put to Mr Kendall, it is true that they contained an element of vagueness, for example that he and the student spent 'a large' amount of time together, and that they had a 'close personal friendship'. In the interview on 23 July 2013, Mr Kendall referred to these as abstract concepts. He took objection during the hearing to the vagueness of those terms.

### The Findings

- 130 As to the first finding, having examined all of the evidence, I find, without hesitation, that Mr Kendall and the student exchanged personal email addresses and telephone numbers. They may have initially done so for the purpose of her assisting with the debating team. However, given that they were often in communication outside of school hours as well as during school, given that Mr Kendall acknowledges the friendly banter and the personal friendship between them, and given the

student's evidence about the level of her knowledge of his personal life, I have no hesitation in finding that it is highly unlikely that they used email and mobile phones to engage only in school related communication.

- 131 As to the second finding, there can be no contention that Mr Kendall and the student developed a close personal relationship – they were friends. Even when she was not attending as a student in his class, she was in his classroom, often daily, and they engaged in discussion including about his personal circumstances. He was alone in his classroom with her, with the door closed. Mr Kendall commented in response to the suggestion that the student leaned against him for a time at the coffee shop, saying he did not notice anything unusual about that. This suggests that, as with the hugging at her initiative, he did not take appropriate steps to ensure there was proper distance between them, to protect both himself and the student. In fact, by his engagement with her alone in the classroom, albeit in view of people passing by, with the door shut, in having coffee with her on a regular basis and in being alone with her in his car, he allowed a high level of physical contact on numerous occasions, such that it became normal. He may not have initiated hugging the student, but he reciprocated on at least two occasions. The student's evidence is of her hugging him regularly. In the circumstances of all of the evidence and in particular that of Ms Ogg, Ms Hewitt and Ms Sayer-Henderson, it is highly likely that he regularly reciprocated and did not reject her physical contact with him. If he did reject it, he did not persist to bring it to a halt.
- 132 There is no contention that Mr Kendall and the student attended coffee shops in Kalamunda. According to Mr Kendall's evidence, it was at least six times at Dome and twice at Merchant. They were outside of school hours where mostly there was just the two of them together. There is also no contention that Mr Kendall drove the student, alone, in his private vehicle a number of times. He did not report this, nor did he seek appropriate consent from her parents, except he says he had informal consent on one occasion when the student's mother believed other students may be included, when in fact they were not.
- 133 A number of circumstances cause me to be satisfied that it is highly likely that the third finding, with the exception of the allegation of locking the doors, is true. (Even the student's account in her third interview and in her evidence before the Commission does not suggest Mr Kendall locked the car doors.) Those circumstances are that the student and Mr Kendall regularly had physical, affectionate contact. They were frequently alone together. On the night, the student was upset, vulnerable and in need of comfort. Mr Kendall comforted her, holding her for a time while she cried and then composed herself. They were then alone in his car for some time before they left the car park at the KPAC. Within a short time of the incident, the student rang her friend, S, in a distressed state and told her about it. Over the following weeks, she told a remarkably similar story to her friend, J. By the way she spoke in Ms Ogg's presence a few months later, the student made clear that she was concerned about the incident but was in a state of conflict because, to seek the adult support she needed, it required her to place Mr Kendall, a person she had a close friendship with, whose personal circumstances and mental state she was aware of, in jeopardy. She also felt some responsibility for not stopping him.
- 134 She told a number of people, including Ms Ogg and S, that she did not want to remember what happened, she did not want Mr Kendall to get into trouble, possibly lose his job and harm himself. J told Ms Edmonds that the student would deny that anything untoward had happened.
- 135 Although he did not expressly say so, I infer that Mr Kendall suggests that the student made unfounded accusations against him about the situation at the KPAC, because she was upset following the argument with the parent and that he did not support her in that argument. However, when he had the opportunity to put that proposition to the student, he did not do so. In any event, it was not denied that the student was very upset that night and that Mr Kendall comforted her. According to the student and other witnesses, she and Mr Kendall had a falling-out after the incident. There is no evidence about what it was about. On the other hand, Mr Kendall says there was no such difficulty or awkwardness between them and they had remained friends. Therefore, it is difficult to conclude that she made up a story of such significance as a way of getting back at him for not supporting her argument with the parent at the KPAC.
- 136 When asked about the fight she and Mr Kendall had after the night at the KPAC, she told people she could not remember what the fight was about. She also told Ms Ogg, after she had been interviewed, that she had lied in the interview. When Ms Ogg said she was going to tell the investigators, the student did not seem upset. It is clear to me that the student wanted adult support and help to get out of the lie that nothing had happened.
- 137 The student's responses to the investigator's questions led the investigator to believe that her denials were not genuine (exhibit 1, tab 5, 47, 3.81).
- 138 After the dismissal, the student felt she could tell the truth.
- 139 In making this finding about the third matter in particular, I am conscious of the seriousness of the allegation and the consequences flowing from the finding.

#### Breaches of the Code

140 The findings against Mr Kendall are all said to constitute breaches of s 80(b) of the PSM Act by contravening the Department's Code, by failing to maintain professional boundaries with a student.

141 The PSM Act s 80(b) provides:

**80. Breaches of discipline, defined**

An employee who —

...

(b) contravenes —

...

(ii) any public sector standard or code of ethics;

...

commits a breach of discipline.

142 The Code is a public sector code of ethics. It provides a number of principles. At cl 1 – Personal Behaviour, it states that:

As employees of the Department we behave with integrity in all personal conduct and treat all others with due consideration.

Employees are expected at all times to behave ethically and act with integrity. In practice, this means employees:

- treat others with respect, dignity, courtesy, honesty and fairness and with proper regard for their rights, safety and welfare;
- ...
- encourage positive work habits, behaviour and personal and professional workplace relationships and boundaries;
- do not engage in behaviour that may bring your own reputation or that of the Department and the Public Sector into disrepute; and
- do not tolerate or participate in behaviour that is inconsistent with these principles.

Exhibit 3, Department of Education Code of Conduct (the Code)  
Principles

143 Department of Education, How to Comply with our Code of Conduct (the Handbook), cl 1.3 – Maintaining professional boundaries with students (exhibit 3) provides:

### 1.3 MAINTAINING PROFESSIONAL BOUNDARIES WITH STUDENTS

Teachers and those people who work directly with students have an influential relationship with them. They have the ability to significantly impact on students' lives in important and long lasting ways. The relationships between staff members and students are characterised by differing roles and an imbalance of power based on factors such as age, authority and gender.

As an employee of the Department you are responsible for maintaining a professional role with the students you come into contact with. This means establishing clear professional boundaries with students that help to protect everyone from misunderstandings or a violation of the professional relationship.

144 Under the Boundary of Communication, the Handbook provides a number of examples of violations. These include:

... examples ... to assist you in establishing and maintaining appropriate boundaries:

- Correspondence of a personal nature including letters, email, phone, SMS text, and on social networking sites i.e. Facebook, Twitter etc. (not including class postcards or bereavement cards, etc).

145 Under the Boundary of Personal disclosure, the examples of violations include:

- Discussing the personal details of your lifestyle or the lifestyle of others. However, it may be appropriate and necessary at times to draw on relevant personal life experiences when teaching.

146 Under the Boundary of Physical Contact and Interaction, the examples include:

- Unwarranted, unwanted and/or inappropriate touching of a student, personally or with an object such as pencil or ruler.
- Initiating or permitting inappropriate physical contact by or on a student, e.g. massage, tickling games.
- ...
- Being alone with a student for purposes or reasons that do not fall within a staff member's role or responsibilities.
- ...
- Driving a student unaccompanied, without appropriate consent.

147 Under the Boundary of Targeting Individual Students, the examples include:

- Adopting a welfare role that is the responsibility of another staff member e.g. a counsellor, or doing so without the knowledge of key staff members.

148 The Handbook continues that:

Professional boundary violations represent a breach of trust. When you violate boundaries you risk:

- harmful consequences for the student;
- seriously undermining the learning process;
- seriously undermining your professional reputation;
- disciplinary action against you.

You are not to, under any circumstances, engage in an intimate, overly familiar or sexual relationship with a student. Improper conduct of a sexual nature by a staff member with a student encompasses all forms of sexual activity including, but not limited to, the following:

- kissing and/or caressing;
- ...
- unwarranted and inappropriate touching;
- ...
- communicating or corresponding with students about sexual or personal feelings for the student; and
- ...

### 1.3.1 Good practice in managing professional boundaries

The following self-assessment questions may assist you in assessing your application of professional boundaries:

- Am I dealing with a particular student in a manner that differs from how I would deal with another student under the same circumstances?
- Is my dress/availability/language with a particular student different from usual?
- Would I do or say this if a colleague were present?
- Would I condone my conduct if I observed it in another adult?
- Could the consequences of my actions have negative outcomes for a student or for me?
- If I were a parent would I want an adult behaving this way towards my own children?

...

### 1.3.6 Physical Contact with Students

Appropriate physical contact with students is governed by Regulation 38 of the *School Education Regulations 2000* and the Department's *Behaviour Management in Schools* policy, and is subject to a test of reasonableness. Pursuant to both of these provisions, physical contact with students should only occur as is reasonable. Some examples of this contact include:

- the delivery of First Aid,
- during Physical Education; and
- where personal care of a student is required

**Care** – includes the administering of First Aid, during Physical Education, and where personal care of a student is required due to age or disability.

**Maintaining Order** – maintaining order should use only such force as is reasonable in the circumstances.

**Restraint** – restraining a student should only occur as a last resort. Some examples include the protection of the student or others from harm, for self protection, or to prevent damage to property.

...

Exhibit 3

How to Comply with our Code of Conduct, 5 – 8

149 Therefore, the Code and the Handbook provide that employees are to act with integrity and behave ethically, having regard for the rights, safety and welfare of others. It requires employees to maintain personal and professional workplace relationships and boundaries. In particular, the Handbook provides that the teacher is responsible for maintaining a professional role in relation to students, and to establish appropriate communication, disclosure and physical boundaries. It explains the consequences.

150 I find that Mr Kendall breached the requirement to maintain professional boundaries with a student that are necessary in the teacher-student relationship. He did so by exchanging personal mobile phone numbers and email addresses and communicating with her in non-school related matters. He developed a close personal relationship with her, spending a large amount of time with her during and outside of school hours. He was in his classroom and in his car alone with her. He spent time at coffee shops with her, usually on their own, albeit in public.

151 Further, there is evidence, which I accept, that Mr Kendall would cut the student off or stop speaking to her when she did things that displeased him, in a way which is not consistent with the objective conduct of a mature teacher towards a 16 year old student. Rather, it is the conduct of an offended friend or of some manipulation by him towards her. It was not the proper relationship of teacher and student.

152 He not only allowed her to have physical contact with him by hugging him, leaning on him and touching him, but reciprocated when she hugged him. Although he says he told her not to hug him, the fact that she did so regularly makes it clear that he took little positive action to prevent it.

153 To have at least protected himself, Mr Kendall ought to have informed his head of department about the hugging and the other activities such as transporting the student in his car and having coffee. He had a friendship, a close personal relationship, with a vulnerable 16 year old female student.

154 He hugged and kissed her and touched her breast.

155 Therefore, Mr Kendall failed to maintain professional boundaries in communications, personal disclosures, physical and sexual conduct. He did so in circumstances which required the student to believe she needed to lie to protect him and did so.

### Conclusion

156 The test for whether a dismissal has been harsh, oppressive or unfair is whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right (*The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Services and Miscellaneous, WA Branch* (1985) 65 WAIG 385).

157 In all of these circumstances, Mr Kendall did not maintain the professional boundaries required of him in many ways in regard to this student. A teacher who cannot maintain professional boundaries to the extent that occurred here and does so to the point where the student lies to protect the teacher, demonstrates that the person ought not be a teacher. Dismissal was an appropriate penalty. I also note that Mr Kendall says that the penalty of dismissal would be appropriate if he had conducted himself as alleged in finding 3 (ts 37).

158 Therefore, the application must be dismissed.

		<b>2015 WAIRC 00987</b>
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	PAUL RALPH KENDALL	<b>APPLICANT</b>
	-v-	
	GOVERNMENT OF WESTERN AUSTRALIA DEPARTMENT OF EDUCATION	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	TUESDAY, 3 NOVEMBER 2015	
<b>FILE NO/S</b>	U 99 OF 2014	
<b>CITATION NO.</b>	2015 WAIRC 00987	
<b>Result</b>	Application dismissed	

*Order*

HAVING heard Mr P Kendall on his own behalf and Mr D Anderson of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

		<b>2015 WAIRC 01006</b>
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	NEIL CAMERON MASON	<b>APPLICANT</b>
	-v-	
	VU GROUP LIMITED	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	WEDNESDAY, 11 NOVEMBER 2015	
<b>FILE NO/S</b>	B 174 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 01006	
<b>Result</b>	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 November 2015 the applicant filed a Notice of Discontinuance in respect of the application;  
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2014 WAIRC 00966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** JUDE MCCULLOCH **APPLICANT**

-v- **RESPONDENT**

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

**CORAM** COMMISSIONER S J KENNER

**DATE** MONDAY, 25 AUGUST 2014

**FILE NO/S** U 131 OF 2014

**CITATION NO.** 2014 WAIRC 00966

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**Result** Order issued

**Representation**

**Applicant** Mr G Ferguson as agent

**Respondent** Mr M Clancy and with him Ms K Post

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*Order*

HAVING heard Mr G Ferguson as agent on behalf of the applicant and Mr M Clancy and with him Ms K Post on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the name of the respondent on the notice of application be amended by deleting the name “Mark Olson, State Secretary, ANFIUWP” and inserting in lieu thereof the name “Australian Nursing Federation Industrial Union of Workers Perth.”

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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2014 WAIRC 01306

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2014 WAIRC 01306

**CORAM** : COMMISSIONER S J KENNER

**HEARD** : FRIDAY, 12 DECEMBER 2014, MONDAY, 8 DECEMBER 2014, TUESDAY, 9 DECEMBER 2014, WEDNESDAY, 10 DECEMBER 2014, THURSDAY, 11 DECEMBER 2014, WEDNESDAY, 3 DECEMBER 2014, FRIDAY, 22 AUGUST 2014

**DELIVERED** : THURSDAY, 4 DECEMBER 2014

**FILE NO.** : U 131 OF 2014

**BETWEEN** : JUDE MCCULLOCH

Applicant

AND

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS  
PERTH

Respondent

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**Catchwords** : Application for production of documents – Relevant principles applied – Application for agent to be restrained from acting – Relevant principles applied – Directions made

**Legislation** :

**Result** : Directions issued

**Representation:**

**Applicant** : In person

**Respondent** : Mr M Clancy and with him Ms V Loveridge

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**Case(s) referred to in reasons:**

*Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA* [2001] WAIRC 03773

*Reasons for Decision*

- 1 The substantive claim in these proceedings is listed to be heard by the Commission on 8 to 12 December 2014. Three interlocutory applications have been made in the proceedings. One application has been made by the applicant for production of documents. Two applications have been made by the respondent. The first seeks production of documents and the second seeks a 'restraint' on the agent for the applicant appearing before the Commission. Given the proximity of the hearing, the three interlocutory applications were listed at short notice for hearing at 4.30 pm, Wednesday, 3 December 2014.
- 2 In relation to the applications for production of documents a list of some 10 classes of documents are sought by the applicant. She contended that they relate to the matters in issue in these proceedings. In that respect, I should note that during the course of the hearing, the notice of application was amended by leave of the Commission, to incorporate an 'Attachment A', containing a list of grievances lodged by the applicant against the Secretary of the respondent which grievances were provided to the President of the respondent, and also, the Federal Secretary of the Australian Nursing and Midwifery Federation. Attachment A refers to particulars of the grievances referred to by the applicant at par 20 of her particulars of claim. I should also note that after the conclusion of the hearing on Wednesday evening, the applicant, by email sent to my Chambers at 10.57pm, enclosed further documents that the applicant said she omitted to refer to at the hearing.
- 3 The first is what the applicant described as the remainder of her grievance referred to above, that she omitted from "Attachment A" to her particulars of claim. The second is a letter from the Federal Secretary of the Federal Union, dated 18 December 2013, containing the allegations presumably referred to at par 20.3 in the applicant's particulars of claim, provided to the applicant by the respondent after the hearing on Wednesday evening.
- 4 The relevant principles in relation to production and discovery of documents were set out by me in *Civil Service Association of Western Australia Incorporated v Director General, Education Department of WA* [2001] WAIRC 03773, where, at par 6, I observed as follows:

The relevant principles in relation to discovery, production and inspection of documents in this jurisdiction were set out by the Commission as presently constituted in *Ellis v The Grand Lodge of Western Australia of Antient Free and Accepted Masons Incorporated* (1998) 79 WAIG 1736, where, in referring to the decision of the Full Bench of this Commission in *ALHMWU v Burswood Resort Management (Ltd)* (1995) 75 WAIG 1801 it was said at 1736-1737:

*"Discovery is not available as of right in this jurisdiction and it is for a party making an application for an order pursuant to s 27(1)(o) to establish that it would be just for such an order to be made: ALHMWU v Burswood Resort Management (Ltd) (1995) 75 WAIG 1801. In Burswood (supra) it was observed at 1805:*

*"The Commission may therefore only make an order if such order is just (see Springdale Comfort Pty Ltd t/a Dalfield Homes v BTA (op cit)(IAC)).*

*s 26(1)(a) of the Act would not seem to be excluded from operation by the words of s 27(1)(o) but we do not think it alters the questions to be asked and answered under s 27(1)(o).*

*It is for the applicant for an order under s 27(1)(o), to establish that it is just for such an order to be made. The expression "just" means "right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right". See Loxton v Ryan (1921) State Reports (Qld) 79 at 84, 88 per Lukin J". Perhaps more appositely in Smith's Weekly Publishing Co Ltd v Sunday Times Newspaper Co Ltd (op cit), which was a case relating to discovery of documents, Isaacs and Rich JJ at page 562 held that "just" means "just according to law".*

*In the event that the discretion to order discovery is exercised, general principles require the provision by one party to the other of a list of documents, which may be verified by affidavit, which are or have been in a party's possession, custody or power relating to any matter in question in the proceedings. A classic statement as to whether a document relates to a matter in question, is contained in the judgement of Brett LJ in Compagine Financiere et Commerciale du Pacifique v Peruvian Guano Company (1882) 11 QBD 55 where he observed at 63:*

*"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may not which must either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences".*

*The case of Board v Thomas Hedley & Co Ltd (1951) 2 All ER 431 is authority for the proposition that the net is to be cast broadly in relation to determining what documents are discoverable based upon the matters in question in the action. To determine whether a document may fairly lead to a train of inquiry relevant to a matter in question, regard is to be had to the pleadings in civil litigation. In this case, regard should be had to the particulars of claim and the amended notice of answer and counter proposal: Mulley v Manifold (1959) 103 CLR 341 at 345."*

- 5 It is therefore necessary to have regard to the application for production of documents in the context of the issues raised by the notice of application and the notice of answer respectively. In that respect in particular, I note that the respondent's notice of answer, at pars 3 and 4 of the 'Allegations' made against the applicant, contend that the grievance provided by the applicant to the President of the respondent and the Federal Secretary of the Federal Union, contained allegations that were allegedly

known to the applicant to be false. Therefore, it is plain, that the veracity of those allegations is a matter in issue in these proceedings.

- 6 Having regard to the relevant principles, I am satisfied that the documents or classes of documents appearing in the direction to be made by the Commission, are matters which arise on the claims and answers respectively, and furthermore, are documents that may fairly lead to a train of inquiry relevant to a matter in question in these proceedings.
- 7 As to the application by the respondent for a 'restraint' on Mr Ferguson appearing by Warrant to Appear as Agent as the agent for the applicant, when becoming aware that the applicant is a member of the Transport Workers Union, the respondent did not further press this application. In any event, I am not persuaded that such an application has any merit. The authorities to which the respondent referred in relation to a prohibition on persons appearing before the Commission as an agent, contrary to s 112A of the Act, are distinguishable and have no application to the present circumstances. Those cases refer to a circumstance where it is established, on the evidence that a person is 'carrying on business as an industrial agent'. There is no evidence to that effect before the Commission in these proceedings.
- 8 In any event, I simply note that Mr Ferguson, as an employee or officer of an organisation registered under the Act, is expressly excluded from any reference to 'carrying on business as an industrial agent' by ss 112A(1) and (3)(c) of the Act. In particular, by s 31(2) of the Act, it is plain that where an organisation or association is represented by its Secretary or by any officer of the organisation or association, it is the organisation which is taken to have appeared in person before the Commission, and not the officer, appearing as agent for the organisation.
- 9 Having regard to the matters raised in the proceedings, the Commission now makes directions.

**2014 WAIRC 01307**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

JUDE MCCULLOCH

**APPLICANT**

-v-

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

**RESPONDENT**

**CORAM**

COMMISSIONER S J KENNER

**DATE**

THURSDAY, 4 DECEMBER 2014

**FILE NO.**

U 131 OF 2014

**CITATION NO.**

2014 WAIRC 01307

**Result**

Direction issued

**Representation**

Applicant

: In person

Respondent

: Mr M Clancy and with him Ms V Loveridge

*Direction*

HAVING heard Ms J McCulloch on her own behalf and Mr M Clancy and with him Ms V Loveridge on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

1. THAT the respondent provide to the applicant the following documents or classes of documents by 12 noon, Friday, 12 December 2014:
  - (a) Copies of records of staff employment and termination of employment, including reasons for termination of employment, in the period December 2011 to December 2013.
  - (b) Copies of 'offensive emails' said to have been sent by the applicant to the Senior Industrial Officer of the respondent, Ms Loveridge, as referred to in an email from the respondent's State Secretary, Mr Olsen, of 19 December 2013, sent at 9.29.04 am and as at "attachment 3" to the applicant's grievances set out at Attachment A to the notice of application.
  - (c) Copies of 'All Staff' emails from the State Secretary to staff in relation to changes to the role of Industrial Officers over the period August 2012 to December 2013.
  - (d) Member recruitment statistics for the applicant in the period June to December 2013.
2. THAT otherwise the applicant's application for production of documents be and is hereby dismissed.
3. THAT the applicant provide to the respondent by 12 noon, Friday, 5 December 2014 copies of all documents in relation to employment undertaken and income received by the applicant since the respondent gave the applicant notice of termination of her employment on 28 April 2014.

4. THAT the application by the respondent to restrain Mr Ferguson from acting as agent for the applicant be, and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.**2014 WAIRC 01322**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JUDE MCCULLOCH **APPLICANT**

**-v-**  
AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH **RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** TUESDAY, 9 DECEMBER 2014  
**FILE NO/S** U 131 OF 2014  
**CITATION NO.** 2014 WAIRC 01322

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**Result** Order issued  
**Representation**  
**Applicant** In person  
**Respondent** Mr M Clancy and with him Ms S Poplawski

*Order*

HAVING heard the applicant on her own behalf and Mr M Clancy and with him Ms S Poplawski on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

The respondent be granted leave for its witness to appear by video link subject to the venue being approved by the Commission.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.**2015 WAIRC 00303**

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JUDE MCCULLOCH **APPLICANT**

**-v-**  
AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH **RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** TUESDAY, 14 APRIL 2015  
**FILE NO/S** U 131 OF 2014  
**CITATION NO.** 2015 WAIRC 00303

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**Result** Order issued  
**Representation**  
**Applicant** In person  
**Respondent** Mr M Clancy and with him Ms S Poplawski

*Order*

HAVING heard the applicant on her own behalf and Mr M Clancy and with him Ms S Poplawski on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT the application be adjourned and the hearing dates of 20-30 April and 1 May 2015 be and are hereby vacated.
- (2) THAT the application be re-listed for hearing on 15-19 and 22-26 June 2015.

- (3) THAT the applicant serve on the respondent a copy of any documents not yet provided to the respondent and upon which she and witnesses to be called by her intend rely, by close of business 15 May 2015.
- (4) THAT the respondent serve on the applicant a copy of any documents in reply, not yet provided to the applicant and upon which it intends to rely, by close of business 29 May 2015.
- (5) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

**2015 WAIRC 00445**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JUDE MCCULLOCH

**PARTIES**

**APPLICANT**

-v-

AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** TUESDAY, 16 JUNE 2015  
**FILE NO/S** U 131 OF 2014  
**CITATION NO.** 2015 WAIRC 00445

**Result** Order issued  
**Representation**  
**Applicant** Mr C Fogliani of counsel  
**Respondent** Mr M Clancy and with him Ms S Poplawski

*Order*

HAVING heard Mr C Fogliani of counsel on behalf of the applicant and Mr M Clancy and with him Ms S Poplawski on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT pursuant to regulation 27 of the Industrial Relations Commission Regulations 2005 there be substituted service by registered express post to be despatched by 12pm 17 June 2015 of the summons to witness of Ms Patricia Fowler which was issued by the Registry on 10 June 2015.
- (2) THAT the summons to witness of Ms Patricia Fowler which was issued by the Registry on 10 June 2015 be returnable on Friday 19 June at 10am (WST).
- (3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

**2015 WAIRC 00945**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2015 WAIRC 00945  
**CORAM** : COMMISSIONER S J KENNER  
**HEARD** : WEDNESDAY, 3 DECEMBER 2014, MONDAY, 8 DECEMBER 2014, TUESDAY, 9 DECEMBER 2014, MONDAY, 13 APRIL 2015, MONDAY, 15 JUNE 2015, TUESDAY, 16 JUNE 2015, WEDNESDAY, 17 JUNE 2015, THURSDAY, 18 JUNE 2015, FRIDAY, 19 JUNE 2015, MONDAY, 22 JUNE 2015, TUESDAY, 23 JUNE 2015, WEDNESDAY, 24 JUNE 2015, THURSDAY, 25 JUNE 2015, FRIDAY, 26 JUNE 2015  
**DELIVERED** : MONDAY, 19 OCTOBER 2015  
**FILE NO.** : U 131 OF 2014  
**BETWEEN** : JUDE MCCULLOCH  
Applicant  
AND  
AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS  
PERTH  
Respondent

Catchwords	:	<i>Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Principles applied - Refusal to comply with a lawful and reasonable request to return to work - Allegations of fraud made without any evidence to support them - Breach of employee's duty of good faith and fidelity towards employer - Union within its contractual rights to terminate employment - Application dismissed</i>
Legislation	:	<i>Industrial Relations Act 1979 (WA) Service and Execution Process Act 1992 (Cth)</i>
Result	:	Application dismissed
<b>Representation:</b>		
Counsel:		
Applicant	:	Mr C Fogliani of counsel
Respondent	:	Mr M Clancy and with him Ms S Poplawski

**Case(s) referred to in reasons:**

*Marriott v Oxford and District Co-operative Society Ltd (No.2)* [1969] 3 WLR 984

*Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567

*Johnson v Nottinghamshire Combined Police Authority* [1974] 1 WLR 358

*Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66

*Shire of Esperance v Mouritz* (1991) 71 WAIG 891

*Briginshaw v Briginshaw* (1938) 60 CLR 336

*Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1985) 65 WAIG 385

**Case(s) also cited:**

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

*Adami v Maison de Luxe Ltd* [1924] HCA 45

*Mr David Miller v University of New South Wales* [1999] AIRC 1233

*Byrnes v Treloar and Ors Matter No 40607/95* [1997] NSWSC 629 (10 December 1997)

*Loughridge v Lavery* [1969] VR 912

*Carr v JA Berriman Pty Ltd* [1953] HCA 31

*The Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board v Denise Drake-Brockman* (2012) 92 WAIG 203

*Re Bodo Schaale v Hoechst Australia Limited* [1993] FCA 125

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

*Garbett v Midland Brick* [2003] WASCA 36

*The Construction, Forestry, Mining and Energy Union of Workers v Fieldway Enterprises Pty Ltd* (2002) 82 WAIG 873

*Reasons for Decision*

- 1 The applicant Ms McCulloch is an experienced union official and has worked as an Industrial Officer for many years. On 5 August 2012 she commenced work with the respondent Union. The Union represents the industrial interests of nurses in this State. In her position as an Industrial Officer for the Union, Ms McCulloch was responsible for the negotiation of enterprise agreements; giving industrial advice and assistance to members; and member recruitment.
- 2 All seemed to be well until about 3 December 2013. Ms McCulloch's working relationship with the Secretary of the Union, Mr Olson, was described by her as being a good one until late 2013. However, working relationships seemed to have deteriorated rapidly. A little earlier, towards the end of September 2013, Ms McCulloch arranged with Mr Olson to take some time off work without pay, to spend time helping her father who was ill. Ms McCulloch initially thought she may have to resign, but Mr Olson proposed an arrangement for Ms McCulloch to work one day per week in the Union office, in conjunction with leave without pay. This arrangement was not of any benefit to the Union, but it was to Ms McCulloch. Whilst there was subsequently some dispute about it, Ms McCulloch understood she would return to work in early January 2014. Mr Olson understood that Ms McCulloch would need to be absent for a couple of months and would return to work in about late December 2013.
- 3 When Mr Olson requested clarification from Ms McCulloch of her intentions, and that she return to her duties on 30 December 2013, Ms McCulloch indicated that she had made other arrangements and would not return to work until 6 January 2014. Various exchanges took place leading to a direction on 18 December 2013 from Mr Olson for Ms McCulloch to return to work on 30 December 2013. She failed to do so.

- 4 Matters then almost immediately took a major turn for the worst. Ms McCulloch, on 19 December 2013, lodged a lengthy grievance with the President of the Union, Ms Fowler. The grievance itself referred to four issues concerning the conduct of Mr Olson. Also, attached to the grievance, was a document entitled "Background and context". This contained a number of serious allegations against Mr Olson. Amongst others, they included him being responsible for excessive staff turnover and forcing staff of the Union to leave; intimidating and bullying staff; and making inappropriate changes to job roles within the Union.
- 5 Shortly before lodging her grievance with the Union President, Ms McCulloch also made contact with the Federal Secretary of the Federal Union, the Australian Nursing and Midwifery Federation. Ms McCulloch raised a number of concerns about Mr Olson's conduct as the Secretary of the Union. This led to the Federal Secretary, Ms Thomas, writing to Mr Olson on 18 December 2013, setting out a number of matters raised by Ms McCulloch. The matters raised were very serious allegations. They included the fraudulent misuse by Mr Olson of Union property. Allegations in relation to excessive staff turnover, and threatening and intimidating behaviour by Mr Olson towards staff, were also included. Ms McCulloch proceeded on sick leave at about this time.
- 6 The matters raised in Ms McCulloch's grievance were considered by the Union's Council in January 2014. They were found to be unsubstantiated.
- 7 As a result of all of this, and sometime later, Mr Olson wrote to Ms McCulloch on 24 March 2014, setting out a number of allegations against her. Amongst them, it was said that some of Ms McCulloch's complaints to the Union President and the Federal Secretary about the alleged conduct of Mr Olson, were knowingly false. Others included Ms McCulloch's deliberate refusal to comply with lawful and reasonable requests by Mr Olson as the Secretary of the Union, and a refusal by her to recognise Mr Olson's authority.
- 8 Despite repeated requests that she do so, Ms McCulloch failed to respond to, or even acknowledge the Union's allegations against her. On 28 April 2014, Ms McCulloch's employment was terminated by the Union on one month's notice. Ms McCulloch now claims that the termination of her employment by the Union was harsh, oppressive and unfair. She does not in the circumstances seek reinstatement or re-employment, rather Ms McCulloch seeks compensation for loss.
- 9 Whilst on one view of the facts, it may be open for the Commission to deal with Ms McCulloch's claim simply on the basis of her refusal and/or failure to respond at all to the allegations against her by the Union of 24 March 2014, I will, nonetheless, deal with each and every allegation and counter-allegation, as they arose on the evidence. Accordingly, a number of issues arise for consideration. They are:
  - (a) the merit or otherwise of the allegations raised by Ms McCulloch in her grievance of 19 December 2013;
  - (b) the merit or otherwise of the allegations contained in the letter from Ms Thomas to Mr Olson of 18 December 2013;
  - (c) the merit or otherwise of the allegations of the Union against Ms McCulloch of 24 March 2014; and
  - (d) the procedure adopted by the Union in considering Ms McCulloch's grievances and the formulation of the Union's allegations against Ms McCulloch, including the manner of the termination of Ms McCulloch's employment by the Union.
- 10 I will now consider each of these issues in turn, in light of the extensive evidence led in these proceedings from 12 witnesses over some 14 sitting days.

#### **Ms McCulloch's grievances of 19 December 2013**

- 11 On 19 December 2013 Ms McCulloch sent to Ms Fowler the President of the Union, a document she described as "grievance". As noted above, there was a second document sent to Ms Fowler, attached to the grievance, headed "background and context". It was common ground that the terms and conditions of Ms McCulloch's employment, set out in a document entitled "Employees', Conditions of Service Australian Nursing Federation, Industrial Union of Workers Perth", contained at cl 39, a Grievance Procedure. This procedure provides that in the first instance, a grievance is discussed between the employee concerned and the Union Secretary and/or President. If the matter is not resolved, the grievance can be referred by either party to the Union Council. In this case, whilst the grievance was referred by Ms McCulloch to Ms Fowler as the Union President, it was clearly intended to be provided to the Union Council. Ms Fowler testified that she received the grievance and forwarded a copy of it to Mr Olson, as he was required to respond to it. Ms Fowler emphasised that in her role as Union President, she did not get involved in day to day matters involving the Union and its employees.
- 12 As noted earlier, the grievance forwarded to the Council by Ms McCulloch raised four specific issues which she asserted were connected to "concerns over the State Secretary's past and current conduct and behaviour". The four issues raised in the grievance document itself related to Ms McCulloch's application for a qualification allowance; the direction by Mr Olson to Ms McCulloch that she return to work on 30 December 2013; some performance management and disciplinary matters; and an allegation that Ms McCulloch's pay was being reduced because she was required to repay a negative personal leave balance.
- 13 The document attached to the grievance dealing with "background and context", was said by Ms McCulloch in her evidence to provide assistance to the Council in understanding her grievance. Whilst I deal with this assertion later in these reasons, I simply observe at this point, that the "background and context" document contained eight quite serious allegations against Mr Olson concerning a broad range of matters. I will deal with each of those matters in the course of this part of my reasons.

#### ***Qualification allowance***

- 14 Ms McCulloch said that she obtained a post graduate qualification and applied to Mr Olson, as the Secretary, for the payment of an allowance under cl 16 – Qualification Allowance, of Ms McCulloch's terms and conditions of employment. I note at this point, that whether or not a specific qualification attracts the payment of any higher allowance is a matter to be determined at the Secretary's discretion. The particular grievance raised by Ms McCulloch in this regard was that in June 2013 she made her application to Mr Olson for the payment of an allowance. Later, in August she enquired about her application as she had not by

that time, had any response. Ms McCulloch said that Mr Olson then requested copies of her academic transcripts, which she duly provided. Ms McCulloch said that she enquired further about her allowance in October and December, and on both occasions was informed by Mr Olson that as he was very busy at the time, he would process the claim during the Christmas office closedown.

- 15 Ms McCulloch's complaint was that she thought that the delay in considering her claim was unreasonable. Ms McCulloch accepted that around the time of or at least while the qualifications allowance claim was being considered, the Union was engaged in negotiations with the State Government in connection with a new industrial agreement. Ms McCulloch noted that the qualification allowance was finally paid to her, after she commenced a contractual benefits claim in this Commission. In his evidence, Mr Olson said very little about this matter, other than that it played no role at all in Ms McCulloch's dismissal. Attached to Ms McCulloch's grievance, was an email from Mr Olson to Ms McCulloch dated 11 December 2013. In it, Mr Olson was responding to a query from Ms McCulloch about the progress of her application. Mr Olson noted that she had previously raised the matter but observed that the payment of an allowance was not automatic, and is to be determined after consideration by the Secretary. Mr Olson further commented on the Union being short staffed since October 2013, changes being implemented to the office management system, and the recruitment of five new Industrial Officers.
- 16 Whilst Ms McCulloch's frustration at the delay in Mr Olson dealing with this matter was understandable, Mr Olson provided explanations for this and in my opinion, they are not inherently unreasonable.

***Direction to return to work***

- 17 This was a matter which assumed some significance in the proceedings. Ms McCulloch testified that she was most upset by Mr Olson's request that she attend for work on 30 December 2013, as she understood the agreement between her and Mr Olson reached some months earlier, was that she would return to work in the first week of January 2014.
- 18 Ms McCulloch said that she was upset by Mr Olson's request, which then became a direction to resume work, because she had made arrangements to spend time with her ill father. I pause to observe at this point however, that at no time did Ms McCulloch elaborate on what those arrangements were, and the importance to her of spending that time with her father. The Union was not made aware at all of those circumstances. All Ms McCulloch told Mr Olson was that she had plans. According to Ms McCulloch, she understood that the Union office would be closed over the Christmas period and therefore it would be convenient for her to resume her duties in January 2014. Copies of a number of emails were attached to Ms McCulloch's grievance dealing with this issue. The first is dated 11 December 2013 in which Ms McCulloch informed Mr Olson that she will "be returning to full time work after the office closedown". She indicated that she appreciated the time that she has had off from the Union to spend with her father.
- 19 About a week later, Mr Olson replied to Ms McCulloch to indicate that the office would not be closing over the Christmas period apart from public holidays. Mr Olson said "we would appreciate your attendance to full time work beginning Monday 30<sup>th</sup> December. As you are aware, there have been a number of changes to the structure of the ANF Office and we need to make sure you receive the proper training." Ms McCulloch replied on the same day that she had "made plans for the week of the 30<sup>th</sup>". Ms McCulloch then applied for annual leave for the following week. A short time later Mr Olson replied to Ms McCulloch to the effect that she did not have sufficient leave but in any event, she had failed to discuss with Mr Olson her plans, despite the fact that she was in the office on Wednesdays over the previous two weeks.
- 20 Mr Olson further referred to the sacrifices made by the Union to allow Ms McCulloch to have an extensive period of time off over the previous three months. He referred to the training required and the Union's expectation for her to attend on 30 December 2013. After a further reply from Ms McCulloch, Mr Olson finally said in an email to Ms McCulloch that she was directed to return to work on 30 December 2013 and that "it is not acceptable for you to make arbitrary decisions about your employment hours or leave arrangements." Mr Olson also noted that Ms McCulloch should have gone to see him to discuss her not returning on 30 December 2013.
- 21 In her evidence, Ms McCulloch did not dispute the fact that she refused Mr Olson's direction to return to work on 30 December 2013. Rather, she considered that the agreement she had with him, as discussed earlier in September, was that she would be away for "three months". Whilst Ms McCulloch did not dispute the fact that in her conversation with Mr Olson he raised the possibility of Ms McCulloch electing to work over the closedown period, which is referred to in her grievance, she said that there was never any firm agreement to this effect. Furthermore, the grievance document provided to the Council stated "today I received an email from the State Secretary which includes the allegation that I am refusing to return to work on the 30<sup>th</sup> December – and threatening immediate termination. I have not refused to return to work on the 30<sup>th</sup> December." This is at odds with the evidence given by Ms McCulloch, that she did in fact refuse the direction from Mr Olson. Furthermore, Ms McCulloch said that she considered the request by Mr Olson that she resume work on 30 December 2013 as being vindictive.
- 22 Mr Olson's evidence was that in his initial discussions with Ms McCulloch about taking a period of unpaid leave, he understood that she would work under this arrangement for one day per week during the period October, November and December. It was his understanding that Ms McCulloch had expressed an interest in performing some work over the Christmas period as she would be in need of the money. Mr Olson said that over the Christmas break, whilst there would not be a formal office closedown, the door to the Union office would be closed and the phones switched off. This provided a perfect opportunity for training to be undertaken for new Industrial Officers, and refresher training to be provided to existing staff, in relation to the significant changes to office procedures that the Union was implementing.
- 23 Accordingly, Mr Olson said it was important that Ms McCulloch attend at this time to take part in these activities with other staff. Mr Olson said that it was with this in mind, that he had rostered Ms McCulloch to be at work in the week commencing 30 December 2013. Mr Olson further noted that he received Ms McCulloch's formal grievance about four to five hours after he had given her a direction to return to work on 30 December 2013.
- 24 I will deal with the return to work matter further, when considering the Union's allegations against Ms McCulloch.

**Performance management**

- 25 This allegation related to an email attached to the grievance from Mr Olson to Ms McCulloch dated 19 December 2013. The email in part referred to the Union's requirement for Ms McCulloch to return to work on 30 December 2013. However, it further went on to refer to a number of other issues regarding Ms McCulloch's conduct and performance. Those issues subsequently became formal disciplinary allegations provided to Ms McCulloch some months later. In short, those matters referred to Ms McCulloch's alleged abuse towards the Union's Senior Industrial Officer, Ms Loveridge; a failure to discuss proposed office administrative changes with Mr Olson; failing to follow Mr Olson's directions regarding assisting another employee; allegations that Ms McCulloch had sent offensive emails to Ms Loveridge; and failing to comply with a lawful directive to return to work on 30 December 2013.
- 26 Other matters were also referred to which Mr Olson said he would discuss with her subsequently. Ms McCulloch in her grievance, said that she found the email from Mr Olson to be threatening, and went on to say "however if the ANF determines to make allegations about my conduct and performance in a professional manner, I will willingly participate in the process – with my representative."
- 27 Whilst I will deal with these matters in part when considering the formal allegations made by the Union against Ms McCulloch in March 2014, I observe at this juncture however, that I do not consider that the issues raised by Mr Olson concerning Ms McCulloch's conduct and performance, to be in and of themselves, threatening. Mr Olson as the Secretary of the Union, and responsible for the management of the Union and staff matters, was entitled to raise such matters and to progress them in an appropriate fashion. Whether Ms McCulloch disputed the matters raised is an entirely different question. As her employer, the Union was entitled to foreshadow consideration of the matters referred to by Mr Olson, and to deal with them subsequently.

**Reducing pay**

- 28 This grievance referred to Ms McCulloch's allegation that Mr Olson had engaged in harassment by advising that he would deduct her negative personal leave balance from her next pay. Ms McCulloch asserted that this was despite both her annual leave and ADO balance being positive. Ms McCulloch seemed to accept that her personal leave had been in arrears, but she was steadily reducing it. Ms McCulloch said that negative leave balances were part of a "custom and practice" within the Union and Mr Olson's request that it be rectified was considered by her as further evidence of vindictiveness.
- 29 In relation to this issue, Mr Olson testified that at the time he informed Ms McCulloch she did not have sufficient leave due, that is what he believed to be the case. Furthermore, whilst in an email to Ms McCulloch of 19 December 2013 Mr Olson referred to a positive annual leave balance of about 49 hours, his evidence was that up to that time, and given Ms McCulloch's reduced hours working arrangements, it would be significantly reduced. In any event however, it was Mr Olson's evidence that he considered the leave balance issue as somewhat of a distraction, because his direction was for Ms McCulloch to return to work on 30 December 2013 and he was not prepared to grant further leave.

**Background and context**

- 30 It is fair to say that insofar as Ms McCulloch's grievance to the Council was concerned, it was the content of this document, which accompanied her grievance that much of the focus was directed towards in the evidence. Because of this, and despite its length, I set out the content of this particular part of Ms McCulloch's grievance in full as an attachment to exhibit A15 as follows:

**Background and context**

In the past couple of months many staff have been forced to leave the ANF – many under the threat of performance management.

In September the State Secretary told some staff (including me) that the current team was the best he ever had. Most of that team worked tirelessly on the successful public sector EB campaign.

Since that time he has forced approximately 1/3<sup>rd</sup> of the ANF staff to leave. In some instances staff were criticized by the State Secretary for lack of recruitment – without there being any clear recruitment targets set. Meanwhile, staff have become aware that the State Secretary has altered the recruitment statistics from the actual recruitment by staff, by removing statistics that prove that staff had in fact recruited.

The State Secretary has also behaved in an intimidating manner towards staff, at times yelling at staff in an angry manner. This created a stressful work environment for many staff. The inconsistent and unpredictable moods of the State Secretary have added to the stressful and unpredictable work environment, as does his equally inconsistent and unpredictable attendance at the office.

Staff pays are not paid consistently, staff are never sure when they will be paid.

Recent major changes to the staffing arrangements which down grade the role of Industrial Officers to one of a combination of Industrial and Administration and Finance was not subject to appropriate consultative processes. In my case – there has been no consultation about the proposed changes - simply an e-mail inviting me (and all relevant staff) to provide feedback on the name of the new positions.

Changes of this magnitude should have been provided in draft form to staff in detail (and in writing) for their careful consideration and subsequent consultation. Staff should have been allowed time and opportunity to discuss the proposals prior to any implementation. Some of the remaining staff are unhappy with these changes but do not feel able to raise their concerns.

There has been an almost 100% turnover in staff in the past 2 years. It cannot be in the best interests of the ANF membership to have high levels of staff turnover. Members deserve experienced staff.

In the context of the above, it is no surprise that I do not want to take up the offer of the State Secretary to work during the office closedown. In particular I do not feel that the current working environment is safe, let alone being in the office with the State Secretary during the closedown.

I believe the conduct of the State Secretary is in breach of normal standards of workplace behaviour. I have many more issues and examples of this and will be happy to provide them.

I request the Council appoint an independent investigator into the concerns I have raised.

- 31 As I have earlier mentioned, Ms McCulloch testified that she prepared this document and included it with her grievance lodged with the Union's Council to provide what she described as "assistance to the Council in understanding the issues".
- 32 The first contention advanced by Ms McCulloch was that many staff had been forced to leave the Union under the threat of performance management. The unstated assertion of Ms McCulloch, revealed in her evidence, was that it was Mr Olson who had "targeted" staff for departure and had forced them to leave. Ms McCulloch described the Union office towards the end of 2013 as a very unhappy place, and concerns were being raised by staff as to how the office was being run.
- 33 When the issues were explored in more detail, in particular through cross-examination, it became apparent that much of Ms McCulloch's impression as to the events regarding staffing at or around this time was only based on what she was told by other staff members. In particular, Ms McCulloch referred to Ms Steele and Mr Coburn, amongst others. Ms McCulloch accepted when it was put to her, that she was not at that time, aware of difficulties that the Union was experiencing with aged care recruitment and the need for possible redundancies in the Union office. She was also not aware of specific performance issues with some staff members. Ms McCulloch was cross-examined in relation to the particular circumstances of a number of employees who left the Union for different reasons around that time. It was quite apparent, as a result of that cross-examination, that Ms McCulloch was not aware of the particular circumstances of many of the employee departures.
- 34 In support of her claim in this respect, Mr Heffernan, the Union's former Membership and Marketing Manager, was called to give evidence. He had been employed by the Union for about nine years. His position was ultimately made redundant in early 2013. Mr Heffernan said he was not properly consulted by Mr Olson before his position was made redundant. Mr Heffernan also testified that Mr Olson dictated to him words to put in an email to request an early release date. Mr Heffernan also complained about an issue concerning his long service leave entitlement. He alleged that Mr Olson initially agreed to pay out his accrued long service leave but later changed his mind and required him to take it.
- 35 Mr Heffernan also denied, when it was put to him, that the evidence he gave in the proceedings was a form of "payback" against the Union and Mr Olson, arising from a dispute between himself and the Union over the calculation of his severance pay, in which the Union's calculation of entitlements was ultimately held to be correct. Documents relevant to this particular issue are set out in exhibits R1, R2 and R3. Exhibit R3 is a letter from the Department of Commerce, Labour Relations, indicating that the complaint lodged by Mr Heffernan against the Union in relation to his entitlements was not established.
- 36 Also called by Ms McCulloch in relation to the allegation of forced departures from the Union was Ms Anglin. Ms Anglin was the former Senior Media Officer with the Union and started in May 2006. Ms Anglin also performed other duties within the Union office. These duties in the last six months of her employment included general reception work, membership and aged care recruitment. Ms Anglin testified that towards the end of her employment she was not enjoying her work as her role had changed. She asked the Union for a redundancy and as a result of discussions with Mr Olson, she left the Union on that basis. A copy of Ms Anglin's letter to Mr Olson requesting the taking of a redundancy was contained in a bundle of letters at exhibit R7. Otherwise, Ms Anglin was not in a position to make any observations about other circumstances existing in the Union office at or around the time of her employment.
- 37 Mr Olson gave evidence in relation to the allegations that staff were forced to leave the Union. His evidence was that in the months leading up to December 2013, very significant changes were made to the administration of the Union and in particular office systems and procedures. These led to staff changes and to a number of redundancies. Additionally, a number of other employees on fixed term contracts did not have their contracts renewed. Specifically in relation to Mr Heffernan, and others working in aged care, Mr Olson testified that the Union undertook a review of the aged care sector and despite significant resources being dedicated to recruitment this resourcing was not translating into significant increases in membership. In his response to the allegations to the Council, at exhibit R35, Mr Olson included a detailed written summary of the changes in the Union office, through increased use of technology and changes on work systems, leading to redundancies and outsourcing of job functions.
- 38 Tendered as exhibit R7, were letters and emails over the period approximately February 2012 to December 2013, containing either staff resignations or letters notifying staff of redundancy as a result of restructuring of aspects of the Union's administration. Mr Olson categorically denied the allegation that staff had been forced to leave as alleged by Ms McCulloch.
- 39 Also called by the Union in relation to these particular allegations was Ms Hadrys. She has been employed by the Union as an Industrial Officer for about seven years. Ms Hadrys provides assistance in enterprise bargaining negotiations and general matters involving members of the Union. Ms Hadrys testified that over the period September 2013 to about January 2014, a number of staff did leave the Union. She also described the atmosphere within the Union office at this time as "uncomfortable" because of the activities of Ms McCulloch, another former employee Mr Coburn and others. Ms Hadrys testified that she just wanted these employees to leave the Union. She said she was scared of Ms McCulloch, found her to be a person who could get angry quickly and had a domineering personality.
- 40 Also called in relation to these matters were Ms Dimovski and Ms Loveridge. Ms Dimovski started with the Union in November 2012 as an Industrial Officer. In relation to staff turnover in the Union office, Ms Dimovski did say that she was aware that some staff did not get their fixed term contracts renewed and that there were some resignations. She said that she did not get involved in any of these matters. Ms Loveridge, the Union's Senior Industrial Officer, has been employed for about 11 years. Ms Loveridge said in terms of staff turnover, the allegation that there has been "an almost 100% turnover in staff in

the past two years” was simply untrue. Many Union employees, including herself who were long serving staff, remain with the Union. As to staff changes within the Union office generally, Ms Loveridge in particular referred to the effort made by the Union in relation to aged care recruitment. After a review, it was clear that this effort did not lead to a significant increase in members for the Union. Ms Loveridge emphasised that this was not a criticism of anyone in particular.

- 41 The allegations set out in parts one, three and eight of the “background and context” document in relation to staff turnover are not, on the evidence, even remotely established by the applicant. As Ms McCulloch herself conceded, many of the complaints she made in this respect, were based on inferences that she drew from her own observations. They were not grounded in fact and the evidence of the Union categorically refuted them.
- 42 I now consider the allegation of manipulation of recruitment statistics made in the third paragraph of the “background and context” document. In this respect, the suggestion of Ms McCulloch was that she raised this matter as she had been informed of this allegation by another staff member, Mr Coburn. There was no direct evidence of this allegation. Moreover, Ms McCulloch accepted that if there was any change to the membership system, a record would be left behind which could be readily seen. Ms Loveridge also gave evidence on this issue. She said that it was not possible to change the membership database. Whilst a spreadsheet which is used to record members may be able to be altered, the membership system itself cannot.
- 43 This matter was also commented on by Mr Olson. His evidence was that from time to time he undertakes a review of the Union membership and a spreadsheet can be compiled from the database. However it was his evidence that it is false to assert that the membership record itself can be in any way altered. This matter was also the subject of evidence from Mr Janfaza, the Union’s Information Technology Manager. It was his testimony that based on the membership system used by the Union it is not possible to manipulate membership data. Any membership changes that are made must be done by logging into the membership database system, and it is not possible for Mr Olson to delete a member from the system. Mr Janfaza further said that Mr Olson has never asked him to do so, and regarded the claim made by Ms McCulloch as false.
- 44 Based on the evidence, I cannot be satisfied that this allegation is made out.
- 45 The next allegation is that the Union Secretary had behaved in an intimidating manner towards staff of the Union. Furthermore, he was said to have displayed inconsistent and unpredictable moods and was inconsistent and unpredictable in his attendance at the Union office. This had created a stressful work environment.
- 46 In relation to this matter, Ms McCulloch said that Mr Olson had yelled at her in the office on occasions shortly after she started her employment. Ms McCulloch said that an issue arose in relation to her start and finish times and a dispute occurred in relation to payroll lists. Ms McCulloch alleged that Mr Olson screamed at her about this matter. Ms McCulloch further said that by about October 2013 she started looking for other work. Her evidence was she also observed Mr Olson yelling at other employees including Mr Coburn, and Ms Anglin. Neither of those former employees gave any evidence about such behaviour by the Secretary.
- 47 Ms McCulloch also said that Mr Olson was unpredictable and he came and went from the Union office all the time. In relation to the specific allegations, I pause to note that the applicant’s outline of its case, described as “Statement of Facts”, at par 6, generally describes her relationship with Mr Olson, in the period between 5 August 2012 and September 2013, as good. Furthermore, in cross-examination Ms McCulloch accepted that when not working in the office Mr Olson was also contactable by email and would respond to communications with him.
- 48 This matter was also the subject of evidence from Ms Loveridge. Her evidence was that it was not her experience that Mr Olson behaved in the manner suggested by Ms McCulloch, with her. Ms Loveridge testified that the Union office is a busy one and may at times be stressful because of work related issues. In terms of general demeanour, Ms Loveridge’s evidence was she regarded Mr Olson as no different to anyone else, and may have ups and downs from time to time. In terms of Mr Olson’s attendance at the Union office, Ms Loveridge said that Mr Olson was not unpredictable or inconsistent. Whenever he was working away from the office at home or elsewhere, he was always contactable.
- 49 Ms Weideman also gave evidence on this issue. She said she had not seen or experienced Mr Olson yelling or threatening staff. She generally described Mr Olson as “joyful and upbeat”. Ms Weideman also gave evidence about the atmosphere when Ms McCulloch, Mr Coburn and Ms Steele were present in the office. Her evidence was that they made her feel uncomfortable and there was always a tense atmosphere in their presence. Ms Weideman described Ms McCulloch, Mr Coburn, Ms Cusens and Ms Steele operating as a “clique”. She described Ms McCulloch’s general approach as aggressive and “in your face”. Ms Weideman said that the atmosphere within the Union office was much better when Mr Coburn, Ms Cusens and Ms Steele had left the Union.
- 50 In relation to this matter, Mr Olson testified that the general allegation against him that he has behaved in an intimidating manner towards staff is not true. He accepted in cross-examination that on occasions he may have yelled at staff in the past and may have been angry about an issue and indeed there may have been some swearing in the office from time to time. This was not just him. However, Mr Olson further testified that he did not have a lot to do with Ms McCulloch and only saw her a few times per week when she was working full time. Most of Ms McCulloch’s dealings were with Ms Loveridge, as the Senior Industrial Officer.
- 51 In relation to the allegation that Mr Olson’s presence in the office was inconsistent and unpredictable, Mr Olson said this allegation was simply false. In this regard, reference was made to attendance rosters for the months of April and May 2013. The attendance roster is a document which sets out the names of Union staff members, the times that they arrive and leave the office and whether they are on various forms of leave or other absences for whatever reason. A copy of this document was exhibit R8. Mr Olson’s evidence was that he regularly works 60 hours a week, six days per week. A more detailed record, for the period 19 August 2013 to 22 December 2013, as exhibit R23, was part of Mr Olson’s response to the Council. These attendance records demonstrate his regularity of attendance at the Union office with a few attendances elsewhere, for example at the Union’s holiday units at Margaret River or working from home.

- 52 Whilst this allegation of Ms McCulloch is general and not particularised, I am not persuaded that her assertions are substantiated. Whilst Mr Olson himself accepted that he may have from time to time yelled at a staff member, I am far from persuaded on the evidence that it has been established that the Union's office is an intimidating and stressful workplace as a consequence of the behaviour of the Secretary. I am also not persuaded to any extent, in relation to the allegation of unpredictable attendances at the workplace. Even if that were so, ultimately, the working hours and activity of the Secretary is a matter for the Secretary. These are not matters which are properly the concern of Ms McCulloch, unless an absence from the workplace by the Secretary materially impacted on Ms McCulloch's capacity to perform her work. There was no evidence at all of this. On the contrary, the evidence before the Commission was that on occasions where Mr Olson was absent from the office, he was always contactable and readily responded to communications with him.
- 53 Furthermore, it is of concern that the allegations made by Ms McCulloch, that Mr Olson did not treat her well, are quite inconsistent with her own case outline at par 11, where Ms McCulloch states that up until September 2013, she had a good working relationship with Mr Olson.
- 54 The next assertion in the "background and context" document was that employees were not paid consistently, and that "staff are never sure when they will be paid". Ms McCulloch's evidence in relation to this matter was that wages, under cl 12 of the Employees' Conditions of Service document, were to be paid fortnightly. Generally, the office payday was a Wednesday. This matter was also the subject of evidence from Ms Weideman and Ms Dimovski. Their evidence was that they did not experience regular late pays or inconsistency in getting paid. Mr Olson testified that staff pays are consistently and regularly made. His evidence was that there was only one occasion when staff pays were late and that was because of industrial action occurring in February 2013.
- 55 In connection with this allegation, the Union prepared a document as exhibit R9, which was a schedule of pays from 2 November 2011 up to and including 11 December 2013. This document has three columns, the first sets out the day and date that staff pays were due to be lodged in their bank accounts. The second column sets out the day and date the staff pays were actually lodged with the employee's bank accounts. The third column contains any explanatory notes as applicable.
- 56 From the compilation document, the veracity of which was not challenged in any way by Ms McCulloch, it is clear that, consistent with Mr Olson's evidence, there was only one occasion in February 2013 where staff pays were made on Thursday 21 February and not Wednesday 20 February. The explanation in the third column is that "pay day fell in the middle of bed closures of public sector EBA campaign". On all other pay periods, the staff pays were made on the due date or in some cases early. There was certainly no complaint on the evidence before me, about employees of the Union receiving their salary payments before they were actually due. From exhibit R9, and from the oral evidence, the assertion that staff pays were not paid consistently is not well founded. On the four occasions where staff pays were made some days earlier than scheduled, there was an explanation provided for it.
- 57 The next issue in the "background and context" complaint relates to staffing changes alleging a downgrading in the role of Industrial Officers without appropriate consultation. Ms McCulloch said she received an email from Mr Olson on 11 November 2013 regarding proposed changes to the role of Industrial Officer following the removal of administration jobs from the Union office. A copy of the email was exhibit R10. It was common ground that a review of the administration area of the Union led to a number of redundancies. This was dealt with in Mr Olson's presentation to the Council that I have referred to above.
- 58 In the email, Mr Olson proposed that Industrial Officers perform some administration tasks for a week to be called the "Industrial Administration Week" on a rotating roster over eight or nine weeks. Some of the proposed additional new tasks included processing emails arriving from members including processing member payments; sending emails to members in relation to various matters; processing resignations; answering telephones and amending the membership database; processing new member payments and some miscellaneous tasks.
- 59 Ms McCulloch said she received a copy of this email. This was during the period where she was on leave without pay and only working one day per week. Ms McCulloch testified that she did not consider that Mr Olson's proposal as set out in his November email was sufficient consultation of any proposed changes to job roles. She said that she was not properly aware of the changes to be introduced. Ms McCulloch said an invitation by Mr Olson for feedback on the proposed change was not in her view, proper consultation. There was no evidence that Ms McCulloch took up this invitation.
- 60 Other staff members were called to give evidence about this matter. Ms Weideman said that the administration changes put in place by the Union were not a difficulty for her. Many of the duties proposed to be performed by Industrial Officers were duties that had been performed by Industrial Officers previously. She said that there was a consultation process for the changes. Meetings of staff were held. Staff members could propose changes that they thought were appropriate.
- 61 Ms Weideman referred to the Union's new telephone system which led to a very significant fall in the number of phone calls required to be processed by administration staff. In terms of the consultation process, Ms Weideman said that there were around three to four meetings to discuss these changes and they went ahead as there were no objections raised. Similarly, Ms Dimovski said that she was not too concerned about the changes to the Industrial Officer role as most of the duties had been performed previously. She had some discussions with Mr Olson about the proposed changes and in particular amendments to starting and finishing times. She considered that the consultation process was adequate.
- 62 Ms Loveridge also testified that she had discussions with Mr Olson about staff development matters. There was consultation between staff members about the proposed changes. The changes came about because a number of staff had left. The alternatives were either to employ new administration staff or to expand the Industrial Officer role by the addition of some minor additional duties. This is what occurred.
- 63 Mr Olson testified that there were major changes to the Union office administration structure. Until 2013, he said there were thousands of telephone calls received from members. The Union moved to an online system to communicate with members. This led to an 80%-90% reduction in incoming telephone calls. The Union has significantly increased its use of technology.

While the Union now has four times the number of members it did 16 years ago, it services those members with the same number of staff. The details of the changes in the Union office administration were set out in Mr Olson's response to the Council in exhibit R35. Mr Olson's evidence was that all staff members were spoken to directly and through email communications about the proposed changes. He sought responses from staff about them. Mr Olson said that some officers raised issues with him and Ms Loveridge both before and after the proposed changes were put in place. In the main, Mr Olson said that most of the Industrial Officers had performed the type of administration work proposed, in the past.

- 64 Mr Olson's evidence was the only work that Ms McCulloch had not done before was the batching of member payments. He said this was why it was important for Ms McCulloch to attend the office during the period over which additional training was to be provided to new and existing staff from 30 December 2013. For Ms McCulloch not to attend, would mean that separate training would have to be provided to her at another time.
- 65 Compounding the difficulty with this issue, was the fact that Ms McCulloch was largely absent from the Union office over the three months of October, November and December, apart from one day per week performing reception duties. Despite this however, Mr Olson's evidence was, and I accept it, that Ms McCulloch received all of the email communications to staff about the proposed changes. In reality, Ms McCulloch's objection was that as an Industrial Officer in her 50s, she regarded the proposed changes as demeaning and they were not, in her view, accompanied by appropriate consultation processes.
- 66 Clause 33 – Employee Participation of the Employees' Conditions of Service document provides that "the State Secretary shall consult with the employees prior to any decision involving the change or introduction of office systems or equipment." Whilst there might be some scope to argue that "office systems or equipment" does not include a variation to contracts of employment to add or vary duties, for present purposes, I accept that cl 33 may have had application to the changes introduced by the abolition of the administration team within the Union office. What the clause requires is consultation prior to a decision to implement change. Whilst Ms McCulloch was personally unhappy with the proposed change, I am not persuaded that there was no consultation by Mr Olson with Union staff about the proposed changes.
- 67 On the evidence, it is quite clear that staff were well aware of the changes to the administrative arrangements within the Union office. The entire administration team were made redundant, as a result of changes in demand for services, largely through the introduction of new technology. This seemed to be well understood by the Industrial Officers who gave evidence. Furthermore, whilst I accept that in some respects a few of the tasks proposed involved work that had not been previously performed by Industrial Officers, the evidence was that much of the work had previously been done by them. It was essentially clerical type work. What was different was how the proposed administration duties were to be incorporated into the role of an Industrial Officer, and the rostering system for the performance of this work.
- 68 Ms McCulloch's most recent letter of appointment dated 25 January 2013, which was exhibit A9, contemplated the performance of other duties. The penultimate paragraph of the letter of appointment provided that "your duties and responsibilities will be in accordance with your job description and include other duties as directed by the State Secretary from time to time." It is trite to observe that as a matter of law, a fundamental change in duties of an employee, not contemplated by the contract of employment, may result in the termination of one contract and the formation of another: *Marriott v Oxford and District Co-operative Society Ltd (No.2)* [1969] 3 WLR 984; *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567. The performance of small alternative duties or tasks, even if not expressly contemplated by the contract of employment, may only amount to a variation and not a termination of the contract of employment: *Johnson v Nottinghamshire Combined Police Authority* [1974] 1 WLR 358.
- 69 In this case, I am satisfied that Ms McCulloch's contract of employment permitted the proposed variations to the Industrial Officer role proposed by the Union. The additional tasks to be performed did not fundamentally change the nature of the role. Moreover, the additional administrative tasks to be performed were not to be performed at all times, only at certain times, in accordance with a roster arrangement. I also accept the evidence that apart from a few tasks, the work involved was not new, and had been performed previously by Industrial Officers.
- 70 I accept that Ms McCulloch took exception to the proposed changes. However in my view, the Union was contractually entitled to make the changes that it did. It may well have been made more difficult by reason of Ms McCulloch's absence from the Union office over the three months that these changes were being proposed and put into effect. There was however on the evidence, nothing preventing Ms McCulloch raising any issues about the duties with either Mr Olson or Ms Loveridge. While she was only in the Union office one day per week, this would not have prevented her raising any issues that she had with the proposed changes, as did some other Industrial Officers, on the evidence. It was not open in my opinion, for Ms McCulloch to simply refuse to perform the work as proposed.

#### **Allegations in the Federal Secretary's letter of 18 December 2013**

- 71 Ms McCulloch testified that after speaking with Ms Fowler, the Union President, she formed the view that taking her complaints within the Union internally was not going to get anywhere. She then said she decided to take the matter further. Ms McCulloch testified that she then found out who the Federal Secretary of the Federal Union was and on 5 December 2013 telephoned her. This was Ms Thomas. Ms McCulloch said that she spoke with Ms Thomas and generally complained about the treatment of staff by Mr Olson. She discussed with Ms Thomas a range of matters and answered questions that Ms Thomas put to her during the conversation. According to Ms McCulloch, Ms Thomas told her words to the effect "they were concerned about the WA Branch and she would be raising concerns with the WA Branch.": 93t.
- 72 Sometime later Ms McCulloch was informed that Ms Thomas had written to Mr Olson on 18 December 2013, following her conversation with Ms McCulloch. Ms McCulloch was not specifically identified in Ms Thomas's letter. Given the nature of the allegations raised in Ms Thomas's letter, which Ms McCulloch confirmed in her evidence was an accurate reflection of the matters discussed on 5 December 2013, it is helpful to set it out in full. Formal parts omitted, the letter is in the following terms:

I am writing to you in your capacity as the Branch Secretary of the Australian Nursing and Midwifery Federation, Western Australian Branch ('the Branch').

I have recently been approached in relation to a number of allegations concerning the administration of the Branch and/or the Western Australian State Registered Union ('the State Union').

It is not part of the Federal Secretary's normal role or function to oversee or investigate concerns relating to Branches or their associated State Union. On the other hand, I consider it is appropriate to draw to your attention the matters recently raised with me in confidence.

Under the ANMF's Rules it is the Branch Council and the members of the Council that have responsibility for the management and control of the affairs of the Branch and as such I have provided a copy of this correspondence to the Branch President and have asked that she provide a copy to Branch Councillors.

The allegations if substantiated would be of serious concern and have the potential to reflect poorly on the Federation as a whole. Accordingly, I draw your attention to the matters set out below:

The allegations are as follows:

1. It is alleged that the employment of seven staff members has ended in a recent period of about seven weeks. As a result the remaining staff have been required to work in areas in which they have either no or little expertise. These areas include both membership and finance.
2. It is alleged that the Secretary has had child care expenses paid from the organisation's funds. Implicit in this allegation is that such payments are not appropriate and/or not authorised.
3. It is alleged that a substantial number of power tools and equipment has been purchased with the organisation's funds and used for renovations of the Secretary's residence.
4. It is alleged that a home-style gym has been installed at the organisation's office using the organisation's funds and has been substantially dedicated for the personal use of the Secretary.
5. It is alleged that at the Secretary's direction lunch is provided to staff on a daily basis. That lunch is routinely over catered and the excess food is regularly packed up for the use of the Secretary. This is despite suggestion by staff that the order be reduced.
6. It is alleged that staff frequently are shouted at and humiliated by the Secretary who is unreasonably aggressive in his dealing with some staff.
7. It is alleged that the Secretary is entirely absent from the office for extended periods amounting to days at a time and then is present 24 hours a day for days at a time. During the latter he uses accommodation at the office and attends the office in a dishevelled state.
8. It is alleged that staff are regularly required to ensure another staff member is available to back up and attend appointments the Secretary is scheduled to attend but fails to attend.

I make no comment on the veracity of any of these allegations. However, I consider that the matters raised are of sufficient concern to warrant my drawing them to your attention and that of the Branch President.

I do emphasise that given the allegations have not at this stage been the subject of any enquiry by the Branch Council or Executive the allegations should be treated in the utmost confidence.

Finally, I do note with concern that the Branch is still the subject of an Inquiry by the Fair Work Commission in respect of its failure to lodge financial accounts. I also note that the accounts on the Branch website for 2012/2013 include the Branch Council Resolution of 29 November 2013 and it refers to "Schedule 1B to the Fair Work (Registered Organisation's) Act 2009". There has never been any such Schedule.

- 73 In her testimony, Ms McCulloch maintained that all the allegations that she made to the Federal Secretary were true. In relation to the first allegation this has been dealt with in the evidence concerning Ms McCulloch's grievance to the Union and I do not propose to consider it further.
- 74 The second allegation carried the inference that Mr Olson had improperly used Union funds for the purposes of paying his private childcare expenses. Ms McCulloch's evidence on this allegation, which, along with a number of others, was plainly a serious allegation, was based on what she said she had been told by a number of other staff of the Union. Ms McCulloch admitted that she had no direct knowledge about such matters. Ms Loveridge gave evidence about this issue. Her evidence was that some childcare expenses for Mr Olson, because of the hours of work and responsibilities of his position, had been approved by the Union Council.
- 75 This matter was also dealt with in Mr Olson's evidence. He said that as he is required to appear at various times at appointments on behalf of the Union, the Council provided its approval for some childcare expenses to be paid by the Union, for the care of Mr Olson's young daughter when necessary. Mr Olson said he was aware also that Ms McCulloch knew this. Mr Olson's submission to the Council, in response to the Federal Secretary's letter contained at exhibit R35, sets out in some detail the background to this matter. Mr Olson's response to the allegation, sets out the specific resolution of the Council at its meeting on 25 March 2011, authorising the payment of childcare expenses for the State Secretary in recognition of the demands placed on Mr Olson, to work outside of ordinary hours, throughout the seven days of the week. The submission referred to a requirement for childcare expenses for a maximum of two days per week, falling to one day per week in the year following. Mr Olson also noted in his response to the allegation, that there have been many occasions on which he has paid for his daughter's childcare expenses, without reimbursement from the Union.

- 76 The allegation made was a serious one. It alleged the fraudulent misuse of Union resources. It was one clearly made without any direct evidence or knowledge of the actual facts and circumstances. It was based totally on hearsay. I am satisfied and I find that the benefit of childcare expenses, to the extent that they may be required to be paid were authorised by the Council. There is no veracity in this allegation.
- 77 The next complaint was a further alleged misappropriation of Union resources, through the purchase by the Union of power tools and equipment for Mr Olson's personal use. As to this matter, again, Ms McCulloch testified that it was based on what she had been told by other staff members, including Mr Heffernan, about the purchase and use of tools and the existence of a tool shed at the Union premises. Ms McCulloch said she was told that Mr Olson had used these tools to renovate his house. She said that she had the impression that no one else was able to use the tools without the permission of Mr Olson. Despite this, Ms McCulloch maintained the allegation to be true. Ms McCulloch said that she was aware of the fact that the Union had some holiday units in Margaret River which required maintenance to be performed on them.
- 78 This allegation was also dealt with in the evidence of other staff members. Ms Loveridge said that she was aware that Mr Olson always had his own tools on the Union premises. Mr Janfaza said that the Union purchased a range of tools for use at both the office and for maintaining the holiday units at Margaret River. Prior to this time, the Union had used Mr Olson's own tools for these purposes. He was aware that all staff can use them, including himself, as he undertakes maintenance on the holiday units from time to time. I should add that photos of a storage cabinet on the Union premises, including the inside of the shed with a number of items of equipment and tools, were tendered as exhibit R21.
- 79 This matter was the subject of evidence from Mr Olson. He testified that he is a qualified mechanic and gas fitter. When he started with the Union, he brought all of his tools of trade with him. This included a badge-making machine which was used by the Union. Mr Olson said that he did undertake renovation works on his home, but kept receipts for all of his expenses incurred on that project. Mr Olson said that he also upgraded his own tool collection at his own expense, for which he kept receipts. Mr Olson seemed to be of the view that Ms McCulloch was aware of this, from conversations he had had with her about her own home renovation. Mr Olson said he offered the use of ladders for her assistance. Staff could use the tools when necessary.
- 80 In connection with this matter, Mr Olson's submission to the Council in response to the allegation, set out in writing, in some detail his position, along with copies of multiple receipts for various tools and items of equipment. The submission referred to over 60 receipts for various specialty tools and so on, that were purchased by him with his own credit card and which receipts were available at the Council meeting for inspection as may be required. Mr Olson in his submission to the Council, referred to the fact that the Union, at the time he commenced employment, had little money for tools and he made his extensive tool collection available for use by the Union over the last 15 years or so. He referred to refurbishing his own tool collection at the time of commencing renovations on his home, for which receipts were produced.
- 81 Mr Olson also made the point that the main reason he commenced purchasing the Union's own tools and equipment was so that less reliance could be placed on the use of his own personal equipment. In relation to his home renovations, Mr Olson made the submission that he has kept all receipts for purchases made in this regard. Mr Olson also said that he would have available at the Council meeting all receipts for perusal if needed.
- 82 This allegation, along with allegation two, is a serious one. Again it alleges the fraudulent misuse of Union property and/or funds for Mr Olson's personal purposes. Again also, the allegation made by Ms McCulloch was based upon no more than hearsay, without a shred of direct evidence. The direct evidence is all to the contrary. I accept it without hesitation. There is no substance to this allegation.
- 83 The next matter relates to an assertion that Mr Olson, using Union funds, arranged to have installed a gymnasium at the Union offices for his personal use. As with allegations two and three above, the inference from such an allegation is that Mr Olson misappropriated Union funds for his own purposes. Ms McCulloch asserted in her evidence that she was, yet again, told that the gymnasium equipment was for Mr Olson's personal use. She was not aware that others were involved in the purchase and/or use of the gymnasium equipment. Ms McCulloch's evidence was that she was not aware that new gymnasium equipment was being purchased by the Union. Ms McCulloch further said she was informed by someone else, not identified, at the Union, that it was new gymnasium equipment for Mr Olson's use only and no one else was allowed to use it. Ms McCulloch's evidence was that "so based on all of that, it struck me that it was yet again another one of those Mark things that Mark had decided he was going to do.": 231t.
- 84 Ms Dimovski testified that the gymnasium equipment at the Union office was used by many staff, though she did not personally use it. Ms Loveridge also said that she had used the Union gymnasium equipment in the past. It was always her understanding that it was available for and was used by all staff. Staff made suggestions as to the use of the equipment. It was Mr Olson's evidence that the Union had some gymnasium equipment for about 15 years. Some of the equipment needed to be updated. In view of this, he left it to the staff to suggest what might need to be done. He sent out an email to tell staff of the new arrangements and rules for the use of the gymnasium equipment, on 18 September 2013. It referred to both himself and Mr Clancy having moved the gymnasium equipment to a larger room, in order for some new equipment to be purchased.
- 85 Mr Olson's response to this specific allegation was also set out in some detail in his submission to the Council at exhibit R36. In it he referred to a resolution of the Council in October 2001, which gave approval to the Union Executive to purchase fitness equipment for the use of Union staff. In the submission Mr Olson referred to an approach by staff to him in July 2012, to update the equipment so it could be used by more staff members. This duly occurred in April and May 2013 and was completed by June. Mr Olson calculated that all staff using the fitness equipment over the previous 12 years, including the cost of recent equipment upgrades, worked out to be somewhere in the vicinity of \$60 per staff member per year. In relation to his own circumstances, Mr Olson testified that he has been a member of various fitness and aquatic centres from 2004 up to the time of the Council meeting and attached membership receipts. Aside from his own personal memberships, Mr Olson referred to an exercise bike which he has at his home, which he purchased for his own purposes, and in relation to which he attached a receipt to his submission to the Council.

- 86 Again as with allegations two and three set out above, the allegation that Mr Olson inappropriately used Union funds to establish a gymnasium for his exclusive use, is without substance. Ms McCulloch had no direct evidence to support her allegation, which was based on supposition and hearsay. Again, the direct evidence is all to the contrary. Mr Olson's evidence, and his submission to the Union Council, was detailed, supported by receipts, and without reservation I accept it.
- 87 The fifth allegation in the letter to the Federal Secretary was to the effect that a lunch provided to Union staff was regularly over-catered for the personal benefit of Mr Olson. Again the inference is that Union resources were being used for the personal benefit of the Secretary. Ms Dimovski said that lunch is provided to the Union staff each day. She was responsible for ordering pasta for the lunches. From time to time she received requests from staff to change the order. Ms Dimovski's evidence was that at no time did she over-order food. She said she has never seen food taken to Mr Olson's home for his personal consumption. Ms Loveridge confirmed that staff lunches are provided as a result of a Council resolution. Food not consumed at the lunch is packed and kept in the office refrigerator. Ms Loveridge also said that this excess food is not for Mr Olson's personal consumption at home.
- 88 This matter was also the subject of a submission by Mr Olson to the Council. He referred to the Council resolution from December 2007, to authorise the Secretary to provide lunch for Union officers from time to time. In his response, he said that initially lunch was provided two to three days per week but now is provided on four days per week Tuesday to Friday. Any leftover food is packed and left in the office freezer for staff to eat at other times, in particular those who work out of hours, for example on weekends. All food containers are marked and dated to ensure that food is kept fresh. Photos of examples of food stored, in plastic containers with dates marked on them, were attached to Mr Olson's submission to the Council at exhibit R35. Mr Olson testified that there has never been over ordering of food as far as he is aware, and he monitors this to ensure over ordering does not occur. Mr Olson asserted that Ms McCulloch would be aware of these practices and regarded her allegation as false and offensive.
- 89 As with allegations two, three and four, Ms McCulloch's complaint to the Federal Secretary about misuse of catered food, is without substance. Apart from the assertion by Ms McCulloch, the direct evidence is contrary to the allegation. Ms Anglin, who was called by Ms McCulloch, contradicted Ms McCulloch's assertion in this respect. Her evidence was that on the one occasion when she sought to take some food to Mr Olson home from the Union office, he told Ms Anglin that she could not do that.
- 90 The next allegation relates to alleged shouting and aggressive behaviour by Mr Olson with staff. This has been referred to above in dealing with Ms McCulloch's grievances. Additionally, Ms Hadrys, one of the Industrial Officers, did say that Mr Olson can be from time to time demanding and she has seen him yell at staff including herself, when she did something wrong. However neither she nor Ms Loveridge, who also gave evidence on this matter, had seen Mr Olson be aggressive or shout at Ms McCulloch. This was also Ms McCulloch's evidence at one point in her testimony, which was inconsistent with her earlier evidence when dealing with aspects of her grievance.
- 91 In relation to allegations that Mr Olson was absent from the office for extended periods, this was in part dealt with in my earlier reasons dealing with the "background and context" document. However some additional evidence was given about this. Ms Loveridge testified that from time to time she was aware Mr Olson may not be in the office and may be working away. On other occasions, he may stay in the office working for long periods of time. As mentioned above, a casual dress code applies in the Union office except for meetings with members. Ms McCulloch said that she mentioned to the Federal Secretary that she observed Mr Olson being away from the office for long periods of time and on some occasions when in the office, he was in a dishevelled and unkempt state.
- 92 Mr Olson's evidence, and his submission to the Council on this matter, as noted above, included a list of office attendances, based on the Union sign in sheets, for the five month period from August to December 2013. This record shows, as in Mr Olson's submission to the Council that he worked on average 60.5 hours each week and was generally present at the Union office for six days of each week. As also mentioned earlier, there were a few occasions recorded where Mr Olson worked from home and also from the Union units in Margaret River. As to the suggestion that Mr Olson uses accommodation at the office to stay overnight and attends in a "dishevelled state", Mr Olson denied this. He further said that on no occasion has he ever attended a meeting with a member or an external visit in such a condition.
- 93 Whilst the allegations as to absences from the Union office made by Ms McCulloch were not supported by direct evidence, and Mr Olson's evidence is to the contrary, in any event, in my opinion, as I have concluded above, these matters were not the business of Ms McCulloch. The working activities of the Secretary of the Union have nothing to do with the terms and conditions and the work undertaken by Ms McCulloch. Unless there was some demonstrated impact on her work or performance, simply put, these matters were none of her concern. She had no business raising them with the Federal Secretary. I will say more about the nature of the allegations generally raised with the Federal Secretary, shortly.
- 94 Finally, is the allegation that the Union staff need to provide "backup", in the event that Mr Olson was unable to attend a scheduled appointment. Ms McCulloch gave an example of a Curtin University talk to students about social media. She testified that Mr Olson was initially to give the talk but shortly beforehand, had to withdraw and Ms McCulloch did it instead. The inference was that this was a regular occurrence and was in some way, improper conduct. Ms McCulloch accepted in her evidence that Mr Olson, as the Secretary, has to from time to time attend media appointments and deal with crises within the Union as and when they arise. Ms Loveridge testified that because of demands on his time, such backup was required by other staff.
- 95 Mr Olson himself, in both his evidence and his submission to the Council said that despite his extensive commitments, which he is mostly able to attend to, on occasions, such as legal talks to members, he has been unable to attend due to conflicting Union commitments that he may have. Mr Olson testified that the reason that such an arrangement exists, is to avoid having to cancel the particular commitment.

- 96 In my opinion, such an arrangement, is simply good management. I see nothing untoward about it and it is difficult to see on what basis the allegation was made by Ms McCulloch, other than to suggest that Mr Olson was in some way, derelict in his duties to the Union. No such finding is open and I do not make it.
- 97 As to the allegations generally set out in the letter from the Federal Secretary, it is concerning that none of the matters discussed by Ms McCulloch with Ms Thomas appeared in her grievance or the "background and context" document provided to the Union Council. The Union was Ms McCulloch's employer, not the Federal Union. The matters raised by Ms McCulloch concerned the administration of the State Union, and the conduct of its Secretary, as her superior.
- 98 As noted above, Ms McCulloch's explanation in her evidence as to why she spoke with Ms Thomas was that by 5 December 2013, she had formed the view that her grievances would not be properly dealt with by the Union. It is difficult to understand this evidence. This is because Ms McCulloch's grievance had not even been sent to Ms Fowler, the Union President, at that time. It is therefore difficult to understand Ms McCulloch's evidence that she did not think that any of her concerns would be adequately dealt with by the Union, and that she needed to raise the matters externally.
- 99 Furthermore, it is deeply concerning to me that allegations of such a serious nature, as the fraudulent misuse of State Union property and resources, were raised with the Federal Secretary, and not the State Union President and Council directly. Ms McCulloch was an employee of the State Union. I also note that the letter from the Federal Secretary referred to matters being raised with her "in confidence". Ms McCulloch's evidence was she made no such request that the matters raised with the Federal Secretary remain so described. However, that is how it was presented to the State Council.
- 100 Additionally, the allegations set out at pars one to eight are, as with much of the material submitted by Ms McCulloch, and her evidence generally, totally lacking in any particularity or with any direct evidence to support them. This stands in stark contrast to the detailed submissions made by Mr Olson to the Union Council and to the Union's evidence generally in these proceedings. Given such generalised allegations, from an unidentified source, in my view, a far better course for the Federal Secretary would have been to redirect Ms McCulloch to the State Union, in particular the President, to whom such serious allegations should have been addressed in the first instance.
- 101 While commenting on these matters, I found Mr Olson to be a very credible witness. He gave detailed explanations in response to the myriad of matters put to him, as he did when answering all of the allegations to the Council. This is in stark contrast to the many generalised and sweeping assertions made by Ms McCulloch in the course of her testimony.
- 102 I also note in passing, that the Federal Secretary, Ms Thomas, was issued with a summons to witness by the Union for the purposes of giving evidence in these proceedings about the content of her discussions with Ms McCulloch and no doubt the content of her letter to Mr Olson of 18 December 2013. The summons to witness was issued through the Registry of the Commission on 23 June 2015. The summons required Ms Thomas to appear before the Commission, via teleconference, on Thursday 25 June 2015 at 10:30am. By letter of 24 June 2015, solicitors for Ms Thomas wrote to the Registrar, drawing to the Registrar's attention that the Union had failed to serve the summons in accordance with the relevant provisions of the Service and Execution of Process Act 1992 (Cth). It was asserted in the letter from Ms Thomas's solicitors that service of the summons was not therefore effective. Furthermore, the letter went on to note that even if it had been effective, given the time constraints involved, Ms Thomas would have insufficient time to make an application to have the summons to witness set aside.
- 103 Given the seriousness of the allegations set out in Ms Thomas's letter to Mr Olson, and the context in which the matters were raised by her with him, including that a copy of it was provided to the Branch President and intended for the Branch Councillors, it is of some concern to me that Ms Thomas was, seemingly, quite resistant to being called to give evidence in relation to the matters set out in her letter to Mr Olson. It seems, from the observations of her solicitors in their letter of 24 June 2015, that despite having written a formal letter to Mr Olson in his capacity as Secretary of the WA Branch of the Federal Union, containing such serious allegations, Ms Thomas was preparing to instruct her solicitors to actively resist giving evidence in these proceedings. If Ms Thomas was as concerned as she foreshadowed on the first page of her letter, that the allegations made against Mr Olson, if substantiated, would reflect poorly on the Federation as a whole then, it is in my view, to say the least, very surprising that Ms Thomas was prepared to not just decline to give evidence, but to take the steps that she did to resist giving evidence about these matters in these proceedings.

#### **The Council meeting on 17 January 2014**

- 104 The Union regular Council meeting for both the State Union and the WA Branch of the Federal Union took place on 17 January 2014. On the agenda for the State Union meeting was the complaint lodged by Ms McCulloch. Ms Fowler's evidence was that as the President she forwarded Ms McCulloch's grievance with its attachments to all Council members. Additionally, Mr Olson's various responses to the allegations had also been provided to Council members. Ms Fowler's testimony was that Ms McCulloch contacted her and informed her she would not be attending the Council meeting. Ms McCulloch's evidence was that she had taken advice from her doctor and it was suggested she not attend the Council meeting because of her stressed state. Instead, Ms McCulloch prepared a statement, a copy of which was exhibit A23. Ms Fowler said that she received a copy of the statement from Ms McCulloch prior to the Council meeting and it was provided to Council members.
- 105 The statement by Ms McCulloch complained about the process used by the Union in handling her grievance and dispute with the Secretary. Ms McCulloch complained that instead of sending her grievance to the Council it was also sent to Mr Olson. Ms McCulloch also complained that the "status quo" should have applied and it was unreasonable for the State Secretary to "unilaterally determine the issues in my dispute by instructing me to follow his desired outcome, and threatening me with termination if I don't. This seeks to undermine my rights." Ms McCulloch further complained that the Union should have appointed an external investigator to deal with her grievance.
- 106 In her statement, Ms McCulloch made further general assertions that since lodging her grievance, Mr Olson had continued to threaten to terminate her employment. These threats were in response to Ms McCulloch downloading a large number of emails from the Union's email system. She said these were necessary to prepare her responses to various matters raised by the Union

- against her. Furthermore, Ms McCulloch complained about Mr Olson's proposal that she shift offices from her proposed commencement date on 6 January 2014, alleging that this was another attempt to bully and humiliate her. Ms McCulloch further complained about the delay in processing her qualification allowance and asserted also, that in relation to a workers' compensation claim she filed, that the Council assured her that she would be provided with workers' compensation assistance by the Union, in accordance with the usual practice for Union members.
- 107 Ms Fowler's evidence was that Ms McCulloch's grievance was the first item of business on the Council agenda and the Council spent over an hour discussing the issues raised. The Council considered Ms McCulloch's objections and her written statement provided to them on the day of the Council meeting. Ms Fowler's evidence was that Mr Olson addressed the Council, answered questions and provided information in response to the allegations made against him. Ms Fowler's evidence was that the Council took the matters raised by Ms McCulloch very seriously. All of the materials and submissions raised by both Ms McCulloch and Mr Olson were carefully taken into account. Exhibits R30, R31 and R36 are a considerable number of documents provided to the Council from Mr Olson, in response to Ms McCulloch's grievances.
- 108 Additionally, I observe that Ms Fowler, on 22 December 2013, after receiving Ms McCulloch's grievances, referred to the assertion by Ms McCulloch that she had other issues and matters to raise with the Council and that if she did wish to pursue further matters, any further allegations and supporting materials should be provided to Ms Fowler no later than 7 January 2014, in order that they may be considered at the Council meeting. No further materials of that kind were provided to Ms Fowler or any other member of the Council, by Ms McCulloch prior to the Council meeting. According to Ms Fowler, after the grievance had been discussed, Mr Olson was required to leave the meeting in order for the Council to deliberate.
- 109 Also giving evidence in relation to the Council meeting was Mr Casey. Mr Casey has been a member of the Union Council for about 10 years. Mr Casey testified that the Council considered Ms McCulloch's grievance and saw the documents she sent being exhibit A15. The Council also had before it the responses from Mr Olson as set out in exhibits R30, R31, R35 and R36. Mr Casey also confirmed that Ms McCulloch did not attend the Council meeting in person, instead providing the statement which she had sent to Ms Fowler. Mr Casey said that Mr Olson, when he appeared before the Council, provided a detailed response to Ms McCulloch's claims. He included receipts for tools and equipment for the Union's gymnasium, the subject of the letter from the Federal Secretary. Mr Casey said that there was discussion about Ms McCulloch's complaint for more than an hour. He confirmed that Mr Olson then left the room while the Council deliberated.
- 110 According to Mr Casey, based on what was before it, the Council considered that the Secretary's response was very credible. Ms McCulloch's allegations were considered to be lacking in substance and Mr Casey thought some were "malicious and nasty". Mr Casey considered that Ms McCulloch's grievance and her bundle of complaints were an attempt to portray Mr Olson in a poor light before the Council. The Council dealt with the letter from the Federal Secretary separately, when dealing with federal matters as the WA Branch. I deal with that now.
- 111 The letter of 18 December 2013 from the Federal Secretary containing the allegations against Mr Olson, were then considered by the Council at the meeting. The WA Branch Council meeting normally immediately followed the Union Council meeting which was convened first. The minutes of the meeting of the WA Branch Council for 17 January 2014 were in evidence as exhibit R34. This was also the subject of evidence from Mr Casey. He testified that the Federal Secretary's letter was put and considered carefully by the Council. Mr Casey said he considered a number of the allegations were fairly serious and concerned matters of fraud and theft. Mr Casey referred to Mr Olson's response to the allegations which were in great detail. The content of Mr Olson's presentation to the WA Branch Council was set out in exhibits to which I have referred earlier, being exhibits R30, R31, R35 and R36.
- 112 From the minutes of the meeting of the WA Branch Council, it is fair to observe that the Council took a dim view of the Federal Secretary raising the matters referred in her letter, and the manner in which they had been presented. In this regard, the WA Branch Council minutes on page 2 noted:
- WA Council have received the allegations by the Federal Secretary to the ANF WA President and ANF WA Secretary that arrived by registered post on Friday 20 December 2013.
- These allegations were provided to all WA Branch Councillors by the Branch Secretary on the same day they were received at the ANF Office.
- Council also notes the email from the Federal Secretary sent at 5pm on Friday 17th January that confirms:
- the Federal Office had no evidence at the time of sending the allegations on 18 December 2013
  - the Federal Office still has no evidence and has made no effort to obtain any evidence or determine the veracity of the allegations despite the statement in the first letter that:  
*"the allegations if substantiated would be of serious concern and have the potential to reflect poorly on the Federation as a whole"*
  - there was no basis to create a list of allegations against the WA Branch Secretary other than the telephone conversation with an anonymous caller and in fact there is no proof that allegations were ever made.
- Council considers a more-appropriate course of action in the circumstances would have been to refer the anonymous caller back to the WA Branch Council.
- Council is still perplexed as to why a reference was included to the Fair Work Investigation and notes that the years being investigated are 2010, 2011 and 2012 and not 'subsequent to the 2007 year' as stated in the second letter.
- Council also notes that Federal Office has failed to acknowledge at any point in any of the correspondence that the WA Branch accounts are up to date.
- It is clear to the WA Branch Council that the purpose of first letter from the Federal Office was to undermine the credibility and reputation of the WA Branch Secretary in eyes of the WA Branch Council.

Council considers that the manner in which this matter has been conducted by Federal Office continues a pattern of behaviour where the Federal Office, Federal Executive and the Federal Council have clearly shown severe prejudice and bias against the WA Branch and in particular the WA Branch Secretary.

113 Furthermore, as to the content of the specific allegations set out in the Federal Secretary's letter, the WA Branch Council minutes go on to state at page 5 as follows:

**The current anonymous allegations sent by Federal Office**

Despite the outrageous nature of the allegations and even though the Federal Office and the anonymous source have failed to provide a scintilla of evidence, the WA Branch Secretary spent a great deal of time over the Christmas public holidays to compile the evidence that comprehensively refutes the allegations. His response and the detailed evidence he compiled supporting that response, consisting of receipts, resolutions of council and other documentation, was sent to all WA Branch Councillors on the evening of Boxing Day 2013.

Whilst we commend the efforts of the WA Branch Secretary in compiling such an extraordinary depth of evidence so quickly and we understand his reasons for wanting to answer the allegations before the commencement of 2014, we are saddened that he had to do so at all.

Council finds that the allegations contained in the letter from the Federal Office are malicious in nature, baseless and without any foundation.

The WA Branch Council also condemns the ANMF Federal Executive and ANMF Federal Office for this disgraceful treatment of the WA Branch Secretary over many years that, in the view of the WA Branch Council, is nothing short of persecution of an individual who has done nothing more than work hard to deliver the following benefits to ANF and ANMF members in WA in his time as ANF IUWP State Secretary and WA Branch Secretary.

114 Suffice to say, that the WA Branch Council found the allegations set out in Ms Thomas's letter completely unsubstantiated.

115 On about 22 January 2014, Mr Olson sent an email to Ms McCulloch, enclosing a copy of the Council Resolution from its meeting of 17 January 2014, confirming that her grievance had been found by the Council to be unsubstantiated and the grievance was now considered to be closed. A copy of that communication was exhibit A24.

116 There was further communication between Ms McCulloch and the Union on or about 23 January 2014 in relation to Ms McCulloch seeking legal assistance through the Union workers' compensation service. This was touched on above. That appeared to be the last written communication between the parties until Mr Olson wrote to Ms McCulloch by letter of 24 March 2014, setting out a number of allegations in relation to her conduct as an employee of the Union. I turn to consider those now.

**The Union's allegations against Ms McCulloch of 24 March 2014**

117 A number of the allegations made by the Union against Ms McCulloch, concerned the perceived veracity of her "background and context" document attached to her grievance lodged with the Union Council, and her contact with the Federal Secretary of the Federal Union, leading to Ms Thomas's letter of 18 December 2013 to Mr Olson. There are a number of other matters raised in the allegations letter. Ms McCulloch was given 28 days to reply to the allegations following which the Union would make a decision about Ms McCulloch's future employment with it. The covering letter of 24 March 2014 also went on to state that if Ms McCulloch failed to respond within 28 days, a decision would still be made in relation to her future employment with the Union. Given the nature of the grievance matters, the letter from the Federal Secretary, and the relationship between all of these matters, and the level of complexity involved, and without wanting to unduly elongate these reasons, it would be helpful to set out the terms of the allegations attached to Mr Olson's letter. They were as follows:

**Allegations**

- 1 That on 4th December 2013 you verbally abused and attacked the Senior Industrial Officer Vickie Loveridge. That this verbal abuse and attack was without provocation and was witnessed by a number of ANF staff. That the attack was so loud, ferocious and threatening that at least one ANF staff member removed themselves from the immediate vicinity because of fear.
- 2 That on the week beginning Monday 30th December 2013 you failed to follow a lawful directive and report for work. That you repeated your failure to follow a lawful directive and report to work on the 31st December, 2nd January 2014 and 3rd January 2014.
- 3 That on 19th December 2013 you sent the President of the ANF a list of serious allegations against the State Secretary that were circulated to the ANF Council as part of your grievance in a section titled: *Background and Context*. The nature and content of the allegations made them irrelevant to the grievance. And furthermore, you knew the allegations that you made against the State Secretary were false.
- 4 That in mid December 2013 you contacted the ANF Federal Secretary and made a number of very serious allegations against the State Secretary that you knew to be false.
- 5 You requested extensive leave without pay during the months of October, November and December 2013. The reason the ANF granted you such extensive time off during these three months was because you said you were going to be the sole provider of care for your father at your home during these months whilst you arranged for him to be moved from one aged care facility to another

However, it has recently come to my attention that for all but a week during these three months, your father was being cared for in an aged care facility. You did not report this change of circumstance to the ANF and you continued on your extensive leave without pay until the end of December.

- 6 That between 7am and 8am on Monday 6th January, you transferred hundreds of confidential ANF emails from your ANF Account to your private Gmail account.

That this was done without the knowledge or permission of the ANF.

That the vast majority of these emails were not personal and were the property of the ANF. That included in these emails were confidential ANF financial records and other documents that you had scanned in previous months.

- 7 In December 2013 you raised a number of workplace issues with the Senior Industrial Officer and you were told by the Senior Industrial Officer and the State Secretary that these matters should be raised with the State Secretary. However, you refused to do this and continued to raise matters with the Senior Industrial Officer. This includes a claim by you that your phone had been cut off and a line had been placed through your name on the ANF Staff Disposition sheet.

- 8 You refused to perform the tasks that make up the role of Industrial Officer, that is, you refuse to participate in the Industrial Administration Week roster even though you have done most of these jobs during your employment at the ANF as per your email of 5th January 2014 where you say:

*"I confirm that I will attend work full time from Monday 6th January 2014. The State Secretary has again directed that I commence training for the administration finance role: I reiterate my earlier position that as this is one of the matters in my grievance/dispute, I will not engage in this training while the matter is under dispute. I remain willing and able to carry out duties under: my current position description."*

- 9 You refused to acknowledge the legitimate authority of the ANF State Secretary to administer and manage the day to day affairs of the ANF Office which includes giving you lawful directives that must be followed by you.

Specifically

- You were directed to return to work on Monday 30th December, Tuesday 31st December, Thursday 2nd January 2014 and Friday 3rd January 2014 but did not do so.
  - you were directed to correspond about matters relating to office administration with the State Secretary and not the ANF President or the Senior Industrial Officer, but you did not do so.
  - your refusal to participate in the Industrial Administration Week roster
- 10 That you told some ANF staff the State Secretary had diagnosed mental health disorder and that his behaviour was a result of him not taking his medications. And further to this allegation, you had no evidence to support your statements and you knew your statements to be false.
- 11 That during the months of November and December 2013 you actively encouraged a number of ANF staff to resign rather than encouraging those same staff to use the grievance procedure of the ANF Staff Terms and Conditions.
- 12 That during an ANF members EBA meeting at SJOG Hospital Subiaco held on 2nd July 2013, you made the following public statements about the personal life of the State Secretary in response to members complaints about aspects of the previous SJOG EBA negotiations in 2010:
- that negotiations for the 2010 SJOG EBA were delayed because the State Secretary was not available to provide any assistance with the negotiations.
  - that the 2010 Public Sector negotiations were similarly delayed because the State Secretary was not available to provide assistance with negotiations.
  - that the reason the State Secretary was unavailable was that he was absent from the ANF Office for 8 months because he had is "own personal stuff going", that he had a "new born baby to look after" and you also said the mother was unable to look after the baby, "but let's not go there."

These statements are untrue and it was grossly inappropriate behaviour by you to make these statements even if you believed them to be true.

- 118 Ms McCulloch testified that she did not respond to the allegations set out in Mr Olson's letter of 24 March 2014. She said that she was on sick leave. I note at this point there was no evidence before the Commission that Ms McCulloch's workers' compensation claim had been accepted by the Union's insurer. Furthermore, Ms McCulloch testified that she also did not respond to any subsequent correspondence from the Union in late April. On 23 April 2014 Mr Olson sent an email to Ms McCulloch reminding her that the due date for her response to the Union's letter of 24 March 2014 was the previous day. Mr Olson requested an indication by close of business that day, whether Ms McCulloch intended to respond, and if so, when the Union could expect to receive it. That communication was exhibit A27.
- 119 A few days later on 28 April 2014, Mr Olson wrote again to Ms McCulloch informing her that despite his letter of 24 March 2014, and the subsequent reminder to Ms McCulloch on 23 April 2014, no response had been received from her. Mr Olson's letter further provided that the Union found the allegations against Ms McCulloch to be proven and for those reasons, her employment with the Union was to be terminated on 30 May 2014.
- 120 As already mentioned above, Ms McCulloch's evidence was that she did not respond to the allegations or to Mr Olson's subsequent correspondence, because she did not consider there to be any point in doing so. Her evidence was that it was clear to her by December 2013 that she would not be working for the Union in the future. It is also common ground that shortly after Mr Olson's letter of termination of employment dated 28 April 2014, Ms McCulloch commenced work as an Industrial Officer with another union on 18 May 2014.

- 121 I turn first to allegation one. A number of witnesses gave evidence about this matter. Ms McCulloch agreed that on the day in question, she did have a conversation with Ms Loveridge. However, Ms McCulloch denied that she was abusive or attacked Ms Loveridge. She said she did not speak in a loud voice and she did not see anyone else at the time. Ms McCulloch did accept however, that she was upset but not angry. She denied that she screamed at Ms Loveridge or was red in the face at any time. Ms McCulloch also said that she was not aware that Ms Loveridge was distressed or upset.
- 122 Ms Loveridge's evidence on this matter was that as Ms McCulloch was only at work on one day each week, on 4 December 2013 she called in to her office to see her. Ms Loveridge said she got to the door of Ms McCulloch's office and said "hello" at which time Ms McCulloch, as she described it, launched into an attack. The first words she said to Ms Loveridge were "What the f... is going on?". When Ms Loveridge asked Ms McCulloch what she meant by that, Ms McCulloch said words to the effect of "Sean and Karen leaving". Ms Loveridge testified that Ms McCulloch "accused me of not knowing what was going on in the office, of burying my head in the sand": 452t. Ms Loveridge testified that she said to Ms McCulloch that she needed to speak to Mr Olson if she had concerns and after repeating that, left her office.
- 123 Ms Loveridge described the exchange as one in which Ms McCulloch was yelling at her. Ms Loveridge also had to raise her voice to be heard. Ms Loveridge described Ms McCulloch's tone as loud and threatening. She said it was not professional, took her by surprise and she had not been spoken to like that before at work. Up to that time, Ms Loveridge said she thought that both she and Ms McCulloch had a good working relationship.
- 124 After the exchange, Ms Loveridge testified that she went back to her office and closed the door. She said she was shocked and upset. She decided to take her mobile phone and go to the building next door to see the Union's legal officer Ms Bourke. When she got there, Ms Loveridge said she described to Ms Bourke what had just occurred with Ms McCulloch and as she did so, she was shaking and burst into tears while speaking. In cross-examination, Ms Loveridge described Ms McCulloch's demeanour as aggressive. She said Ms McCulloch had a red face, gritted her teeth and made Ms Loveridge feel threatened. She described it as an unprovoked attack. Ms Loveridge said that because of the demeanour and loudness of Ms McCulloch, she had to raise her voice and keep repeating herself to be heard.
- 125 Other witnesses gave evidence about this incident. Mr Quinn was the Finance Officer for the Union. He was located in the office next door to Ms Loveridge. He said that on the day in question, which was in the morning, he heard loud voices. He went to his door. He then saw Ms Loveridge returning to her office and said that she looked upset, had a red face and appeared to have tears in her eyes and her eyes were red. Mr Quinn said that he was 100% sure that Ms Loveridge had been or was crying. Ms Weideman said that she saw Ms Loveridge walk past her office and go to Ms McCulloch's office. She heard Ms McCulloch tell Ms Loveridge to "get her head out of the sand". She described Ms McCulloch as the loudest in the conversation and her tone of voice sounded aggressive. She heard Ms Loveridge say words to the effect "Jude you need to get on with your job". Ms Weideman described Ms Loveridge as being very upset and she seemed to be crying. Ms Weideman later reported the incident to Mr Olson.
- 126 Ms Dimovski was also in the office on 4 December 2013. She said she heard Ms McCulloch in a loud voice say to Ms Loveridge to get "her head out of the sand". Ms Dimovski said she saw Ms Loveridge and asked her if she was alright and she said no. Ms Dimovski described the applicant as being loud and angry.
- 127 Mr Olson was not present in the Union office on the morning of 4 December 2013. He received a telephone call from Ms Bourke. She said that Ms Loveridge was in her office and was very upset. Sometime later Mr Olson spoke to both Ms Weideman and another employee Ms Post, who told him that they removed themselves from the area when they heard what was going on. Mr Olson accepted that he did not immediately raise the issue with Ms McCulloch. He testified that he was very busy on other matters and also had become wary of dealing with Ms McCulloch because of how she had been conducting herself. Mr Olson accepted that allegation one in his letter was framed based on Ms Loveridge's report to him as to what occurred on the day in question, and what had been reported to him by other staff.
- 128 There was some conflict in the evidence as to this issue. There is no dispute that both Ms Loveridge and Ms McCulloch had a conversation on 4 December 2013. Ms McCulloch disputes that she was loud or abusive. The weight of the evidence, which evidence I have no reason to doubt, is against that proposition. Three independent witnesses testified that she was. Ms Loveridge's evidence, which I have accepted was that she was upset after the encounter with Ms McCulloch. That was also the evidence of other witnesses.
- 129 Whilst the allegation uses the somewhat emotive word "attacked", I am satisfied that a verbal altercation took place between Ms McCulloch and Ms Loveridge which was initiated by Ms McCulloch, in which she spoke to Ms Loveridge in a loud and aggressive fashion. I accept that Ms McCulloch was angry, and such a conclusion is consistent with the evidence of other witnesses. It is also consistent with Ms McCulloch's evidence that she was not happy with changes that were occurring in the Union office at the time. She considered she needed to be involved.
- 130 In relation to the second allegation, Ms McCulloch admitted that she refused to follow Mr Olson's directive and report for work on 30 December 2013. She also admitted that she failed to return to work later in the following week. To an extent this issue has been dealt with already in relation to Ms McCulloch's grievance to the Council and I do not need to repeat the evidence for present purposes. I simply reiterate that the leave without pay and working arrangement entered into between the Union and Ms McCulloch was solely for her benefit. On the evidence, it was to some extent at least, disruptive to the effective operations of the Union office. In my view, it would have at least been incumbent on Ms McCulloch to have gone to see Mr Olson to update him on her proposed plans, well prior to the end of December 2013. In my view that would have been the right and proper thing to have done. To flatly refuse to comply with a lawful and reasonable request by the Union Secretary was not appropriate conduct or behaviour.
- 131 In relation to the third allegation, I refer to my summary and findings set out above concerning the "background and context" attachment to Ms McCulloch's grievance. I do not accept that this document in and of itself, was explanatory in nature or provided to the Council to assist in understanding the four grievances lodged by Ms McCulloch. There is little overlap between

- the two documents and in my view, each stand alone. In my opinion, the “background and context” document, containing a number of serious allegations against Mr Olson, was made for the purpose, or purposes, of embarrassing and damaging Mr Olson in the eyes of the Union Council. The timing of these matters is important. The grievance dated 19 December 2013, was sent to Ms Fowler the day after Mr Olson’s direction to Ms McCulloch that she return to the Union office on 30 December 2013. Given the very broad ranging allegations raised in the “background and context” document, in my opinion, it was prepared for the purpose of a retaliatory action against Mr Olson.
- 132 There is some dispute on the evidence, as to whether a number of the allegations made by Ms McCulloch to the Council were knowingly false or not. Ms McCulloch seemed to adopt the view that it was her opinion which was expressed in the documents provided to the Council. Given that Ms McCulloch’s own evidence was that most of the allegations were based upon hearsay, opinion or supposition, without any direct evidence, then if the allegations were not made knowingly falsely, they were certainly made with reckless indifference as to their truth. Given the obligations of an employee to their employer, under a common law contract of employment, such conduct at least gives rise to prima facie, a breach of the broad implied term of fidelity and good faith imported into the contract of employment at common law (see generally Sappideen C, O’Grady P, Riley J and Warburton G, *Macken’s Law of Employment* (7<sup>th</sup> ed, 2011) at pars 5.880-5.890.
- 133 More concerning, is allegation four, that being Ms McCulloch’s complaints to the Federal Secretary leading to the Federal Secretary’s letter to Mr Olson of 18 December 2013. I need not repeat my summary and conclusions in relation to the evidence dealt with above as to this matter. However, it is difficult to imagine more serious allegations to be made against a Union Secretary, than the fraudulent misuse of Union funds and/or property. That was the essence of a number of the allegations made not to Ms McCulloch’s employer I might add, ultimately being the Council of the Union, but a related body, the Federal Union. I reiterate again, that none of those most serious allegations appear anywhere in the grievance or “background and context” documents lodged with the Union Council.
- 134 Ms McCulloch denied that her contact with the Federal Secretary was motivated in any way by malicious intent or vindictiveness towards Mr Olson. I have some reservations about that evidence. The timing of the events is again important. Ms McCulloch made contact with Ms Thomas, on her evidence, on about 5 December 2013. This was at about the time she said she was developing concerns about the number of staff departures from the Union office and considering lodging a “group grievance” with the Council. Ms McCulloch said she discussed this matter with Ms Fowler. Despite all this, the matters discussed with the Federal Secretary, involved unsubstantiated serious allegations of fraud made against Mr Olson, without a shred of evidence to support them, other than hearsay, innuendo and supposition.
- 135 Again, as with the “background and context” document sent to the Union Council, even if the allegations were not knowingly false, they were plainly made with reckless indifference as to their truth. Making such serious allegations, knowingly, without any evidence at all to support them, was in my view, again a plain breach of Ms McCulloch’s duty of good faith and fidelity towards her employer. It was conduct totally destructive of the necessary confidence between the employer and the employee: *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66. It was in and of itself in my opinion, along with the reckless allegations in the “background and context” document, grounds for dismissal for misconduct, if no evidence could be produced to support the allegations made.
- 136 In relation to the fifth allegation, there was some dispute on the evidence as to this matter. Ms McCulloch testified that she did not tell Mr Olson that she was going to be the sole carer for her father. Her evidence was she told him that she would be so for three to four days per week and therefore, denied there was any change in her circumstances, on which her leave without pay was based. Ms McCulloch said that she assumed Mr Olson understood this.
- 137 Mr Olson’s evidence was that Ms McCulloch went to see him in the last week of September 2013. The Union was short staffed at the time. Ms McCulloch wanted to take leave without pay because her father was ill. If she could not take leave without pay, then she would have to leave the Union. Mr Olson said that he proposed the change in Ms McCulloch’s working hours, to work one day per week and take the rest of the time as leave without pay. Mr Olson said that he later found out from information provided by Ms Loveridge, that the situation with Ms McCulloch’s father had changed. He understood that Ms McCulloch’s father came out of aged care for a while but then went back in. Mr Olson’s understanding was that the reason for Ms McCulloch’s request was to enable her to move her father from one aged care facility to another. She also mentioned to him that this would only be for a couple of months and she would be able to do some filing work in the Union office for some extra income.
- 138 There was some conflicting evidence in relation to this matter. There may have been some misunderstanding between Ms McCulloch and Mr Olson as to the circumstances of Ms McCulloch’s father. I am unable to conclude on the evidence, that there had definitely been a change of circumstance, such as to suggest any wrong doing by Ms McCulloch in this regard.
- 139 The next allegation relates to the downloading of emails by Ms McCulloch on 6 January 2014. On 9 January 2014, it came to the attention of the Union that on 6 January 2014 Ms McCulloch transferred approximately 1500 emails from her Union email address to her personal Gmail account. Mr Olson wrote to Ms McCulloch on 9 January 2014 referring to the downloading of emails and the fact they were the property of the Union, and contained confidential information about the Union and additionally, confidential information personal to Union members. It was not in dispute that Ms McCulloch had no authority to remove this material from the Union office and Mr Olson directed Ms McCulloch to delete the information immediately. The next day on 10 January 2014 by email to Mr Olson, Ms McCulloch confirmed that she had deleted the emails and not disclosed it to any other person nor kept copies of the material. A copy of both Mr Olson’s email of 9 January 2014 and Ms McCulloch’s reply of 10 January 2014 was exhibit A22. A large sample of emails improperly downloaded by Ms McCulloch from the Union email system was tendered as bundles in exhibit R11 and R12.
- 140 This conduct was admitted by Ms McCulloch. It was plainly wrong for her to do so although her evidence was she did this in a panic and did not read the material. Whilst Ms McCulloch said that she downloaded the emails so she could respond to matters raised by the Union against her, she could simply have asked the Union for access to the email system or to obtain copies of

particular documents. It was clearly reckless for Ms McCulloch to have taken such a large volume of confidential communications from the Union office as she did. A perusal of exhibits R11 and R12 shows that the material contains sensitive personal information about members of the Union and confidential Union documents generally. To remove such a large volume of material from the Union's secure information technology network, was a clear breach of proper procedure and protocol. Ms McCulloch could not guarantee the security of these documents, on her home computer. But ultimately, that is not really the point. It is the removal of the documents in the first place, that is of major concern.

- 141 The next matter relates to an allegation that Ms McCulloch refused to communicate and raise issues with the Union Secretary, rather continuing to raise issues with Ms Loveridge the Senior Industrial Officer. Ms McCulloch agreed that she did this, however said she did so because her grievance was with Mr Olson whom she described as "the problem".
- 142 Mr Olson's evidence on this point was that he asked Ms McCulloch to raise issues with him because of the prior conflict with Ms Loveridge in early December 2013 where Ms Loveridge felt threatened and intimidated by Ms McCulloch's behaviour. This stemmed from an email of 10 December 2013 from Ms McCulloch to Ms Loveridge, in which Ms McCulloch alleged that her phone and internet access had been cut and a line had been ruled through her name on the roster. This was replied to by Mr Olson on the basis that he was the most appropriate person to respond. Mr Olson explained that no one had cut Ms McCulloch's internet access and any problems with telephones should be referred to the officer of the Union dealing with those matters.
- 143 Mr Olson also explained that no one had drawn a line through her name on the roster, but as she was on leave without pay, the roster was noted accordingly. Mr Olson concluded his response by emphasising that because Ms McCulloch was only working in the office one day per week, there may be some difficulty in keeping up to date on developments in the office. However, in light of that, it would be better for her to raise any issues of that nature with Mr Olson. The relevant email communications setting these issues out was at exhibit A11. In my view, Mr Olson's response to Ms McCulloch was matter of fact and professional. I do not consider that the request made of Ms McCulloch, even though there was a grievance pending, that she continue to communicate about such matters with Mr Olson, was inappropriate.
- 144 The next issue, allegation eight, dealt with the changes to the office administration and the creation of the "Industrial Administration Week roster", dealt with earlier in these reasons. I do not propose to repeat the evidence, the summary of issues and my findings in that regard. I also refer to exhibit R15, being an email from Mr Olson to Ms McCulloch of 5 January 2014. That email set out a document dated November 2013 and described the duties to be performed by staff during the Industrial Administration Week. The email reiterates that only in minor respects, have the proposed duties not been performed previously by Industrial Officers over the prior five year period. The work previously performed, was highlighted in yellow text.
- 145 Importantly, as previously noted, there is no "status quo" provision in the Union's terms and conditions document, and nothing proposed by the Union, was inconsistent with Ms McCulloch's contract of employment or the terms and conditions applying to her employment.
- 146 The next allegation, allegation nine, deals with an alleged refusal by Ms McCulloch to acknowledge the legitimate authority of Mr Olson as the Union Secretary. To the extent that this allegation refers to the direction to Ms McCulloch to return to work, to correspond with Mr Olson rather than others about office matters, and Ms McCulloch's refusal to participate in the Industrial Administration Week roster, then it is made out.
- 147 As to the allegation that Ms McCulloch told staff that Mr Olson had a diagnosed mental health disorder, this was denied. Ms McCulloch testified that there was some general gossip in the office about these sorts of issues and Ms McCulloch said she was told that Mr Olson was bipolar. Ms McCulloch also mentioned that there was some casual discussion in the Union office and she had even heard Ms Fowler talk about the matter. Ms McCulloch said in any event, that she regarded these issues as Mr Olson's business. Ms Weideman also gave evidence on this matter. She testified that Ms McCulloch told her that Mr Olson was bipolar. She did not put much store on this conversation.
- 148 When Mr Olson was asked about this matter, his evidence was that he has no diagnosed mental illness. Furthermore, he did not and does not expect these sorts of issues to be spread amongst staff. He was especially upset that it was mentioned amongst the younger staff members in the office.
- 149 Ms Fowler's evidence was that from time to time some joking reference had been made to these sorts of matters in the past. She said that she had heard some reference to "bipolar disorder". Her evidence was she thought reference to that was "a bit weird": 381t. Ms Fowler's evidence was that staff did sometimes joke about things that are said about Mr Olson, rather than jokes being made about him.
- 150 The evidence on this matter is inconclusive. I am not persuaded that Ms McCulloch would have deliberately or maliciously spread any such rumours. I suspect it may well have been, as Ms Fowler described it, mentioned in an office setting in a jocular way when it came up from time to time. Regardless of this, such discussion is not appropriate and no staff member should, even jokingly, refer to such matters in the workplace.
- 151 Allegation 11 is that Ms McCulloch actively encouraged a number of staff members to resign from the Union. This was also denied by Ms McCulloch. Her evidence was in the case of Ms Steele, she may have spoken to her, but it was to encourage her to stay with the Union, not to leave. Ms McCulloch also denied that she created a rumour that Mr Olson had a "hit list" of staff that he wanted to get rid of. She also denied wanting to deliberately damage the Union by starting or fuelling rumours of a "hit list" in the workplace. Ms McCulloch did accept that there was some discussion amongst other staff members in relation to the preparation of a draft joint grievance, a copy of which was exhibit R16. Other staff members included Mr Coburn, Ms Anglin and Ms Steele.
- 152 Ms McCulloch also agreed that she helped Mr Coburn and Ms Steele with their unfair dismissal applications which were subsequently brought against the Union. However, she denied that there was any conflict of interest in her doing so. I note that this was at the time when Ms McCulloch was away from the office under a medical certificate.

- 153 Mr Olson gave some evidence on this matter. He said that some staff, not identified, had come to see him in January 2014. He was informed that Ms McCulloch had encouraged some staff to resign and that Mr Olson was targeting staff and they should leave.
- 154 The state of the evidence in relation to this allegation is not entirely satisfactory. Whilst Ms McCulloch admitted that she had some discussions with staff members about a group grievance, she denied that she was spreading rumours of a "hit list" in the Union office. Ms McCulloch also denied actively encouraging staff members to leave the Union. In relation to staff being "targeted" this was a phrase that Ms McCulloch used quite consistently in her testimony, in particular during cross-examination. Ms McCulloch used this phrase when talking about the circumstances of other staff members of the Union who left their employment, for a variety of reasons. In particular, Ms McCulloch made reference to Mr Olson "targeting" her, in particular, after she complained to Ms Loveridge, leading to their verbal altercation, on 4 December 2013, which has been the subject of detailed evidence earlier in these reasons.
- 155 On balance, as to the predisposition of Ms McCulloch to describe events in these terms, I consider it more likely than not that she would have made reference to the "targeting" of staff in the Union office by Mr Olson. In particular, when she felt that she, as she described it, was next. In my opinion this reflects a particular state of mind which emerged at various times throughout Ms McCulloch's evidence. This lends some support to allegation 11. However I cannot conclusively find on balance that Ms McCulloch actively encouraged other staff members of the Union to resign.
- 156 The final allegation relates to a meeting of Union members at which Ms McCulloch attended at the St John of God Hospital in Subiaco in early July 2013. Ms McCulloch testified that she did say words to the effect set out in the first and third dot points in relation to allegation 12, although denies that she made any reference to a period of absence of Mr Olson from the office of eight months. Ms McCulloch said that this particular meeting was a difficult meeting and the members were angry and wanted answers in relation to why there had been delays in the enterprise agreement negotiations. Ms McCulloch said further, that she did discuss the approach to take in this meeting with Mr Olson the day prior.
- 157 Ms McCulloch admitted that she did tell members that Mr Olson had a sick partner at the time, because the members were angry that he was not present at the meeting. Ms McCulloch denied that she mentioned the 2010 public sector negotiation. Given the anger of the members, Ms McCulloch testified that she had to tell them something as to why Mr Olson was not present and why there had been some delay. She said that she only passed on information she had obtained from Mr Olson. Ms McCulloch accepted that as a general proposition, personal information should not be made public in such circumstances.
- 158 Ms Dimovski who was also at the St John of God meeting with Ms McCulloch, said that members were upset that Mr Olson was not present. She confirmed the content of the three dot points in allegation 12 and said that Ms McCulloch did say that the reason for the delay was that Mr Olson was absent from work looking after his partner's child. Ms Dimovski testified that she felt uncomfortable that Ms McCulloch was disclosing this level of personal detail at a meeting of members. Because of this, she mentioned it to Mr Olson.
- 159 In this regard, Mr Olson testified that Ms Dimovski did come to see him about the St John of God meeting. He said he was disturbed by what he had been told and that his personal situation with his former partner and young daughter had been disclosed to a public meeting of Union members. Mr Olson added that his former partner is also a member of the Union. Overall he saw the disclosures by Ms McCulloch at this meeting as a gross breach of trust. Additionally, the statement in relation to the public sector enterprise negotiations in 2010 was simply not true.
- 160 Given that the content of the allegation was largely admitted by Ms McCulloch, and given that the allegation was supported by the evidence of Ms Dimovski, whose evidence I have no reason to doubt, I am satisfied that misleading and personal information relating to Mr Olson's private life, was inappropriately disclosed to the meeting of Union members as alleged. Whilst no doubt Union member meetings may, from time to time, be difficult, as a very experienced Industrial Officer, I would have expected Ms McCulloch to be able to deflect and deal with such difficulties in a more professional manner. The disclosure of highly personal information about the Secretary's private life was in my opinion, not appropriate.
- 161 As noted above, Ms McCulloch did not return to work with the Union as directed by Mr Olson. On 6 January 2014 she sent a medical certificate to the Union, indicating that she would be absent from duty until at least 20 January 2014. A workers' compensation claim was also made by Ms McCulloch. Both the medical certificate and the workers' compensation claim were exhibit A29. By email of 6 January 2014, as exhibit A21, Mr Olson acknowledged receipt of Ms McCulloch's medical certificate and that she would be absent until at least 20 January 2014. The Union also requested that Ms McCulloch return her mobile telephone and laptop computer to the Union Office.

#### **The Union procedure**

- 162 A contention advanced by Ms McCulloch was that the process adopted by the Union, in dealing with her grievance and the way in which Mr Olson managed these matters was unfair. In particular, Ms McCulloch contended that once she had raised her grievance with the President, then a broad "status quo" should have applied, precluding any further steps being taken by the Secretary, until such time as the grievance had been fully considered by the Union Council. Furthermore, Ms McCulloch also contended that there should have been a full investigation into her allegations.
- 163 The first observation to make is that, as noted above, there is no provision in either Ms McCulloch's written contract of employment, or the Employees' Conditions of Service document that contained a status quo provision. That does not mean of course, that the Union was relieved of its obligation to deal with staff members fairly and responsibly. Insofar as the terms of cl 39 – Grievance Procedure of the Employees' Conditions of Service document is concerned, I am satisfied that this procedure was complied with. Whilst it is a general procedure, it does provide for quite straight forward steps as to how a staff members' grievance is to be progressed. Ms McCulloch was entitled to progress her grievance through the President, Ms Fowler, which she did.

- 164 The matter was then forwarded to the Council and Ms McCulloch was invited to provide all relevant material to the Council in connection with her grievance. She was invited to attend the Council meeting on 17 January 2014. She declined to do so for the reasons stated in her evidence, and provided a written statement instead. Likewise, Mr Olson was afforded the opportunity of providing all relevant material to the Council and to address the Council not only in relation to Ms McCulloch's grievance, but also to the matters raised in the letter from the Federal Secretary, following Ms McCulloch's conversation with her.
- 165 In relation to the involvement of Mr Olson, and Ms McCulloch's request for an investigation, it needs to be borne in mind that the Union administration is comprised of a relatively small number of senior staff members. Mr Olson, as the Secretary, is charged by the Council, under the rules of the Union, with the overall management and running of the Union office. Inevitably, decisions to be made about deployment of staff, and other staffing arrangements, will need to be made by him, as the Secretary. Whilst on some occasions for example, the foreshadowing of possible termination of employment when Ms McCulloch refused to return to work on 30 December 2013, may on reflection, have been seen to be somewhat of an overreaction, in the end, of course, that did not occur. Ms McCulloch remained employed for some months after those events and it was not until her failure to respond to any extent, to the Union's complaints provided to her in March 2014, did termination of employment ultimately follow.
- 166 Having regard to all of the steps taken by the Union to consider Ms McCulloch's grievance, in providing her every reasonable opportunity of addressing them, and making a decision upon them, in my view, the procedure could not be said to have been found wanting. Similarly, in relation to the allegations made by the Union against Ms McCulloch in March 2014, I cannot come to any other conclusion, than the process adopted by the Union in enabling Ms McCulloch to consider those and respond to them, was fair. The fact that Ms McCulloch simply failed to respond to those allegations at all, was in my opinion very telling. Whilst Ms McCulloch testified that she considered that by December 2013 she would no longer be ultimately working for the Union, as a very experienced Industrial Officer, she ought to have at least provided the Union an opportunity to consider her responses to the allegations made, even if they were merely bare denials. To simply ignore them, was in my opinion, inexcusable, and may well have, taken alone, constituted grounds to terminate the employment of Ms McCulloch.
- 167 I am also not persuaded by the suggestion in Ms McCulloch's evidence that because she was away from the office on what was said to be sick leave, she was unable to respond to the various matters raised by the Union. Over this entire time, from the end of December 2013, Ms McCulloch admitted she did give some assistance to other employees who had lodged unfair dismissal applications in this Commission. Ms McCulloch also commenced and proceeded with an application for denied contractual benefits in the Commission concerning her qualification allowance claim. In any event, there was no request by Ms McCulloch for more time to consider the matters raised by the Union, or for more information, despite having ample opportunity to raise these matters. There was simply no response. In any event, the issue of whether an employer has adopted a fair procedure in cases leading to termination of employment, is one factor, although it may be an important one, depending on the circumstances of the case: *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. I am far from persuaded that there is any procedural unfairness in this case.
- 168 Furthermore, even if it could be said, although it was not argued by Ms McCulloch, that the complaints against Ms McCulloch that she made knowingly false allegations against Mr Olson, required the Union to be satisfied to the higher standard of proof as set out *Briginshaw v Briginshaw* (1938) 60 CLR 336, based on the knowledge possessed by the Union, in relation to the allegations of fraudulent misuse of Union property or funds, there was ample basis for the Union to conclude that the allegations were both reckless and false. Such was clear on the evidence before the Commission. It was open to the Union to proceed to make a decision in relation to Ms McCulloch's employment, particularly in the absence of any response at all to the Union's complaints against her.
- 169 Given the allegations made, in particular what I regard to be completely unsubstantiated complaints to both the Union Council and the Federal Secretary, the Union was, in my view, in the absence of any compelling evidence advanced by Ms McCulloch to support them, well within its contractual rights to terminate Ms McCulloch's employment. This is so in the context of the well settled principles applicable to unfair dismissal claims in this jurisdiction, as set out in particular in *Miles v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. The dismissal was on notice. It was not summary for misconduct, even though in my view, Ms McCulloch's conduct could well have warranted such a course. It could not be said in my opinion, that the ultimate termination of employment of Ms McCulloch, on notice to her, could be said to be in any sense, harsh, oppressive or unfair. Indeed, in the circumstances, it is difficult to contemplate any alternative course that the Union could have taken, when confronted with all of the issues which have arisen in this case.

### Conclusions

- 170 Having regard to all of the extensive evidence led in this case, and applying the well-established industrial and legal principles, the Commission cannot come to the conclusion that the dismissal of Ms McCulloch was harsh, oppressive or unfair, to any extent. Accordingly, the application must be dismissed.
-

2015 WAIRC 00946

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JUDE MCCULLOCH **APPLICANT**

**-v-**  
AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS PERTH **RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** MONDAY, 19 OCTOBER 2015  
**FILE NO/S** U 131 OF 2014  
**CITATION NO.** 2015 WAIRC 00946

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**Result** Application dismissed  
**Representation**  
**Applicant** Mr C Fogliani of counsel  
**Respondent** Mr M Clancy and with him Ms S Poplawski

*Order*

HAVING heard Mr C Fogliani of counsel on behalf of the applicant and Mr M Clancy and with him Ms S Poplawski on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 00927

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
NEVILLE WILLIAM STEVENS **APPLICANT**

**-v-**  
SCHO HOMES **RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** FRIDAY, 9 OCTOBER 2015  
**FILE NO/S** U 104 OF 2015  
**CITATION NO.** 2015 WAIRC 00927

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**Result** Dismissed for want of jurisdiction  
**Representation**  
**Applicant** In person  
**Respondent** Mr S Hannah

*Order*

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

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

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 00952

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2015 WAIRC 00952  
**CORAM** : CHIEF COMMISSIONER A R BEECH  
**HEARD** : WEDNESDAY, 14 OCTOBER 2015  
**DELIVERED** : WEDNESDAY, 21 OCTOBER 2015  
**FILE NO.** : U 98 OF 2015, U 99 OF 2015  
**BETWEEN** : PATRICIA ANNE WHITE;  
 JAMES RICHARD GARRATT  
 Applicants  
 AND  
 LEGACY FUND OF PERTH INC  
 Respondent

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**CatchWords** : Termination of employment - Harsh, oppressive or unfair dismissal - Acceptance of referral out of time - Claim filed in Fair Work Commission - Applications referred outside of 28 day time limit - Relevant principles applied - Commission satisfied applying principles that discretion should be exercised - Applications accepted out of time - Orders issued  
**Legislation** : *Industrial Relations Act 1979* (WA) s 29AA(1)-(2), s 29(3); *Fair Work Act 2009* (Cth)  
**Result** : Claims of unfair dismissal made out of time accepted  
**Representation:**  
**Applicants** : Mr B Douglas, of counsel  
**Respondent** : Mr R Ratkovicc

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**Case(s) referred to in reasons:**

*Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683  
*Michael Moore-Crouch v Goldfields Individual and Family Support Association Inc* [2014] WAIRC 01364; (2014) 95 WAIG 147  
*Ekhayeme v B.D Kirk & C.E Mcelwee trading as Fountains Chemmart Pharmacy* [2013] WAIRC 00304; (2013) 93 WAIG 526  
*Maddock v Ken Gratton-Wilson Redlion Bus and Coach* [2015] WAIRC 00395; (2015) 95 WAIG 1553  
*Penelope Archer v Starick Services Inc* [2014] WAIRC 00314; (2014) 94 WAIG 498

**Case(s) also cited:**

*Aboriginal Legal Service of WA Inc v Lawrence No. 2* [2008] WASCA 254; (2008) 89 WAIG 243; 178 IR 168  
*Bankstown Handicapped Children's Centre Association Inc v Hillman & Anor* [2010] FCAFC 11  
*Jackamarra v Krakouer* (1998) 195 CLR 516

*Reasons for Decision*

- Ms White and Mr Garratt were summarily dismissed for serious misconduct on 20 March 2015. They both filed claims of unfair dismissal in the Fair Work Commission (FWC) but withdrew them on 23 June 2015. They then filed these claims of unfair dismissal in this Commission on 26 June 2015. As a claim of unfair dismissal in this Commission must be lodged within 28 days of the termination of employment, which in this case was 17 April 2015, their claims in this Commission are 71 days out of time.
- The claims were initially listed for conciliation before Harrison C on 27 August 2015. No conciliation was possible and both applications were listed for hearing to determine whether it would be unfair not to accept them out of time. By agreement both applications were heard together.

**The applicable law**

- The power to extend time is found in s 29(3) of the *Industrial Relations Act 1979* (the Act) as follows:
  - (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.
- Considerations which are usually relevant in deciding whether it would be unfair not to accept a claim of unfair dismissal that is out of time are discussed in the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683 and I apply those considerations here.

**The length of the delay and the reasons for delay**

- The length of the delay is stated above. The reasons for the delay are not really in dispute, although there is considerable disagreement about the interpretation which should be placed upon those reasons.

**- The applicants' submissions**

- 6 Each applicant sought legal advice either the same day (Ms White) or within a few days (Mr Garratt) of the terminations and their FWC claims were filed 9 April 2015.
- 7 They say that they filed their claims in the FWC because Mr Ratkovic, the respondent's Executive Officer told them at the time of the dismissal and immediately before the dismissal twice that the respondent was a national system employer. Their notice of suspension letters referred to the national employment standards in the *Fair Work Act 2009 (Cth)* (FW Act). Their letters of termination referred to a specific definition in that Act. The applicants' affidavits each say that the respondent led them to believe that the respondent was a national system employer and accordingly each made a claim of unfair dismissal to the FWC.
- 8 The applicants also say that they had no reason not to believe Mr Ratkovic or that he was seeking to mislead them. They understood the respondent was part of an extremely large national group operating under the name Legacy Australia and has large land holdings and other considerable assets, and engages in considerable fundraising and other commercial activities related to raising and investing funds.
- 9 However, the respondent objected to the claims in the FWC on grounds which included that the respondent is not a national system employer, saying that it does not provide goods or services for reward or engage in any financial or trading activities (response dated 30 April 2015 and enclosed in a letter to the FWC dated 1 May 2015). The respondent filed its submissions which addressed the jurisdictional points on 25 May 2015.
- 10 On 26 May 2015 the FWC required the applicants to respond to the objection to jurisdiction by 5 June 2015. The applicants say that the respondent's jurisdictional objections were extensive and required detailed consideration and an endeavour to liaise with the respondent's then solicitors before they could be advised of their options. Mr Douglas, who appears for the applicants, tendered an affidavit containing the details of the emails.
- 11 The applicants sought, and were granted by the FWC, extensions on three occasions, first to 12 June, then to 17 June and then 22 June 2015. The applicants did not respond by 22 June but say that it was 23 June when the respondent's solicitors agreed by email that it would not object to the applicants filing their applications in the WAIRC on the grounds that they were out of time. On 26 June they withdrew the FWC claims and lodged these claims in this Commission, which were received by the respondent on 30 June 2015. The applicants point to s 29AA(2) of the Act which they say takes into consideration circumstances where a claim is filed in the incorrect jurisdiction which may be withdrawn or rejected on jurisdictional grounds.

**- The Respondent's submissions**

- 12 For the respondent, Mr Ratkovic acknowledges that at the time of the dismissals, he believed that the respondent was a national system employer. He says he was unaware it was not until he sought legal advice in order to respond to the FWC claims; that is why at the dismissals, and in the letters he handed to the applicants, he mentioned the FW Act from the contents of the letters.
- 13 He states however that the respondent is fundamentally opposed to the extension of time being granted in these claims. Its opposition is not because it wishes to deny the applicants natural justice or a right of remedy, but simply because the claims are 71 days late and the respondent did not materially influence their decisions to lodge any claim in any jurisdiction, nor has it been the cause of their delay and late lodgement.
- 14 In his submission, Mr Ratkovic points out that the applicants had access to their own legal advice. They do not appear to have given much weight to any advice that their lawyers might have given them and made their decisions based on that advice and not on what he said or wrote in the letters. Mr Garratt at least ought to have known that his offer of employment said that his employment was subject to the laws of WA and so he, if not Ms White, ought to have known from the beginning that he should have lodged the claims in the WAIRC. It took the applicants 57 days from the respondent's initial objection to jurisdiction on 30 April 2015 to them filing their claims in this Commission.
- 15 Further, in the respondent's view, the applicants sought three extensions of time in the FWC proceedings by misleading the Commissioners in that jurisdiction into believing there were negotiations when there were not and they have therefore contributed to the delays which have occurred. The respondent objects to the applicants saying in support the reason they did not withdraw the FWC claim and file in this Commission that they had been 'in negotiations'.
- 16 Other than lodging their claims, the respondent has seen no other evidence of active protest at their dismissals. Mr Ratkovic says that in an email on 23 March 2015, Mr Garratt said he would not appeal his dismissal and wanted his entitlements paid that day.
- 17 Mr Ratkovic says that the respondent neither consents nor objects to the applicants' claims being accepted out of time, emphasising that this does not mean that the respondent does not object to an extension of time but that in his view the applicants' solicitors have routinely misquoted the respondent's position.

**- Conclusion on this consideration**

- 18 I recognise that the length of the delay is more than twice the 28 day period prescribed by the Parliament. I consider that the reasons for the delay commence with the respondent not having considered whether it was or was not a national system employer until after the dismissals had occurred. Ms Garratt's letter of appointment should have indicated to the respondent as much as to Mr Garratt that there was an issue about jurisdiction. This led it to state to the applicants it was acting in accordance with the FW Act. I do not say that it provides the complete reason for the applicants filing their claims in the FWC.
- 19 Neither do I say that the respondent's statements were of no consequence or that they were insignificant. In *Michael Moore-Crouch v Goldfields Individual and Family Support Association Inc* [2014] WAIRC 01364 I observed at [15] that the issue

which arises from the operation of State and Commonwealth legislation covering employment in WA of whether or not an employer is a national system employer, is not an uncommon issue. It can be of itself an acceptable reason for the delay.

15 I accept that, generally, where a party to proceedings is represented by legal practitioners experienced in industrial relations in WA, their understanding will allow them to recognise and deal with this issue when it might not be understood by an unrepresented litigant.

16 However, much depends on the circumstances. In many, perhaps even most, circumstances, a correct assessment may readily be made from the correct identification of the employer as a company whether or not it is likely to be a constitutional corporation and therefore a national system employer. In this case, where the respondent is a not for profit incorporated body, not only can there be a significant difficulty in making that assessment based upon the correct identification of the employer, the decisions of the WA Industrial Appeal Court in *Aboriginal Legal Service of WA Inc v Lawrence No. 2* [2008] WASCA 254; (2008) 89 WAIG 243; 178 IR 168, contrasted with the Full Court of the Federal Court in *Bankstown Handicapped Children's Centre Association Inc v Hillman & Anor* [2010] FCAFC 11, show that such an assessment can sometimes be uncertain even where a party to proceedings is represented by legal practitioners.

See too *Ekhayeme v B.D Kirk & C.E Mcelwee trading as Fountains Chemmart Pharmacy* [2013] WAIRC 00304; (2013) 93 WAIG 526; *Maddock v Ken Gratton-Wilson Redlion Bus and Coach* [2015] WAIRC 00395; (2015) 95 WAIG 1553; *Penelope Archer v Starick Services Inc* [2014] WAIRC 00314; (2014) 94 WAIG 498.

- 20 The fact that respondent believed at the time of the dismissals that it was a national system employer covered by the FW Act, and said so, means that I am not critical of the applicants for filing their claims in the FWC. They say they relied upon the statements and in my view it was not unreasonable for them to have done so. I take into account that they had sought their own legal advice promptly, and that their solicitors ought to have considered the question of jurisdiction but in these circumstances I have not found there to be decisive against accepting the claims out of time.
- 21 Once the issue of jurisdiction was raised in the respondent's response however, the applicants were firmly on notice. The applicants through their counsel submit that the issue of whether an incorporated body is or is not in law a trading corporation is not straightforward and is something of a 'grey area'. Each case will turn upon its own circumstances and therefore an assessment whether or not the respondent is or is not a trading corporation needed to be considered following receipt of its submissions.
- 22 There is no legal reason why they could not have filed their claims in this Commission at any time from when the issue of jurisdiction was first raised. Section 29AA(1) prevents the Commission from determining a claim of unfair dismissal if the dismissed employee has lodged an application with the FWC for relief in respect of the termination of that employment – it does not prevent the dismissed employee from filing the claim.
- 23 However I accept the applicants' submission that they and their solicitors did need time to consider whether they needed to do so given the respondent's earlier stated position. It is whether the respondent's objection to jurisdiction was soundly based, rather than the fact that it was made, which is important. It is not clear to me that the applicants had the access to the respondent's financial information in the necessary detail before the submissions were received, although they may have been aware of it generally. I accept their submission that even if they may have known of that information, its significance is another matter. For those reasons I consider it is not significant in this case that the applicants waited until they could assess the basis for the challenge to jurisdiction.
- 24 From the time that basis was known, 25 May 2015, a further month passed before the withdrawal of the FWC claims and the filing of the claims in this Commission. In the circumstances, I think it reasonable to allow some time for the applicants to properly consider the basis for the respondent's objection to jurisdiction. The respondent's submission took approximately three weeks between the request for it, 6 May, to 25 May. It might not be unreasonable for me to allow a similar period of time for the applicants' consideration. The period from 5 June to 22 June is the period when the FWC granted extensions to the applicants and this length of time, evidently, was not regarded by the FWC as inappropriate.
- 25 The respondent's submission is that at least for the three weeks it took the applicants to decide to withdraw the FWC claim and file these claims, the respondent is of the view that the applicants were not actively contesting their dismissals. I consider the exchanges between their solicitor and the respondent's former solicitors is evidence of the applicants continuing to actively pursue their claims with the respondent through its then solicitors. That time does not demonstrate a neglect or lack of priority. The email from Mr Garratt referred to by Mr Ratkovic appears to have been overtaken by Mr Garratt filing his claim.

#### **The merits of the claims**

- 26 When considering whether it would be unfair not to accept these claims of unfair dismissal out of time, it is relevant to make some assessment of the merits of the claims because it would not be unfair to reject a claim that is out of time if the claim could not succeed anyway. It is accepted that at this preliminary stage an assessment is only possible in a 'rough and ready way'.
- 27 The respondent believes that there is no likelihood of success if the claims were to be heard on the merits. The applicants disagree.
- 28 The reasons for the dismissals are set out in point form in the letters of termination handed to the applicants. The respondent says it has documentary evidence and can call a substantial range of witnesses to support the summary dismissals on the grounds of serious misconduct. It also says it is simultaneously pursuing criminal investigations of the activities of the applicants and a previous employee with the WA Police.
- 29 In respect of Ms White it says that what it found meant that she as the respondent's community engagement manager risked the respondent's reputation, viability and profitability that she was guilty of serious misconduct and it lost complete trust and confidence in her ability to perform the job.

- 30 In respect of the serious misconduct alleged against Mr Garratt it says that the respondent consequently lost trust and confidence in Mr Garratt's ability to perform the role, and given he was an officer and senior member of organisation with significant access, control and influence, it acted to protect its assets and resources by way of summary dismissal.
- 31 Ms White had been employed as community engagement manager since 13 June 2010. She has sworn in her affidavit that Mr Ratkovcic read the entirety of each document to her but provided no further detail in relation to the allegations against her. She also has sworn that she denies each and every one of the allegations contained in the termination and notice of suspension letters, has never received a formal or written warning and that previous reviews of her work performance have generally been positive. Ms White also replies specifically in relation to the new fringe benefits policy and the use of the mobile phone.
- 32 Mr Garratt had been employed as office manager, bookkeeper and CRM manager since 29 August 2013. He has sworn in his affidavit also that he denies each and every one of the allegations contained in the termination letter, has never received a formal or written warning and that previous reviews of his work have generally been positive. He acknowledges that he should have activated his online banking token, and reconstituted the online banking authorisations, earlier than he did.
- 33 The respondent's notice of answer filed 21 July 2015 also details the reasons for the dismissals. Ms White's affidavit denies each and every one saying that these are not matters ever put to her and she has never been given the opportunity to refute and/or respond to the allegations. She refers to each allegation separately and gives a brief response. Mr Garratt in his affidavit similarly denies each and every allegation.
- 34 The notice of answer also says that since the dismissals the respondent has discovered further evidence of each applicant's misconduct and gives brief particulars. Ms White and Mr Garratt each deny these allegations.
- 35 It is not possible, nor appropriate, to reach a conclusion about the likelihood of the applicants' chances of success. This because the respondent's foreshadowed documentary and witness evidence is not yet known to the Commission. I accept that the respondent believes that there is no likelihood of success if the claims were to be heard on the merits; it would be remarkable if it did not believe so given it has dismissed the applicants summarily for serious misconduct.
- 36 I note that each applicant denies, and denies in a sworn affidavit, each allegation made by the respondent; a denial which is sworn carries greater weight than a mere denial that is not sworn.
- 37 The applicants say that they were not given the opportunity to refute or respond to the allegations. This may be so other than during the dismissal itself. Whether this supports their claims of unfair dismissal might depend upon whether it can be shown that if they had been given an opportunity to respond before the respondent made its decision, their responses could have changed the outcome.
- 38 I cannot conclude that the applicants have no prospect of success at this stage. They are not obliged to show at this stage that their claims have merit. As Steytler J observed in *Malik -v- Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51 at [25]:

While an assessment of the merits "in a fairly rough and ready way" (see *Jackamarra v Krakouer* (1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s 29(3) which imports any obligation, on the part of an applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s 27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success. However, that is a very different proposition from one to the effect that an applicant has, in every case, an obligation to show that he or she has some prospect of success.

- 39 At [44] his Honour also observed:

The result is that the correct approach to applications under s 29(3) of the Act is to consider the sole criterion of whether it would be unfair not to grant the extension. Factors which are relevant will vary from case to case. The length of the delay and the reasons for the delay will usually be relevant factors. The merits of the substantive application will usually be a relevant factor, but it is not a *sine qua non*.

**Prejudice to the respondent if the claims are accepted out of time**

- 40 The respondent refers to the time and cost of Mr Ratkovcic having to attend to these matters. It does point out that it is a charity with limited human and financial resources and the progress of these claims is not in the best interests of its beneficiaries nor in the public interest.
- 41 I note that if the claims are accepted out of time, the respondent will be given the opportunity to conciliate with the applicants and may have to present its case in a hearing which will involve time, if not also cost; however, there is no greater prejudice to the respondent having to do so in this Commission than if it would have had to do so in the FWC.
- 42 I do not consider the delay overall arising from the claims having been lodged with the FWC, and the time taken to decide to withdraw them, has caused a significant prejudice to the respondent.

**Considerations of fairness**

- 43 Considerations of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Commission's discretion. The respondent says that fairness should be to all parties including the public and the beneficiaries of the respondent.
- 44 When considering the issue of fairness, EM Heenan J also observed the following in *Malik*:

I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant

and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims [74].

### Conclusion

- 45 I am mindful that there is a 28 day timeframe to lodge a claim of unfair dismissal and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
- 46 I find there is an acceptable explanation. The fact that the applicants filed their claims in the FWC means that they took action within the 28 days of the date of termination which is required to file a claim of unfair dismissal under the Act. The respondent has known since that time that they contest the decisions to dismiss them.
- 47 There is something to be said for the view that there is a natural progression of their claims: their original claims having been withdrawn on the basis that they had been filed in the wrong jurisdiction, they have now been filed in this jurisdiction. The applicants are continuing to exercise a legal right to challenge their dismissals. I do not find the time taken for the applicants to deal with the issue of the correct jurisdiction has caused an unfairness to the respondent in now having to deal with their claims on the merits in this jurisdiction. Accepting these claims out of time will not put the respondent in a significantly different position than it would have been in if these claims had been filed at the same time as the FWC claims, or when the jurisdiction issue was raised, and had remained dormant until the outcome of the issue was known.
- 48 Taking into account the relevant considerations and the issue of fairness to both parties, I find that it would be unfair for the Commission not to accept these claims of unfair dismissal out of time. An order that they be accepted out of time now issues. The Commission will now set these claims down for conciliation or, if requested by the applicants and the respondent, for hearing.

**2015 WAIRC 00955**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

### PARTIES

PATRICIA ANNE WHITE

**APPLICANT**

-v-

LEGACY FUND OF PERTH INC

**RESPONDENT**

**CORAM** CHIEF COMMISSIONER A R BEECH  
**DATE** THURSDAY, 22 OCTOBER 2015  
**FILE NO/S** U 98 OF 2015  
**CITATION NO.** 2015 WAIRC 00955

**Result** Claim of unfair dismissal made out of time accepted  
**Representation**  
**Applicant** Mr B Douglas, of counsel  
**Respondent** Mr R Ratkovic

### *Order*

HAVING HEARD Mr B Douglas of counsel on behalf of the applicant and Mr R Ratkovic on behalf of the respondent;  
 AND HAVING given Reasons for Decision;  
 NOW THEREFORE, I the undersigned, pursuant to the powers conferred under s 29(3) of the *Industrial Relations Act 1979*, hereby order:

THAT this claim be accepted out of time.

[L.S.]

(Sgd.) A R BEECH,  
 Chief Commissioner.

2015 WAIRC 00956

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** JAMES RICHARD GARRATT **APPLICANT**

-v-

LEGACY FUND OF PERTH INC **RESPONDENT**

**CORAM** CHIEF COMMISSIONER A R BEECH

**DATE** THURSDAY, 22 OCTOBER 2015

**FILE NO/S** U 99 OF 2015

**CITATION NO.** 2015 WAIRC 00956

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**Result** Claim of unfair dismissal made out of time accepted

**Representation**

**Applicant** Mr B Douglas, of counsel

**Respondent** Mr R Ratkovic

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*Order*

HAVING HEARD Mr B Douglas of counsel on behalf of the applicant and Mr R Ratkovic on behalf of the respondent;  
AND HAVING given Reasons for Decision;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under s 29(3) of the *Industrial Relations Act 1979*, hereby order:

THAT this claim be accepted out of time.

(Sgd.) A R BEECH,  
Chief Commissioner.

[L.S.]

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### SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Dale M. Zadow	Gillbert Chich P. Chich + Co	B 79/2015	Commissioner J L Harrison	Discontinued
Robert McEvoy	Employer Oven Sparkle , Owner Sean Miller	B 114/2015	Commissioner S J Kenner	Discontinued

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### CONFERENCES—Notation of—

Parties	Commissioner	Conference Number	Dates	Matter	Result	
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Harrison C	PSAC 16/2015	1/09/2015	Dispute re Temporary Special Allowance	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Harrison C	PSAC 17/2015	N/A	Dispute re employment status	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Kenner C	PSAC 21/2015	22/09/2015	Dispute re termination of employment	Discontinued
United Voice WA	The Roman Catholic Church Archdiocese of Perth trading as IdentityWA	Kenner C	C 28/2015	13/10/2015	Dispute re termination of employment	Discontinued

## PROCEDURAL DIRECTIONS AND ORDERS—

2015 WAIRC 00980

### REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 8 AUGUST 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

BEN THOMPSON

**APPLICANT**

-v-

THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

**RESPONDENT**

**CORAM**

ACTING SENIOR COMMISSIONER P E SCOTT

**DATE**

MONDAY, 2 NOVEMBER 2015

**FILE NO.**

APPL 21 OF 2014

**CITATION NO.**

2015 WAIRC 00980

**Result** Direction issued

**Representation**

**Applicant** Mr M Swinbourn of counsel

**Respondent** Mr S Kemp of counsel

#### *Direction*

WHEREAS this is an application brought pursuant to Section 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985*; and

WHEREAS on 20 October 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS the matter was not resolved and is to be set down for hearing and determination; and

WHEREAS the parties agreed to discuss arrangements for the preparation for the hearing; and

WHEREAS the parties provided a minute of consent order for directions signed by each counsel and the Commission has formed the opinion that the issuing of the directions will assist in the conduct of the hearing of the matter; and

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

1. THAT any evidence in chief at the hearing will be by way of affidavit.
2. THAT any further evidence in chief will require leave of the Commission.
3. THAT by 25 November 2015 the applicant file and serve:
  - (a) any affidavits of evidence and materials that he intends to rely upon;
  - (b) an amended outline of submissions; and
  - (c) a list of authorities.
4. THAT by 15 December 2015 the respondent file and serve:
  - (a) any affidavits of evidence and materials that it intends to rely upon;
  - (b) any amended outline of submissions; and

- (c) a list of authorities.
5. THAT by 6 January 2016 each party give notice of:
- (a) its intention to cross-examine any witness; and
- (b) any objections to affidavits of evidence.
6. THAT where a party does not intend to cross-examine a witness, the witness's affidavit of evidence will be admitted as evidence without the requirement for the witness to attend the hearing.
7. THAT by 8 January 2015 the parties file any statement of agreed facts.
8. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) P E SCOTT,  
Acting Senior Commissioner.**2015 WAIRC 00950**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

JASON ZHOU

**APPLICANT**

-v-

CURTIN UNIVERSITY

**RESPONDENT**

**CORAM** COMMISSIONER J L HARRISON

**DATE** MONDAY, 19 OCTOBER 2015

**FILE NO/S** B 58 OF 2015

**CITATION NO.** 2015 WAIRC 00950

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<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Ms J van den Herik and Ms L Forstner (of counsel)

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*Order*

On 15 April 2015 Jason Zhou (the applicant) lodged this application claiming that he was owed benefits under his contract of employment with Curtin University (the respondent). The respondent disputes that it owes the applicant the benefits he is seeking and claims he was not an employee of the respondent.

A conference was held on 15 June 2015 with a Mandarin interpreter to assist the applicant. Given the lack of detail about what the applicant was claiming was owed to him the applicant was required to provide further details about his claims by 29 June 2015. As the applicant did not do so an order issued for the applicant to supply the required information and the applicant complied with this order on 30 July 2015.

The preliminary issue of whether the applicant was employed by the respondent was listed for hearing on 16 October 2015. The applicant requested to attend the hearing by telephone and the Commission informed him that he was expected to attend the hearing in person. As the applicant did not confirm that he would attend, the hearing date of 16 October 2015 was vacated and a hearing was listed on this date for the applicant to show cause why the matter should not be dismissed pursuant to s 27(1) of the *Industrial Relations Act 1979*.

Prior to the hearing the applicant sent the Commission an email stating that he had been in hospital and also a medical certificate from a doctor based in Shanghai. This certificate, dated 8 September 2015, stated that the applicant was unwell and needed a two month break.

At the show cause hearing held on 16 October 2015 with a Mandarin interpreter in attendance the applicant confirmed that he would return to Perth soon after 8 November 2015 to proceed with his application and the applicant agreed to provide further detail about his application and discovery of documents prior to the hearing.

Given the applicant's health issues and with the consent of the respondent the parties were advised that this application would proceed and a hearing would be set down in November 2015 to deal with the preliminary issue of whether the applicant was an employee of the respondent.

NOW THEREFORE, the Commission, pursuant to the powers vested in it by the *Industrial Relations Act 1979*, hereby orders:

THAT this application be adjourned to a date to be fixed in November 2015.

[L.S.]

(Sgd.) J L HARRISON,  
Commissioner.

2015 WAIRC 00979

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MR ROBERT FRY

**APPLICANT**

-v-

COMMUNITY LIVING ASSOCIATION INC.

**RESPONDENT**

**CORAM** CHIEF COMMISSIONER A R BEECH  
**DATE** MONDAY, 2 NOVEMBER 2015  
**FILE NO.** B 105 OF 2015  
**CITATION NO.** 2015 WAIRC 00979

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**Result** Direction issued  
**Representation** (By written correspondence)  
**Applicant** Ms G Cronin, of counsel  
**Respondent** Ms R Airey, of counsel

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*Direction*

WHEREAS the parties continue to engage in without prejudice settlement discussions with a view to finalising this application;  
AND WHEREAS notwithstanding this, the parties have conferred and reached agreement on matters relating to the programming of this application and request a direction in the terms of the agreement;  
AND WHEREAS the Commission is of the view that it is necessary for the orderly progress of the matter for a direction to issue;  
NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(o) of the *Industrial Relations Act 1979*, hereby direct –

1. THAT by Wednesday, 4 November 2015 the parties file a Statement of Agreed Facts annexing any agreed documents relevant to those facts.
2. THAT by Monday, 16 November 2015, the applicant file and serve:
  - 2.1. a written Outline of Submissions;
  - 2.2. any witness statements constituting the whole of the evidence in chief of the witnesses the applicant intends to rely upon; and
  - 2.3. any further documentary evidence including a list of authorities the applicant intends to rely upon.
3. THAT by Monday, 30 November 2015, the respondent file and serve:
  - 3.1. a written Outline of Submissions;
  - 3.2. any witness statements constituting the whole of the evidence in chief of the witnesses it intends to rely upon; and
  - 3.3. any further documentary evidence including a list of authorities the respondent intends to rely upon.
4. THAT the matter be listed for a one-day hearing in Albany on Monday, 7 December 2015.

[L.S.]

(Sgd.) A R BEECH,  
Chief Commissioner.

2015 WAIRC 00958

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JENNIFER JOI FIELD

**APPLICANT**

-v-

THE BOARD OF THE GASCOYNE ABORIGINAL HERITAGE AND CULTURAL CENTRE,  
JOHN OXENHAM CO-CHAIRMAN, TERRY CAHILL CO-CHAIRMAN, PAUL BARRON,  
ALAN PERRY, JOE GRIESSMAN

**RESPONDENTS**

**CORAM** CHIEF COMMISSIONER A R BEECH  
**DATE** FRIDAY, 23 OCTOBER 2015  
**FILE NO/S** B 108 OF 2015  
**CITATION NO.** 2015 WAIRC 00958

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**Result** Respondent's name amended

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*Order*

WHEREAS the Commission convened a conciliation conference on Friday, 23 October 2015;

AND WHEREAS at the conciliation conference, the parties agreed to amend the respondent's name to 'Gascoyne Aboriginal Heritage and Cultural Centre Inc';

AND WHEREAS the Commission considers that amending the respondent's name will result in the applicant's former employer being correctly identified;

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

THAT the name of the respondent 'The Board of The Gascoyne Aboriginal Heritage and Cultural Centre, John Oxenham Co-Chairman, Terry Cahill Co-Chairman, Paul Barron, Alan Perry, Joe Griessman' be deleted and 'Gascoyne Aboriginal Heritage and Cultural Centre Inc' be inserted in lieu thereof.

[L.S.]

(Sgd.) A R BEECH,  
Chief Commissioner.

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**2015 WAIRC 00951**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES

**APPLICANT**

-v-

DR T MCDONALD DIRECTOR CATHOLIC EDUCATION OFFICE; THE ROMAN CATHOLIC ARCHBISHOP OF PERTH INC; LORETO EDUCATION COUNCIL (THE INSTITUTE OF THE BLESSED VIRGIN MARY); AND THE ROMAN CATHOLIC BISHOP OF BUNBURY

**RESPONDENTS**

**CORAM** CHIEF COMMISSIONER A R BEECH

**DATE** TUESDAY, 20 OCTOBER 2015

**FILE NO/S** C 32 OF 2015

**CITATION NO.** 2015 WAIRC 00951

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**Result** Name of respondents amended

**Representation**

**Applicant** Mr N Briggs

**Respondent** Ms J Maccarone

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*Order*

HAVING HEARD Mr N Briggs on behalf of Independent Education Union of WA, Union of Employees and Ms J Macarone on behalf of the Catholic Education Office as agent for the respondents;

AND being of the view that an Order is necessary to accurately name the employers the subject of the application;

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

THAT the respondents to the application are hereby amended by:

1. Deleting 'Dr T McDonald Director Catholic Education Office'; and
2. Deleting after the words 'The Roman Catholic Archbishop of Perth' the word 'Inc'.

[L.S.]

(Sgd.) A R BEECH,  
Chief Commissioner.

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2015 WAIRC 00977

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
YVONNE ROGERS **APPLICANT**

-v-  
SHARYN O'NEILL  
DIRECTOR GENERAL OF EDUCATION **RESPONDENT**

**CORAM** CHIEF COMMISSIONER A R BEECH  
**DATE** THURSDAY, 29 OCTOBER 2015  
**FILE NO/S** U 96 OF 2015  
**CITATION NO.** 2015 WAIRC 00977

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**Result** Application adjournmed sine die  
**Representation**  
**Applicant** Mr S Millman, of counsel  
**Respondent** Mr D Anderson, of counsel

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*Order*

WHEREAS this application was listed for hearing for 9 and 10 November 2015;

AND WHEREAS the parties consent to the making of the following orders;

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

1. THAT the hearing listed for 9 and 10 November 2015 be adjourned sine die.
2. THAT the application be re-listed following the determination of the matter of APPL 122 of 2015 - *Sharon Hislop v. Director General, Department of Education.*
3. THAT there be liberty to apply.

[L.S.]

(Sgd.) A R BEECH,  
Chief Commissioner.

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2015 WAIRC 00976

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MURIEL MURAT **APPLICANT**

-v-  
MIA DOHNT  
CEO  
SHIRE OF SANDSTONE **RESPONDENT**

**CORAM** CHIEF COMMISSIONER A R BEECH  
**DATE** THURSDAY, 29 OCTOBER 2015  
**FILE NO/S** U 151 OF 2015  
**CITATION NO.** 2015 WAIRC 00976

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**Result** Name of respondent amended; Claim of unfair dismissal made out of time accepted  
**Representation**  
**Applicant** Mrs M Murat  
**Respondent** Mr J Wyatt, of counsel

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*Order*

HAVING HEARD Mrs M Murat, on her own behalf and Mr J Wyatt, of counsel 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 "Mia Dohnt CEO".
2. THAT this claim of unfair dismissal made out of time be accepted.

(Sgd.) A R BEECH,  
Chief Commissioner.

[L.S.]

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### INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Disability Services Commission -Disability Justice Officers Agency Specific Agreement 2015 PSAAG 6/2015	9/11/2015	The Director General of the Disability Services Commission, The Civil Service Association of Western Australia Incorporated	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered

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### NOTICES—Appointments—

2015 WAIRC 00960

**Designation of Officers**  
*Sections 85(9) and 99D*  
**Industrial Relations Act 1979**

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

Pursuant to sections 85(9) and 99D of the *Industrial Relations Act 1979*, **I DESIGNATE** the person nominated, being Sally Leeanne Anderson to be the CLERK OF THE COURT for the WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 9 November – 13 November 2015 inclusive.



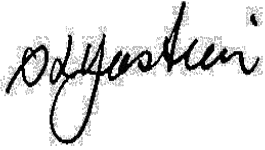
**SUSAN BASTIAN**  
**CHIEF EXECUTIVE OFFICER**  
**REGISTRAR**  
**DEPARTMENT OF THE REGISTRAR**  
27 October 2015

2015 WAIRC 00961

**Designation of Officers**  
*Sections 81D and 99D*  
**Industrial Relations Act 1979**

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

Pursuant to sections 81D and 99D of the *Industrial Relations Act 1979* **I DESIGNATE** the person nominated, being Sally Leeanne Anderson to be the CLERK OF THE INDUSTRIAL MAGISTRATES COURT of Western Australia to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws for the period 9 November – 13 November 2015 inclusive.



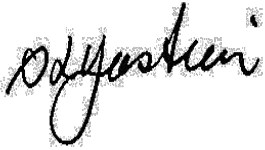
SUSAN BASTIAN  
 CHIEF EXECUTIVE OFFICER  
 REGISTRAR  
 DEPARTMENT OF THE REGISTRAR  
 27 October 2015

2015 WAIRC 00962

**Designation of Officers**  
**Section 93(1AC)**  
**Industrial Relations Act 1979**

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

Pursuant to section 93(1AC) of the *Industrial Relations Act 1979*, I **DESIGNATE** the person nominated, being Sally Leeanne Anderson, AS A DEPUTY REGISTRAR to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 9 November – 13 November 2015 inclusive.



SUSAN BASTIAN  
 CHIEF EXECUTIVE OFFICER  
 REGISTRAR  
 DEPARTMENT OF THE REGISTRAR  
 27 October 2015

**RECLASSIFICATION APPEALS—**

2015 WAIRC 00991

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BARBARA HOLLEY	<b>APPLICANT</b>
	-v-	
	DIRECTOR-GENERAL DEPARTMENT OF EDUCATION	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON	
<b>DATE</b>	FRIDAY, 6 NOVEMBER 2015	
<b>FILE NO</b>	PSA 102 OF 2013	
<b>CITATION NO.</b>	2015 WAIRC 00991	

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<b>Result</b>	Discontinued
<b>Representation</b>	
<b>Applicant</b>	Ms J O'Keefe (as agent)
<b>Respondent</b>	Ms A Young

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*Order*

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.

On 23 October 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* in respect of the appeal.

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby discontinued

(Sgd.) J L HARRISON,  
Commissioner,  
Public Service Arbitrator.

[L.S.]

**2015 WAIRC 00473**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CHERYL BELINDA JONES	<b>APPELLANT</b>
	-v-	
	WESTERN AUSTRALIAN POLICE	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER	
<b>DATE</b>	MONDAY, 29 JUNE 2015	
<b>FILE NO</b>	PSA 1 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 00473	

<b>Result</b>	Direction issued
<b>Representation</b>	
<b>Appellant</b>	Mr K Rukunga of counsel
<b>Respondent</b>	Mr T Clark

*Direction*

HAVING heard Mr K Rukunga of counsel on behalf of the appellant and Mr T Clark on behalf of the respondent the Arbitrator, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby directs –

- (1) THAT the appellant file and serve a written statement of the case and facts upon which the appellant relies to support the appeal and any witness statement(s) by the close of business Wednesday 1 July 2015.
- (2) THAT the respondent file and serve a written statement of the basis upon which it relies to resist or otherwise question the appeal and any witness statement(s) that it may intend to rely on by the close of business Thursday 2 July 2015.
- (3) THAT the appellant's application for an adjournment of the appeal filed on 29 June 2015 be dismissed.

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

[L.S.]

**2015 WAIRC 00981**

**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

<b>CITATION</b>	:	2015 WAIRC 00981
<b>CORAM</b>	:	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
<b>HEARD</b>	:	THURSDAY, 26 MARCH 2015, MONDAY, 29 JUNE 2015, FRIDAY, 3 JULY 2015, FRIDAY, 23 OCTOBER 2015
<b>DELIVERED</b>	:	TUESDAY, 3 NOVEMBER 2015
<b>FILE NO.</b>	:	PSA 1 OF 2015
<b>BETWEEN</b>	:	CHERYL BELINDA JONES Applicant AND WESTERN AUSTRALIAN POLICE Respondent

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Catchwords	:	<i>Industrial Law (WA) - Reclassification appeal - Principles applied - Work presently performed is largely accommodated within existing JDF - Not persuaded that appellant has established a significant net addition to the value of the work attached to the position - Appellant previously performed higher level duties - Special allowance did not adequately compensate appellant for the value provided to the respondent - Arbitrator not restricted to the specific claim made - Jurisdiction to be exercised consistent with equity, good conscience and the substantial merits of the case - Arbitrator limited to matters concerning the salary ascribed to "the office" occupied by the individual officer - Despite a clear inequity, not persuaded that Arbitrator has jurisdiction and power to make an order for compensation - Substantive appeal dismissed - Recommendation that respondent make a further payment to the appellant in recognition of the higher level work she performed for some years</i>
Legislation	:	<i>Industrial Relations Act 1979 Public Service Award 1992</i>
Result	:	Upheld in part
<b>Representation:</b>		
Counsel:		
Appellant	:	Mr K Rukunga of counsel and with him Ms K Hagan of counsel
Respondent	:	Ms J Brennan and with her Mr A Chapple and later Ms Rhodes of counsel
Solicitors:		
Appellant	:	Civil Service Association of Western Australia Inc.

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**Case(s) referred to in reasons:**

*United Voice WA v The Minister for Health* (2014) 95 WAIG 178

*Minister Controlling Harbour and Light Department v Maritime Workers Union of WA* (1982) 62 WAIG 820

*Health Services Union of Western Australia (Union of Workers) v Director General of Health* (2008) WAIRC 00215

*Director-General Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244

*Megan Maree In De Braekt v Chief Executive Officer of the Department of Productivity and Labour Relations* (2000) 80 WAIG 3040

*BHP Billiton Iron Ore Pty Ltd v CFMEU* [2006] WASCA 49

*Flashman and Ors v Attorney General* (2012) WAIRC 00294

*The Civil Service Association of Western Australia Incorporated v Commissioner, Public Service Commission* (1992) 72 WAIG 2595

**Case(s) also cited:**

*Newman v Italiano* (2011) WAIRC 00875

*Reasons for Decision*

- 1 The appellant Ms Jones is employed as the Manager, Taxation Compliance Unit with the respondent WA Police. She was appointed to this position in February 2008. The position is classified as a Level 6 position and is within the Taxation and Accounting Services Branch of WAPOL.
- 2 In November 2013 Ms Jones sought to have her position reclassified. Ms Jones maintained at that time that her position, last reviewed in April 2001, had evolved from essentially a compliance focussed position, responsible for preparing Goods and Services Tax and Fringe Benefits Tax returns for WAPOL, to a broader, more strategically focussed position. Ms Jones maintained that the job she then performed had developed into a leadership role in both tax and risk management.
- 3 In terms of internal reporting relationships, Ms Jones contended that while within the intended formal structure her position reported to the Level 7 Executive Manager, Taxation and Accounting Services position, in practice, for all intents and purposes, Ms Jones reported directly to the higher Level 9 position of Director of Finance. In support of her request for the reclassification of her position, Ms Jones provided to WAPOL a Reclassification Evaluation Report dated July 2013, undertaken by Shelby Consulting. The Shelby Consulting Report concluded at p 11 that in relation to the work value of Ms Jones' position:
 

The position plays a key role in managing the taxation risk and ensuring compliance on behalf of WA Police. It has significant autonomy and requires leadership and complex problem analysis and resolution skills. The significant tactical and strategic influence of the role suggests a work value in the order of upper middle level management which is comparable to a Level 7 classification.
- 4 The report further concluded that from a comparative summary of both external and internal positions and the performance of a BIPERS assessment, a Level 7 classification was appropriate. In particular, the Report in summary at p 17 said:

The position of **Executive Manager, Indirect Taxation** was last formally reviewed in April 2001. Since this time the role has evolved from the hands on preparation of the GST and FBT returns to a strategic role of indirect tax management and providing indirect tax related advice to the Director Finance and senior management. It leads the Indirect Taxation Unit and is responsible for identifying tax related initiatives and influencing decision making in terms of taxation policy and processes. The position plays a key role in managing taxation risk and ensuring compliance on behalf of WA Police. It has significant autonomy and requires leadership and complex problem analysis and resolution skills. The significant tactical and strategic influence of the role suggests a work value in the order of upper middle level management which is comparable to a Level 7 classification.

The BIPERS assessment and the comparative assessment also support classification of the position at Level 7.

Overall, the classification evidence identified supports classification of this critical finance position, at level 7.

- 5 The recommendation of the Report was that Ms Jones' position be reclassified as Executive Manager Indirect Taxation, Level 7 and that Ms Jones, having undertaken the higher level duties and responsibilities for greater than 12 months, receive a personal reclassification with the position.
- 6 As a consequence of other major organisational reform within WAPOL at the time, and the State Government's recruitment freeze, no further progress was made in relation to Ms Jones' reclassification request until about August 2014. As a consequence of an internal review undertaken by the Workplace Relations Branch of WAPOL, which concluded in January 2015, it was recommended that Ms Jones' position not be reclassified. In terms of work value, the Review accepted that Ms Jones' performed higher level responsibilities and had considerable autonomy for taxation related matters. The Review accepted Ms Jones' contention that contrary to the intended reporting structure in the Taxation and Accounting Branch, Ms Jones did not in fact report to the Executive Manager but rather, to the Director of Finance.
- 7 However, whilst accepting the central propositions advanced by Ms Jones, the Review contended that the additional responsibilities performed by Ms Jones only continued from 2008 until 31 December 2013, when Ms Jones was directed by the Chief Finance Officer to cease performing higher level work. This later assertion was disputed by Ms Jones.
- 8 In relation to what the Review referred to as the "claimed period", from May 2007 when the position was last reviewed, until July 2013, when Ms Jones' reclassification request was made, the Review concluded at p 6 that:

As the comparative position is responsible for the entire Taxation and Accounting Services Branch, it is reasonable to assume that the level of responsibility and accountability would be higher than that of the review position which is responsible for the Taxation Compliance Unit only. However, in reality, during the claimed period and under the direction of the DOF at the time, the comparative position managed the Accounting Services Unit only and the review position was given significant autonomy over the Taxation Services Unit working independently with little or no input from the comparative position. The review position reported directly to the DOF in almost all matters relating to Taxation. During this claimed period, the level of liaison of both positions was similar.

Although the functions of the comparative and review positions appear similar, the main difference is the breadth to which these functions extend. The structure suggests that the comparative position is the head of and responsible for the entire Taxation and Accounting Services Branch and should have end of line responsibility for the services provided by both the Units in the Branch. However, during the claimed period, full autonomy was provided to the review position in relation to all taxation matters and the comparative position had little or no involvement in this area. As such, during the claimed period, the autonomy, decision making and end of line responsibility in all matters relating to taxation lay with the review position, thus increasing its work value from when it was created at Level 6.

- 9 The Review also concluded that applying the Mercer Cullen Egan Dell position evaluation assessment during the claimed period, the position Ms Jones occupied fell within the range for a Level 7 classification.
- 10 Despite a number of the findings of the Review being supportive of the claim made by Ms Jones, the Review came to the conclusion that the position should not be the subject of a reclassification. In particular, flow on effects and staffing implications were seen as a major impediment. In this respect, the Review noted at p 9 as follows:

5. FLOW-ON EFFECTS

If the review position was to be reclassified to Level 7, there would be significant impact to the work value and current classification level of the Executive Manager, Taxation and Accounting Services Branch (Level 7). Additionally, the reporting structure would not be sound and would result in the requirement for a restructure of the Taxation and Accounting Services Branch. This view has also been confirmed and supported by the now A/Chief Finance Officer (CFO) (Level 9) Ms Santa Cardenia and the Executive Manager, Taxation & Accounting Services Branch (Level 7) Mr Ian Holt.

- 11 Instead, in recognition of the performance of the higher level work by Ms Jones, a temporary special allowance was recommended to be paid to her.
- 12 In these appeal proceedings, Ms Jones contended that the conclusion reached by WAPOL in the Review was erroneous and that the Shelby Report correctly examined the position that Ms Jones occupied, and came to the proper conclusion that a Level 7 classification was warranted. In her evidence Ms Jones testified that from the time she was appointed to her position and the Executive Manager Tax and Accounting Services Mr Holt was appointed to his position, the intended structure did not operate. She testified that she managed the Tax Compliance Unit independently and reported directly to the then Director of Finance Mr de Mamiel, while Mr Holt managed the Accounting Services Branch. Ms Jones said that both she and Mr Holt attended manager's meetings and planning days on behalf of the taxation and accounting areas respectively. According to Ms Jones, this went on for some years.

- 13 In about 2010 Ms Jones said that she discussed this operational structure with the Director of Finance who in turn referred her to Shelby Consulting to review the classification of her position. This duly commenced but because of other matters, the process was placed on hold. It was finally completed in July 2013 which, as noted above, recommended that Ms Jones' position be reclassified to Level 7 and that the position be retitled Executive Manager Indirect Taxation. There were further delays as a result of the major organisational change within WAPOL and in about March 2014, Ms Jones testified that she raised with Ms Cardenia, the then Acting Chief Finance Officer, what the status was in relation to her reclassification. At that time the response was that the process would have to again be placed on hold, because of the Government's then recruitment freeze in the public sector.
- 14 Ms Jones then referred to the recommencement of the process, when she had discussions with Ms Soares, WAPOL's Workplace Consultant who was conducting a review of her position in August 2014. Further contact was made by Ms Jones with Ms Soares in early 2015 to ascertain the status of her reclassification request. She became aware by letter of 6 February 2015, that her reclassification request was not supported. In particular, Ms Cardenia did not consider there was an ongoing requirement for higher level work. It was Ms Jones' evidence that there was no express indication, written or oral, from Ms Cardenia for her to cease undertaking the higher duties by the end of December 2013. Ms Jones did accept however, that she was no longer reporting to Ms Cardenia by that time.
- 15 In particular, Ms Jones emphasised that with the organisational restructuring occurring within WAPOL, the entire Finance Directorate will be undergoing a restructure and therefore in her view, she cannot see how her reclassified position cannot be accommodated within any new structure. Furthermore, it was Ms Jones' evidence that she continued to perform higher level duties in areas such as leadership and management; policy development; taxation reporting; advisory/training; compliance; and representing WAPOL at inter-agency taxation working groups and other forums involving the Australian Taxation Office, the WA Treasury and other government departments.
- 16 As noted earlier in these reasons, WAPOL's position was that the higher level work, acknowledged to have been undertaken by Ms Jones previously effectively ceased on 3 January 2014 when Ms Cardenia was appointed to the position of Acting Chief Finance Officer. In this respect, Ms Cardenia testified that since being appointed to her position on 3 January 2014, she has been responsible for the overall management of the Level 7 Executive Manager who in turn oversees Ms Jones' position. Ms Cardenia said that during the course of the review undertaken by Ms Soares, she met with both her and Mr Holt to discuss Ms Jones' claims outlined in the Shelby Consulting Report. Ms Cardenia confirmed that in discussions with those conducting the review it was acknowledged that under the previous reporting arrangement, when Ms Jones reported directly to Mr de Mamiel, that she was indeed undertaking the higher level work as was claimed. However, Ms Cardenia was emphatic that that work ultimately ceased.
- 17 In relation to the internal restructuring at WAPOL, Ms Cardenia testified that it is possible that the present Level 7 Executive Manager position may be abolished. However irrespective of this, Ms Jones' position would more appropriately fall within other control and compliance areas of the Finance Directorate with the intention that the position still report to a Level 7 Executive Manager position.
- 18 Specifically in relation to Ms Jones' contentions about the current work undertaken, Ms Cardenia did not agree that Ms Jones continues to perform the higher level work described by Ms Soares during the claimed period. According to Ms Cardenia, she considers that Ms Jones is undertaking her work in accordance with her existing Level 6 Position Description. Furthermore, Ms Jones' contention that the Level 7 Executive Manager position was abolished in December 2013 is not correct and she referred to her evidence immediately above.
- 19 In terms of flow on effects, it was Ms Cardenia's view that given the current structure and the present intention that Ms Jones' position report to a Level 7 Executive Manager position, it would be untenable for such reclassified position to report to another Level 7 position. According to Ms Cardenia, since her appointment to her current position, the original approved reporting structure has been operating with Mr Holt having overall responsibility for both the Taxation Compliance Unit and the Accounting Services Unit.
- 20 Ms Cardenia further generally endorsed the existing PD for Ms Jones' position and also confirmed that the Executive Manager Level 7 position has the duties and accountabilities as set out in the registered PD, regarding the managerial oversight of the taxation area.
- 21 In terms of the specific contentions advanced by Ms Jones as to higher level work she maintains is still being performed, Ms Cardenia took issue with some of these contentions. In terms of Ms Jones undertaking final quality assurance of tax returns to be submitted to the Australian Taxation Office, Ms Cardenia said that this is completed by the Executive Manager prior to presentation to her for sign off. Furthermore, Ms Jones does not independently produce and submit reports on behalf of the Chief Finance Officer.
- 22 In terms of undertaking specialised projects, Ms Cardenia said that any work issued from her office, is delegated through the Executive Manager's position, and no projects have originated from her office since she has been in the position. Nor, according to Ms Cardenia, has Ms Jones independently represented the Taxation Compliance Unit or WAPOL at various forums, committees or working parties regarding taxation while she has been in her present position.
- 23 Whilst Ms Cardenia seemingly accepted that not all work undertaken by Ms Jones is progressed through the Executive Manager's position, "end of line" responsibility and accountability for taxation matters ultimately rests with her as the Acting Chief Finance Officer. Ms Cardenia, also had ongoing contact with Ms Soares, during the review. The review undertaken by WAPOL considered the Shelby Consulting Report and involved detailed consultation with not only Ms Jones but also with Ms Cardenia, Mr Holt and others. A fulsome consideration was given to the responsibilities and duties of Ms Jones' position, both prior to and after Ms Cardenia's appointment.
- 24 Ms Soares has some seven years' experience in classification review work for WAPOL. Ms Soares outlined the process she engaged in in undertaking the review of Ms Jones' position, including the conclusions reached by Shelby Consulting.

Ms Soares referred to the conclusions of the Classification Report, and the two principal reasons why Ms Jones' reclassification request was denied. They firstly involved structural unsoundness in one Level 7 position reporting to another, as would be the ultimate effect if Ms Jones' reclassification claim was to succeed. Secondly, the conclusion was reached in the Classification Review that the higher level work undertaken by Ms Jones, previously acknowledged, did not continue past about December 2013.

- 25 In terms of reporting structure, Ms Soares also confirmed her assessment after discussions with Ms Cardenia and Mr Holt, that the reporting relationships originally intended from the 2007 restructuring of the finance area, and as set out in Ms Jones' registered PD, have in fact been in effect since Ms Cardenia took over her present position.
- 26 The overall response of WAPOL was also confirmed in the evidence of Ms Hopkinson, presently the Acting Executive Manager Workforce Design and Consultancy, Human Resources. Ms Hopkinson referred to the Classification Report prepared by Ms Soares and confirmed its content. Ms Hopkinson concluded that the report did not substantiate a significant ongoing increase in work value to justify a reclassification. However, in recognition of the performance of higher duties during the claimed period from 1 July 2013 to 31 December 2013, a temporary special allowance was recommended to be paid to Ms Jones, as compensation for the higher level work performed.

### Consideration

- 27 The principles to apply in matters such as these are well settled. In *United Voice WA v The Minister for Health* (2014) 95 WAIG 178 at pars 11-12 I said as follows:

#### Tests for work value review

- 11 The Commission has, in many cases, set out the relevant principles to apply in applications to reclassify positions, based on work value. Recently, in *Francis v WA Police* (2013) 93 WAIG 437 I said at par 38:
- 38 It is well settled in this jurisdiction, that in order to obtain a reclassification of a position, an appellant needs to demonstrate a significant net addition to the value of the work attached to a position, such as to warrant the creation of a new classification. Work value in this respect, embraces changes in the nature of the work, the skills and responsibility required or the conditions under which the work is performed. This fundamental principle is set out in the Commission's Wage Fixing Principles 2012 at Principle 7.2. A reclassification appeal, involves an assessment by the Commission of the work value of a position, at the time the appeal is lodged: *Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service at PathWest Laboratory Medicine WA* (2008) 88 WAIG 475; *Wall v Department of Fisheries* (2004) 84 WAIG 3895.
- 12 The approach of the Commission has been to apply the test strictly. This means a substantial burden falls on an applicant in such matters. In relation to the requirement of "significant" change, 'significant' does not necessarily mean 'major', but 'to a meaningful degree, not insignificant, not immaterial, not trivial'. To be significant a factor does not have to be dramatic, sudden or eye-catching. A change, as in this case, may occur subtly, gradually, even covertly but on examination prove to be significant": *In re Mineral Sands (State) Award* [1980] AR (NSW) 107. Significant change may be either evolutionary or revolutionary. Evolutionary change can be just as substantial and significant as revolutionary change: *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Royal Perth Hospital and Others* (1987) 67 WAIG 554 at 557. Further, "Incremental or cumulative change, when taken as a whole, may constitute such a level of change that developments have exceeded those which would reasonably be expected": *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Royal Perth Hospital* (2002) 83 WAIG 23.
- 28 I adopt and apply this approach to the determination of the present matter. The onus is, of course, on Ms Jones to establish her claim.
- 29 There is considerable common ground in this matter. It is not in dispute that Ms Jones did perform higher level duties and responsibilities for a considerable period, up until 31 December 2013. What occurred from then on is in dispute. However, in recognition of this, Ms Jones was paid an allowance from 1 July 2013 to 31 December 2013, representing the period from the date the Shelby Consulting Report and application was received by the Workplace Relations Branch to the time at which WAPOL contends that the additional higher level work ceased to be undertaken by Ms Jones.
- 30 There were two principal reasons why WAPOL was not prepared to support Ms Jones' reclassification. Firstly, is the flow on implications of the reclassification to a Level 7 classification, given the existence of the current Executive Manager Level 7 or alternatively, a revised structure which will involve another Level 7 position, to which Ms Jones' position will report. Secondly, the work for which the allowance was paid by WAPOL to Ms Jones was concluded not to be ongoing and that the reporting structure, at least from early 2014, reverted to that set out in Ms Jones' current registered PD, with her reporting to the Executive Manager Level 7 role, who in turn is responsible to Ms Cardenia.
- 31 It is the case that Ms Jones no longer reports to the Acting Chief Finance Officer, as the Accounting Services Branch of WAPOL falls within the Executive Manager's responsibility. I also accept, consistent with the evidence of Ms Cardenia, that not all work of Ms Jones is progressed through the Executive Manager's position. Ms Jones' does have autonomy as a Level 6 officer, which is a senior role. One would expect that such a position would be able to initiate projects and to manage them. That simply is a part of the responsibilities of such a role. I also accept on all of the evidence that the end of line responsibility for all tax and accounting matters within WAPOL rests with the Chief Finance Officer.
- 32 Whilst at par 39 of Ms Jones' witness statement, reference is made to a number of responsibilities and duties which she maintained are still "higher-level", from a detailed analysis of her present PD, I am not persuaded to this view. I consider that for the following reasons, the work presently performed by Ms Jones in this respect, as referred to by her, is largely accommodated within the existing PD dated August 2007.

- 33 Ms Jones firstly referred to “Leadership and Management”. She referred to undertaking leadership accountabilities for the Level 3 and Level 5 positions reporting to her. She referred to performance management, training, management of leave approvals etc, supervising team activities and reviewing and amending daily work undertaken. This, in my opinion, is encompassed within the existing PD, given that the overall role of the position is to manage and coordinate the Taxation Compliance Unit. This specifically involves accountabilities including managing staff, ensuring effective training and individual performance management. It also involves the review of work practices and implementing change programs. In my view these are existing duties as a part of a senior manager’s responsibility.
- 34 Next, reference is made to “Policy Development”. Again in my opinion, from a review of the existing PD, policy development is a key responsibility and accountability of the position, including the management of WAPOL’s taxation policies and procedures. In terms of “Taxation Reporting”, the duties referred to by Ms Jones include managing the accurate completion of the various tax returns required. This is a key responsibility of Ms Jones’ position set out in the current PD. I am not persuaded that the final end of line management accountability rests with Ms Jones in this respect.
- 35 In terms of “Advisory/Training”, Ms Jones referred to the provision of “consultancy” to internal and external stakeholders on tax matters, and the provision of accurate taxation information for presentation at training events. In my view, these matters are specifically referred to in the current PD and there is nothing referred to in the evidence of Ms Jones which in my opinion is significantly different to the existing responsibilities of the position. Further, on the subject of “Compliance” Ms Jones refers to undertaking and managing reviews of developments in tax legislation and continuous improvement initiatives. Again I am not persuaded this is outside of that responsibility contemplated by Ms Jones’ existing PD.
- 36 Finally, in terms of representation of WAPOL, external contacts are specified for Ms Jones’ position including the ATO, Treasury and other government departments and agencies. This is not inconsistent with Ms Jones’ assertions in relation to representation of the Taxation Unit in dealing with external parties.
- 37 Accordingly, from all of the evidence, and having regard to all of the materials before me, I am not persuaded to the view that Ms Jones has established on balance, such a significant net increase in work value, to warrant a reclassification. Furthermore, whilst it is not determinative in my mind, there may be some substance to the contentions advanced by WAPOL in relation to flow-on, given the structural arrangements in place, and proposed, in the relevant areas.
- 38 However, I would add the following: In my view, on the evidence, it is clear that Ms Jones did perform higher level duties for a considerable period of time well prior to July 2013, when the Shelby Consulting Report was produced. Indeed as far back as 2010, on Ms Jones’ evidence, which evidence was not contradicted, she raised the issue of the reporting structure and her duties with the then Director of Finance. It was only because of a number of significant delays, none of which were the responsibility of Ms Jones, that the process was not then progressed. Having regard to these matters, and the acknowledgment of the higher level work by WAPOL, the period of the special allowance paid to Ms Jones from 1 July 2013 to 31 December 2013, in my opinion, does not adequately compensate Ms Jones for the clear value to WAPOL that she provided over these years.
- 39 The present claim before me is one brought to the Arbitrator under s 80E(2) of the Act. Sections 80E(1) and (2) of the Act provide as follows:
- 80E. Jurisdiction of Arbitrator**
- (1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.
  - (2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —
    - (a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and
    - (b) a claim in respect of a decision of an employer to downgrade any office that is vacant.
- 40 It is trite to observe that in proceedings before both the Commission and the Arbitrator, the Commission and Arbitrator are not restricted to the specific claim made or to the subject matter of the claim (see s 26(2) of the Act and *Minister Controlling Harbour and Light Department v Maritime Workers Union of WA* (1982) 62 WAIG 820). Furthermore, the Arbitrator’s jurisdiction is to be exercised consistent with equity, good conscience and the substantial merits of the case: s 26(1)(a) Act.
- 41 These observations prompted me to direct my Associate to write to the parties to raise the issue as to whether, s 26(2) read with s 26(1)(c) of the Act, could provide a basis for the Arbitrator to award a sum as compensation for higher duties performed by the appellant prior to 1 July 2013. This is regardless as to whether or not a reclassification was found by the Arbitrator to be warranted. In connection with this, both parties expressed their initial views in writing, from the Union by letter of 17 September 2015 and by WAPOL by letter of 18 September 2015. The matter was relisted for further hearing on 23 October 2015 and in that connection, both parties filed written outlines of submissions in connection with the points raised in my Associate’s letter.
- 42 For the appellant, the Union submitted that on the basis of the evidence led in these proceedings it was open for the Arbitrator to make an order for the payment of a sum of compensation for higher duties performed by the appellant prior to 1 July 2013. The submission was made, referring to s 26(2) when read with s 26(1)(a), that the equity and good conscience of the case would warrant the making of such an order.
- 43 In particular, the appellant submitted that the jurisdiction of the Arbitrator is to be construed very widely, and referred in particular to *Health Services Union of Western Australia (Union of Workers) v Director General of Health* (2008) WAIRC 00215 at par 58 and also *Director-General Department of Justice v Civil Service Association of Western Australia Inc* [2005]

- WASCA 244 at par 29 per Wheeler and Le Miere JJ. The contention was put that given the breadth of the definition of industrial matter, s 80E(2)(a), under which the present claim was brought, does not limit the jurisdiction of the Arbitrator under s 80E.
- 44 Overall Ms Jones contended that equity and good conscience warranted the making of an order in this case. She had been performing higher duties for a considerable period of time and such an order would also be consistent with the objects of the Act in s 6.
- 45 In submitting that the Arbitrator has no jurisdiction to make an order for Ms Jones to be paid an additional sum as compensation, WAPOL put two principal submissions. The first was that any such order would in effect, be in the nature of a Temporary Special Allowance under the terms of the Public Service Award 1992. It would therefore be tantamount to enforcing a provision of the Award, which is in the exclusive jurisdiction of the Industrial Magistrate's Court under s 83(3) of the Act.
- 46 The second jurisdictional objection advanced was that the present application brought by Ms Jones, as an individual officer under s 80F(2) seeking a remedy under s 80E(2)(a), is limited to matters concerning the salary ascribed to her "office". Accordingly, construed in this way, any order for payment of compensation to Ms Jones, would be payment to her personally, as the holder of an office, and not a payment in respect of the office itself. In this respect WAPOL referred to the decision of Fielding SC in *Megan Maree In De Braekt v Chief Executive Officer of the Department of Productivity and Labour Relations* (2000) 80 WAIG 3040.
- 47 The final submission made by WAPOL was that even if the Arbitrator was of the mind to make an order of compensation in favour of Ms Jones, any such order would, necessarily, be retrospective in effect and be ultra vires. In this respect, reference was made to *BHP Billiton Iron Ore Pty Ltd v CFMEU* [2006] WASCA 49 at par 83. It was contended that any reclassification order may also only operate prospectively. If an order in the nature of compensation was made in this matter, the submission was that it would necessarily in effect, backdate a reclassification for Ms Jones from Level 6 to Level 7 for the period of the order.
- 48 Reference was also made by WAPOL to a decision of Scott A/SC in *Flashman and Ors v Attorney General* (2012) WAIRC 00294. In this case the Arbitrator, in an application under ss 80E(2)(a) and 80F(2), ordered the payment of a Temporary Special Allowance to the applicants from the date on which the applications were filed in the Commission. It was contended that in that matter, the Arbitrator, in referring to s 39 of the Act, acknowledged that the allowance could not operate retrospectively and made a recommendation in that regard. The further submission made was that consistent with the contentions put by WAPOL in these proceedings, the order made by the Arbitrator in *Flashman* for the payment of an allowance, was not open to be made and was a matter for the exclusive jurisdiction of the Industrial Magistrate's Court.
- 49 I have carefully considered the submissions made by the parties in respect of the issue raised.
- 50 Insofar as the objection to jurisdiction contending enforcement of the Award is concerned, I am not persuaded by those submissions. Firstly, cl 11(5) of the Award, dealing with Special Allowances, does not, in my view, confer any entitlement on an employee or impose any obligation on an employer covered by the Award. What this provision does is permit an employer to make a special allowance payment in appropriate circumstances, at its discretion. The terms of cl 11(5) simply specify that "the employer shall not be prohibited from granting special allowances...". In my opinion, such a clause would not prohibit, the Arbitrator, in an appropriate case, from making an order that a temporary allowance, or however it may be described, apply. Such an order would not have the effect of enforcing a right or obligation created by the Award. Section 83 of the Act concerns itself with "contraventions or a failure to comply with" a relevant industrial instrument. Necessarily in my view, any such contravention or failure to comply must be in connection with a right, entitlement or obligation imposed by the industrial instrument, to fall within the scope of the enforcement machinery of the Act.
- 51 The second basis of alleged enforcement, set out in the letter from WAPOL related to cl 19(1), dealing with a higher duties allowance. However in my view, from the terms of cl 19(1), that clause can only operate where "an officer who is directed by the employer to act in an office which is classified higher than the officer's own substantive office ...". The necessary factual circumstance for cl 19(1) to operate involves a direction by an employer in the occupation by the employee, of a higher office, for a prescribed period, in return for which an allowance is payable. That is not the circumstance on the facts in this case. Any order made by way of compensation, could not in my view, be tantamount to enforcement of that provision of the Award.
- 52 As to the submission raised concerning s 80F(2) when read with s 80E(2)(a) of the Act, in my opinion, there is greater force to the WAPOL submissions in this regard. I respectfully agree with the observations of Fielding SC in *In de Braekt*, where at 3041, he refers to the limitations to matters that may be referred to the Arbitrator by individual officers, under s 80F(2) of the Act. In the matter then before him, Fielding SC concluded that a claim for a payment to be payable to the holder of an office, rather than a loading or payment attaching to the office itself, is not a matter authorised by s 80E(2). Fielding SC was however, at pains to emphasise, that in his opinion, that limitation only extended to applications by an individual officer under s 80F(2). The question of the application of s 26(2) of the Act did not arise in that case for consideration.
- 53 However, in *The Civil Service Association of Western Australia Incorporated v Commissioner, Public Service Commission* (1992) 72 WAIG 2595, the scope and application of s 26(2) of the Act was considered by the Arbitrator, on an application under s 80E by the Association. The claim made in those proceedings by the Association, was for an order that the respondent reinstate an undercover car park for the duration of an employee's employment and to compensate him for out of pocket expenses. Alternatively, an order of compensation in the total sum of \$61,321 was sought. An issue arose in that case as to the application of s 26(2) to the claim made, which was expressed as a "contractual entitlement" and purportedly brought under s 29(b)(ii) of the Act. Despite this, Fielding C was prepared to characterise the essence of the applicant's claim as one brought by the Association under s 80E of the Act, as being an industrial matter and referred by it under s 80F(1) of the Act. The Commission, having regard to the fact that it should deal with the matter without regard to technicalities or legal forms, was prepared to so characterise the claim.

54 As to s 26(2) of the Act, and its application to the matter before him, Fielding C said at 2598:

Though the claim is expressed to rest on a contractual entitlement, the Commission, by virtue of s.26(2) of the Act, is not restricted to that claim. Section 26(2) is, by force of s.80G(1) of the Act, part of the armoury of the Public Service Arbitrator. Clearly, the authority given to the Commission by that provision cannot be utilised to enable the Commission to vary or add to a contract of employment so as to establish a benefit thereunder which does not otherwise exist (see *Bartlett v. Indian Pacific Limited* (supra) and *Perth Finishing College Ply Ltd v. Watts* (supra)). The provisions of section 26(2) can, however, be utilised to enable the Commission, on an application instituted by the Association, to confer a benefit or privilege which fits the description of an industrial matter on a government officer independently of the contract of employment, if the Commission considers it just and equitable to do so. Of course any such benefit or privilege awarded by the Commission in this way must be consistent with the provisions of the Public Service Act 1978 (see: section 80C(2) of the Act). The position is different in the case of an application brought by an individual under sections 29(b) or section 80F(2) of the Act because the Commission has authority to enquire into and deal with only the industrial matters specified in those sections of the Act. Section 26(2) of the Act could not sensibly be read as empowering the Commission, however constituted, to consider an industrial matter other than of the kind specified in sections 29(b) and 80F(2) of the Act. In the case of proceedings instituted by an organisation or by an employer, as is the case with these proceedings the range of industrial matters which may be brought before the Commission is not limited as it is for applications by individual persons. Thus, it seems to me the Commission is entitled on this occasion to consider whether, having regard to the "equity, good conscience and the substantial merits of the matter" the parking privileges previously enjoyed by Mr Bluhe should be reinstated notwithstanding there was no contractual right to those privileges.

55 Having considered the matter, I agree with the views expressed by Fielding C set out above. That is, given that the specific nature of the matters which an individual officer under s 80F(2) of the Act may refer to the Arbitrator, are limited in the manner expressed, then s 26(2) cannot be availed of. A payment of an allowance for example, would not be a matter specifically within the scope of ss 80F(2) and 80E(2)(a), and s 26(2) could not be the basis for such an order to be made. The position however, is different in relation to claims brought by the Association, for the reasons identified, given the breadth of ss 80E(1) and 80F(1) of the Act.

56 My agreement with Fielding C's conclusions above necessarily entails my disagreement with the approach taken by Scott A/SC in *Flashman*, not because of any issue of purported enforcement, but rather because the limited scope of the Commission's jurisdiction in matters under ss 80E(2)(a) and 80F(2) of the Act.

57 As to the final submission by WAPOL that any such order of compensation would have retrospective effect, whilst it is not necessary for me to finally deal with the issue, in view of the conclusion that I have just reached, I am not persuaded to the view expressed in that submission. Simply because an order in the nature of compensation may relate to performance of work prior to the operative date of the order, does not, by that reason alone, mean that the order is retrospective. There are many occasions on which the Commission may make an order for payment of a sum of money in respect of circumstances in existence prior to the date the order was made. However, as was conceded by WAPOL in the course of the hearing, the reliance by Scott ASC in *Flashman* on s 39 of the Act in relation to the issue of retrospectivity was, with respect, erroneous, as neither those nor these proceedings involve a decision in the form of an award, as defined in s 3 of the Act.

58 Therefore despite what I regard as a clear inequity arising in this matter, I am not persuaded that the Arbitrator has jurisdiction and power to make an order for compensation in respect of a sum of money to be paid to Ms Jones prior to 1 July 2013. However, as a matter of equity and good conscience, I strongly recommend that WAPOL consider making a further payment to Ms Jones in recognition of the higher level work she performed for some years. It is plainly the case that the employer had the benefit of her skills and experience over an extended period of time. This work has only been recognised in the period from 1 July 2013 to 31 December 2013, a period of six months or so. On the evidence, it would appear well open to conclude that Ms Jones, certainly by about August 2010, formally instigated the process for a review of her classification. It seems to me, that all other things being equal, that could be a date from which some further recognition of Ms Jones' contribution could be made.

#### Conclusion

59 Accordingly, whilst I will make an order that the substantive appeal be dismissed, I will also recommend that WAPOL make a further payment to Ms Jones in the circumstances as outlined above.

2015 WAIRC 00982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
CHERYL BELINDA JONES

**PARTIES**

**APPLICANT**

-v-

WESTERN AUSTRALIAN POLICE

**RESPONDENT**

**CORAM**

PUBLIC SERVICE ARBITRATOR  
COMMISSIONER S J KENNER

**DATE**

TUESDAY, 3 NOVEMBER 2015

**FILE NO**

PSA 1 OF 2015

**CITATION NO.**

2015 WAIRC 00982

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<b>Result</b>	Recommendation and Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr K Rukunga of counsel and with him Ms K Hagan of counsel
<b>Respondent</b>	Ms J Brennan and with her Mr A Chapple and later Ms Rhodes of counsel

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*Recommendation and Order*

HAVING heard Mr K Rukunga of counsel and with him Ms K Hagan of counsel on behalf of the appellant and Ms J Brennan and with her Mr A Chapple and later Ms Rhodes of counsel on behalf of the respondent the Arbitrator, pursuant to the powers conferred on him under the Industrial Relations Act, 1979 hereby –

- (1) RECOMMENDS that the respondent pay to Ms Jones a further amount equal to the Temporary Special Allowance amount paid to her from 1 July 2013 to 31 December 2013 from August 2010 to 30 June 2013.
- (2) ORDERS that otherwise the appeal be and is hereby dismissed.

[L.S.]

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

**2015 WAIRC 01009**

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<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BRUCE MIGHALL	<b>APPLICANT</b>
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 AS THE WA COUNTRY HEALTH SERVICE	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	WEDNESDAY, 11 NOVEMBER 2015	
<b>FILE NO</b>	PSA 21 OF 2014	
<b>CITATION NO.</b>	2015 WAIRC 01009	

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<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	Ms P Marcano as agent
<b>Respondent</b>	Mr J Sheppard and with him Mr J Ross

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*Order*

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS by email on 10 November 2015 the applicant advised that he wished to withdraw his application;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

2015 WAIRC 00973

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2015 WAIRC 00973  
**CORAM** : PUBLIC SERVICE ARBITRATOR  
 ACTING SENIOR COMMISSIONER P E SCOTT  
**HEARD** : MONDAY, 26 OCTOBER 2015  
**DELIVERED** : THURSDAY, 29 OCTOBER 2015  
**FILE NO.** : PSA 100 OF 2013  
**BETWEEN** : JOHN SHEHADE  
 Applicant  
 AND  
 DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR  
 HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND  
 HEALTH SERVICES ACT 1927 AS THE EMPLOYER  
 Respondent

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**CatchWords** : Reclassification appeal – Increased work value – Administrative and managerial responsibilities – Health professionals specified callings – Health Professionals Classification Descriptors – BiPERS assessment – Statement of Principles  
**Legislation** : *Industrial Relations Act 1979* s 80E(2)(a)  
*Therapeutic Goods Act 1989*  
**Result** : Application dismissed  
**Representation:**  
**Applicant** : Ms K Heal as agent  
**Respondent** : Mr J Sheppard and with him Mr J Ross

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*Reasons for Decision*

- 1 The applicant seeks the reclassification of the position of Manager, Orthotic and Prosthetic Services as that position stood at Royal Perth Hospital in August 2013, from Level P3 to P4.
- 2 The application is made under s 80E(2)(a) of the *Industrial Relations Act 1979* and is based on a claim of increased work value. The applicant also says the Health Professionals Classification Descriptors justify the level being P4, and the BiPERS assessment results in a score within the range of Level P4.
- 3 The applicant relies on changes said to have arisen in that position to a range of administrative and managerial responsibilities, including participation in departmental and hospital-wide planning processes; legislative and policy changes including compliance with the *Therapeutic Goods Act 1989* and the resultant international accreditation of the Department; developments in fitting, modifying and manufacturing equipment, and a range of other matters.

**The Work Value test**

- 4 The Statement of Principles arising in the State Wage Case ([2015] WAIRC 00444 Schedule 2 [7]; (2015) 95 WAIG 691) sets out the test to be applied for a reclassification grounded on an increase in work value as being:

...

7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage “leapfrogging” arising out of changes in relative position.

7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.

7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

...

- 7.10 The expression “the conditions under which the work is performed” relates to the environment in which the work is done.
- 7.11 The Commission should guard against contrived classifications and over-classification of jobs.
- ...
- 5 The test has also applied over many years, even prior to its inclusion as a Principle (see *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] WAIRC 00253; (2008) 88 WAIG 475, [7] – [15]).
- 6 Therefore, for this position to warrant reclassification on the basis of increased work value, the applicant needs to demonstrate that since the position was last reviewed, the work, skill or responsibility of the position, or the conditions under which the work is performed, have changed, and that such change constitutes a significant net addition to work value such as to warrant upgrading to a higher classification. Change of itself is not sufficient, it must bring a higher level of work, skill or responsibility, or changes to the work environment which make the work of a higher level. It is a strict test.
- 7 This position falls within the health professionals specified callings. In *Re Medical Officers – Hospital Specialists (State Award)* (1990) 33 IR 79 at 84, Fisher P noted:
- One of the problems with the application of the ‘strict test’ to professional or managerial employment lies in the nature of the change. Change must be accommodated, being an essential part of what professional practice is all about. It does not follow therefore without more, that changes, even spectacular changes, necessarily fall within the work value principle.
- Secondly, it is to be understood that new techniques and procedures bring with them their own advantages. For every new technological advance there is likely to be somewhere an inferior technology in part or in whole abandoned. Superior technologies give superior results and tend to free practitioners from laborious, uncertain and stressful practice. Changes, such as habituation, do not necessarily make things more difficult or more demanding. They may, but equally they may remove problems, decrease anxieties and uncertainties and as well be more rewarding and more productive.
- 8 I considered a claim of increased work value for health professionals in 2006 in application P 18 of 2003 (*Hospital Salaried Officers Association of Western Australia (Union of Workers) v Hon Minister for Health and Others* [2006] WAIRC 03473; (2006) 86 WAIG 279). As part of that claim, an introductory paper covering the whole of the public health sector as it affected the various groups of health professionals was prepared by the Health Services Union. In addition, individual papers set out the work value changes which were claimed to justify reclassification on the basis of the increased work value for the various health professions.
- 9 Many of the changes claimed in relation to this position have already been accounted for in the health professionals’ case, P 18 of 2003, and therefore cannot be included in the grounds justifying reclassification for this case. Such matters as a state wide orthotic and prosthetic service being provided at Royal Perth Hospital; the supervision and training of new graduate orthotists and prosthetists as well as Australian and international prosthetics and orthotics students; telehealth facilities; a greater understanding and involvement in the surgical stages of patient care; technological changes; specialisations and their advancement and development; benchmarking, best practice and continuous improvement practices; multidisciplinary and clinical teams; the introduction of the *Therapeutic Goods Act* and the changes brought by it, were all included in the work value submission on behalf of the professions of orthotics and prosthetics dated May 2005 in P 18 of 2003. That application dealt with changes which had occurred in the health professions from 1989 until that time. There is little within the grounds of this application that has not already been encompassed by either the introductory paper or the particular submission on behalf of the professions of orthotics and prosthetics.
- 10 Mr Shehade and Mr Carter both gave evidence of certain requirements under the *Therapeutic Goods Act* being deferred, that the actual performance of any higher level work was not implemented until some time after that work was recognised in the Health Professionals Work Value Case. This does not alter the fact that it has been counted. The position received the benefit of the increased work value before the work had to be performed.
- 11 As to the change in personnel supervised either directly or indirectly, there is a marginal increase, however, not sufficient to indicate a significant net addition to work value.
- 12 I also note the references to the applicant’s particular professional qualities and his work performance. Those things are laudable, and Mr Shehade has the right to feel that his efforts are recognised. However, the basis for consideration of a reclassification appeal is the requirements of the position rather than the individual’s qualities and qualifications.
- 13 In the circumstances, the application will be dismissed as there is no demonstration of a significant net addition to work requirements which has not already been recognised and rewarded.
- 14 In the circumstances of a claim of increased work value not being sustained, the reliance on the Classification Descriptors and the BiPERS assessment fall away. That is because they are each an aid to classification determination but of themselves do not assist if there is no significant increase in work value. The same applies to comparative positions. In a claim of increased work value, each of those things comes into play to verify the level of classification only after increased work value has been established.
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2015 WAIRC 00974

**PARTIES**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
JOHN SHEHADE**APPLICANT**

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN  
HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES  
ACT 1927 AS THE EMPLOYER**RESPONDENT****CORAM**PUBLIC SERVICE ARBITRATOR  
ACTING SENIOR COMMISSIONER P E SCOTT**DATE**

THURSDAY, 29 OCTOBER 2015

**FILE NO**

PSA 100 OF 2013

**CITATION NO.**

2015 WAIRC 00974

**Result**

Application dismissed

*Order*HAVING heard Ms K Heal on behalf of the applicant and Mr J Sheppard and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the application be, and is hereby dismissed.

[L.S.]

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