



# Western Australian Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 2

WEDNESDAY 24 FEBRUARY, 2016

Vol. 96—Part 1

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

96 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

## FULL BENCH—Appeals against decision of Commission—

2016 WAIRC 00073

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTERS U 59 OF 2015 AND B 59 OF 2015 GIVEN ON 10 AUGUST 2015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

<b>CITATION</b>	:	2016 WAIRC 00073
<b>CORAM</b>	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
<b>HEARD</b>	:	TUESDAY, 22 DECEMBER 2015
<b>DELIVERED</b>	:	WEDNESDAY, 10 FEBRUARY 2016
<b>FILE NO.</b>	:	FBA 10 OF 2015
<b>BETWEEN</b>	:	ANDRIES LUCAS HOFFMAN  Appellant  AND  PALADIN ENERGY LTD  Respondent

### ON APPEAL FROM:

<b>Jurisdiction</b>	:	<b>Western Australian Industrial Relations Commission</b>
<b>Coram</b>	:	<b>Acting Senior Commissioner P E Scott</b>
<b>Citation</b>	:	<b>[2015] WAIRC 00783; (2015) 95 WAIG 1439</b>
<b>File Nos.</b>	:	<b>U 59 of 2015; B 59 of 2015</b>

Catchwords	:	Industrial Law (WA) - Appeal against decision of Commission - Claim of contractual benefits - Appellant's salary exceeded prescribed amount in s 29AA(4) of the <i>Industrial Relations Act 1979</i> (WA) - Commission prohibited from determining appellant's claim - Appeal dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 3, s 7(1), s 12(1), s 23, s 23(1), s 29(1)(b)(ii), s 29AA, s 29AA(4), s 29AA(5), s 49, pt VID <i>Commonwealth Constitution</i> s 51(xx) <i>Fair Work Act 2009</i> (Cth) s 14 <i>Workplace Relations Act 1996</i> (Cth)
Result	:	Appeal dismissed

**Representation:**

Appellant : Mr A L Hoffman in person  
 Respondent : Mr T J S French (of counsel) and with him Mr J X Cockerell (of counsel)  
 Solicitors:  
 Respondent : Clyde & Co

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

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243; (2008) 37 WAR 450; (2008) 252 ALR 136; (2008) 228 FLR 318  
 Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (1992) 72 WAIG 1499  
 Hot Holdings Pty Ltd v Creasy [1996] HCA 44; (1996) 185 CLR 149  
 Matthews v Cool or Cosy Pty Ltd [2004] WASCA 114; (2004) 136 IR 156; (2004) 84 WAIG 2152  
 Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307  
 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355  
 Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd [2006] WAIRC 05220; (2006) 86 WAIG 2725  
 Re Bland Bros and the Council of the Borough of Inglewood (No 2) [1920] VLR 522  
 Re Harrison; Ex parte Sealanes (1985) Pty Ltd [2005] WASC 158  
 Robe River Iron Associates v Federated Engine Drivers' and Firemens' Union of Workers of Western Australia (1986) 67 WAIG 315  
 Saldanha v Fujitsu Australia Pty Ltd [2008] WAIRC 01732; (2008) 89 WAIG 76  
 Stothers v Toll Energy Logistics Pty Ltd [2013] WAIRC 00725; (2013) 93 WAIG 1320  
 Triantopoulos v Shell Company of Australia Ltd [2011] WAIRC 00004; (2011) 91 WAIG 67

**Case(s) also cited:**

Balfour v Travelstrength Ltd (1980) 60 WAIG 1015  
 Barlett v ANZ Banking Group Ltd [2014] NSWSC 1662  
 Coleman v Shell Co of Australia Ltd (1943) 45 SR (NSW) 27  
 Harris v Brandrill Ltd (2000) 80 WAIG 2456  
 Maloney v Hoffman [1980] AR (NSW) 318  
 Maxwell v Murphy (1957) 96 CLR 261  
 Parker v Tranfield [2001] WASCA 233  
 Perrott v XcelleNet Australia Ltd (1998) 84 IR 255  
 Rogers v J-Corp Pty Ltd [2015] WAIRC 00862  
 Romero v Farstad Shipping (IP) Pty Ltd [2014] FCAFC 177  
 Stylianou v Country Realty Pty Ltd [2010] WAIRC 01074; (2010) 91 WAIG 2029  
 Tranfield v Parker [2001] WAIRC 02456

*Reasons for Decision***THE FULL BENCH:****The Appeal**

- 1 This appeal is instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision made by the Commission on 10 August 2015 dismissing U 59 of 2015 and B 59 of 2015: [2015] WAIRC 00783; (2015) 95 WAIG 1439. This appeal is only against the decision insofar as it relates to the decision to dismiss B 59 of 2015.
- 2 Application B 59 of 2015 is a claim for contractual benefits referred to the Commission as an industrial matter by an employee, Andries Lucas Hoffman, under s 29(1)(b)(ii) of the Act. Mr Hoffman claims that he is owed by Paladin Energy Ltd (the Corporation) remuneration, pursuant to his contract of employment, from the date his employment was terminated on 27 February 2015 until expiration of his fixed term contract of employment which was, but for the termination, to expire on 1 January 2016.

**Background**

- 3 Mr Hoffman at all material times resides in South Africa. At the time of the termination of his employment he was employed as an engineering manager at the Corporation's Kayelekera mine in Malawi. He was initially employed as the maintenance manager at the mine. He was subsequently promoted to the position of engineering manager.

- 4 The Corporation has its administrative headquarters in Western Australia. It is engaged in the mining and sale of uranium. It has a number of tenements in Australia, including Western Australia, but has no active mining operations in Australia. It is, however, engaged in mining in a number of countries internationally.
- 5 When Mr Hoffman was employed by the Corporation it communicated with Mr Hoffman from Western Australia and signed the initial contract of employment in Western Australia. Mr Hoffman, however, signed all the contracts of employment in Africa and all of the work he performed was exclusively in Malawi. At the time of the termination of Mr Hoffman's employment his salary was \$195,000 per annum.
- 6 Following service of U 59 of 2015 and B 59 of 2015 on the Corporation, the Corporation challenged the Commission's jurisdiction to deal with Mr Hoffman's claims.
- 7 The first issue raised by the Corporation related to both claims. It argued that Mr Hoffman's employment did not have a real and sufficient connection with the State of Western Australia. The second issue related solely to the claim for unfair dismissal in U 59 of 2015. This was whether the Corporation is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and thereby a national system employer for the purposes of s 14 of the *Fair Work Act 2009* (Cth). The third issue raised by the Corporation went to both applications. The Corporation contended that Mr Hoffman's employment was not subject to an industrial instrument, within the meaning of s 29AA of the Act; and his salary exceeded the amount prescribed for the purposes of s 29AA, which precluded him from referring a claim of unfair dismissal or contractual benefits in the Commission.
- 8 The three issues challenging the jurisdiction of the Commission to enquire into and deal with Mr Hoffman's claims were heard and determined by the Commission. On 10 August 2015, the learned Acting Senior Commissioner delivered reasons for decision and made the following findings:

**Is there a sufficient connection with the state?**

- 9 The learned Acting Senior Commissioner referred to s 3 of the Act which sets out the circumstances under which the Act applies to and in relation to an industry carried on partly within the state and partly within an area to which an industry applies or partly in an area to which the Act applies.
- 10 She then found that the evidence before her was insufficient to determine with any certainty the Corporation's status for the purposes of deciding whether there was a real and sufficient connection with the state. However, it was not necessary for her to reach a conclusion regarding this issue due to her findings in respect of the application of the limits on the Commission's jurisdiction in s 29AA of the Act.

**Is the respondent a trading corporation?**

- 11 The learned Acting Senior Commissioner referred to the decision of *Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] WASCA 254; (2008) 89 WAIG 243; (2008) 37 WAR 450; (2008) 252 ALR 136; (2008) 228 FLR 318 in which Steytler P set out the principles for determining whether or not a corporation is a trading corporation and pointed out that the Commission does not have jurisdiction to deal with claims of unfair dismissal in respect of an employee of a constitutional corporation.
- 12 She found that the Corporation is a trading corporation as there was no contention that it is a public company, limited by shares and its predominant, if not sole, activity is mining and selling uranium. She also found that it gives all the appearance of undertaking activity with a view to earning revenue and making a profit. In these circumstances, the learned Acting Senior Commissioner found that the Commission did not have jurisdiction to deal with the claim of unfair dismissal by Mr Hoffman.
- 13 The learned Acting Senior Commissioner then went on to deal with Mr Hoffman's claim for contractual benefits in B 59 of 2015.

**Section 29AA - Certain Claims Not To Be Determined**

- 14 At the time of the termination of Mr Hoffman's employment the prescribed amount was \$149,400: [2014] WAIRC 00615; (2014) 94 WAIG 775. As it was agreed between the parties that at the time of termination Mr Hoffman's salary was \$195,000 per annum, Mr Hoffman's salary clearly exceeded the prescribed amount.
- 15 Pursuant to s 29AA, the Commission cannot determine claims of contractual benefits where an employee's contract of employment provides for a salary which exceeds the prescribed amount except where an industrial instrument applies to the employment of the employee.
- 16 The learned Acting Senior Commissioner observed that it is established that the Commission has jurisdiction to deal with a claim of denied contractual benefits by an employee of a constitutional corporation: *Triantopoulos v Shell Company of Australia Ltd* [2011] WAIRC 00004; (2011) 91 WAIG 67.
- 17 Mr Hoffman put forward an argument at first instance that an industrial instrument applied to his employment at the material time. He argued that the general order on termination, change and redundancy made by the Commission on 1 June 2005 ((2005) 85 WAIG 1681, the General Order) was an industrial instrument which applied to his employment. In support of his argument he relied upon the decision of the Full Bench in *Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* [2006] WAIRC 05220; (2006) 86 WAIG 2725.
- 18 This argument was rejected by the learned Acting Senior Commissioner. She found that where the employer is a constitutional corporation, the General Order no longer applies to that employment. This is because the General Order became a Notional Agreement Preserving State Award (NAPSA) under the *Workplace Relations Act 1996* (Cth) and continued to apply until it was cancelled as a NAPSA by Senior Deputy President Harrison of Fair Work Australia on 29 July 2011: PR 512464. As the General Order was cancelled as a NAPSA, for the purposes of the federal jurisdiction, she found it no longer had application to

the employment of an employee of a constitutional corporation: *Stothers v Toll Energy Logistics Pty Ltd* [2013] WAIRC 00725; (2013) 93 WAIG 1320.

- 19 Mr Hoffman also put forward an argument that his contract of employment was regulated by an industrial instrument as an industrial instrument is defined under s 29AA(5) of the Act to also include an employer-employee agreement. The learned Acting Senior Commissioner also rejected this argument. She found that an examination of the contract between the parties indicated that it is a common law contract of employment, not an employer-employee agreement. She also found that the common law contract was not registered under pt VID of the Act and that, in any event, even if it was an employer-employee agreement it would not be enforceable under s 29(1)(b)(ii).
- 20 In these circumstances, she found that an industrial instrument does not apply to Mr Hoffman's employment.
- 21 For these reasons, the learned Acting Senior Commissioner found that there was no jurisdiction to determine the contractual benefits claim in B 59 of 2015 and that the application should be dismissed.

### Grounds of Appeal

22 Mr Hoffman's grounds of appeal are as follows:

1. The Learned Commissioner has found that the Respondent is a Trading Corporation and that the Commission does not have jurisdiction to deal with the claim. The Commission erred in fact and law to note *Section 51 (xx) of the Australian Constitution which defines a constitutional corporation among others as a trading and financial corporation formed within the limits of the Commonwealth.*
2. The Learned Commissioner examined the contract of employment and found that it is a common law contract of employment. The Commission erred in fact and law to consider the expressed terms and conditions of a common law employment contract.
3. The Learned Commissioner has found accordance [sic] with a decision in *Triantopoulos v Shell Company of Australia Ltd [2011] WAIRC 00004; (2011) 91 WAIG 67*, that the Commission has jurisdiction to deal with a claim of denied contractual benefits by an employee of a constitutional corporation. The Learned Commissioner then erred in fact and law to apply the jurisdictional powers conferred upon the Commission to deal with the matter.
4. The Learned Commissioner has erred in fact in respect that some information was based on contradictory evidence presented by the Respondent (Medical Examination/Exit and contract was not a fix [sic] term employment contract).
5. The Learned Commissioner determined that the employment arrangement was to work exclusively in Malawi, the Commission erred in fact and law that the contract with its expressed terms specifically indicates in Clause 3 that '*you may be required to work at such other location of the Company's activities as the Company may determine from time to time on notification to you*'.

### The appellant's submissions

- 23 At the hearing of the appeal, Mr Hoffman conceded that the Corporation is a trading corporation. Consequently, he agrees the Commission does not have jurisdiction to deal with his claim of unfair dismissal by an employee of the Corporation. For this reason, he does not seek to appeal the decision to dismiss insofar as it relates to U 59 of 2015. However, he says in accordance with the decision in *Triantopoulos* the Commission has jurisdiction to deal with his claim of denied contractual benefits.
- 24 It is clear from Mr Hoffman's submissions that he does not dispute the finding that at the time of termination of his employment his salary exceeded the prescribed amount. Nor does he challenge the findings made by the learned Acting Senior Commissioner that an industrial instrument did not apply to his employment. Consequently, in this appeal he does not contend that it should have been found that his contract was either an employer-employee agreement or that the terms of the General Order applied to his employment.
- 25 Mr Hoffman's argument in essence is that the limitations on the Commission's jurisdiction to determine certain claims brought before it pursuant to s 29AA of the Act do not apply to a claim of denied contractual benefits by an employee of a constitutional corporation.
- 26 In support of his argument he puts the following points:
- (a) The terms of his contract expressly referred to and applied to the laws of Western Australia.
  - (b) Pursuant to s 23(1) of the Act the Commission 'subject to this Act' has cognizance of and authority to enquire into and deal with any industrial matter. The words 'subject to this Act' were interpreted by the Full Bench in *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307 to mean that the extent of the authority of the Commission is governed by the whole of the Act.
  - (c) The Commission's jurisdiction is to deal with the industrial matter which includes the power, to compel by order the performance of a benefit under a contract of employment, or where the contract does not continue make a monetary order in the nature of damages: *Matthews v Cool or Cosy Pty Ltd* [2004] WASCA 114; (2004) 136 IR 156; (2004) 84 WAIG 2152 [73] (Heenan J).
  - (d) The Commission has power by the combined effects of s 23(1) and s 29(1)(b)(ii) to enforce the payment of entitlements: *Cool or Cosy* [64] (Heenan J).
  - (e) It is an agreed fact that he and the Corporation signed a formal valid contract of employment dated 22 December 2014. As the learned Acting Senior Commissioner found, on examination of the contract that there was a

common law contract of employment not an employer-employee agreement, she should have applied common law principles to his claim.

- (f) A contractual benefit exists independent of the provisions of the Act: *Cool or Cosy* [60] (Heenan J).
  - (g) A contractual benefit is an enforcement of legal rights involving the exercise of judicial power: *Saldanha v Fujitsu Australia Pty Ltd* [2008] WAIRC 01732; (2008) 89 WAIG 76 [122] (Ritter AP).
  - (h) A claim under s 29(1)(b)(ii) is to be determined upon common law principles, the process being the same as that for enforcement in courts of appropriate jurisdiction: *Saldanha* [73] (Ritter AP). Therefore, the Commission must decide what the terms of the contract were and whether or not they have been complied with.
- 27 Mr Hoffman says that when these principles are applied, the combined effects of s 23(1) and s 29(1)(b)(ii) is that these provisions override the restrictions in s 29AA of the Act. This, he says, arises because the Commission is empowered to make a monetary order in the nature of damages to deal with an industrial matter for a breach of an employment contract. That is, it has the jurisdiction to give effect to common law entitlements on an application by an employee under s 29(1)(b)(ii) of the Act and that those entitlements arise from the common law independently from the provisions of the Act.
- 28 Mr Hoffman in his written submissions and other materials provided to the Full Bench referred to a number of provisions of Commonwealth and state legislation which deals with the incorporation of the companies in Australia and legislation that deals with mines, safety and inspection and provisions of the *Fair Work Act*. However, this legislation does not confer any jurisdiction on this Commission. Consequently, those legislative provisions are not relevant to the outcome of this appeal.
- 29 Mr Hoffman in his written submissions also set out his argument as to why he says his employment was for a fixed term and the basis of his claim for contractual benefits. However, those submissions go to the merits of his claim and have not been set out in these reasons for decision as those submissions do not deal with the subject matter of this appeal, that is, whether the Commission has jurisdiction to enquire into and deal with Mr Hoffman's claims.

### Conclusion

#### (a) Relevant provisions of the Industrial Relations Act 1979 (WA)

- 30 By s 23(1) of the Act, the Commission is conferred with the power to hear and determine particular matters. This provision provides:
- Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.
- 31 An 'industrial matter' is defined in s 7(1) of the Act to include, among other matters, any matter affecting or relating or pertaining to the wages, salaries, allowances, or other remuneration of employees and conditions of employment.
- 32 Section 29(1)(b)(ii) of the Act provides standing to an employee to refer a claim of contractual benefits to the Commission. It states that an industrial matter may be referred to the Commission by an employee if the employee has not been allowed a benefit to which he is entitled under his contract of employment. Thus, this provision implicitly recognises that a claim of a denied contractual benefit is an 'industrial matter': *Cool or Cosy* [14] (Steytler J); *Saldanha* [88] (Ritter AP).
- 33 Once a claim has been referred under s 29(1)(b)(ii) the jurisdiction to grant remedies is found in s 23 of the Act: *Cool or Cosy* [14] and [49] (Steytler J).
- 34 Section 29AA(4) and s 29AA(5) relevantly provide:
- (4) The Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if —
    - (a) an industrial instrument does not apply to the employment of the employee; and
    - (b) the employee's contract of employment provides for a salary exceeding the prescribed amount.
  - (5) In this section —
 

*industrial instrument* means —

    - (a) an award; or
    - (b) an order of the Commission under this Act that is not an order prescribed by regulations made by the Governor for the purposes of this section; or
    - (c) an industrial agreement; or
    - (d) an employer-employee agreement;

*prescribed amount* means —

    - (a) \$90 000 per annum; or
    - (b) the salary specified, or worked out in a manner specified, in regulations made by the Governor for the purposes of this section.

#### (b) Principles of interpretation of statutes

- 35 It is a modern rule of statutory interpretation that an Act of Parliament is to be read as a whole. The object of the statutory construction is to construe the meaning of words used in a section in the context of the language in the legislation as a whole, to try to discern the intention of the legislature: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby and Hayne JJ). Thus, the expression 'subject to this Act' does not have a lot of work to do: *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149, 176 (Dawson and Toohey JJ). If,

however, there is conflict between provisions in an Act, the expression shows what provision is to yield: *Re Bland Bros and the Council of the Borough of Inglewood (No 2)* [1920] VLR 522, 533.

- 36 Context must be considered first. Words of limitation in a provision cannot be ignored. In *Project Blue Sky* McHugh, Gummow, Kirby and Hayne JJ said [71]:

[A] court construing a statutory provision must strive to give meaning to every word of the provision (*The Commonwealth v Baume* (1905) 2 CLR 405 at 414, per Griffith CJ; at 419, per O'Connor J; *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 12-13, per Mason CJ). In *The Commonwealth v Baume* ((1905) 2 CLR 405 at 414) Griffith CJ cited *R v Berchet* ((1688) 1 Show KB 106 [89 ER 480]) to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'.

(c) **Jurisdiction of the Commission to hear and determine claims of contractual benefits referred by an employee**

- 37 The Commission is a court of record and has a judicial seal: s 12(1) of the Act. It, however, is an inferior court of record. It has no inherent jurisdiction: *Robe River Iron Associates v Federated Engine Drivers' and Firemens' Union of Workers of Western Australia* (1986) 67 WAIG 315; *Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1992) 72 WAIG 1499. Of particular relevance in this matter, it has no jurisdiction conferred by the common law other than that conferred by the provisions of the Act. Only superior courts of record are conferred with unlimited jurisdiction: see the discussion in *Re Harrison; Ex parte Sealanes (1985) Pty Ltd* [2005] WASC 158 [13] (Owen-Conway QC).
- 38 As the Commission is not a superior court of record with unlimited jurisdiction, its jurisdiction is limited to that expressly provided for in the Act. In particular, it does not have unlimited jurisdiction to deal with and determine claims for damages arising out of a breach of contract. Whilst its jurisdiction allows the Commission to provide common law remedies for breach of contract, its jurisdiction to do so is confined by the express provisions of the Act.
- 39 The jurisdiction to enquire into and deal with an industrial matter is conferred by s 23(1) to hear and determine a claim. As discussed above, s 29(1)(b)(ii) simply provides standing to an employee to bring a claim: *Cool or Cosy* [14] (Steytler J). It does not confer jurisdiction.
- 40 Thus, pursuant to the jurisdiction conferred by s 23(1) of the Act, the Commission is empowered to hear and determine a claim of contractual benefits that arises from an employment contract by application of the principles of common law that apply to the construction and the application of damages to common law contracts. Acting under the power conferred by s 23(1) and s 29(1)(b)(ii) of the Act, the Commission may only hear and determine an industrial matter referred by an employee that is a claim of a benefit the employee claims to be entitled under his or her contract of employment. This does not mean that the Commission can enquire into and deal with all industrial matters that are claims for a contractual benefit. A limit is placed upon the class of employees who can refer such claims.
- 41 Section 23(1) of the Act cannot be read in isolation, or only together with s 29(1)(b)(ii). Both of these provisions must be read with the restrictions set out in s 29AA(4) and s 29AA(5) of the Act. This approach applies the principle that the Act is to be read as a whole. Section 29AA(4) and s 29AA(5) are very specific provisions that unambiguously operate to prohibit the Commission from determining a claim where the contract of employment of the employee who seeks to refer the claim pursuant to s 29(1)(b)(ii) of the Act provides for a salary that exceeds the prescribed amount and an 'industrial instrument' within the meaning of s 29AA(5) of the Act does not apply to the employment of the employee in question.
- 42 The limitations set out in s 29AA(4) and s 29AA(5) apply to s 23(1) and s 29(1)(b)(ii). The general provision conferring jurisdiction in s 23(1) and providing standing to refer a claim in s 29(1)(b)(ii) must be construed to give way to the specific limit on the jurisdiction of the Commission. In other words, the limitations provided for in s 29AA(4) and s 29AA(5) prevail to read down the general jurisdiction to enquire into and deal with an industrial matter conferred in s 23(1) of the Act when the matter referred is a claim that an employee has not been allowed a benefit to which he or she is entitled to under the contract of employment.
- 43 Thus, s 29AA(4) clearly provides a limitation on claims referred pursuant to s 29(1)(b)(ii) of the Act that can be determined by the Commission.
- 44 Because Mr Hoffman's contract of employment provided for a salary in excess of the prescribed amount and an industrial instrument did not apply to his employment, the pre-conditions in s 29AA(4) bar the Commission from enquiring into and dealing with Mr Hoffman's claim.
- 45 Thus, the learned Acting Senior Commissioner properly found that the Commission was prohibited from determining Mr Hoffman's contractual benefits claim.
- 46 For these reasons, we are not persuaded that grounds 1, 2 and 3 of the grounds of appeal have been made out. We are also not persuaded that grounds 4 or 5 have any merit. Ground 4 does not relate to, or deal with, any finding made by the learned Acting Senior Commissioner. As to ground 5, as the Corporation in its written submissions points out, the learned Acting Senior Commissioner did not find that Mr Hoffman's work arrangement was to work exclusively in Malawi. She found that he undertook work involved exclusively in Malawi. In any event, the question whether the Commission is prohibited from dealing with Mr Hoffman's claim does not turn upon this finding of fact.
- 47 For these reasons, we are of the opinion that the appeal should be dismissed.

2016 WAIRC 00074

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
ANDRIES LUCAS HOFFMAN  
**APPELLANT**

**-and-**  
PALADIN ENERGY LTD  
**RESPONDENT**

**CORAM** FULL BENCH  
THE HONOURABLE J H SMITH, ACTING PRESIDENT  
CHIEF COMMISSIONER A R BEECH  
COMMISSIONER S J KENNER

**DATE** WEDNESDAY, 10 FEBRUARY 2016

**FILE NO.** FBA 10 OF 2015

**CITATION NO.** 2016 WAIRC 00074

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**Result** Appeal dismissed

**Appearances**

**Appellant** In person

**Respondent** Mr T J S French (of counsel) and with him Mr J X Cockerell (of counsel)

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*Order*

This appeal having come on for hearing before the Full Bench on 22 December 2015, and having heard Mr A L Hoffman on his own behalf as appellant and Mr T J S French (of counsel) and with him Mr J X Cockerell (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 10 February 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

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

[L.S.]

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## AGREEMENTS—Industrial—Retirement from—

2016 WAIRC 00077

**NOTICE****AG 13 OF 2013****DERBARL YERRIGAN HEALTH SERVICES ENTERPRISE AGREEMENT 2013**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 5 of 2016

IN THE MATTER of the Industrial Relations Act 1979

and

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

Derbal Yerrigan Health Service Inc. will cease to be a party to the *Derbarl Yerrigan Health Services Enterprise Agreement 2013*, on and from the 4<sup>th</sup> day of March 2016.

DATED at Perth this 4<sup>th</sup> day of February 2016.

(Sgd.) S BASTIAN,  
Registrar.

[L.S.]

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

2016 WAIRC 00038

### CLERKS (UNIONS AND LABOR MOVEMENT) AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>PARTIES</b>	ON THE COMMISSION'S OWN MOTION
<b>CORAM</b>	CHIEF COMMISSIONER A R BEECH
<b>DATE</b>	FRIDAY, 22 JANUARY 2016
<b>FILE NO/S</b>	APPL 85 OF 2015
<b>CITATION NO.</b>	2016 WAIRC 00038

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<b>Result</b>	Award varied
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#### Order

WHEREAS on 21 August 2014 the Full Bench of the Commission cancelled the registration of *The Federated Millers and Mill Employees' Union of Workers of Western Australia* (FMMEU) [2014] WAIRC 00961;

AND WHEREAS on 10 September 2014 the Registrar identified that the FMMEU is a named party to the *Clerks (Unions and Labor Movement) Award 2004* (the Award);

AND WHEREAS 12 January 2015 the Commission directed the Registrar pursuant to s 47(2) of *Industrial Relations Act 1979* (the Act) that an application be created for the removal of FMMEU as a named party to the Award;

AND WHEREAS on 12 January 2015 the Commission directed the Registrar pursuant to s 47(3) of the Act to conduct an investigation to review the named respondents in Schedule A of the Award;

AND WHEREAS on 9 April 2015 the Registrar reported the findings of the review;

AND WHEREAS on 10 December 2015 the Commission sent to the named parties to the Award a revised Schedule A with proposed amendments;

AND WHEREAS the parties were advised that if they wished to be heard in relation to the proposed amendments to advise the Commission by email by 14 January 2016;

AND WHEREAS on 17 December 2015 the Health Services Union of Western Australia, Union of Employees requested that the *Salaried Pharmacists' Association of Western Australia Union of Workers* and the *W.A. Dental Technicians' and Employees' Union of Workers, Perth* be removed from Schedule A due to the cancellation of their registration by the Full Bench of this Commission on 16 April 2015 [2015] WAIRC 00311; [2015] WAIRC 00310;

AND WHEREAS on 14 January 2016 The Australian Maritime Officers Union – Western Area Union of Employees filed a Notice of answer consenting to the proposed amendments sent on 10 December 2015;

AND WHEREAS at 15 January 2016 no party had contacted the Commission wishing to be heard;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on it under the Act hereby order:

THAT the *Clerks (Unions and Labor Movement) Award 2004* be varied in accordance with the following schedule and that such variation shall have effect on or from 22 January 2016.

(Sgd.) A R BEECH,  
Chief Commissioner.

[L.S.]

#### SCHEDULE

1. SCHEDULE "A" – RESPONDENTS: Delete SCHEDULE "A" and replace with the following in lieu thereof:

#### SCHEDULE "A" – RESPONDENTS

#### Union Employers registered under Industrial Relations Act 1979

#### **Australian Institute of Marine and Power Engineers, Western Australian Union of Workers**

1/169 Stock Road  
PALMYRA WA 6157

#### **Australian Medical Association (WA) Incorporated**

14 Stirling Highway  
NEDLANDS WA 6009

#### **Building Trades Association of Unions of Western Australia (Association of Workers)**

82 Royal Street  
EAST PERTH WA 6004

**Electrical Trades Union WA**

Unit 24, 257 Balcatta Road  
BALCATTWA WA 6021

**Health Services Union of Western Australia (Union of Workers)**

8 Coolgardie Terrace  
PERTH WA 6000

**Mining Unions Association of Employees of Western Australia (Iron Ore Industry)**

PO Box 6289  
EAST PERTH WA 6004

**Seamen's Union of Australia, West Australian Branch**

2<sup>nd</sup> Floor, 2-4 Kwong Alley  
NORTH FREMANTLE WA 6159

**The Association of Professional Engineers, Australia (Western Australian Branch)**

**Organisation of Employees**  
Suite 1/12-14 Thelma Street  
WEST PERTH WA 6005

**The Australian Collieries' Staff Association, Western Australian Branch**

Level 1, 491 Kent Street  
SYDNEY NSW 2000

**The Australian Maritime Officers Union - Western Area Union of Employees**

1 High Street  
FREMANTLE WA 6160

**The Australian Nursing Federation, Industrial Union of Workers Perth**

260 Pier Street  
PERTH WA 6000

**The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch**

2/10 Nash Street  
PERTH WA 6000

**The Australian Workers' Union, West Australian Branch, Industrial Union of Workers**

Level 3, 25 Barrack Street  
PERTH WA 6000

**The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch**

121 Royal Street  
EAST PERTH WA 6004

**The Boot Trade of Western Australia Union of Workers, Perth**

110 Charles Street  
PERTH WA 6000

**The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia**

Unit 11, 64 Bannister Road  
CANNING VALE WA 6155

**The Civil Service Association of Western Australia Incorporated**

Level 5, 445 Hay Street  
PERTH WA 6000

**The Coal Miners' Industrial Union of Workers of Western Australia, Collie**

c/- Mineworkers Institute, 75 Throssell Street  
COLLIE WA 6225

**The Construction, Forestry, Mining and Energy Union of Workers**

80 Beaufort Street  
PERTH WA 6000

**The Disabled Workers' Union of Western Australia**

78 A Collingwood Street  
OSBORNE PARK WA 6017

**The Food Preservers' Union of Western Australia Union of Workers**

5<sup>th</sup> Floor, 25 Barrack Street  
PERTH WA 6000

**The Independent Education Union of Western Australia, Union of Employees**

PO Box 739  
BELMONT WA 6984

**The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers**

Unit 24, 257 Balcatta Road  
BALCATTWA WA 6021

**The Shop, Distributive and Allied Employees' Association of Western Australia**

5<sup>th</sup> Floor, 25 Barrack Street  
PERTH WA 6000

**The State School Teachers' Union of W.A. (Incorporated)**

150-152 Adelaide Terrace  
EAST PERTH WA 6004

**The Western Australian Clothing and Allied Trades' Industrial Union of Workers, Perth**

c/- Textile Clothing and Footwear Union of Australia (National Office) 359 Exhibition Street  
MELBOURNE VIC 3000

**The Western Australian Gold and Nickel Mines Supervisors Association Industrial Union of Workers**

18 Sturt Pea Crescent  
KAMBALDA WEST WA 6444

**Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch**

Suite 302, 3<sup>rd</sup> Floor 82 Beaufort Street  
PERTH WA 6000

**United Firefighters Union of Australia West Australian Branch**

21 View Street  
NORTH PERTH WA 6006

**University of Western Australia Academic Staff Association**

W2 Winthrop Tower, University of Western Australia, 35 Stirling Highway  
CRAWLEY WA 6009

**Western Australian Grain Handling Salaried Officers Association (Union of Workers)**

30 Delhi Street  
WEST PERTH WA 6005

**Western Australian Municipal, Administrative, Clerical and Services Union of Employees**

Kenafick House, 102 East Parade  
EAST PERTH WA 6004

**Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth**

112 Charles Street  
WEST PERTH WA 6005

**Western Australian Police Union of Workers**

639 Murray Street  
WEST PERTH WA 6005

**Western Australian Prison Officers' Union of Workers**

63 Railway Parade  
MT LAWLEY WA 6050

**Union Employers registered under *Fair Work (Registered Organisations) Act 2009*****Australian Education Union**

150-152 Adelaide Terrace  
PERTH WA 6000

**Australian Municipal, Administrative, Clerical and Services Union**

102 East Parade  
EAST PERTH WA 6004

**Australian Nursing and Midwifery Federation**

260 Pier Street  
PERTH WA 6000

**Australian Rail, Tram and Bus Industry Union**

2/10 Nash Street  
PERTH WA 6000

**Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union**

121 Royal Street  
EAST PERTH WA 6004

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Communication Workers Union Division**

196 Lord Street  
PERTH WA 6000

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Electrical, Energy & Services Division**

Unit 24, 257 Balcatta Road  
BALCATTWA WA 6021

**Construction, Forestry, Mining and Energy Union**

80 Beaufort Street  
PERTH WA 6000

**CPSU, the Community and Public Sector Union**

1/445 Hay Street  
PERTH WA 6000

**Finance Sector Union of Australia**

3<sup>rd</sup> Floor, 165 Adelaide Terrace  
EAST PERTH WA 6004

**Health Services Union**

8 Coolgardie Terrace  
PERTH WA 6000

**Independent Education Union of Australia**

Suite 20, 63 Knutsford Avenue  
RIVERVALE WA 6103

**Media, Entertainment and Arts Alliance**

Suite 1, 12 – 14 Thelma Street  
WEST PERTH WA 6005

**Musicians' Union of Australia**

10 Black Street  
MONT ALBERT VIC 3127

**National Tertiary Education Industry Union**

Level 3, 27 Railway Road (Corner of Alvan Street)  
SUBIACO WA 6008

**Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia**

2<sup>nd</sup> Floor, 52 Victoria Street  
CARLTON SOUTH VIC 3053

**Shop, Distributive and Allied Employees Association**

5<sup>th</sup> Floor, 25 Barrack Street  
PERTH WA 6000

**Textile, Clothing and Footwear Union of Australia**

359 Exhibition Street  
MELBOURNE VIC 3000

**The Association of Professional Engineers, Scientists and Managers, Australia**

Suite 1 12-14 Thelma Street  
WEST PERTH WA 6005

**The Australasian Meat Industry Employees Union**

227 Henley Beach Road  
TORRENSVILLE SA 5031

**The Australian Institute of Marine and Power Engineers**

1/169 Stock Road  
PALMYRA WA 6157

**The Australian Maritime Officers' Union**

1 High Street  
FREMANTLE WA 6160

**The Australian Workers' Union**

Level 3, 25 Barrack Street  
PERTH WA 6000

**The Maritime Union of Australia**

Level 2, 2-4 Kwong Alley  
NORTH FREMANTLE WA 6159

**Transport Workers' Union of Australia**

Suite 302, 3<sup>rd</sup> Floor Labour Centre  
82 Beaufort Street  
PERTH WA 6000

**Union of Christmas Island Workers**

PO Box 84  
Christmas Island  
INDIAN OCEAN WA 6798

**United Firefighters' Union of Australia**

21 View Street  
North Perth WA 6006

**United Voice**

54 Cheriton Street  
PERTH WA 6000

**Western Australian Shire Councils, Municipal Road Boards, Health Boards, Parks, Cemeteries and Racecourse, Public Authorities Water Boards Union**

112 Charles Street  
WEST PERTH WA 6005

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**INDUSTRIAL MAGISTRATE—Claims before—**

2016 WAIRC 00035

**WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT**

**CITATION** : 2016 WAIRC 00035  
**CORAM** : INDUSTRIAL MAGISTRATE G. CICCHINI  
**HEARD** : WEDNESDAY, 9 DECEMBER 2015  
**DELIVERED** : WEDNESDAY, 20 JANUARY 2016  
**FILE NO.** : M 13 OF 2015  
**BETWEEN** : TERRI VINCENT

**CLAIMANT**

AND

DEPARTMENT OF FINANCE

**RESPONDENT**


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**Catchwords** : Alleged breach of clause 22 of the Public Service and Government Officers General Agreement 2014 – Whether application for purchased leave considered – Refusal to grant purchased leave – Whether the Industrial Magistrates Court has power to review the decision not to grant the application for purchased leave – Whether the Industrial Magistrates Court can order the granting of purchased leave.

**Legislation** : *Industrial Relations Act 1979*  
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005

**Instruments** : Public Service Award 1992  
Public Service and Government Officers General Agreement 2014

**Case(s) referred to in Reasons** : *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [20060] FCA 813  
*Minister for Immigration and Citizenship v Li* [2013] HCA 18  
*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223  
*Josephson v Walker* [1914] HCA 68; (1914) 18 CLR 691  
*Byrne v Australian Airlines Limited* [1995] HCA 24; (1995) 131 ALR 422

**Result** : Claim dismissed

**Representation:**

Claimant : In Person

Respondent : Mr N.P. van Hattem instructed by the State Solicitor of Western Australia

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**REASONS FOR DECISION**

1 This claim concerns the refusal by the Department of Finance (the respondent) to allow its employee Ms Terri Vincent (the claimant) to enter into a purchased leave arrangement in 2015.

**Agreed Facts**

- 2 The claimant has been employed by the respondent since 2002 and continues to be employed by it within its Office of State Revenue (OSR). The claimant currently occupies the position of Senior Revenue Consultant.
- 3 The claimant's terms of employment are and were at all material times governed by the Public Service Award 1992 (the Award) and the Public Service and Government Officers General Agreement 2014 (the General Agreement).
- 4 Clause 22 of the General Agreement, which replaces cl 13 of the Award, provides that an employer and an employee may enter into an arrangement whereby the employee can purchase up to 10 weeks' additional leave.
- 5 At all material times, the claimant's employment was subject to various policies and instructions, as identified below:
  1. The respondent had in place the following published policies:
    - a) Leave Management Policy; and
    - b) Employee Purchased Leave Policy.

2. The respondent had published the following documents:
  - a) A Great Place to Work – Flexible Working Arrangements; and
  - b) Discussion Guide for Flexible Working Arrangements.
3. The Department of Consumer and Employment Protection (now known as the Department of Commerce) had issued the following circulars:
  - a) Circular to Departments and Authorities No 2 of 2005 - Flexible Work Practices (Circular 2); and
  - b) Circular to Departments and Authorities No 3 of 2005 - Purchased Leave (Circular 3).
4. The Department of Commerce had published the following policy statements:
  - a) Leave Liability Management – Policy Statement October 2012; and
  - b) Circulars to Departments and Authorities – Policy Statement August 2011.
5. The Department of Commerce's website, within the Labour Relations section, (<http://www.commerce.wa.gov.au/labour-relations/public-sector-policies-1>) provides information regarding the applicability of 'policy statements' of the kind referred to in paragraph 4 above.
6. On 17 October 2014, Ms Tracey Jenkin, HR Consultant, Department of Finance (Ms Jenkin) sent an email to staff at OSR, inviting applications for purchased leave to be submitted to their manager by close of business on 7 November 2014.
7. On 21 October 2014, the claimant submitted an application for eight weeks' purchased leave for the 2015 calendar year (the/her Application).
8. On 24 November 2014 Mr Clayton Cox Assistant Director Review, OSR (Mr Cox) met with the claimant to discuss details of her Application. At that meeting, Mr Cox informed the claimant that higher management had considered her Application and had made a decision to not approve her request for purchased leave (the first decision). The respondent acknowledged that work priorities from a branch/operations perspective could accommodate the claimant's Application for eight weeks' purchased leave in the 2015 calendar year if it were approved.
9. By email dated 1 December 2014, the claimant requested that her Application be reconsidered. She provided reasons as to why she believed that her Application had not been properly considered.
10. On 2 December 2014, Ms Jenkin met with the claimant to discuss her Application. The claimant advised Ms Jenkin that the reasons she required purchased leave, in addition to her available leave balances were:
  1. her need to take leave (on an ad-hoc basis) in order to manage the responsibility of settling her late father's estate;
  2. her desire to also have some time of a recreational nature in the 2015 calendar year to help achieve an appropriate work-life balance; and
  3. her plan to hold on to her long service leave to take an extended overseas holiday in a year or so hence.
11. At that meeting, the claimant explained to Ms Jenkin the importance of holding on to her long service leave. If she did not hold on to it, she would not be able to take her planned extended overseas holiday, unless additional leave was granted at that time, and there was no guarantee that additional leave would or could be granted at a time in the future.
12. Also at the meeting on 2 December 2014, the claimant confirmed that she was prepared to modify her request from eight weeks' to four weeks' purchased leave. Ms Jenkin agreed to refer this offer to Ms Nicki Suchenia, Acting Commissioner of State Revenue, (the Acting Commissioner) for further consideration.
13. On 3 December 2014 the Acting Commissioner met with Mr Cox, Ms Jenkin and Mr Murray Hancock, Director, Legislation, Training and Review, OSR to further deliberate the claimant's request to reconsider her Application.
14. After the meeting on 3 December 2014, Ms Jenkin emailed the claimant to inform her that her Application had been considered, but that it could not be supported at that time (the second decision).
15. Each of the first and second decisions not to approve purchased leave was made by or at the direction of the Acting Commissioner.
16. In considering the Application, the Acting Commissioner took into account the following factors in making the second decision:
  1. that the claimant had advised the Acting Commissioner that her father's death had caused her considerable stress and as such she required additional leave to deal with his death and manage his estate. The claimant also advised that she would require leave for the usual recreational reasons and extended leave for overseas travel at a later date;
  2. that the claimant's forecast positive leave credits at the close of business on 31 December 2014 would be 248.2 hours (33 days) of accrued annual leave and 322.374 hours (42 days) of accrued long service leave;
  3. the respondent's overall leave liability; and
  4. that work priorities from a branch/operations perspective could accommodate the claimant's original and varied Application.
17. The claimant responded to Ms Jenkin's email of 3 December 2014, by return email on 8 December 2014, which set out her concerns regarding the decision to decline her Application after reconsideration.

- 18 By email dated 12 December 2014, Ms Jenkin responded to the concerns raised by the claimant in her email dated 8 December 2014.
- 19 On 19 December 2014, the Civil Service Association of Western Australia Incorporated (CSA) wrote to the Acting Commissioner on behalf of the claimant, lodging a formal dispute under cl 49 of the General Agreement. The dispute was in relation to the refusal to grant the claimant's application for purchased leave.
- 20 On 23 December 2014 Mr Michael Jozwicki, Director, People Strategy and Performance, OSR, (Mr Jozwicki) replied to the letter sent by the CSA and set out the view that the respondent had considered the Application on its merits.
- 21 The dispute did not resolve.

### **Claim and Response**

- 22 On 16 February 2015 the claimant instituted this claim. Her reasons for making the claim and the remedy sought are expressed therein as follows:

#### **Statement of grounds**

*My application for purchased leave has not been properly considered in accordance with clause 22 of the Public Service and Government Officers General Agreement 2014 and departmental policies relating to these issues. In making the decision declining my application for purchased leave for the 2015 calendar year:*

1. *my personal circumstances, which including(sic) specific and compelling reasons for requesting additional leave, were not properly taken into account; and*
2. *inappropriate matters were taken into consideration.*

#### **Orders sought**

*That an order be made pursuant to section 83 of the Industrial Relations Act 1979 that my application for purchased leave be properly considered and additional leave for the 2015 calendar year be granted.*

- 23 On 6 March 2015 the respondent responded by saying that it ... *assessed the Claimant's application for paid leave on its merits and gave consideration to the personal circumstances of the Claimant.*

### **Purchased Leave**

- 24 Purchased leave is additional leave, purchased by an employee who forgoes a pro-rata portion of salary to facilitate payment during the time additional leave is taken. Unlike annual leave and long service leave, purchased leave is not paid for by the employer. Purchased leave cannot be taken at half pay. It does not accrue and any portion of unused purchased leave at the end of the calendar year is paid out to the employee by the employer.
- 25 Clause 22 of the General Agreement facilitates the purchase of leave. It states:

#### **22. PURCHASED LEAVE – 42/52 ARRANGEMENT**

- 22.1 *The provisions of this clause replace clause 13 – Purchased Leave – 44/52 Salary Arrangement of the applicable Award.*
- 22.2 *The employer and the employee may agree to enter into an arrangement whereby the employee can purchase up to ten weeks additional leave.*
- 22.3 *The employer will assess each application for a 42/52 salary arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.*
- 22.4 *Where an employee is applying for purchased leave of between five and ten weeks, the employer will give priority access to those employees with caring responsibilities.*
- 22.5 *In order to access the approved purchased leave, an employee must:*
- (a) *satisfy the agency's accrued leave management policy; and*
  - (b) *take one week annual leave if purchasing nine weeks' leave; or*
  - (c) *take two weeks annual leave if purchasing ten weeks' leave.*
- 22.6 *Notwithstanding clause 22.5 (b) and (c), the employer may allow an employee to access purchased leave before they have accessed one or two week's annual leave, whichever applies, where the employee requests it. Any such request may only be refused by the employer if there are reasonable grounds to do so.*
- 22.7 *The provisions of clause 22.5 (b) and (c) do not apply to an employee who purchases less than nine weeks leave.*
- 22.8 *An agreement to take a reduced salary spread over the 52 weeks of the year will yield the following amounts of purchased leave.*

<i>Number of weeks salary spread over 52 weeks</i>	<i>Number of weeks purchased leave</i>
42	10
43	9
44	8
45	7

<i>Number of weeks salary spread over 52 weeks</i>	<i>Number of weeks purchased leave</i>
46	6
47	5
48	4
49	3
50	2
51	1

- 22.9 (a) Purchased leave is not able to be accrued. The employee is entitled to pay in lieu of any purchased leave not taken. In the event that the employee is unable to take such purchased leave, their salary will be adjusted in the last pay period in February to take account of the fact that time worked during the previous year was not included in their salary.
- (b) Untaken purchased leave will be paid out at the rate at which it was purchased.
- 22.10 (a) Where an employee who is in receipt of an allowance provided for in clause 19 – Higher Duties Allowance of the applicable Award or clause 38 – Higher Duties Allowance of this General Agreement proceeds on any period of purchased leave, the employee shall not be entitled to receive payment of the allowance for any period of purchased leave.
- (b) Other than when an employee is on a period of purchased leave, the higher duties allowance component of an employee's salary shall not be affected by an agreement to reduce the employee's salary for purchased leave purposes.
- 22.11 Overtime is paid at the ordinary rate of salary and not the reduced rate. This will also apply where overtime is referred to as a percentage of salary.
- 22.12 In the event that a part time employee's ordinary working hours are varied during the year, the salary paid for such leave will be adjusted in the last pay in February to take account of any variations to the employee's ordinary working hours during the previous year.
- 26 The provision of purchased leave is achieved by agreement and is subject to the employee satisfying the pre-requisites required by cl 22.5 of the General Agreement. In order to access approved purchased leave an employee must, inter alia, satisfy the agency's accrued Leave Management Policy.
- 27 The respondent's Leave Management Policy (agreed document 1) was implemented in response to cabinet's decision of 24 September 2012 to cap leave liability. The policy's stated purpose (at page 4) is as follows:
- The Department of Finance is committed to promoting a healthy work-life balance and this policy outlines the department's approach to leave management and planning.*
- 28 The respondent's Leave Management Policy states (at page 4) that in managing leave, in addition to consideration being given to operational needs of the work unit, managers will also take into consideration an employee's preferred timing of leave.
- 29 The respondent's Leave Management Policy sets out a number of initiatives to enable the department to manage its leave liability, including:
1. developing leave plans (see page 4);
  2. focused discussions with employees who have excessive leave balances (see page 5);
  3. encouraging employees to utilise:
    - a) four weeks' (20 days) annual leave each year (see page 5); and
    - b) two weeks' long service leave each year for those employees with a long service leave balance of 487.5 hours (65 days) or greater (see pages 5 and 7);
  4. implementing targeted leave management for employees with excessive leave balances (see page 5); and
  5. directing employees with excessive leave (annual and long service) to take leave at a stipulated time and duration (see page 5).
- 30 The Leave Management Policy defines 'excessive leave' (at page 5) as:
1. excessive annual leave is accrued annual leave of over 300 hours (40 days); and
  2. excessive long service leave is accrued leave of more than one full entitlement being 487.5 hours (65 days).
- 31 The provision of purchased leave is in keeping with the government's stated objectives across the public sector, as is set out in Circular 2, issued in 2005 (agreed document 5). At page 2, Circular 2 states:
- It is incumbent on public sector agencies to bring to the attention of employees the scope that exists within public sector awards and agreements to pursue flexible phased retirement and work/life balance options, including:*
- ...
- c) purchased leave – 44/52 salary arrangement.

32 To achieve that end, the respondent has implemented policies and management practices to provide for flexible work arrangements. These are published in two documents entitled *A Great Place to Work – Flexible Working Arrangements* (Flexible Working Arrangements Policy) and *Discussion Guide for Flexible Working Arrangements* (Flexible Working Arrangements Discussion Guide).

33 The Flexible Working Arrangements Policy states inter alia:

***What is our commitment to flexible working arrangements?***

*Both the Department and the Director General are committed to supporting staff in achieving work/life balance. With this commitment is an expectation that managers will support flexible working arrangements that assist employees to balance work and life, whilst at the same time continuing to meet the work unit's business needs.*

34 The Flexible Working Arrangements Discussion Guide states:

***Flexible work arrangements offer benefits to both staff and the Department.***

...

*It will help to establish a flexible work arrangement that meets business needs and the employee needs. This will lead to a:*

- *decision regarding approving/not approving the flexible working arrangement; and negotiated parameters of the flexible work arrangement.*

*If the flexible work arrangements cannot be accommodated, the process of going through this guide and documenting the reasons why it cannot be done will then form the basis of the justification for the decision.*

35 In 2005, Circular 3 (agreed document 6) was released setting out the guidelines applicable to all employees eligible to apply for purchased leave in the Western Australian public sector. It provides inter alia:

1. The guidelines are to be read in conjunction with the relevant purchased leave clauses contained in the applicable award or agreement, and where the provisions of these guidelines are inconsistent with the award or agreement, the award or agreement shall prevail.
2. Approval is subject to the operational requirements and leave management policies of the agency.
3. In assessing an application for purchased leave, the employer is to assess each application on its own merits, giving consideration to the personal circumstances of the employee.
4. Employers should ensure that purchased leave is not used in substitution of annual leave, resulting in carry over and accrual of annual leave into the following year.

36 The guidelines contained in Circular 2 were subsequently augmented by the respondent's own Employee Purchased Leave Policy (agreed document 2). That policy sets out the criteria to be followed by management in determining an application for purchased leave as part of its Employee Purchased Leave (EPL) Scheme. It provides at page 4:

*Applications for the EPL scheme will be reviewed on a case by case basis taking into account the applicant's current leave liability and previous utilisation of the EPL scheme. In determining an application, managers are to give consideration to the following:*

- *previous access to and usage of the EPL;*
- *individual personal circumstances; and*
- *the application(sic) leave entitlements*
- *the impact of the application on operational requirements. Managers are to ensure the following:*
  - o *leave balances deemed excessive in accordance with this policy are cleared prior to an application being made; and*
  - o *an employee purchasing 9 or 10 weeks leave has taken 1 or 2 weeks annual leave, whichever applies, as a minimum before accessing the purchased leave.*

37 The meaning of 'leave balances deemed to be excessive' is not defined within the Employee Purchased Leave Policy. Its meaning must therefore be construed in the context of the respondent's overall Leave Management Policy.

**Claimant's Application for Purchased Leave**

38 At the time the claimant made her Application she was compliant with the respondent's Leave Management Policy in that her accrued annual leave and long service leave was not deemed to be excessive, nor was it forecast to become excessive in 2015.

39 The claimant made her Application using the respondent's generic form (H4011 - Leave Application for Purchased Leave or Deferred Leave Arrangement) (agreed document 12). The form did not make provision for the giving of reasons in support of such an application. In completing the application form, the claimant did not attach any document that set out her reasons for making her Application. It follows therefore, that her Application was unsupported by any evidentiary material which enabled a proper assessment of her Application to be undertaken, and in particular, consideration of her personal circumstances. The first decision was made in those circumstances.

40 It is obvious that in making its first decision, the respondent did not take into account matters personal to the claimant because those matters were not available for consideration. It is difficult to know how the merits of her Application were otherwise assessed. When informed about the first decision, the respondent acknowledged that work priorities from a branch/operations perspective could accommodate the claimant's original Application for eight weeks purchased leave to be taken during 2015.

- 41 The claimant subsequently sought the reconsideration of her Application and for that purpose, met with Ms Jenkin on 2 December 2014. During that meeting the claimant informed Ms Jenkin of the reasons she required purchased leave, in addition to her available balances. Those reasons were:
1. her need to take leave (on an ad-hoc basis) in order to manage the responsibility of settling her late father's estate;
  2. her desire to also have some time of a recreational nature in the 2015 calendar year to help achieve an appropriate work-life balance; and
  3. her plan to hold on to her long service leave to take an extended overseas holiday in a year or so hence.
- 42 By email dated 3 December 2014, Ms Jenkin advised the claimant that her Application had been refused (the second decision). The claimant was advised that in arriving at her decision, the Acting Commissioner took into account the following:
1. the personal circumstances of the claimant;
  2. the claimant's forecast annual leave and long service leave credits;
  3. work priorities from a branch/operations perspective; and
  4. the respondent's overall leave liability.

#### **Claimant's Argument**

- 43 Clause 22.3 of the General Agreement provides that in assessing an application for purchased leave, an employer will assess each application on its own merits, giving consideration to the personal circumstances of the employee seeking the arrangement. Further, cl 22.5 of the General Agreement provides that to access purchased leave, an employee must satisfy the agency's accrued Leave Management Policy.
- 44 In considering the Application, the respondent was bound to consider the following in terms of the claimant:
1. her reasons for requesting additional leave in the 2015 calendar year;
  2. her accrued leave balances;
  3. her plans and reasons to utilise her leave balances (preferred timing); and
  4. whether she had complied with the respondent's accrued Leave Management Policy.
- 45 The claimant accepts that, although not expressly stated, the factors enunciated in the General Agreement were not intended to be an exhaustive list of factors. She accepts that other relevant matters to be considered in determining her Application might have reasonably included:
1. the availability of suitable cover;
  2. any costs and savings implications associated with the grant of additional leave;
  3. the impact on the agency's service requirements;
  4. the respondent's documented policies governing leave management and purchased leave; and
  5. the respondent's policies and commitment to flexible working arrangements.
- 46 The claimant says that in taking into account all of those factors, there were compelling reasons for the grant of her Application. Those compelling reasons were:
1. Her leave balances were compliant with the respondent's Leave Management Policy.
  2. She needed to utilise her annual leave on an ad-hoc basis in the 2015 calendar year to deal with the responsibilities of settling her late father's estate. She also had plans to hold on to her long service leave for an overseas holiday in a year or so hence.
  3. There were no work-related or operational requirements from a branch/work unit perspective that would have impeded her Application.
  4. The salary saving the respondent would make in granting her Application would have more than offset the negligible cost associated with carrying her (compliant) accrued leave balances, estimated to be less than \$1,000.00.
  5. The respondent's Leave Management Policy states that the respondent is committed to promoting a healthy work-life balance and that, subject to the operational requirements of the work unit, managers will take into consideration an employee's preferred timing of leave.
  6. The respondent's stated commitment to flexible working arrangements, which provides that, subject to the business needs of a work unit, there is an expectation that managers will support flexible working arrangements.
- 47 The claimant contends that the respondent has fallen into error in the consideration of her Application. She says that as a consequence of those errors, cl 22 of the General Agreement has been breached. She submits that this court ought to review and set aside the respondent's administrative decision to refuse her Application.
- 48 The claimant identifies the following errors on the part of the respondent:
1. not taking into account relevant matters;
  2. taking into account irrelevant matters;

3. the inflexible application of policy;
4. allocating improper weight to matters considered; and
5. making a manifestly unreasonable decision.

#### Irrelevant Matters

- 49 The respondent acknowledges that in declining the claimant's Application, its overall leave liability was taken into consideration. The claimant says that the respondent's decision was driven by its desire to reduce the claimant's leave balance and that it intended to exhaust, or substantially reduce her leave credits in the 2015 calendar year. That is evidenced by various emails from the respondent to the claimant during December 2014.
- 50 The claimant was informed that her Application could not be approved because of the 'necessity to reduce the current leave liability of the respondent' (see agreed document 18).
- 51 Although the claimant acknowledges that the respondent has an obligation to manage its overall leave liability, she says that its desire to reduce its liability by attempting to exhaust the claimant's compliant leave balances is irrelevant and extraneous to cl 22 of the General Agreement because:
1. Clause 22 of the General Agreement does not provide for it.
  2. The respondent has a Leave Management Policy that could deal with it.
  3. It is not fair or reasonable that the respondent use the claimant, who is compliant with the Leave Management Policy, as a vehicle to reduce its overall liability. Non-compliant employees should have been targeted instead.
  4. Attempting to manage leave liability through access to flexible working arrangements is an undocumented policy inconsistent with the General Agreement.
  5. Purchased leave is the grant of 'additional leave' not paid for by the employer. It should not be treated like 'leave without pay' which requires the exhaustion of all other leave credits.
  6. The denial of purchase of leave will not necessarily reduce the respondent's overall leave liability and therefore the overall leave liability is an irrelevant consideration.

#### Inflexible Application of Policy

- 52 In the respondent's email to the claimant dated 3 December 2014 (agreed document 18), it states that reconsideration could only be given to the claimant's Application once all leave balances had been exhausted or otherwise committed.
- 53 The claimant contends that the respondent did not seek to balance operational requirements with the needs of the employees. Rather, the respondent inflexibly applied an undocumented policy of attempting to manage its leave liability through access to flexible working arrangements, to the exclusion of all other matters.

#### Improper Weight

- 54 The claimant asserts that, given that her personal circumstances and compliance with the respondent's Leave Management Policy are matters that the respondent was obliged to take into account, those issues should have attracted considerable weight.
- 55 If the respondent's overall leave liability was a relevant factor, then such ought to have been weighted appropriately with the needs of employees. The weight afforded to the respondent's overall leave liability was improper and unreasonable and that led to a decision which was unnecessarily harsh, illogical and manifestly unreasonable.

#### Manifestly Unreasonable

- 56 The claimant says that the respondent's decision to decline her Application was irrational and manifestly unreasonable because:
1. The cost would have been negligible.
  2. The decision does not conform to the respondent's flexible working arrangements or Circular 2.
  3. The decision did not conform to the respondent's Leave Management Policy which allowed staff to take leave at their preferred time and did not achieve the respondent's commitment to promote a healthy work-life balance.
  4. Clause 22 of the General Agreement does not require an applicant for purchased leave to exhaust or substantially reduce all of their leave credits.
  5. It was not reasonable to use the claimant as a vehicle to offset leave balances of those employees who were not compliant with the respondent's Leave Management Policy.
  6. The decision to decline the Application will not result in any reductions of the respondent's overall leave liability.
  7. The decision was harsh because it was likely to adversely affect the claimant's health and work productivity. Given that operational requirements could accommodate the grant of additional leave, the decision could not be seen as being made in the best overall interests of the department.
  8. Managing leave liability through flexible working arrangements represents an undocumented policy inconsistent with the General Agreement and other policies to which the respondent is committed.
  9. It is unreasonable that the respondent manage its leave liability through an undocumented policy.

- 57 The claimant submits that if the rules of administrative decision making do not apply to the decision made regarding the exercise of discretion under cl 22 of the General Agreement, then the rules applicable to the exercise of a contractual discretion apply.
- 58 Those rules provide that discretionary contractual powers should not be exercised in a manner that is inconsistent with the purpose of the power, capriciously or arbitrarily, or otherwise unreasonably.

#### Proper Purpose

- 59 The legitimate purpose of the power contained in cl 22 of the General Agreement is the ability to enable agencies to grant employees (who are compliant with the agency's leave management policy) additional leave so as to enable employees to manage competing work and personal commitments. Additional leave means leave that is in addition to an employee's other leave entitlements, but not in lieu of or in substitution thereof. Paragraphs (b) and (c) of cl 22.5 of the General Agreement would suggest that purchased leave was not intended as a mechanism to grant leave only when an employee has exhausted their leave balances, and there are specific provisions within the Award that deal with leave without pay.
- 60 The claimant says that the respondent has, in considering her Application, misdirected itself as to the operation of cl 22 of the General Agreement and thus exceeded the power afforded by it. The Respondent has attempted to manage its overall leave liability through this clause, rather than managing its leave liability through relevant provisions contained within the Award and its own leave management policies.

#### Reasonableness

- 61 The claimant submits that in the matter of *Minister for Immigration and Citizenship v Li* [2013] HCA 18, the majority of the High Court of Australia considered that the legal standard of reasonableness is not limited to decisions so unreasonable that no reasonable authority would ever come to it (see the test in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). Rather, the test of whether discretion was exercised unreasonably extends to taking irrelevant considerations into account, bad faith, dishonesty, disregard to public policy, and misdirecting oneself to the operation of the statute.
- 62 The claimant says that respondent's decision was manifestly unreasonable because:
1. It took into account an irrelevant consideration (the respondent's overall leave liability).
  2. It did not conform to the respondent's documented policies.
  3. It did not conform to Circular 2 or other commitments with respect to flexible working arrangements.
  4. It went beyond that required by cl 22 of the General Agreement.
  5. There were negligible cost implications.
  6. It used the claimant as a vehicle of reducing leave balances rather than targeting non-compliant employees in applying leave management policies.
  7. Its decision would not result in a reduction of the respondent's leave liability.
  8. Its decision would adversely affect the claimant's health, work productivity and morale.

#### Arbitrariness

- 63 The claimant asserts that the respondent acted arbitrarily by not adhering to its documented policies and by inflexibly applying the respondent's undocumented policy of attempting to manage its leave liability through access to flexible working arrangements.

#### Determination

- 64 The claimant made this claim pursuant to s 83 of the *Industrial Relations Act 1979* (IR Act) to enforce cl 22 of the General Agreement.

- 65 Section 83 of the IR Act provides:

**83. Enforcing awards etc.**

- (1) *Subject to this Act, where a person contravenes or fails to comply with a provision of an instrument to which this section applies any of the following may apply in the prescribed manner to an industrial magistrate's court for the enforcement of the provision —*
- (a) *the Registrar or a deputy registrar;*
  - (b) *an industrial inspector;*
  - (c) *in the case of an award or industrial agreement, any organisation or association named as a party to it;*
  - (d) *in the case of an award, industrial agreement or order, an employer bound by it;*
  - (e) *any person on his or her own behalf who is a party to the instrument or to whom it applies;*
  - (f) *if an employee under an employer-employee agreement is a represented person, a representative acting on his or her behalf.*
- (2) *In this section —*
- instrument to which this section applies means —**
- (a) *an award; and*
  - (b) *an industrial agreement; and*

- (c) *an employer-employee agreement; and*
- (d) *an order made by the Commission, other than an order made under section 23A, 32, 44(6) or 66.*
- (3) *An application for the enforcement of an instrument to which this section applies shall not be made otherwise than under subsection (1).*
- (4) *On the hearing of an application under subsection (1) the industrial magistrate's court may, by order —*
  - (a) *if the contravention or failure to comply is proved —*
    - (i) *issue a caution; or*
    - (ii) *impose such penalty as the industrial magistrate's court thinks just but not exceeding \$2 000 in the case of an employer, organisation or association and \$500 in any other case;*
- or*
- (b) *dismiss the application.*
- (5) *If a contravention or failure to comply with a provision of an instrument to which this section applies is proved against a person as mentioned in subsection (4) the industrial magistrate's court may, in addition to imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision.*
- (6) *An order under subsection (5) —*
  - (a) *may be made subject to any terms and conditions the court thinks appropriate; and*
  - (b) *may be revoked at any time.*
- (7) *An interim order may be made under subsection (5) pending final determination of an application under subsection (1).*
- (8) *A person shall comply with an order made against him or her under subsection (5).*

*Penalty: \$5 000 and a daily penalty of \$500.*

66 The claimant has standing to bring this claim (see s 83(1)(c) of the IR Act) as the General Agreement is an instrument to which s 83 of the IR Act applies (see s 83(2)(b) of the IR Act).

67 This court's powers on the substantive hearing of the claim are set out in s 83(4), s 83(5) and s 83(6) of the IR Act.

68 I observe that s 83(5) of the IR Act does not extend to the making of orders of the type that the claimant seeks, being:

1. additional leave for the 2015 calendar year to be granted (see annexure to the claim); and
2. the respondent's decision declining the claimant's application for purchased leave be set aside (see [74] of the claimant's further submissions lodged on 16 November 2015).

69 The extent of this court's power is governed by s 83(4) and s 83(5) and, where applicable, s 83(7) of the IR Act. Any order to prevent a further contravention as provided for by s 83(5) of the IR Act cannot be in a declaratory form. The relief provided by s 83(5) of the IR Act is injunctive in nature and is aimed at preventing further specific contraventions of the applicable instrument. If, in this instance, an order is to be made pursuant to s 83(5) of the IR Act, it will necessarily be limited to the claimant's Application made in 2014 for the 2015 calendar year. It cannot relate to prospective years.

### **Court's Powers**

70 The claimant submits that awards and industrial instruments made under the IR Act regulate what would otherwise be governed by an employment contract. She points out that awards and registered agreements (such as the General Agreement) are statutory instruments which stand and operate independently from employment contracts. Awards secure conditions by virtue of statute (see *Josephson v Walker* [1914] HCA 68; (1914) 18 CLR 691 and *Byrne v Australian Airlines Limited* [1995] HCA 24; (1995) 131 ALR 422). The conditions and entitlements contained within awards and industrial instruments are imported as a statutory right imposing a statutory obligation and right to abide by and enforce (see French J said at [51] and [52] of *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813).

71 The claimant contends that the General Agreement, being an instrument registered by an order of the Western Australian Industrial Relations Commission, is authority conferred by statute (namely the IR Act) and therefore subject to the rules of administrative law. Although the claimant is correct in what she says about the statutory nature of the General Agreement, she has not provided any authority as to how or why administrative law concepts are said to apply to these proceedings.

72 The respondent submits that the respondent's exercise in discretion conferred by the General Agreement is akin to that of a contractual discretion, rather than a discretionary power given to an administrative body.

73 The General Agreement is an industrial instrument having statutory force. That of itself does not confer upon this court an ability to review administrative decisions made thereunder. The court's powers in enforcing statutory rights afforded by industrial instruments are limited to those provided by s 83 of the IR Act. The IR Act does not give this court the power to quash decisions, substitute its own decision, or make declaratory orders. Such relief must be sought in a court of superior jurisdiction.

74 I accept the respondent's submissions that administrative law concepts have no application in this matter. This court is limited to determining whether the respondent has done that required of it by cl 22 of the General Agreement.

### Issues

- 75 The only issue between the parties is whether the respondent complied with cl 22 of the General Agreement.
- 76 Clause 22 of the General Agreement does not confer a right to be granted purchased leave but rather, gives employees a procedural ability to have any purchased leave application assessed on its merits, with the employer giving consideration to the personal circumstances of the employee. The process is not axiomatic. An application may not be granted even if the necessary pre-requisites have been met and there are valid reasons to support the application.
- 77 The respondent accepts that the decision not to grant the claimant's Application would not have been made on the merits if the decision was made capriciously or arbitrarily. It also accepts that the court would be able to infer that the respondent did not make a decision on its merits if the court formed the view that no reasonable employer in the respondent's position could have come to the decision that the respondent has come to in this case. Those concessions are appropriate.
- 78 The ultimate question for this court however, is whether the respondent considered the Application on its merits, giving consideration to the personal circumstances of the claimant. It is not this Court's role to determine whether the respondent was correct in its decision, but rather, whether it carried out its decision making process in accordance with that required by cl 22 of the General Agreement.

### The Decision

- 79 The respondent's decision not to approve the claimant's Application is said to be comprised of two separate decisions. Clearly, those decisions were made in one continuum.
- 80 The respondent's first decision was not in conformity with the requirements of cl 22.3 of the General Agreement because it failed to give any consideration to the claimant's personal circumstances. When it first considered the claimant's Application, her personal circumstances were not known to it and therefore were incapable of consideration. That situation occurred in part because the application form the respondent provided to the claimant did not contain provision for the inclusion of personal circumstances. The form itself led to error. The respondent cannot, as it seeks to do, shift blame onto the claimant for lodging a form that did not refer to her personal circumstances. Indeed, the respondent had an obligation to ensure that its form did not lead the claimant (and the respondent) into error.
- 81 In the end result the problem with the form was not critical because the defect in the application form was subsequently cured when the claimant made known to the respondent her personal circumstances, which were then considered in making the second decision.
- 82 The decision complained of is the respondent's second decision in which it refused to allow the claimant to enter into a purchased leave arrangement in 2015. The Acting Commissioner did not give evidence or provide a witness statement in this matter. There is no direct evidence from her as to why she refused the claimant's Application. The Acting Commissioner's reasons for declining the Application must therefore be gleaned from the available documentary evidence and from statements of subordinates who were involved in the process.
- 83 One such subordinate is Mr Cox. In Mr Cox's statement (received by consent) made on 13 November 2015, he said at [20] - [24]:
20. *On 28 November 2014 I emailed Terri and confirmed the decision that her application for purchased leave had been declined, and advised "The reason (the application) has not been approved is that you have an accrued paid leave liability of 608 hours, which equates to in excess of 16 weeks" and that "it is considered that, at this point in time, you have sufficient paid leave entitlements."*
  21. *In this email I also confirmed the comments I had made at the meeting of 24 November 2014 in respect of the ability to reapply for purchased leave throughout the year. Specifically, I advised "...I would note that applications for purchased leave may be made throughout the year, and should you apply again, that application may be assessed with regard to the circumstances, including your accrued leave liability, that exist at that future time."*
  22. *On 1 December 2014, Terri sent me an email requesting that her application for purchased leave be reconsidered. Both Murray and Tracey were copied into this email.*
  23. *On 2 December 2014, I met with Nicki, Murray and Tracey to further discuss the application for purchased leave. Tracey outlined details of a conversation that she had had with Terri regarding her personal circumstances, including the work Terri was undertaking to settle her late father's estate, and her desire to hold over her long service leave for the purpose of overseas travel in a year or so hence. I had confirmed at this meeting I was aware that Terri had been an avid traveller in her earlier years, but this had been something she had been unable to do for many years, due to family caring responsibilities.*
  24. *Nicki advised at this meeting that she would still decline the application for purchased leave, essentially for the reasons that had been set out in my email of 28 November 2014 and detailed at paragraphs 20 and 21 above.*
- 84 It is apparent from Mr Cox's statement that the Acting Commissioner refused the Application because the claimant had an 'accrued paid leave liability of 608 hours equating to 16 weeks leave' and that it was considered that she had sufficient leave entitlements.
- 85 I digress for a moment to note that the Acting Commissioner, when making her decisions, was incorrect in her view that the claimant had 608 hours of leave owing to her. The claimant, in fact, had 22.5 hours less than that. The error was brought about by a record keeping defect. Nothing turns on that because it has been agreed (agreed facts page 3) that even if the true position was known, the decision would have been the same.

86 In an email from Ms Jenkin to the claimant dated 3 December 2014 (agreed document 18), Ms Jenkin said:

*As advised above, your specific case has been considered individually and your personal circumstances taken into consideration. Though the impact to operational requirements within the Review may be minimal, the operational requirements of State Revenue and the Department of Finance are such that this request cannot be approved due to the necessity to reduce the current leave liability of the Department.*

87 In that same email Ms Jenkin said:

*We understand that you need to have a work/life balance and the need to reserve some leave for this purpose but the Commissioner is unable to support the approval of purchased leave when you have a significant balance of leave available to you which we consider would meet your requirements (sic). If you could provide any further explanation and / or breakdown of the leave you are intending to take in 2015 that would exhaust your current leave liability and require additional Purchased leave, please submit this and this may be taken into further consideration.*

88 The claimant asserts that the respondent made it clear that purchased leave would be denied unless the claimant exhausted or otherwise committed to use all of her available leave.

89 The respondent denies that assertion. It says that although some portions of Ms Jenkin's email dated 3 December 2014 suggest that the claimant needed to explain how she would exhaust her leave credits, the email was not written by the decision maker and does not purport to be comprehensive reasons for decision. Further, there is no obligation to provide reasons. The respondent says that in any event, the email of 3 December 2014 must be considered in context of Ms Jenkin's further email dated 12 December 2014 (agreed document 20). That email makes it abundantly clear that the Acting Commissioner did not request the claimant to utilise all of her leave credits, but rather, that the claimant would need to more precisely identify when and how much leave she intended to take in 2015. In that email, Ms Jenkin went on to say:

*Your current leave liability has been a factor in the decision, as are the operational requirements of the agency. I would also like to draw your attention to the guidelines which state that purchased leave can be applied for in addition to the normal 4 week entitlement. As you have in excess of this, it is considered that you have the leave resources available to meet your personal needs as outlined by yourself.*

3. **Leave Management Policy** clearly states the need for the Department to manage its leave liability as below;

**Introduction** On 24 September 2012 Cabinet approved the capping of leave liabilities (in dollar terms) at 30 June 2012 levels. The Department of Finance (Finance) needs to take immediate action to manage leave liabilities.

*As such, employees are requested to discuss their leave plans with their managers, this would usually occur at the employees PDP, "**Leave Management Policy** – Leave plans should also form part of everyone's Performance and Development Plan (PDP)". I am unsure if you have any leave plan in place but would encourage you to discuss this with your manager to inform him of your leave intentions for 2015 so these can be managed in conjunction with operational needs.*

90 In the claimant's witness statement made on 22 July 2015, the claimant refers to communications with Mr Jozwicki, made after 12 December 2015, and says that they are relevant. The respondent says that they are not relevant and therefore inadmissible. Further, the respondent says that such materials are covered by without prejudice privilege, which the respondent has not waived. In that regard, the documents (attached to the claimant's witness statement) do not ostensibly indicate that they attract privilege and appear relevant and are therefore admissible. In any event this court, which is not bound by the rules of evidence, can have regard to them (see r. 35(4) of the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005).

91 Having considered the documents, I find that they offer no further assistance in my determination.

92 It is abundantly clear from all of the available materials that the respondent, having considered the claimant's personal circumstances, decided that she had sufficient accrued leave to meet her needs in 2015. It is obvious that the respondent was of the view that the claimant should access her accrued leave rather than purchase leave to accommodate her needs. In arriving at that decision, the respondent considered that the requirement to manage its leave liability was of considerable importance. In that regard, the respondent sought that the claimant use her accrued leave credits, rather than purchase leave, which would have had the effect of substantially maintaining the claimant's overall leave credit.

### **Was the Decision Made Capricious, Arbitrary, or Unreasonable?**

93 The claimant does not suggest that the decision was made capriciously. Indeed there is no basis for such a finding.

94 In determining whether the respondent's decision was arbitrary I find that it was not because the respondent considered matters that had a rational connection with the Application. In that regard, the respondent was not only entitled to, but required to take into account the claimant's leave credits and weigh that against its Leave Management Policy and the requirement for it to contain and/or reduce its leave liability.

95 Although the claimant takes issue with how the respondent considered her personal circumstances, leave credits and the respondent's work priorities, the mainstay of her complaint is that in arriving at its decision to reject her Application the respondent impermissibly considered its overall leave liability or alternatively, if that was permissible, it applied an inflexible and undocumented policy or alternatively gave such consideration improper weight. The claimant asserts that in all of the circumstances, the respondent's decision was manifestly unreasonable.

96 The pivotal issue to be considered in this matter in that regard is whether the respondent's overall leave liability is rationally connected to any application for purchased leave.

97 I am of the view that it is because of the following reasons:

1. The fact that the respondent will take into account operational requirements is well known and acknowledged in the respondent's Employee Purchased Leave Policy. That is the case because the respondent's ability to manage its overall leave liability is but one aspect of its operational requirements.
2. If the respondent's leave liability is too large, it may not have funds in its budget to cover its liability for leave. Any increase in costs (even if small) that result from an approval to grant leave is a legitimate and indeed obligatory consideration.
3. It may also impact on the respondent's ability to grant other employees leave at their preferred timing.
4. If by granting an employee purchased leave the respondent's overall operation is impacted, and because of budgetary or other considerations it is unable to undertake its day to day business, the whole purpose of the General Agreement will be frustrated.

98 There was nothing manifestly unreasonable in the respondent attempting to manage its leave liability. There was nothing unreasonable in it attempting to reduce its leave liability by causing the claimant to take accrued leave rather than parking it. That is the case even though the claimant's accrued leave was not deemed excessive. The respondent is not precluded from attempting to reduce its overall leave liability by encouraging employees with non-excessive leave credits to take paid leave.

99 Clause 22.5 of the General Agreement requires satisfaction of an agency's accrued leave management policy as a pre-requisite to access purchased leave. Compliance with an agency's leave management policy does not guarantee approval for purchased leave and does not tie the hands of the employer. Whether or not an employer enters into the purchased leave arrangement is a matter for the employer, taking into account relevant factors pertinent to it.

100 It is the case that sometimes various policies will not sit comfortably together, as was in the case in this instance. There was some agitation between the flexible working arrangement commitment given by the respondent and its need to manage its leave liability. In those circumstances, it is incumbent for the decision maker to have regard to all relevant policies. The decision must, in the end result, be made on its merits weighing all relevant factors having regard to those policies.

101 In the particular circumstances there were factors weighing in each direction. In the claimant's mind her personal circumstances favoured the grant of the Application whereas the respondent's commitment to reducing its overall leave liability favoured the refusal. Given the factors that existed, it was open for the respondent to have formed the view that its requirements outweighed that of the claimant particularly given that she had a considerable amount of leave available.

102 It is not for this court to determine which of the factors carried greater weight or whether the ultimate decision was the correct decision.

103 The respondent submits that the court has no power to consider for itself whether it would grant the claimant's Application, or to determine whether the respondent properly considered the Application on its merits. The court can only consider whether the matters taken into account by the respondent were rationally and logically connected to the Application.

104 I generally agree with that submission. This court cannot interfere with the respondent's assessment of the factors considered provided that they were rationally and logically linked to the Application.

105 If some extraneous matter were considered which did not have a rational or logical connection to the Application, then the Application would not have been considered on its merits. However, that did not occur in this instance.

106 I find that the respondent considered the claimant's Application on its merits because it took into account the following, which it was either required or permitted to do:

1. the claimant's personal circumstances;
2. the claimant's leave credits as at 31 December 2014;
3. the respondent's work unit/branch priorities;
4. the respondent's operations perspective, and
5. the respondent's overall leave liability in light of its obligation to manage its leave liability.

### **Conclusion**

107 The respondent has not breached cl 22.3 of the General Agreement because the respondent employer assessed the claimant's Application on its merits and gave consideration to the claimant's personal circumstances, as required.

108 It follows that the claimant has not made out her claim in which she alleged that the respondent has failed to comply with cl 22 of the General Agreement.

**G. CICCHINI**  
**INDUSTRIAL MAGISTRATE**

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

2016 WAIRC 00054

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

### WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2016 WAIRC 00054
<b>CORAM</b>	:	ACTING SENIOR COMMISSIONER P E SCOTT
<b>HEARD</b>	:	WEDNESDAY, 13 JANUARY 2016
<b>DELIVERED</b>	:	FRIDAY, 5 FEBRUARY 2016
<b>FILE NO.</b>	:	APPL 21 OF 2014
<b>BETWEEN</b>	:	BEN THOMPSON
		Applicant
		AND
		THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
		Respondent

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CatchWords	:	Review of a decision of the Construction Industry Long Service Leave Payments Board – Entitlement to long service leave – Definition of construction industry – Exclusion of the carrying out of any work on ships – Beneficial or purposive interpretation of legislation
Legislation	:	<i>Construction Industry Portable Paid Long Service Leave Act 1985</i> s 3, s 3(1) definition of <i>construction industry</i> (a), (b), (c), (d), (e), (f), s 50 <i>Construction Industry Long Service Leave Act 1997</i> (Vic) <i>Long Service Leave Act 1958</i> (WA)
Result	:	Application dismissed
<b>Representation:</b>		
Applicant	:	Mr M Swinbourn of counsel
Respondent	:	Mr S Kemp of counsel

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#### *Reasons for Decision*

- 1 The applicant seeks a review of the decision of the Construction Industry Long Service Leave Payments Board (the Board) made on 8 August 2014 that his work on the SapuraKencana Constructor Vessel (the Vessel) was not construction work. This decision means that he is not eligible for contributions to be made by his employer to the Board for long service leave. There is no dispute that the decision is a reviewable decision under s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985* (the Act).
- 2 The basis of the respondent's decision was that the work performed by the applicant did not fall within the meaning of 'construction industry' under s 3 of the Act due to the exclusion of 'the carrying out of any work on ships'. The applicant accepts that the Vessel is a ship for the purposes of the exclusion at (d) to the meaning of 'construction industry' in s 3(1) of the Act.
- 3 For the following reasons, I find that the applicant's work is expressly excluded from the definition of construction work set out in s 3(1) of the Act.

#### **Agreed facts**

- 4 The parties agree the following facts:
  1. The Applicant's employment was covered by the *Sapuraclough Offshore Western Australia and Northern Territory Offshore Projects Construction Agreement 2013-2015* (**Agreement**).
  2. The Applicant was employed as a rigger by Sapura Kencana Petroleum (Australia) Pty Ltd (**Sapura**) on the SapuraKencana Constructor Vessel (**Vessel**).
  3. The Vessel is a 117 metre subsea construction support vessel which is utilised for the transportation and installation of various items of subsea equipment for the purposes of extracting oil and gas.
  4. The Vessel is used to lift equipment (manifolds) down to the sea floor, lay flowline pipes and umbilical cable and other associated components, ultimately for the extraction and processing of oil and gas from the ocean floor.

5. Cranes are attached to the Vessel and are used on the Vessel to lower equipment to the sea floor. The umbilical cable and flowline pipes are reeled off large spools on the Vessel to the sea floor.
6. The umbilical cables are used for the transfer of power and data and for the extraction of oil and gas. The flowline pipes are used for the transportation of oil and gas from subsea wells, manifolds and off shore process facilities.
7. The umbilical cable and flowlines are connected through manifolds which are strategically placed on the sea floor.
8. Divers are involved in the positioning of equipment on the sea floor and the connection of umbilical cables and flowlines.
9. In May 2014 the Applicant lodged a Days of Service Query Form (**Query**) with the Respondent in relation to his employment with Sapura.
10. The Respondent undertook an inspection in relation to the Query.
11. The Respondent sent a letter dated 8 August 2014 to the Applicant, a copy of which is attached to the Applicant's witness statement marked 'BT9'.

Statement of Agreed Facts  
filed 11 January 2016

5 The applicant seeks that the Commission:

- (a) set aside the Respondent's decision; and
- (b) substitute the decision with its own decision finding that the work that the Applicant performed for the Employer comes within the meaning of construction industry and that the Employer is required to:
  - (i) be registered as an employer with the Respondent;
  - (ii) lodge returns to the Respondent regarding the Applicant's days of service with the Employer; and
  - (iii) make contributions to the Respondent for any days of service the Applicant has completed with the Employer.

Applicant's Amended Outline of Submissions  
filed 25 November 2015, [3]

#### **The applicant's work**

- 6 The applicant, as a rigger, performed work on the deck of the Vessel, assisting in the lowering of equipment and the deployment of the cables and pipelines to the ocean floor.
- 7 The applicant also says that his usual occupation is as a rigger performing construction work in the oil and gas industry. He was employed by Sapura as a rigger from November 2013 to May 2014. He performed that work offshore in the northwest of Western Australia, near Exmouth. The work related to the BHP Billiton Petroleum Construction Project for the Upper Pyrenees and Moondyne Subsea oil and gas fields. His work pattern was three weeks on and three weeks off, working 12 hours per day, Monday to Sunday, for 21 days straight.
- 8 He says the Vessel has a Hydramarine DNV Class Offshore Crane attached to the deck, as well as a number of other smaller deck cranes. He included with his affidavit photographs of the deck, two large steel structures on the back deck which are manifolds, and a photograph of the Vessel with three workers with a testing component about to be lifted subsea. There was also a photograph of the Vessel showing the hangover arch where the flowline goes into the water. He says to mobilise and demobilise from the Vessel, he was either flown by helicopter or ferried by crew boat transfer.
- 9 The applicant's duties were set out in his job description form (exhibit A1, BT7). This is a job description for a rigger in the Vessel Ops Business Division, and it describes the purpose of the job as including:
 

To complete the rigging activities on the vessel within the guidelines of the project, quality, safety and environmental management plans. Undertaking the correct procedures required in lifting of loads and slinging any material that requires to be moved from one place to another by crane and the assembly and erection of structural steel on the back deck.
- 10 The prime responsibilities and deliverables include:
  - Responsible for the safe execution of deck activities in support of the construction work program in accordance with the relevant legislation, company and project procedures
  - Keeping all deck personnel informed of a significant change to the deck status.

Exhibit A1, BT7

- 11 The essential qualifications and experience required include Rigging/Scaffolding Certification Industry Standard; license to Perform High Risk Work (or tickets within validity transfer period); a minimum of 12 months construction industry experience (offshore/remote site preferable); work experience in an offshore/remote location (preferable); to be the current holder of relevant offshore medical (UKOOA) or equivalent; a current offshore survival course certificate suitable for the geographical area of operation, and a good understanding of all rigging/scaffolding/marine construction activities.
- 12 The applicant says that in general terms, this job 'was to assemble structural steel components, such as subsea manifold on the deck of the vessel, arrange for them to be lowered over the side of the vessel onto the sea floor by the crane, and also to lay the continuous flowline, umbilical and other associated components on the sea floor'. He described manifolds as 'large steel structures, similar to modules used in onshore construction projects that contain valves, connection points for flowlines,

umbilical cabling and pipework that deal with the product that comes from the wells in the oil and gas fields'. The applicant described his typical shift as including but not limited to the following duties:

- (a) Laying flowline and umbilical (which is basically like a flexible pipeline). This comes on large reels and to initiate the lay we would rig up the relevant end of the flowline or umbilical and lift it to the subsea floor with the crane.
- (b) Lifting large manifolds subsea and assisting Remote Operated Vehicle (**ROV**) technicians with their equipment. ROV's assist in placing equipment along with the crane subsea and part of riggers duties is to assist the ROV techs when necessary.
- (c) Working in conjunction with divers and lifting their tools and equipment overboard.
- (d) Offshore construction in particular with subsea work riggers are basically expected to assist other construction trades and specialist contractors when required, as well as obviously lifting all componentry whether it be on deck or subsea.

30. All the work I performed was construction focused for the specific project.

Exhibit A1, [29] – [30]

### **The parties' contentions**

- 13 The issue in contention is the very limited question of the meaning to be attributed to the exclusion from the definition of 'construction industry' at (d) of 'the carrying out of any work on ships' contained in s 3(1) of the Act.
- 14 The applicant says that the exclusion in paragraph (d) of 'the carrying out of any work on ships' ought to be read as being work in relation to ships such as 'the doing of work to ships, in effect, such as construction work, in making the ships, maintaining the ships, servicing the ships, painting ships et cetera' (ts 17). On the other hand, the respondent asserts that it means work performed while on board a ship.

### **The applicant's case**

- 15 The applicant says there is ambiguity as to the meaning of the words and that I should prefer the meaning he advocates because when regard is had to the context in which it arises, the general purpose and policy of the Act and the subject it covers, the meaning the applicant proposes will give full effect to the object and purpose underlying the Act. This, according to the applicant, is to provide an entitlement to employees in the broader construction industry who have short term and intermittent engagements that do not give rise to an entitlement to long service leave, in spite of the employees having provided long service to the industry. The applicant says that the respondent's preferred meaning would result in an absurd outcome which does not promote the purpose or object of the Act, as it has the effect of excluding an employee who would otherwise be included, from the benefits of the Act.
- 16 The applicant says '[t]here is nothing else, save for the exclusion that would suggest that Mr Thompson wouldn't be covered by the provisions of the Act' (ts 18). The applicant says that if the respondent's preferred meaning were accepted, it would have the effect that where two people perform identical work in the construction industry, employed by the same employer and on the same project, but if one performs that work on land and one on a ship, the latter would be excluded from the portable scheme, and the other included. An employee building a jetty from a ship would not be covered but one building a jetty from the land is included. The applicant also says that under the respondent's interpretation, a diver who is based on a ship and dives overboard to undertake work would be covered because they are not working on a ship.
- 17 The applicant asserts that employees who, for all intents and purposes are working together, are not covered by the same scheme, and in his case, he worked directly with the divers in the performance of the work.
- 18 The applicant relies on the requirement for the legislation to be given a beneficial interpretation.

### **The respondent's case**

- 19 The respondent says that if the purposive approach is to be applied, then it would be difficult to read the definition of the industry covered, in accordance with the legislation, on the basis that the purpose is to include people who are actually excluded by the legislation. The respondent says 'you cannot extend the statutory scheme beyond that purpose by trying to expand on the wording' (ts 22). The purposive approach does not assist in the interpretation according to the respondent.
- 20 As to the question of it being beneficial legislation, the respondent says one still needs to approach it from the question of who was the legislation intended to benefit. It is intended to benefit employees in the construction industry, however, that industry is defined including by reference to particular exclusions. Therefore, both the purposive and beneficial approaches result in a circular argument, neither of which assists in the resolution of the meaning of the words.
- 21 The respondent also says that the construction industry is referred to as being the building and construction industry and that it was the construction of buildings, and not the ship building industry, which was the focus of the legislation. It was not intended to cover the manufacture, maintenance or repair of ships.
- 22 Further, the respondent says it is the performance of work, the 'carrying out' of work, on board a ship, which is excluded, not the work on ships. It is not work relating to the ship itself but work which takes place on the ship. An examination of some of the other subparagraphs of the definition such as s 3(1)(c) give an indication of the meaning to be attributed to the terms 'carrying out of work on ships'.
- 23 The exclusion is of work performed whilst on board the ships.
- 24 As to the anomaly referred to in respect of divers, the respondent says that divers perform a different type of work. When they are on the seabed, they are performing construction work and that is why they are not excluded from being in the construction industry as opposed to a person performing work on a ship, 'on board the vessel'.

### The approach to interpretation

25 In *The Public Transport Authority of Western Australia v Junghee Yoon* [2015] WAIRC 00918; (2015) 95 WAIG 1620, the Full Bench of the Commission considered the terms of the *Long Service Leave Act 1958* (WA) and referred to authorities dealing with statutory interpretation. A/President Smith noted:

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

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

The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

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

26 The issue of courts taking account of the consequences of giving a particular meaning to an act have been considered in a number of cases. As noted in Pearce DC and Geddes RS *Statutory Interpretation in Australia* (8<sup>th</sup> ed, 2014) [2.38]:

There are numerous cases that show the courts approach the interpretation of legislation by taking into account the consequences of giving a particular meaning to an Act. ... In fact, it could be said that it is unusual to find a case in which the court has not taken that approach. However, as is discussed at 2.3-2.5, 2.9-2.13 and 2.32-2.37 in particular, the language of the statute may prove so intractable that the court is unable to give effect to what it considers to be the evident purpose or object of the legislation. The case that is most frequently cited in support of this general approach is *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; 35 ALR 151. Mason and Wilson JJ commented (at 320-1; 169-70):

The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction. The rules [of construction], as D C Pearce says in his *Statutory Interpretation*, p 14, are no more than rules of common sense, designed to achieve this object. They are not rules of law. If the judge applies the literal rule it is because it gives emphasis to the factor which in the particular case he thinks is decisive. When he considers that the statute admits of no reasonable alternative construction it is because (a) the language is intractable or (b) although the language is not intractable, the operation of the statute, read literally, is not such as to indicate that it could not have been intended by the Legislature.

On the other hand, when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions. Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention.

If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

27 Interpretation is a text based activity and the first point of consideration is the text of the statute concerned (*Alcan (NT) Alumina Pty Ltd v The Commissioner of Territory Revenue* (2009) 239 CLR 27 per Hayne, Hayden, Crennan and Kiefel JJ at [47]; *Amcor Ltd v CFMEU* (2005) 222 CLR 241 per Kirby J at [67]). Therefore, the first step is to examine the text of the Act.

### The provisions of the Act

28 The Act is '[a]n Act to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes' (long title of the Act).

29 It provides for a board to carry out the administration of the Act (the Act, s 14).

- 30 The scheme of the Act provides that employers and employees who meet the definitions in the Act are registered with the Board; the employer makes contributions to the Board in respect of employees, who on meeting the requirements for service in the construction industry have an entitlement to paid long service leave.
- 31 All aspects of application of the Act, for the employer, the employee, and for service, relate to the 'construction industry' as defined in s 3(1) of the Act, which consists of a detailed range of activities. Exclusions from that definition are set out in (d), (e) and (f) of the definition. The issue here is whether one of the exclusions, that is (d), applies.
- 32 Section 3(1) provides the following definitions:

**construction industry** means the industry —

- (a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —
    - (i) buildings; and
    - (ii) swimming pools and spa pools; and
    - (iii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and
    - (iv) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation; and
    - (v) works for the storage or supply of water or for the irrigation of land; and
    - (vi) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises; and
    - (vii) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials; and
    - (viii) bridges, viaducts, aqueducts or tunnels; and
    - (ix) chimney stacks, cooling towers, drilling rigs, gas-holders or silos; and
    - (x) pipelines; and
    - (xi) navigational lights, beacons or markers; and
    - (xii) works for the drainage of land; and
    - (xiii) works for the storage of liquids (other than water) or gases; and
    - (xiv) works for the generation, supply or transmission of electric power; and
    - (xv) works for the transmission of wireless or telegraphic communications; and
    - (xvi) pile driving works; and
    - (xvii) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and
    - (xviii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and
    - (xviiii) fences, other than fences on farms;
  - (b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;
  - (c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,
- but does not include —
- (d) the carrying out of any work on ships; or
  - (e) the maintenance of or repairs or minor alterations to lifts or escalators; or
  - (f) the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation;

...

**employee** means —

- (a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or
- (b) an apprentice;

...

*employer* means —

- (a) a natural person, firm or body corporate who or which engages persons as employees in the construction industry; or
  - (b) a labour hire agency which arranges for a person who is a party to a contract of service with the agency (*person A*) to do work in the construction industry for another person (*person B*), even though person A is working for person B under an arrangement between the agency and person B,
- but does not include a Minister, authority or local government prescribed under subsection (4)(c);

### Consideration

33 There was no Explanatory Memorandum for the Bill in 1985. There have been no previous interpretations of the exclusion the subject of this matter, that is ‘the carrying out of any work on ships’. The contentious word is ‘on’.

34 The definition of the word ‘on’ contains many aspects. That definition is:

a particle expressing: **1.** position above and in contact with a supporting surface: *on the table*. **2.** contact with any surface: *the picture on the wall; the shoes on my feet*. **3.** immediate proximity: *a house on the coast; to border on absurdity*. **4.** situation, place, location, etc.: *a scar on the face*. **5.** support, suspension, dependence, reliance, or means of conveyance: *on foot; on wheels*. **6.** state, condition, course, process, etc.: *on the way; on strike*. **7.** ground or basis: *on good authority; a story based on fact*. **8.** risk or liability: *on pain of death*. **9.** time or occasion: *on Sunday*. **10.** position with relation to something else: *on the left; on the other side*. **11.** direction or end of motion: *to march on the capital*. **12.** encounter: *to happen on a person*. **13.** object or end of action, thought, desire, etc.: *to gaze on a scene*. **14.** membership or association: *on the staff of a newspaper; to serve on a jury*. **15.** agency or means: *to speak on the telephone; we saw it on television*. **16.** manner: *on the cheap; on the sly*. **17.** subject, reference, or respect: *views on public matters*. **18.** *Colloq.* relation of someone to an event which affects them, especially where they are morally responsible: *I don't want him to die on me; the apples went bad on me*. **19.** liability for expense: *drinks are on the house*. **20.** *Aust.* engagement in the mining of a specified resource: *on the tin*. **21.** *Colloq.* indulgence to excess: *he's on the bottle, on the turps*. **22.** direction of attention or emotion: *don't go crook on me*. —*adv.* **23.** on oneself or itself: *to put one's coat on*. **24.** fast to a thing, as for support: *to hold on*. **25.** towards a place, point or object: *to look on*. **26.** forwards, onwards or along, as in any course or process: *further on*. **27.** with continuous procedure: *to work on*. **28.** into or in active operation or performance: *to turn the gas on*. —*adv.* **29.** operating or in use: *the heating is on; the handbrake is on*. **30.** taking place; occurring: *sport is on tomorrow*.

*Macquarie Concise Dictionary* (6<sup>th</sup> ed, 2013) 821

35 Given the breadth of possible meanings, it needs to be read in the context in which it is used, both in the particular exclusion and by reference to other inclusions and exclusions contained within the definition of construction industry.

36 Read in isolation, (d) of the definition in s 3(1) of the Act may afford ambiguity – that is, the phrase ‘any work on ships’ could be read to mean either the construction, renovation, alteration, demolition, maintenance, repairs ‘of or to ships’ in a similar way to those matters listed under (a) of the definition in s 3(1), or maintenance of or repairs or minor alterations to lifts or escalators as at (e) of the definition in s 3(1).

37 However, read as part of the whole definition, the use of the language and the context strongly support the conclusion that no ambiguity exists.

### ‘Construction industry’

38 The definition of ‘construction industry’ is very detailed and is set out in a particular structure. That structure breaks down the work to a location or position; type of building, structure or works; activities and purpose. Firstly, it sets out in paragraph (a), a position or a location in which the work is performed, in this case ‘on a site’. A ‘site’ is defined as:

**1.** the position of a town, building, etc., especially as to its environment. **2.** the area on which anything, as a building, is, has been, or is to be situated. **3.** ... **4.** to locate; place; provide with a site: *they sited the school next to the oval*.  
[L: position]

*Macquarie Concise Dictionary* (6<sup>th</sup> ed, 2013) 1112

39 The definition of construction industry then sets out a list of particular activities and their purposes. In (a), the activity is the construction, erection, installation, reconstruction etc. The type of things to which those activities are done is specified in (i) as buildings, and in (iia) as swimming pools and spa pools.

40 From subparagraphs (ii) to (vi), it sets out, not only the type of structure or works to which the activity is done, but also the purpose to be achieved. For example, (ii) is ‘roads, railways, airfields or other works *for the passage of persons, animals or vehicles*’ (my emphasis).

41 In (iv) is works ‘for the storage or supply of water or for the irrigation of land’, that is, the purpose to be achieved by the works.

42 From (vii) to (x), it describes the structure or the works such as bridges, viaducts, aqueducts or tunnels, chimney stacks, navigational lights etc. but without specifying the purpose.

43 From (xi) to (xiv), it describes the purpose only, such as ‘works for the drainage of land’, ‘for the storage of liquids or gasses’, ‘for the generation, supply or transmission of electric power’, ‘for the transmission of wireless or telegraphic communications’.

44 Paragraph (xv) is simply the type of the works, being pile driving works.

- 45 Paragraph (xvi) sets out the ‘structures, fixtures or works’ and their use, that is ‘for use on or for the use of any buildings or works of a kind referred to in (i) to (xv)’.
- 46 Paragraph (xvii) sets out a purpose as being ‘works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi)’.
- 47 Finally, paragraph (xiii) specifies the structure, that is fences, other than fences on farms.
- 48 Therefore, all of those structures, fixtures or works, the associated activities and purposes specified in (a) of the definition in s 3(1) are carried out *on a site*, that is, the area on which anything, as a building, is, has been or is to be situated (my emphasis).
- 49 Paragraph (b) of the definition specifies ‘carrying out of works *on a site* of the construction, erection, installation ... of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection, installation of plant, plant facilities or equipment for those buildings or works’; that is, paragraph (b) brings within the definition of construction work, the work *on a site* relating to plant and equipment (my emphasis).
- 50 Paragraph (c) clarifies that if the work in (a) or (b) is normally carried out *on site* ‘but which is not necessarily carried out *on site*’, it is included in the definition of construction industry (my emphasis).
- 51 Paragraphs (d), (e) and (f) specify those locations, types of work and employer’s usual arrangements which are not included in the definition of construction industry. The first, in (d), is ‘the carrying out of any work on ships’. Paragraph (e) excludes ‘the maintenance of or repairs or minor alterations to lifts or escalators’. Paragraph (f) excludes carrying out of maintenance or repairs of a routine or minor nature by employees of an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry described in this interpretation.
- 52 Therefore, the definition of construction industry specifies the location, type and purpose of work which is included and that which is excluded.
- 53 When referring to location, it specifies ‘on a site’ or ‘on site’. When it refers to the nature of the structure or works, such as buildings, roads, works, bridges, etc. it uses the terms ‘to’ or ‘of’. In the exclusion, in (e), it refers to work ‘to lifts or escalators’. Where it refers to purpose, it says ‘for’.
- 54 All of the paragraphs contained in (a) and (b) are carried out ‘on a site’. Paragraph (c) is work normally, but not necessarily, carried out ‘on site’.
- 55 Therefore, to apply the word ‘on’ in paragraph (d) in a manner consistent with how that word ‘on’ is used throughout the remainder of the definition of construction industry, it is work carried out at a particular position or location, that is located on ships, not work ‘to ships’.

#### **Beneficial or purposive approach**

- 56 In *The Public Transport Authority of Western Australia v Junghee Yoon*, the A/President considered the issue of beneficial interpretation, saying:
- 34 The legislative purpose of the LSL Act is beneficial. As a beneficial enactment its terms are to be given a liberal interpretation, so as to give the fullest relief which the fair meaning of its language will allow: *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1, 12; *Barns v Barns* [2003] HCA 9; (2003) 214 CLR 169 [42] - [44].
- 35 Thus, the LSL Act should be construed in a manner favourable to those whose benefit it applies to. It is clear the LSL Act creates a scheme of a minimum safety net entitlement, or alternatively entitlements, to long service leave which are to apply to employees when the pre-conditions of service set out in the LSL Act are met.
- 57 The Supreme Court of Victoria – Court of Appeal considered the issue of the beneficial approach to the interpretation of legislation in *Baytech Trades Pty Ltd v Coinvest Ltd* [2015] VSCA 342 (17 December 2015). This is a decision which dealt with the *Construction Industry Long Service Leave Act 1997* (Vic), which is of a similar nature to the Act, the subject of this matter in terms of its purpose. The Court made the following comments regarding the correct approach to the beneficial purpose of the legislation (footnotes omitted):
- 56 With respect, her Honour’s conclusion about the beneficial purpose of the legislation was undoubtedly correct. But the Act also made clear that the beneficial purpose was to be achieved by imposing burdens on employers. The purpose of the very detailed provisions in the Rules was to define, with some precision, the circumstances in which benefits were to be conferred and corresponding burdens imposed. It is by giving primacy to the text that the interpreting court fulfils its task of discerning how far the legislature decided to go in the effectuation of its purpose.
- 57 We draw attention here to the caution expressed by Gleeson CJ in Carr:
- That general rule of interpretation [that a construction that would promote the purpose of the Act is to be preferred to a construction that would not promote the purpose] may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.
- 58 In *Victims Compensation Fund v Brown*, Spigelman CJ observed that it was not appropriate to apply the principle of liberal construction to a clause clearly intended to be one of limitation. His Honour said:

In a passage that has been frequently cited with approval, the Supreme Court of the United States said in *Rodriguez v United States*, at 525–526:

... No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.

In the present proceedings, the Respondent submitted that the purpose was to compensate victims. Even if we were to accept a legislative purpose stated at that level of generality, that would not entail that any ambiguity must be construed in such a way as to maximise compensation (cf *Favelle Mort Ltd v Murray*). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the and not otherwise.

The issue before the Court is the determination of the circumstances in which compensation is payable. The Court is not required to give the most expansive possible interpretation of such circumstances.

Specifically, the Court is not required to give words a meaning other than their primary meaning, unless the context indicates that that should be done.

- 59 On appeal to the High Court, Heydon J (with McHugh ACJ, Gummow, Kirby, and Hayne JJ agreeing) agreed with the approach adopted by Spigelman CJ:

The question is a narrow one and it is possible to answer it briefly. It could be answered very briefly, merely by stating that the answer propounded by Spigelman CJ was correct for the reasons he advanced. In deference to the extremely careful judgments of the majority in the Court of Appeal, however, a longer answer is called for.

- 60 In *MyEnvironment v VicForests*, where one of the purposes of the relevant legislation was to protect the habitat of the Leadbeater’s Possum, the Court of Appeal was invited to construe the relevant provisions expansively with a view to furthering this legislative purpose. Warren CJ said that, while there was no doubt that the authorities endorsed a purposive approach to statutory construction, the authorities also showed that caution was required before interpreting a particular provision expansively because of an underlying purpose of the legislation. The Chief Justice observed:

In my view, the authorities can be seen as supporting two related propositions. First, that it is rarely, if ever, the case that legislation pursues a single purpose to the fullest extent possible. Rather legislation is typically the result of a carefully considered attempt at balancing multiple and sometimes competing objectives. To assume that the apparently confined words of a provision must be given an expansive operation on the basis of what is perceived to be the legislation’s primary purpose may frustrate rather than effectuate legislative intent.

- 61 Tate JA said:

When construing legislation that has a multiplicity of purposes, or seeks to strike a balance between competing interests, it is necessary to keep in mind the observation of Gleeson CJ in *Carr v Western Australia* that the purposive rule of statutory interpretation, embodied in Victoria in s 35(a) of the *Interpretation of Legislation Act 1984*, is of limited assistance in construing legislation, or regulatory instruments, that embrace numerous potentially conflicting objectives in relation to which the court has to determine from the language used where the intended balance lies. In that context, he expressly eschewed the adoption of a construction that furthered the pursuit of one of the competing objectives to the greatest extent possible while leaving the other objectives unfulfilled.

- 62 Drawing on the passage from the judgment of Gleeson CJ in *Carr* set out above, Tate JA concluded that the complexity of the statutory scheme and the competing aims apparent in the regulatory context showed that there had been ‘a compromise’. In the legislative scheme before the court, the ‘purpose or object’ identified did not compel any particular construction, nor was it possible to identify a single purpose or objective. The fact that the legislative scheme was directed at the fulfilment of multiple purposes meant that the ‘correct construction ... must depend on the words used’, within the relevant context.

- 58 In the case of the Act, the beneficial or purposive approaches to interpretation take the matter no further than to say that the purpose is to provide a benefit to employees in the construction industry. The Act then defines that industry by work that is included and that which is excluded. The construction industry to which the employees’ benefit (and in the case of the employers’ the burden) extends, is defined in the legislation. It then becomes a circular argument to define the industry by reference to who benefits, rather than to define it according to the terms of the statute. It is only when a person comes within the definition of construction industry that a benefit is to be provided. The purpose of the legislation is to provide a benefit to those who are within its scope, not to those who are beyond its scope. If the work meets any of the definitions as set out in s 3(1)(a), in (b), or in (c), it will still be excluded if it is performed in any of the circumstances set out in s 3(1)(d), (e) or (f), even if in all other respects it is work carried out in the construction industry.

- 59 Therefore, I conclude that the meaning of construction industry excludes the carrying out of any work while located or positioned on board a ship, not work performed to a ship. Given that the applicant’s work was ‘the carrying out of work on [a] ship’, that work was not part of the construction industry for the purposes of the Act, and the Board’s decision was not in error.

- 60 The application must be dismissed.

2016 WAIRC 00055

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

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
<b>PARTIES</b>	BEN THOMPSON	<b>APPLICANT</b>
	-v-	
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	FRIDAY, 5 FEBRUARY 2016	
<b>FILE NO/S</b>	APPL 21 OF 2014	
<b>CITATION NO.</b>	2016 WAIRC 00055	
<b>Result</b>	Application dismissed	

*Order*

HAVING heard Mr M Swinbourn of counsel on behalf of the applicant and Mr S Kemp 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.

## UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 01097

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

<b>CITATION</b>	:	2015 WAIRC 01097
<b>CORAM</b>	:	COMMISSIONER S J KENNER
<b>HEARD</b>	:	TUESDAY, 4 AUGUST 2015, TUESDAY, 24 NOVEMBER 2015
<b>DELIVERED</b>	:	WEDNESDAY, 16 DECEMBER 2015
<b>FILE NO.</b>	:	U 88 OF 2015
<b>BETWEEN</b>	:	ANTOINETTE BLACK
		Applicant
		AND
		LORD AND CO
		Respondent

Catchwords	:	Industrial Relations (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Whether redundancy was genuine - Whether applicant was informed as soon as was reasonably practicable after the decision was made - Whether the employer brought to the applicant's attention the requirements of s 41(2) <i>Minimum Conditions of Employment Act</i> (WA) and the matters that are entitled to be discussed - Principles applied - Applicant was made redundant - Employer substantially complied with its obligations save for the applicant was not informed as soon as was reasonably practicable after the decision was made and was not informed that she was not considered suitable for the new position - Contravention of s 41 <i>Minimum Conditions of Employment Act</i> (WA) - Breach of contract - Whether contravention deprived applicant of a real opportunity to pursue alternative positions - No evidence that the employer could have readily taken another course - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Minimum Conditions of Employment Act 1993</i> (WA)
Result	:	Application dismissed

**Representation:**

Applicant : In person  
 Respondent : Mr B Jones as agent

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

*FDR Pty Ltd and Ors v Gilmore and Ors; Gilmore and Anor v Cecil Bros and Ors* (1998) 78 WAIG 1099; *Gromark Packaging v FMWU* (1992) 46 IR 98

*Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893

**Case(s) also cited:***Reasons for Decision*

- 1 From 7 July 2014 until 8 June 2015 Ms Black was employed as the Office Manager for Lord and Co. In this position Ms Black was responsible for all office functions of the business including oversight of financial and accounting functions. As a result of a review of the structure of the business, a decision was made to abolish the Office Manager position and create a new, lesser position of Bookkeeper. As a consequence of this restructuring, Ms Black was made redundant and her employment was terminated.
- 2 Ms Black now complains that the termination of her employment was harsh, oppressive and unfair. It is alleged that she was not properly consulted about the office restructuring, was not given any opportunity to discuss alternatives to redundancy, and was required to pack up and leave on the day her employment was terminated. Furthermore, Ms Black alleged that an advertisement for the new position published in mid-June 2015, was in essence her former job. This is said to be an additional reason why she said that her dismissal was harsh, oppressive and unfair. Ms Black has commenced these proceedings and seeks compensation for loss.

**Recruitment for the position and duties**

- 3 Ms Black has a background in human resources, marketing and communications. A human resources consultant to Lord and Co, Ms McDiarmid, gave evidence. She said she has provided human resources consultancy to the business since about 2011. She was approached by the principal of the business, Mr Lord, to recruit a suitable person for the Office Manager position. She discussed the requirements of the job with Mr Lord and a position description was prepared, a copy of which was exhibit R2. She testified that the requirements for the position were finalised by the end of April 2014. The position description for the job of Office Manager as prepared by Ms McDiarmid had, as the overall purpose of the position, "to manage all office functions in an efficient and productive manner, whilst providing and maintaining a safe work environment." Direct reports to the position included administration and secretarial staff.
- 4 The tasks and responsibilities of the position included human resources matters, administration including managing all financial and accounting functions and other related matters, renewals for trademarks and patents, management of staff, pay roll and related duties. As evidence that this position description was for the Office Manager position ultimately occupied by Ms Black, Ms McDiarmid referred to a copy of her computer records, referring to the position description as finalised on 28 April 2014, a copy of which Ms McDiarmid said she provided to an applicant for the job.
- 5 On 16 June 2014 Ms McDiarmid said that she met with Ms Black in a café to discuss the Office Manager role, which the applicant had expressed an interest in. Ms McDiarmid testified that her standard practice was to provide a copy of the position description at the meeting. Later on 1 July 2014, Ms McDiarmid and Mr Lord interviewed Ms Black for the job. Ms McDiarmid said that the position was an expanded role, to incorporate human resources responsibilities. This meant Lord and Co would be less reliant on her as a consultant to undertake this sort of work. As the applicant had a human resources background, Ms McDiarmid thought she may be suitable.
- 6 Ms Black was subsequently offered the position of Office Manager. However, Ms McDiarmid said that she did not provide Ms Black with a copy of the position description, exhibit R2, when the offer was made. When presented with a copy of a position description dated 7 July 2014, signed by the applicant, that was quite different to exhibit R2, Ms McDiarmid said she had never seen this prior to Ms Black's unfair dismissal application having been made. She further said that this was not the kind of position description which was previously used in the business.
- 7 A copy of Ms Black's contract of employment dated 7 July 2014, under cover of a letter 1 July 2014, was exhibit A1. At cl 1 – Contract of Service of the written contract of employment, reference is made to the position of Office Manager working in accordance with a job description annexed to the contract. There was no annexure to the contract tendered in evidence and which was signed by Ms Black and Mr Lord on 7 July 2014. This would appear to be consistent with Ms McDiarmid's evidence that as far as she was aware, a copy of the position description was not given to Ms Black at the time the offer of employment was made. This was also the evidence of Mr Lord when, after some questioning by Ms Black, he conceded that a copy of the position description was probably not given to Ms Black at the time of the offer of employment.
- 8 In the position of Office Manager, Ms Black testified that she had a range of administration and management duties, including human resources and staffing matters. She said that as to the latter, Mr Lord had a number of staffing issues that he wanted resolved which was one of the reasons that she got the job. In terms of the bookkeeping and accounting type of work, Ms Black said that she did basic bookkeeping work, but the business had a company accountant who also provided accounting services. Ms Black testified that she served the probationary period of six months under her contract of employment without any issues. Ms Black said that she has some familiarity with MYOB, payroll administration and the completion of budgets,

from previous experience. Ms Black accepted that she needed assistance from the accountant working in the business in relation to this work.

- 9 In connection with this, in answering questions from the Commission, Mr Lord testified that when Ms Black was employed, after some months looking for someone, she undertook to upgrade her computing skills in areas such as MYOB. In that connection, the business took on an accountant, Mr Murray, who in addition to resolving some legacy issues and a backlog of work arising from the involvement of an accountancy firm in the past, was to provide assistance and training to Ms Black. Mr Lord said that the intention was for Mr Murray to resolve the outstanding issues and provide assistance to Ms Black on the basis of working about three quarters of a day, once per week. However, according to Mr Lord, once the backlog of previous problems had been resolved, it transpired that Mr Murray was working closer to two days a week in helping Ms Black in the bookkeeping and accounting work, contrary to his original intention. It was Mr Lord's evidence that Ms Black was supposed to apply herself and "learn the ropes", but it transpired that the business was incurring increasing costs through Mr Murray's services, contrary to the original idea.
- 10 Mr Lord said that he did bring these matters to Ms Black's attention prior to the decision to restructure the business.
- 11 Mr Murray was called to give evidence. He said that in addition to resolving historical issues, he was engaged to train and support Ms Black in MYOB work. His evidence was that he found Ms Black to be not particularly capable on double entry bookkeeping and did not perform proper reconciliations. Mr Murray said that he ended up spending more time getting the business's books into a proper and orderly state. Mr Murray did agree that the applicant did do bookkeeping work on a regular basis and was also required to prepare profit and loss statements for Mr Lord. In cross-examination, Mr Murray confirmed that he provided MYOB support to Ms Black and also in the maintenance of day to day accounts.

### **Restructuring and redundancy**

- 12 Mr Lord said that over time it was becoming apparent that the business expenditure on accounting services for work performed by Mr Murray, in addition to Ms Black's salary and other costs, was becoming very high. Mr Lord said that the human resources aspect of the Office Manager position could be performed by Ms McDiarmid as might be required. This thinking led to a discussion between Mr Lord and Ms McDiarmid in May 2015. Ms McDiarmid confirmed that this occurred and she met with Mr Lord on 20 May 2015. He told her that he had been looking at the business structure and the costs involved, and wanted to make the business more efficient. Mr Lord informed Ms McDiarmid that he only needed a bookkeeper to perform the work required. Ms McDiarmid then suggested that he speak with Mr Jones. Mr Lord did so and a meeting took place towards the end of May 2015 at Miss Maud's coffee shop in West Perth.
- 13 Mr Lord said that he discussed with Mr Jones the need for the accounts work to be done in an efficient, cost effective way, which had not been occurring up until that time. It was discussed that in the circumstances, the Office Manager's position was not necessary, and could be made redundant, given that Lord and Co is a small business. Mr Lord said that a bookkeeper position would be quite different to the Office Manager position, and would only be responsible for bookkeeping work. When asked whether Ms Black would be suitable for such a new position, Mr Lord said that she would not be. He said this was why the business had had so much input from Mr Murray, the accountant and MYOB consultant.
- 14 Ms McDiarmid confirmed that in her discussions with Mr Lord he also said that the business only needed a bookkeeper. She was also present at the meeting at Miss Maud's on 26 May 2015 between Mr Lord and Mr Jones where the restructuring of the positions was discussed. In connection with the accounting work, Ms McDiarmid also testified that some time earlier, when she was engaged in some recruitment tasks for the business she was being assisted by Ms Black. Ms McDiarmid thought that this was in about April or possibly earlier in May 2015. They began discussing her job as the Office Manager and Ms McDiarmid said that Ms Black told her during the conversation that she did not want to be involved in the accounting work because of an issue with Mr Lord losing money some time previously. When asked about this in cross-examination, Ms McDiarmid said she did not distinguish between accounting and bookkeeping work, as it was all the same to her.
- 15 The upshot of all of this was that a decision was made arising out of the meeting on 26 May 2015 that the Office Manager's position would be made redundant and a new lesser position of Bookkeeper would be recruited. Mr Lord did not consider that Ms Black would be suitable for this position, because of the issues in the past with the accounting type of work. It was agreed that the date of the redundancy meeting with Ms Black would be 8 June 2015, some two weeks hence. Discussion took place about ways to reduce the impact of the redundancy on Ms Black. It was agreed that Lord and Co would offer her outplacement services. Mr Jones prepared a "Redundancy Communication Process" document which contained a meeting "script" for the meeting to take place on 8 June 2015 involving Mr Lord, Mr Jones and Ms Black. This script referred to preparation of a redundancy letter, preparation of any severance, notice of termination and statutory entitlements, and details of outplacement arrangements.
- 16 On 8 June 2015 Ms Black testified that she received a telephone call from Mr Lord to meet with him and Mr Jones at 11am. She attended the meeting at which Mr Jones informed her that, due to operational and organisational circumstances, her position was being made redundant. This was not a reflection on her work performance. Ms Black said that there was no discussion with her of the reorganisation and nor was she offered any other role within the business. Nor was there any discussion about other options to keep her employed. Ms Black said that when Mr Jones offered outplacement services, she asked him whether they had any positions available at the time and he said no that they did not. Ms Black was given a letter by Mr Jones which set out what she had been told in the meeting. A copy of the letter dated 8 June 2015 was tendered as exhibit A2. Ms Black said the meeting was a very short one and afterwards she went upstairs to gather her personal belongings and say goodbye to the staff. Whilst up there, Ms Black said she printed off an employment separation certificate for Centrelink, completed it, went back downstairs and presented it to Mr Lord who signed it. She then left the premises. Ms Black said she was quite upset and shaken by the events that had occurred.
- 17 There was no real dispute by Lord and Co about the content of the meeting on 8 June 2015, except for one matter. Mr Lord confirmed that both he and Mr Jones followed the script that had been prepared and emphasised that the redundancy was not a

reflection of Ms Black's performance. When asked about consultation prior to implementing the redundancy, Mr Lord said that was discussed before the meeting on 8 June 2015 however, as he thought Ms Black would be quite angry with the decision, it was decided to undertake the process all in the one meeting. In relation to the offer of outplacement services, Mr Lord said that Ms Black was not interested and said words to the effect "I don't need that rubbish" and threw the documents on the table: 109t.

- 18 In relation to the employment separation certificate, whilst this is not strictly relevant to the proceedings, Mr Lord denied that he signed such a document then and there in the meeting, as contended by Ms Black. There were also other issues raised by Lord and Co in relation to the alleged forgery of cheques and other documents, which are not relevant to the disposition of these proceedings.
- 19 Subsequent to the redundancy, Ms Black said that she saw an advertisement on an employment website "Seek" dated 15 June 2015, advertising for a position of "Bookkeeper/Administrator". A copy of the advertisement was exhibit A6. Ms Black contended that this was in effect, her former position, and confirmed that the decision to make her redundant was unfair. Ms Black maintained that the bookkeeping functions set out in that position description, which is quite different to exhibit R2, the position description prepared by Ms McDiarmid in conjunction with Mr Lord, were almost identical with the description of the Bookkeeper job in the Seek advertisement.
- 20 The origin of exhibit R1, the position description signed by Ms Black and dated 7 July 2014, which she said she prepared on her first day of employment, was controversial. Lord and Co contended that this document was a fabrication prepared by the applicant herself, for the purposes of these proceedings, to justify her contention as to the similarity of the positions.

### Consideration

- 21 The thrust of Ms Black's claim was that her position was not really abolished; that she was not consulted about the restructure; there was no discussion with her about other possibilities as an alternative to redundancy; and she was required to leave the premises after a short meeting with the employer.
- 22 An employer has the right to restructure its business as it sees fit. Where any restructure involves the redundancy of employees or has other significant impacts, the law in this State imposes certain obligations. Thus, in the case of restructuring leading to redundancy, two issues arise in an industrial context. The first is whether any redundancy is genuine, and the second is whether the procedure followed by an employer was fair. This latter consideration involves, as noted, any statutory and contractual obligations. It is well settled in this jurisdiction that a dismissal on the grounds of redundancy may be harsh, oppressive or unfair: *FDR Pty Ltd and Ors v Gilmore and Ors*; *Gilmore and Anor v Cecil Bros and Ors* (1998) 78 WAIG 1099; *Gromark Packaging v FMWU* (1992) 46 IR 98.
- 23 In this State, subject to any more beneficial entitlements of an employee under any relevant industrial instrument or contract of employment, the minimum obligations are set out in s 41 of the Minimum Conditions of Employment Act 1993 (WA) which is in the following terms:
- 41. Employee to be informed**
- (1) Where an employer has decided to —
- (a) take action that is likely to have a significant effect on an employee; or
- (b) make an employee redundant,
- the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
- (2) The matters to be discussed are —
- (a) the likely effects of the action or the redundancy in respect of the employee; and
- (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect, as the case requires.
- 24 By s 40(1) of the MCE Act "redundant" means "being no longer required by an employer to continue doing a job because the employer has decided that the job will not be done by any person".
- 25 By s 5(1), all minimum conditions of employment, of which s 41 is one, are implied into all contracts of employment. Thus, the failure of an employer to comply with its obligations under s 41 constitutes a breach of the contract of employment. What consequences follow any such breach is a matter I will consider later.
- 26 Consideration of the terms of s 41 of the MCE Act, arose in the decision of the Industrial Appeal Court in *Garbett v Midland Brick Company Pty Ltd* (2003) 83 WAIG 893. In this case an employee of the company, Mr Garbett, was made redundant as his position had been abolished. Mr Garbett was notified of this redundancy on the day his employment was terminated. In a short interview he was informed that a review had been taken of his department and his position was made redundant. It was to take effect immediately and his employment would be terminated that day. He was given a letter setting out his dismissal on the grounds of redundancy. Nothing further was discussed.
- 27 On appeal to the Full Bench of the Commission, Mr Garbett unsuccessfully argued that the employer had failed to comply with its obligations under s 41 of the MCE Act. The Full Bench held that Mr Garbett did not request any information from the employer, either at his dismissal interview or subsequently and therefore did not avail himself of the opportunity to discuss the matters required by s 41(2). On appeal, the Court concluded that the Full Bench was in error in reaching that conclusion. It was held by EM Heenan J (Parker and Hasluck JJ agreeing), that s 41(2) requires more than just an employee being given an

opportunity to discuss such matters. Rather, the employer must bring to the employee's attention the matters prescribed by s 41 and discuss them. In terms of the requirements of s 41 EM Heenan J said at par 94:

94 Accordingly, in the present circumstances, I consider that the term implied in all contracts of employment by s 41 of the *MCEA* that, where the employer has decided to take action that is likely to have a significant effect on an employee or make an employee redundant, the employee is entitled to be informed by the employer as soon as reasonably practicable after the decision has been made, of the action on the redundancy, as the case may be, and the obligation to discuss with the employee the various matters mentioned in s 41(2), actually requires the employer to bring that entitlement to the attention of the employee and to discuss the matters so arising, notwithstanding that the employee may not be aware of the existence of his or her entitlement to be so informed or of the obligation of the employer to discuss the matters provided. In the absence of such an obligation, the statutory provision is likely to have haphazard and random effect depending upon the existence or otherwise of knowledge by the individual employee, at the relevant time, of the effect of s 41. As the section applies to contracts of employment of all kinds, and the Act is designed to provide minimum conditions of employment which will, inevitably, involve many employees at the lower end of the employment scale whose knowledge and experience is likely to be limited, I consider that any different approach would fail to ensure that such employees receive the benefit of the statutory provision which its policy demonstrates is a necessary ingredient of their employment.

28 Given that there was no discussion at all with Mr Garbett in his termination of employment meeting, the Court concluded that the employer was in breach of its obligations under s 41 and the contract of employment. Importantly however, in that case, it was held that where there has been a contravention of s 41 and therefore a breach of a contract of employment, in order for the Commission to assess whether because of this, an employee's dismissal is harsh, oppressive or unfair, the Commission must consider the effect of the breach of contract. In this respect, EM Heenan J went on to say at par 98 as follows:

98 Because Commissioner Wood and the Full Bench concluded that there had been no breach, by the respondent, of the terms of the appellant's contract of employment as implied by the *MCEA* in this case, the decisions below failed to address the vital issue of whether, in these circumstances where there was such a breach of contract, the dismissal was, for that reason, and in effect harsh, oppressive or unfair. By failing to address this issue I consider that there was an error of law in the decisions both of the learned Commissioner at first instance and of the Full Bench and that, as a result, there has not been a determination of the appellant's claim according to law. Had that issue been addressed below it would, in my opinion, have been necessary for the Commission to make findings about the effect of that breach of contract in this particular case, especially having regard to any consequences which it may have caused to the appellant which he asserted caused him loss or damage. Such an exercise would inevitably have required the Commission to make further findings of fact about the effect of this breach of contract upon the appellant and the gravity of any consequences for him in the particular situation. It would also be necessary, in my opinion, for the Commission to make findings of fact about the consequences of this breach of contract in a situation where, had the termination of employment been carried out in a manner which complied with the terms of the contract of employment, as indeed the Commission has already found would have been justified, whether the course which was followed by the respondent by acting in breach of contract produced loss or damage for the appellant which would not, otherwise, have occurred. Only when findings of fact of this nature are made will it be possible to determine the appellant's claim finally by deciding whether or not, in all the circumstances, his dismissal was harsh, oppressive or unfair, and, if it were, whether the appellant has suffered any loss or damage in respect of which compensation or other relief should have been ordered under s 23A.

29 In light of these considerations, I return to the facts of the present case. On the evidence I am satisfied and I find that the position offered to Ms Black as the Office Manager was a broad based position. I accept the evidence of Ms McDiarmid and Mr Lord that they discussed and agreed on a broadening of the Office Manager position to incorporate substantial human resources management responsibilities, so less reliance would be placed on Ms McDiarmid's services. This was clearly one reason why Ms Black was considered to be a good candidate for the position, with her background in this area.

30 On this basis, I accept that exhibit R2 was the position description prepared for the Office Manager position. I accept also that Ms Black may well have been provided with a copy of this position description by Ms McDiarmid in the very early stage of her recruitment. However, I am also satisfied that Ms Black was not provided a copy of the position description at her interview with Mr Lord nor when she was formally offered the Office Manager position. I therefore accept that the duties and responsibilities of the Office Manager position were as set out in exhibit R2. As a consequence of this, I do not accept that exhibit R1, the document that Ms Black said she prepared herself as a description of her position, is a fulsome description of the requirements of the job. For example, there was little or no reference to human resources responsibilities in exhibit R1, which was clearly intended to be on the evidence, a substantial feature of the revised Office Manager position, as reflected on p 2 of exhibit R2.

31 Given my findings in this respect, it is unnecessary for me to deal with the contention advanced by Lord and Co that exhibit R1 was created by Ms Black after her dismissal, to support her claim in these proceedings.

32 I also find on the evidence that it was the plan for Lord and Co to engage Mr Murray to resolve legacy accounting issues within the business, and to provide support while Ms Black gained further experience in the bookkeeping aspects of the position and was willing to do so. I accept however that over time, the levels of Mr Murray's assistance to Ms Black did not diminish as anticipated, with the intention being for Ms Black to increasingly perform accounting type duties on her own account, without Mr Murray's ongoing assistance. On the evidence too, it appears that the level of human resources related work was not maintained as expected, once initial work was completed.

33 As to the proposal to replace the Office Manager position with the lesser Bookkeeper position, I accept on the evidence that the position to be created, as set out in the position description prepared by Ms McDiarmid for Lord and Co as exhibit R4, was substantially narrower in focus and a more confined role. It was to involve the performance of traditional bookkeeping duties,

by a person with a sound background in accounting. I therefore accept on all of the evidence, that the Office Manager position was abolished, and the job was no longer to be performed by anyone. I therefore conclude in these circumstances, that Ms Black was made redundant, as that term is defined in s 41 of the MCE Act.

- 34 The next issue was whether Lord and Co complied with its obligations under s 41 of the MCE Act. The first question is whether Ms Black was informed “as soon as was reasonably practicable” of the redundancy, after the decision was made. On the evidence as I have already found, a meeting took place between Mr Lord, Mr Jones and Ms McDiarmid at Miss Maud’s Café on 26 May 2015. This followed an earlier meeting between Mr Lord and Ms McDiarmid on 20 May 2015. It was clear on the evidence that a decision was taken at the meeting on 26 May 2015 to make Ms Black’s position redundant. The date of 8 June 2015 was set as the day to meet with Ms Black and to inform her of the decision. This was about two weeks after the decision had been taken. As noted, Mr Lord testified that the respondent decided to do the consultation with Ms Black at the same time as the retrenchment, because he thought she may get upset.
- 35 No other good reason was advanced for the quite lengthy period between the decision taken to make Ms Black redundant and the redundancy being implemented. I do not consider that Lord and Co informed Ms Black as soon as reasonably practicable of its decision to make her redundant. Lord and Co did not comply with s 41 in this respect.
- 36 The next issue was whether the employer complied with the obligation under s 41(1) to discuss with Ms Black the matters set out in s 41(2). As already noted, this requires an employer in a redundancy case to specifically bring to an employee’s attention, the requirements of s 41(2) and the matters that are entitled to be discussed. This is particularly so in circumstances where the employee may be unaware of such an entitlement.
- 37 In this case the oral evidence was that in the meeting of 8 June 2015, Ms Black was told that her position of Office Manager was to be made redundant. Ms Black said that she was told her position was to be replaced. Ms Black said that no other options were discussed or raised with her. It was a very short meeting. Ms Black gave some fleeting evidence of a job being vacant as a “renewals officer” or some such position, responsible for the administration of renewals of trademarks and patents. As to this suggestion of a “renewals position”, there was no other evidence before the Commission from Lord and Co on this issue.
- 38 Therefore, there is insufficient before the Commission to enable findings to be made as to whether this was truly a vacant position and moreover, one that Ms Black may have been suitably qualified for and therefore able to be considered for appointment to. As to the Bookkeeper position, Lord and Co said that because of the need to maintain the ongoing accounting support for Ms Black, and because of difficulties which had been experienced in the past, the prospect of Ms Black occupying this position was not an option for the business.
- 39 A strong guide as to the discussion at the meeting on 8 June 2015 was the script tendered as exhibit R6. Mr Lord testified that the script was followed “from start to finish” in the meeting: 110t. On all of the evidence I find accordingly. According to the script, Mr Lord invited Ms Black to have an independent person present if she wished to. Mr Lord informed Ms Black of the review of the requirements of the practice and that he had decided that the role of Office Manager was no longer required. Reference was made to the need to focus more on bookkeeping and accounting functions. Also reference was made to the employment of additional accounting resources by the business. Ms Black was then advised that the decision had been taken to make the Office Manager position redundant.
- 40 Mr Jones then informed Ms Black that the decision taken by the business was not a reflection of her work performance but the needs of the organisation. Lord and Co wished to consult with Ms Black and give her “the opportunity to raise issues regarding the redundancy including any suggestions or mitigation you wish to raise for us to consider. Suggestions and mitigation will include things we can do to reduce the impact of the redundancy on you.” Reference was made by Mr Jones to one mitigation, that being the provision of outplacement services.
- 41 Ms Black was then asked if she had any issues or suggestions to make to reduce the impact on her of the employer’s decision. It seemed to be the case on the evidence that none was raised by Ms Black. If any had been raised, the script provided that there be a break in the meeting to consider any such matters. A letter confirming the employer’s decision and referring to final payments and outplacement services was provided to Ms Black.
- 42 Ms Black complained that no other options were put to her in the course of the meeting. This of course, carries with it the implication that there were alternatives open to the business. As to the Bookkeeper position, it may have been prudent for Lord and Co to have informed Ms Black that it had considered the option of offering her this position but had not because they were not satisfied that Ms Black was suitable to perform this work as a standalone position, based on experience to date, and invite a response. As I have already indicated, there was insufficient evidence before the Commission to establish, and to make any findings, that there were any other positions for which Ms Black may have been suitable for consideration.
- 43 As mentioned, s 41 requires the employer to bring the entitlement to the attention of the employee, to discuss the impact of a redundancy, and to consider any means that might be available to lessen or to avoid any adverse effects. In this case I consider that the employer substantially complied with its obligations, save for the delay in informing Ms Black of the decision, and also perhaps of not informing her that she was not considered suitable for the new Bookkeeper position, and inviting any input from her. To that extent only, I consider there was a contravention of s 41 of the MCE Act and therefore a breach of contract.
- 44 However, as *Garbett* makes clear, that is not the end of the matter. It is then necessary to consider what the consequences of a failure to comply are, and whether this has led to any identifiable loss or damage for Ms Black. In such cases, it needs to be established by Ms Black that a contravention deprived her of a real opportunity to pursue alternative positions either internally or externally. To establish this, there would need to be tangible evidence, sufficient to support findings by the Commission. This is not so in the present case. One could not perhaps discount the possibility that had the notice of the decision to make Ms Black redundant being given at an earlier time, there may have been other alternatives put by Ms Black for the employer to consider. However, in the absence of any evidence of such a loss of an opportunity, a finding cannot be made. There was no other evidence that the employer could have readily taken another course, apart from the offer of job search support that would have made a material difference to the outcome.

45 For the foregoing reasons, the Commission cannot come to the conclusion that the termination of Ms Black's employment, in all of the circumstances of this case, was harsh, oppressive or unfair. Accordingly the application must be dismissed.

2015 WAIRC 01098

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ANTOINETTE BLACK	<b>APPLICANT</b>
	-v-	
	LORD AND CO	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	WEDNESDAY, 16 DECEMBER 2015	
<b>FILE NO/S</b>	U 88 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 01098	

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<b>Result</b>	Application dismissed
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Mr B Jones as agent

*Order*

HAVING heard Ms A Black on her own behalf and Mr B Jones as agent 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.

2016 WAIRC 00066

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION VICKI CROSS	<b>APPLICANT</b>
	-v-	
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER J L HARRISON	
<b>DATE</b>	TUESDAY, 9 FEBRUARY 2016	
<b>FILE NO/S</b>	U 182 OF 2015	
<b>CITATION NO.</b>	2016 WAIRC 00066	

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<b>Result</b>	Discontinued
<b>Representation</b>	
<b>Applicant</b>	Mr D Stojanoski (of counsel)
<b>Respondent</b>	Ms M Butler and Mr J O'Brien

*Order*

This application was made under s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 3 and 9 December 2015 the Commission convened conciliation conferences and on 16 December 2015 the applicant advised that the parties were negotiating a settlement in relation to the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 1 February 2016 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,  
Commissioner.

**2015 WAIRC 00967**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DEANNE HATCH	<b>APPLICANT</b>
	-v-	
	PARKERVILLE CHILD AND YOUTH CARE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	TUESDAY, 27 OCTOBER 2015	
<b>FILE NO/S</b>	B 161 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 00967	

<b>Result</b>	Extension of time granted
<b>Representation</b>	
<b>Applicant</b>	No appearance required
<b>Respondent</b>	Mr D Paton of counsel

*Order*

HAVING heard Mr D Paton 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 time for the filing of the notice of answer in the herein proceedings be and is hereby extended to 13 November 2015.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2016 WAIRC 00049**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DEANNE HATCH	<b>APPLICANT</b>
	-v-	
	PARKERVILLE CHILD AND YOUTH CARE	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	THURSDAY, 4 FEBRUARY 2016	
<b>FILE NO/S</b>	B 161 OF 2015	
<b>CITATION NO.</b>	2016 WAIRC 00049	

<b>Result</b>	Discontinued by leave
<b>Representation</b>	
<b>Applicant</b>	In person
<b>Respondent</b>	Ms L Fysh of counsel

*Order*

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

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2016 WAIRC 00039**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PHILLIPPA HILL	<b>APPLICANT</b>
	-v-	
	MENTAL HEALTH LAW CENTRE	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	FRIDAY, 22 JANUARY 2016	
<b>FILE NO/S</b>	U 164 OF 2015	
<b>CITATION NO.</b>	2016 WAIRC 00039	

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**Result** Application dismissed

*Order*

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and  
 WHEREAS on 6 November 2015 the Commission convened a conference for the purpose of conciliating between the parties; and  
 WHEREAS during that conference the parties reached agreement in principle; and  
 WHEREAS on 20 January 2016 the applicant filed a Notice of Discontinuance in respect of the application;  
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

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

**2015 WAIRC 00882**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MS VICKY ANN NEWALL	<b>APPLICANT</b>
	-v-	
	MR STAN LIAROS CEO GROUP TRAINING SOUTH WEST INC.	<b>RESPONDENT</b>
<b>CORAM</b>	COMMISSIONER S J KENNER	
<b>DATE</b>	MONDAY, 21 SEPTEMBER 2015	
<b>FILE NO/S</b>	B 87 OF 2015	
<b>CITATION NO.</b>	2015 WAIRC 00882	

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**Result** Order issued

**Representation**

**Applicant** Ms A Nyariel

**Respondent** Mr S Liaros

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*Order*

HAVING heard Ms A Nyariel on behalf of the applicant and Mr S Liaros on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent, hereby orders –

THAT the application be and is hereby adjourned to a date to be fixed and the hearing listed on 24 September 2015 be and is hereby vacated.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 01090

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2015 WAIRC 01090  
**CORAM** : COMMISSIONER S J KENNER  
**HEARD** : MONDAY, 14 DECEMBER 2015  
**DELIVERED** : MONDAY, 14 DECEMBER 2015  
**FILE NO.** : B 87 OF 2015  
**BETWEEN** : MS VICKY ANN NEWALL  
 Applicant  
 AND  
 MR STAN LIAROS CEO  
 GROUP TRAINING SOUTH WEST INC.  
 Respondent

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Catchwords : Industrial Law (WA) - Contractual benefits claim - Application for additional redundancy payment pursuant to contract of employment - Whether there was a variation of the contract to reflect the National Employment Standards set out under the Fair Work Act - Principles applied - Unilateral variation to the terms of the contract of employment - No agreement to or acceptance of the variation - Applicant had a contractual entitlement to a redundancy payment in accordance with the written contract - The applicant was denied a contractual benefit on the termination of her employment - Application upheld

Legislation : *Industrial Relations Act 1979 (WA)*  
*Fair Work Act 2009 (Cth)*  
*Minimum Conditions of Employment Act 1993 (WA)*

Result : Application upheld

**Representation:**  
 Applicant : Ms A Nyariel  
 Respondent : Mr S Liaros

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

*Porter v City of Stirling* (2015) 95 WAIG 577

**Case(s) also cited:***Reasons for Decision**Ex Tempore*

- 1 The applicant was employed by the respondent as Administration Supervisor for the respondent's office. She started work on 20 August 2007 and the employment came to an end because of circumstances of redundancy, through the closure of the respondent's Mandurah office, on about 18 May 2015. There is no dispute as to the fact of the redundancy. The applicant says her contract of employment provided that on termination of her employment she was entitled to three weeks' pay for each year of service in addition to four weeks' payment in lieu of notice. The contract sets out those provisions in clear and unambiguous terms in clause 14 and as I have already indicated, there is no dispute as to the terms and conditions of employment that Ms Newall commenced and signed on 21 September 2012.
- 2 The respondent provided to Ms Newall on termination of her employment on the grounds of redundancy, 13 weeks' pay based on section 119 of the Fair Work Act 2009 (Cth) which are what are colloquially known as the National Employment Standards or the NES. The applicant therefore claims she is entitled to an amended additional amount of \$8,664.21 gross, based on the terms of her contract and based on 21 weeks' of service, given her length of service with the employer. She has commenced these proceedings to recover that amount and the parties have not agreed to resolve the matter through conciliation.

- 3 There is little real contest on the evidence. The applicant testified that she signed her most recent contract of employment as I have said on 21 January 2012. A copy of the contract entitled “The Group Training Southwest Incorporated Staff Employment Contract” was exhibit A1. It was signed by both the applicant and the chief executive of the respondent, Mr Liaros, on the date that I have indicated. The relevant clause as I have mentioned is clause 14. That clause is headed “Redundancy or Significant Change and Effect” and provided for the benefits to which I have referred, in addition to various other entitlements which an employee would be paid in accordance with the Agreement. As I have said on the face of it, this provision is clear and unambiguous in accordance with its terms.
- 4 The applicant testified that she met with Mr Liaros on 15 May or thereabouts this year. She was informed of the respondent’s decision to close the respondent’s Mandurah office and that the staff at that office were to be retrenched. The applicant further testified that in the meeting, Mr Liaros told her that her redundancy entitlements would be in accordance with the Fair Work Act. He said this change had been implemented sometime prior and the respondent’s decision would override the terms of her contract. She said at no stage was she made aware of this change and says that she certainly did not agree to it.
- 5 Mr Liaros gave evidence for the respondent and to his credit he substantially did not dispute what the applicant had said. Mr Liaros testified that each year he undertook a review of the terms and conditions for staff of the respondent. Whilst administration staff were paid well in excess of the applicable awards, on the introduction of the NES under the Fair Work Act, he took a decision to attempt to standardise conditions. One of those standardised conditions was in relation to redundancy pay. He sent, in accordance with his evidence, a memorandum of 25 June 2013 to the respondent’s Payroll Officer which purported to change the staff contracts to vary clause 14, to reflect the NES standards set out under the Fair Work Act. A copy of that memorandum is exhibit R1.
- 6 Mr Liaros freely accepts that because of what was described as an administrative error, this notification did not come to the applicant’s attention and there is no evidence before the Commission that the applicant agreed to the change as intended to operate from the date of Mr Liaros’ memorandum, at least insofar as her employment was concerned. As I have indicated, there is no dispute in relation to the terms of exhibit A1, that is Ms Newall’s contract of employment at the time of her redundancy.
- 7 The relevant legal principles are very well settled in relation to contractual entitlements and the variation of contracts and in that respect, I refer to what I said in relation to the variation of contracts in the matter of *Porter v City of Stirling* (2015) 95 WAIG 577 where at par 34 dealing with a not dissimilar case, where there was a purported variation of a contract of employment I said as follows:
- 34 It is possible that a unilateral variation to an employment contract can amount to a breach of the contract: see for example *Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia* (1999) 90 IR 211. While it is clear that employers must have some ability to alter aspects of the employment relationship, changes imposed must be consistent with the contract of employment and cannot be a unilateral variation of that contract: Thomson Reuters, *The Laws of Australia* (as at 1 April 2011) 26 Labour Law, ‘Individual Employment’ [26.1.2090].
- 8 Further at par 36 of that judgment I went on to say:
- ... A mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of a contract: McKendrick EG, ‘Discharge by Agreement’ in *Chitty on Contracts: General Principles* (27th ed, 1994) 1083. More specifically, in the employment context, the reduction in an employee’s pay without consent can amount to a unilateral variation, breaching the employment contract: see TLA [26.1.2090].
- 9 In relation to the issue where an employee who continues to work under a contract unilaterally varied can be taken to have consented to the change, I continued at par 39 of *Porter* as follows:
- Generally speaking, continuing to work under a varied contract will not amount to acceptance of the unilateral variation: TLA [26.1.2070]; *Visscher v Giudice* (2009) 239 CLR 361. While it is possible that a failure to protest about a unilateral variation may result in consent to the variation, that circumstance does not arise on these facts: TLA [26.1.2070]; *Buckman v Barnawartha Abattoirs Pty Ltd* (1994) 140 IR 376. ...
- 10 A statutory obligation such as section 119 of the Fair Work Act or the terms of the Minimum Conditions of Employment Act 1993 (WA) regarding minimum conditions, are statutory minima below which a person may not contract. That does not, of course, preclude more favourable terms from being agreed and being enforceable. In my opinion, such is the case in this matter. I am satisfied on the evidence in this case that the applicant had, as at 18 May 2015, a contractual entitlement to a redundancy payment in accordance with clause 14 of the written contract. As the respondent’s CEO Mr Liaros has properly conceded, the entitlements were not paid for reasons explained by Mr Liaros. I find that the applicant was entitled to a redundancy payment based on three weeks’ wages per year of service, in total being 21 weeks and this was denied to her as a contractual benefit on the termination of her employment.
- 11 Accordingly, having made those findings, I propose to make the following order. That the applicant was denied a contractual benefit on the termination of her employment on or about 18 May 2015 in the sum of \$8,664.21 gross and such sum is to be paid within 21 days of today.
-

2015 WAIRC 01091

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MS VICKY ANN NEWALL

**APPLICANT**

-v-  
MR STAN LIAROS CEO  
GROUP TRAINING SOUTH WEST INC.

**RESPONDENT**

**CORAM** COMMISSIONER S J KENNER  
**DATE** MONDAY, 14 DECEMBER 2015  
**FILE NO/S** B 87 OF 2015  
**CITATION NO.** 2015 WAIRC 01091

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**Result** Order issued

**Representation**

**Applicant** Ms A Nyariel

**Respondent** Mr S Liaros

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*Order*

HAVING heard Ms A Nyariel on behalf of the applicant and Mr Liaros 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 pay to the applicant the sum of \$8,664.21 gross as a denied contractual benefit within 21 days.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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2016 WAIRC 00043

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
KEVIN JOHN PIETSCH

**APPLICANT**

-v-  
RIVERVIEW CHURCH INC

**RESPONDENT**

**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT  
**DATE** THURSDAY, 28 JANUARY 2016  
**FILE NO/S** U 192 OF 2015  
**CITATION NO.** 2016 WAIRC 00043

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**Result** Application dismissed

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*Order*

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

WHEREAS on 17 December 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS during that conference the parties reached agreement in principle; and

WHEREAS on 22 January 2016 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

[L.S.]

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2016 WAIRC 00085

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2016 WAIRC 00085  
**CORAM** : CHIEF COMMISSIONER A R BEECH  
**HEARD** : THURSDAY, 4 FEBRUARY 2016  
**DELIVERED** : MONDAY, 15 FEBRUARY 2016  
**FILE NO.** : U 194 OF 2015  
**BETWEEN** : REECE ANTHONY PEPPIATT  
                   Applicant  
                   AND  
                   RILEYS AUTO ELECTRICS  
                   BENJAMIN IAN RILEY  
                   Respondent

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**Catchwords** : Industrial law - claim of unfair dismissal - use of employer's account for personal purchases - expiry of licence - summary dismissal - whether delay in dismissal amounts to condonation - principles applied  
**Legislation** :  
**Result** : Claim of unfair dismissal dismissed  
**Representation:**  
**Applicant** : Mr R A Peppiatt  
**Respondent** : Mr B I Riley

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**Case(s) referred to in reasons:***Concut Pty Ltd v Worrell* [2000] HCA 64; 75 ALJR 312*Rankin v Marine Power International Pty Ltd* [2001] VSC 150*Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia* (1985) 65 WAIG 385**Case(s) also cited:***Heugh -v- Central Petroleum Ltd [No 5]* [2014] WASC 311*Reasons for Decision*

- 1 Mr Peppiatt was employed as an automotive electrician/technician by Riley's Auto Electrics from 1 March 2012 until his dismissal on 21 October 2015. Mr Riley dismissed Mr Peppiatt for gross misconduct and did not provide Mr Peppiatt with a notice period or pay in lieu of notice.
- 2 Mr Riley gave evidence and also called evidence from Ms McKenzie, the office manager. Mr Peppiatt gave evidence. Mr Riley and Mr Peppiatt each cross-examined the other and some documents were tendered into evidence.

The personal purchases and the warning

- 3 Mr Riley's evidence is that he had warned Mr Peppiatt on many occasions that he was not to use the firm's account for his own personal purchases. Mr Riley's evidence is supported by Ms McKenzie who, as office manager, had overheard Mr Riley saying so. She has been employed since October 2014 and to her own knowledge there had been 10 occasions when Mr Peppiatt had done so; it seems that prior to January 2015, no close watch was spent on this practice, however since that date Mr Peppiatt had used the firm's account for over \$2,000 worth of personal purchases on 10 occasions. When she heard Mr Riley telling this to Mr Peppiatt, and she could hear Mr Peppiatt's response, she heard Mr Peppiatt agree and say 'That's fine' or 'That's ok' or words to that effect.
- 4 I therefore accept Mr Riley's evidence on this point. Mr Riley had frequently spoken to Mr Peppiatt on the telephone making it clear that under no circumstances was he to use the firm's account for personal purchases and that Mr Peppiatt agreed he would not do so. Mr Riley's emphasis is that he had said this specifically on or about 7 July 2015 – he had had enough, and was drawing a line in the sand. Ms McKenzie's evidence is that a conversation occurred on 7 July 2015.
- 5 For his part, Mr Peppiatt said initially he had been specifically told in "coming up to August" that he was not to use the firm's account for personal purchases, although he later agreed that Mr Riley had told him on or about 7 July 2015 that he had to stop using Riley's Auto Electrics account for his own personal purchases and that if he made any further personal purchases using the firm's account his employment would be in jeopardy. After considering all of the evidence, I find that the conversation is more likely to have been on or about 7 July 2015.
- 6 He says, however, that Mr Riley had also said that if he made Mr Riley aware of a personal purchase, there shouldn't be a problem. I accept that Mr Riley had said something like this because in his own evidence Mr Riley said that even after all of

this, if Mr Peppiatt had made sure his name was on the invoice, and he had told Mr Riley about it, and to take the money out of his wages, Mr Riley would have accepted it.

- 7 Mr Riley says that on the day after 7 July 2015, he handed Mr Peppiatt a written warning. Mr Peppiatt disputes this, saying that the copy of the letter Mr Riley handed to the Commission was not given to him until 15 October 2015 and that he was then dismissed only 4 days later. The evidence does not conclusively show whether Mr Riley gave Mr Peppiatt the written warning on 7 July or on 15 October 2015. It is not necessary to finally decide this particular point because even in the absence of a written warning, I find that Mr Peppiatt knew that he was not permitted to use the firm's account for personal purchases, unless, perhaps, he had asked Mr Riley beforehand. He had been told on or about 7 July 2015 that he had to stop using Riley's Auto Electrics account for his own personal purchases and warned that if he made any further personal purchases using the firm's account his employment would be in jeopardy.
- 8 Mr Peppiatt does not dispute that he nevertheless did make further personal purchases. The invoices which became exhibit 3 show that on 8 and 14 July 2015 Mr Peppiatt ordered two batteries for his own purposes on the firm's account at a total cost of \$259.00. He did not have the prior permission of Mr Riley to do so. At the time, Mr Riley was out of the country in Bali. Mr Peppiatt says that Mr Riley was therefore not able to be contacted to ask permission, so he made the purchases anyway. He needed to purchase the batteries at that precise time in order to get the firm's price which was available only at that time (which I understand to mean a price cheaper than he could otherwise buy them himself).
- 9 After considering Mr Peppiatt's evidence, I consider that he thought that he could purchase these personal items on the firm's account notwithstanding Mr Riley's warning to him on or about 7 July 2015 because Mr Riley was out of the country and uncontactable. However, the opposite is in fact the case. Mr Peppiatt's employer had stated to him as an employee that there were to be no further personal purchases on the firm's account. Even if there had been a past practice whereby Mr Peppiatt had on at least some occasions informed Mr Riley, and Mr Riley had not taken any disciplinary action against Mr Peppiatt for doing so, that is not the case here. The fact that Mr Riley was away and uncontactable meant that he could not give permission and that meant, particularly after the 7 July 2015 warning, that Mr Peppiatt simply should not have bought those items for his personal use on the firm's account.
- 10 In doing so, Mr Peppiatt put his own interests before the instruction he had been given by his employer. Mr Riley made the very good point in cross-examining Mr Peppiatt that those prices are the firm's prices, because of the money spent by the firm with that supplier, not Mr Peppiatt's prices, and Mr Peppiatt had no right to those prices for his personal purchases.
- 11 The invoices also show that on 11 July 2015 Mr Peppiatt ordered a number parts totalling \$49.29 for his own purposes on the firm's account.
- 12 The invoices also show that on 12 August 2015 Mr Peppiatt ordered a soldering iron for \$102.30 for his own purposes on the firm's account. As to this, Mr Peppiatt says that he had spoken to Mr Riley about this purchase. Mr Riley at first denied this but then admitted that possibly Mr Peppiatt had done so. I therefore give far less weight to this purchase than I do to the purchases on 8, 11 and 14 July 2015.
- 13 Mr Peppiatt says that on each occasion he left his name with the order so that there was no dishonesty, however the evidence of Mr Riley, and of Ms McKenzie, shows that leaving his name with the order is inadequate. The evidence is that unless Mr Peppiatt specifically informs his employer of the purchase and gives in the copy of the invoice and requests that the cost be taken from his wages, a practice followed by at least one other employee, there is a very good chance the purchase will not be identified by the firm as a personal purchase and it will just be paid by the firm in the usual way. In such a case, Mr Peppiatt would not be asked to pay for the purchase by a deduction from his wages.
- 14 The evidence from Mr Riley, which I accept, is that on previous occasions he had become aware 1½ months after a purchase that an invoice received was one of Mr Peppiatt's personal purchases and when he raised the matter with Mr Peppiatt, he said he had 'forgot' it. Mr Peppiatt's own evidence is that Mr Riley did get upset if he found something that he had forgotten to tell Mr Riley about. I accept Mr Riley's submission that if Mr Peppiatt did forget, and the firm did not check all the invoices, the firm would have paid for Mr Peppiatt's personal purchases. Mr Peppiatt had always paid the invoices when they were brought to his attention but the issue is what happened if he did not bring them to the firm's attention.
- 15 Mr Peppiatt's evidence that he kept the invoices in his wallet because he had to pay for them, which prompted Mr Riley to observe that in that case there was a very good chance that the firm might not become aware of the personal purchases having been made, is to the same effect. I therefore accept Mr Riley's evidence that the invoices for the batteries were found in Mr Peppiatt's vehicle.
- 16 I am satisfied that Mr Peppiatt did purchase personal items on the firm's account, without permission, after he had been told that he should no longer do so and warned that his employment would be in jeopardy if he did so. Mr Peppiatt was obliged to obey the reasonable and lawful directions of his employer. The purchases show that Mr Peppiatt acted contrary to the direction from Mr Riley. He was wrong to do so.
- 17 The standard against which Mr Peppiatt's conduct is to be assessed is well put by Justice Kirby as follows:

It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside), that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee ..., will normally afford legal justification for summary dismissal. Such a case will be classified

as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal." (*Concut Pty Ltd v Worrell* [2000] HCA 64; 75 ALJR 312 at para 51)

- 18 In this case, Mr Peppiatt's not obeying the reasonable and lawful direction was destructive of the trust that needs to exist between him and Mr Riley. Had the soldering iron been the only such purchase, the evidence that Mr Riley may have been told about it means that it would be an exception to this rule and would not by itself have justified Mr Peppiatt's dismissal for gross misconduct. However, the evidence of other 3 invoices cannot be seen in that light.

#### The ARC licence

- 19 There is also another matter. Mr Peppiatt had allowed his Refrigerant Handling Licence to expire. This licence, referred to as an ARC card, expired on 9 May 2015. Mr Peppiatt's evidence is that he could not find it in order to check whether it had expired and by the time he phoned ARC, the paperwork arrived too late. He did not renew it until 16 November 2015 although Mr Peppiatt's evidence is that he did no refrigerant work during that time.
- 20 I am satisfied from Ms McKenzie's evidence, including from the copy of the email dated 8 October 2015 from Ms McKenzie (exhibit 5), that she called and texted Mr Peppiatt on a number of occasions to check the validity of his ARC card. Her evidence is each time he would say he either had left it at home or that he will bring it in, and eventually when Mr Peppiatt did not do so, Ms McKenzie herself checked and found that Mr Peppiatt was not listed as having a current ARC card. Mr Peppiatt agrees he was contacted by Ms McKenzie but he couldn't find his licence. Mr Riley considers Mr Peppiatt had been dishonest in stating that he had a current licence but it was just that he had left it at home and would send it in soon, when in fact he did not hold one.
- 21 I accept the evidence that it is unlawful for a person who does not have an ARC card to carry out work in relation to refrigeration and air conditioning. It may be, as Mr Peppiatt said, that he had no cause after the time it had expired to do refrigerant work, however he needed the licence for the full range of the duties of his job. His employer, through Ms McKenzie, had spoken to him often enough about it. It is his responsibility to maintain it and he should not have allowed it to expire.
- 22 For those reasons, I find that Mr Peppiatt's summary dismissal was justified.

#### The manner of the dismissal

- 23 Mr Peppiatt claims that his dismissal was unfair principally because of the way the dismissal itself was carried out - it took way too long for him to find out why he had been dismissed and he was given no solid reason. His evidence is that when he was dismissed on 21 October 2015, he arrived at work at approximately 6.50 am and found Mr Riley waiting for him. Mr Riley told him that his employment was now ended and that he no longer worked there. Mr Peppiatt said he became rather distraught. He says he never really understood why he had been dismissed and really did not find out until he received Mr Riley's answering statement in response to his unfair dismissal claim. Mr Peppiatt recalls that Mr Riley referred to things being quiet at work and that his paperwork was not up to scratch, but he did not say it was for his using the firm's account for personal purchases.
- 24 I think Mr Peppiatt has a point. Mr Riley's evidence is that at the time he gave only a brief description of the reasons why he had been dismissed and it was not until he went to Mr Peppiatt's home to collect the vehicle that he said it was for using the accounts for personal purposes. Even accepting Mr Riley's evidence, and Mr Peppiatt disputes it, when an employer summarily dismisses an employee the employer should tell the employee the reason for it. This did not occur and the dismissal could have been handled better by Mr Riley. When giving evidence he said that it was not something he had done before and he found the process distressing, and I suspect that it was not handled well by him on the day.
- 25 The manner in which a dismissal is carried out may have an important bearing on whether a dismissal is harsh, oppressive or unfair. It is, however, only one part of the dismissal and should not be viewed in isolation. The manner in which the dismissal is carried out is one factor amongst all of the relevant issues.
- 26 In this case, I am satisfied that Mr Peppiatt's actions in continuing to make personal purchases on the firm's accounts when he had been warned not to do so, and had agreed not to do so, and letting his ARC card lapse, justified his dismissal. Even if Mr Riley had handled the dismissal better than he did, and Mr Peppiatt had responded along the lines of his evidence in this matter, the dismissal would still have occurred.
- 27 As Mr Peppiatt's actions amounted to misconduct sufficient to warrant dismissal, and he was dismissed, it is very difficult for him to argue that because he was not given a clear reason for his dismissal at the time it occurred, or that there was a delay in paying his annual leave and even that there was a deduction from the payments due, makes the dismissal unfair. In the whole of the circumstances of this case, I am not persuaded that the manner the dismissal was carried out makes the dismissal harsh, oppressive or unfair.

#### Delay in dismissing

- 28 Mr Peppiatt also says the dismissal was unfair because the purchases occurred in July and August and yet he was not dismissed until October. He submits that the delay in dismissing him is itself unfair.
- 29 The principle is that an employer is not entitled to justify termination for misconduct not relied upon at the time of termination if the employer condoned the misconduct or waived its right to terminate on the ground of that misconduct.

An employer who has full knowledge of the misconduct of an employee and who makes a decision to continue to employ the employee cannot at a later date dismiss him summarily on the basis of the employee's known misconduct: *Rankin v Marine Power International Pty Ltd* [2001] VSC 150. It is said that the employer has elected to continue the employee in his service or waived his right to dismiss the employee summarily and thereby condoned the misconduct. However, no such waiver, condemnation or election can take place until the employer has full knowledge of the misconduct: *Rankin* [354] (Gillard J); *Le Miere J in Heugh -v- Central Petroleum Ltd [No 5]* [2014] WASC 311 at 94.

- 30 The evidence is the processing of the invoices takes about 1½ months and that the supplier has to be contacted to supply copies of any missing invoices. These particular purchases were discovered in late September 2015. Mr Riley delayed dismissing Mr Peppiatt until 21 October 2015 because he was preoccupied with the illness and hospitalisation of his son. He tendered

health insurance statements and a medical receipt which show dates of treatment for his son on 4 September, 9 and 14 October 2015. He also found the prospect of dismissing Mr Peppiatt very upsetting and this meant there was delay in doing so.

- 31 Whether that delay means he had waived his right to dismiss Mr Peppiatt must involve a consideration of all of the circumstances. In this case, Mr Riley did not become aware of the invoices until late September 2015. He then was obliged to attend to his family, which I consider to be the major priority for him. There is no basis for finding that once Mr Riley knew about the invoices he made a decision to continue to employ Mr Peppiatt and then at a later date changed his mind and decided to dismiss him summarily.
- 32 It was not satisfactory for Mr Riley to delay dismissing Mr Peppiatt once he knew about the invoices, but his family reason for not doing so is understandable and this accounts for a significant part of the delay. The delay in the context of the whole of the circumstances does not mean that the dismissal which otherwise was justified was unfair.

The letters given on 15 October 2015

- 33 I am not persuaded that Mr Peppiatt's dismissal was unfair because of the submission that it occurred only 4 days after he had been given the written warning. In fact Mr Peppiatt's evidence is that he was given two letters, not one. Mr Riley disputes this. After having given the matter some thought I do not think much turns upon this. Even if the letters of warning had been given to Mr Peppiatt on 15 October 2015, it does not change the finding that Mr Peppiatt did purchase personal items on the firm's account, without permission, after he had been told that he should no longer do so and warned that his employment would be in jeopardy if he did so. Nor does it change the fact that he let his ARC card expire.

Conclusion

- 34 The test in matters of this nature has been stated by the Industrial Appeal Court in the *Undercliffe Nursing Home* case (1985) 65 WAIG 385. The question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question 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.
- 35 For the reasons I have set out above, I conclude that Mr Peppiatt has not shown that Mr Riley's right to dismiss him was exercised so harshly or oppressively towards him as to amount to an abuse of the right. His claim will be dismissed and an order now issues to that effect.

2016 WAIRC 00088

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

REECE ANTHONY PEPIATT

**APPLICANT**

-v-

RILEYS AUTO ELECTRICS

BENJAMIN IAN RILEY

**RESPONDENT**

**CORAM**

CHIEF COMMISSIONER A R BEECH

**DATE**

MONDAY, 15 FEBRUARY 2016

**FILE NO/S**

U 194 OF 2015

**CITATION NO.**

2016 WAIRC 00088

**Result**

Claim of unfair dismissal dismissed

**Representation**

**Applicant**

Mr R A Peppiatt

**Respondent**

Mr B I Riley

*Order*

HAVING HEARD Mr R A Peppiatt on his own behalf and Mr B I Riley on his own behalf, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

THAT the application be, and is hereby dismissed.

[L.S.]

(Sgd.) A R BEECH,  
Chief Commissioner.

2016 WAIRC 00083

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MS ANGELINA ROSE RASCHILLA

**APPLICANT**

-v-

MRS LIDIA KUKLINSKA - BODY AND SOUL

**RESPONDENT**

**CORAM** COMMISSIONER J L HARRISON  
**DATE** MONDAY, 15 FEBRUARY 2016  
**FILE NO/S** U 187 OF 2015, B 187 OF 2015  
**CITATION NO.** 2016 WAIRC 00083

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**Result** Discontinued

**Representation**

**Applicant** In person

**Respondent** Mr S Heathcote (of counsel)

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*Order*

These are applications pursuant to s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.

On 10 December 2015 the Commission convened a conciliation conference and following the conference the applicant was given further time to consider an offer to settle the matters.

The Commission was advised on 11 January 2016 that an agreement had been reached in relation to the matters and the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 10 February 2016. The respondent consents to the matters being discontinued.

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

THAT these applications be, and are hereby discontinued.

(Sgd.) J L HARRISON,  
Commissioner.

[L.S.]

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2016 WAIRC 00080

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
LEE WELTHY

**APPLICANT**

-v-

NICOLA JURIN

**RESPONDENT**

**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT  
**DATE** THURSDAY, 11 FEBRUARY 2016  
**FILE NO/S** U 184 OF 2015  
**CITATION NO.** 2016 WAIRC 00080

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**Result** Application dismissed

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*Order*

HAVING heard Mr L Welthy on his own behalf and Ms M Vujcic as agent for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

[L.S.]

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2016 WAIRC 00036

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** MS NIKKI WILSON **APPLICANT**

-v-

MR DAVID KERNOHAN  
MENTAL HEALTH LAW CENTRE **RESPONDENT**

**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT

**DATE** FRIDAY, 22 JANUARY 2016

**FILE NO/S** U 163 OF 2015

**CITATION NO.** 2016 WAIRC 00036

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**Result** Application dismissed

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*Order*

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

WHEREAS on 6 November 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on 21 January 2016 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.

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2016 WAIRC 00041

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2016 WAIRC 00041

**CORAM** : CHIEF COMMISSIONER A R BEECH

**HEARD** : THURSDAY, 12 NOVEMBER 2015

**DELIVERED** : MONDAY, 25 JANUARY 2016

**FILE NO.** : B 129 OF 2015

**BETWEEN** : FARHANG ZARE  
Applicant  
AND  
ARC HOLDINGS (WA) PTY LTD  
Respondent

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**CatchWords** : Industrial law - claim for benefit under contract of employment - - employment under 457 visa as tradesman - demotion - whether demotion unlawful

**Legislation** : Migration Act 1958 (Cth) s 140H(1), s 140GB(1), (2); Migration Regulations 1994 (Cth) r 2.86(2)(a), r 2.79(2)

**Result** : Claim upheld and order issued

**Representation:**

**Counsel:**

**Applicant** : Mr C Fogliani

**Respondent** : Mr K Kutasi

**Solicitors:**

**Applicant** : WG McNally Jones Staff Lawyers

**Respondent** : Solve Legal Pty Ltd

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

*Barker v. Midstyle Nominees Pty Ltd* [2014] WASCA 75

*Mr Farhang Zare v. Arc Holdings (WA) Pty Ltd T/A Arc Switchboards* [2015] FWC 8322, 17 December 2015

**Case(s) also cited:**

*Miller & Miller* [2011] HCA 9; (2011) 242 CLR 446

*Equuscop Pty Ltd v. Haxton* [2012] HCA 7; (2012) 246 CLR 498

*Reasons for Decision***The Claim**

- 1 Mr Zare claims that he has not been paid in accordance with his contract of employment from 7 July 2011 until the termination of his employment on 23 April 2015. Mr Zare was offered, and accepted, employment with ARC Holdings (WA) Pty Ltd (ARC) from 27 April 2011 as a Sheetmetal worker (Fabricator) at an hourly rate of \$28.00 per hour. He was paid at that rate until 7 July 2011 but after that date ARC demoted him and reduced his rate of pay. He claims he has been underpaid \$21,466.93. ARC opposes the claim.
- 2 In 2011 a shortage of available tradesmen in WA caused ARC to recruit tradesmen from overseas. Mr Zare is from Iran and was a resident of that country. ARC offered him employment via a migration agent while he was in Iran and he came to Australia under a 457 visa. Mr Griffiths, the Managing Director, stated that in his time at ARC, he has employed approximately 10 or 12 persons on 457 visas and there were approximately 8 at the time Mr Zare was employed.

**The Meeting of 1 July 2011**

- 3 On or about 1 July 2011, the date is not certain and may have been some 6 weeks after Mr Zare had commenced employment, he was called to a meeting. At the meeting was Mr Griffiths, Mr Ford the manager for the sheetmetal section, Mr Mahoney the general manager, and an electrician whose name is Javad Asghari who had been asked to attend the meeting as a translator because management thought perhaps Mr Zare would not understand what was going on.
- 4 There is no dispute that Mr Griffiths stated that he was not happy with Mr Zare's work. Mr Griffiths' evidence is that ARC had not been in a position to give Mr Zare a trade test or conduct an interview with him prior to employing him, and Mr Griffiths trusted the opinion of the migration agent regarding Mr Zare's skill level. In his opinion, Mr Zare was 'useless as a Sheetmetal fabricator' because his skills were 'very, very limited'. It was quite apparent to Mr Griffiths that Mr Zare's training was structural fabrication, for example girders or heavy metal welding. However switchboards are furniture-class sheetmetal work where the seams are welded together, cleaned off and sanded back, so that when it is powder coated the joints cannot be seen. In one case, Mr Zare's attempt to grind off a couple of welds resulted in him gouging big holes in the side of the kiosk which meant Mr Griffiths had to have another person re-work the job and finish it off, at the cost of possibly two days' work.
- 5 After the first couple of weeks he had asked Mr Ford to assess Mr Zare's abilities and give him some smaller jobs as a test to see what he could do. ARC has two sheetmetal fabrication shops: one to do custom-made switchboards which require a much higher skill level, and the other to do a modular design system where everything is designed on a computer programme, punched out, and welded together. ARC tried on numerous occasions to have Mr Zare do small test pieces in the other workshop and Mr Zare never managed to achieve a satisfactory result the whole time.
- 6 Mr Griffiths' evidence is that he takes a very moral stand on his obligations with regards to 457 visa holders. He does his best to try and look after them. When this issue came to his attention, he was faced with two choices: one was to terminate Mr Zare because he could not do the job; the other choice was to try and work with Mr Zare and develop him so that he could become a good tradesman. Given that there were no tradesmen about, and it was difficult to try and recruit, that swayed him towards the development side. ARC does employ other persons who are paid as tradesmen but they do not have the necessary Australian qualifications.
- 7 Mr Griffiths says that at the meeting he said to Mr Zare that he had a problem with Mr Zare's performance, skill level, technical abilities and the time it takes him to do the job. Mr Griffiths explained the two choices to Mr Zare which included dropping him down to a trades assistant and trying to build up his skills so that he could later be classified as a tradesman. Mr Griffiths said that he would be paid \$20.00 per hour; the rate that he improved would be up to Mr Zare, and when he reached certain benchmarks he would be paid eventually as a tradesman.
- 8 Mr Griffiths' evidence is that he knew there was a legal requirement in relation to Mr Zare's rate of pay so he consulted his migration agent who informed him he was able to do what he was proposing to do. As I find below, that information was incorrect.
- 9 Mr Zare says that Mr Griffiths stated he was not happy with Mr Zare's work and that he was a bit slow. Mr Zare's evidence is that Mr Griffiths said that they were going to drop his salary to \$20.00 per hour and that in a few months his salary will get back to the original \$28.00 per hour. He was going to say he was not happy about this when Javad told him to 'just be quiet' because of his visa, that if he made a complaint ARC might sack him and he would 'need to leave Australia'. Mr Zare's evidence is that because of what Javad said regarding his visa, he did not have any option except to be quiet. He therefore did not respond although he believed they understood from his body language and his face that he was not happy.
- 10 Mr Griffiths' evidence is that Mr Zare just said that he was 'ok' and that he did not look angry.
- 11 Mr Mahoney is the general manager at ARC and has been employed there for 15 years. His evidence is consistent with that of Mr Griffiths, saying that Mr Zare did not seem suited to the position because although he was a 'pretty good' welder, he was bit rough and took a long time on jobs.

- 12 It is not disputed that after that meeting, Mr Zare's hourly rate was reduced from \$28.00 per hour to \$20.00 per hour. The payslip at Exhibit A4 shows the period from 1 July 2011 to 6 July 2011 and the hourly rate shown is \$20.00 per hour. The following payslips show that from 14 July 2011 his hourly rate increased to \$22.00 per hour.
- 13 Mr Zare's rate of pay increased to \$26.00 per hour from 17 November 2011 following a meeting in the lunch room with all employees at which rates of pay for other employees increased from \$28.00 to \$30.00 per hour.
- 14 The payslip from 30 May 2013 shows an hourly rate of \$26.78 per hour, which had happened when the other tradesmen's rates of pay were raised from \$30.00 to \$30.98 per hour and his salary changed from \$26.00 to \$26.78 per hour.

#### The Employment Agreement Signed 20 May 2013

- 15 ARC points to a document on ARC letterhead entitled 'Employment Agreement' (Exhibit A8). It shows Mr Zare's employment classification as Trades Assistant, with an hourly rate of \$26.00 and has a start date of 27 April 2011. It was signed by Mr Griffiths and Mr Zare on 20 May 2013. It has attached to it a copy of the ARC Holdings (WA) Pty Ltd Collective Agreement 2009-2014.
- 16 Mr Griffiths' evidence in relation to the employment agreement signed on 20 May 2013 is that it was introduced after a recommendation from a government department employee that ARC should have employment contracts for every employee. He created one and held a meeting with employees, including management employees, explained what ARC was doing, gave them an opportunity to ask questions and then over the next two days went around and personally asked each person to sign their contract. When he went to Mr Zare, Mr Zare signed the contract and did not say anything. He denied he had said to Mr Zare in relation to the contract that if he did not sign it he would be dismissed.
- 17 Mr Zare's evidence is that he realised it was a new contract with a new position from tradesman to trades assistant and a rate of pay of \$26.00 per hour. He did not agree with the employment agreement and said so to Mr Griffiths. He says Mr Griffiths said to him it was not a contract; they were some documents regarding quality assurance. Mr Griffiths denies this however Mr Mahoney's evidence is that when Mr Griffiths had spoken about the employment agreements at a meeting, he had thought Mr Griffiths had said it was to do with quality assurance and I accept Mr Zare's evidence on this point. Mr Zare says he signed it under pressure.

#### Consideration

- 18 Mr Fogliani, appearing on behalf of Mr Zare, submits that the demotion of Mr Zare from Sheetmetal worker (Fabricator) to trades assistant is void for illegality, and in my view that submission must be upheld.
- 19 The *Migration Act 1958* (Cth) s 140H(1) obliges ARC to satisfy the sponsorship obligations prescribed by the *Migration Regulations 1994* (Cth). Regulation 2.86(2)(a) of those regulations is as follows:
- (2) If the primary sponsored person holds a Subclass 457 (Temporary Work (Skilled)) visa, or the last substantive visa held by the primary sponsored person was a Subclass 457 (Temporary Work) (Skilled) visa, the person must ensure that the primary sponsored person:
- (a) does not work in an occupation unless both of the following apply:
- (i) the occupation was nominated by the person for the primary sponsored person under subsection 140GB(1) of the Act;
- (ii) the nomination was approved by the Minister under subsection 140GB(2) of the Act.
- 20 As Mr Zare was 'the primary sponsored person' holding a subclass 457 visa, ARC was obliged to ensure that he did not work in an occupation unless that occupation had been nominated by ARC for Mr Zare under subsection 140GB(1) of the Migration Act.
- 21 Exhibit A3 shows that Mr Zare was granted a Temporary Business Entry (Class UC) Business (Long Stay) (Subclass 457) visa and that the 'Primary Visa Holder Occupation' is 'Welder (First Class)'. Exhibit A1 at p 20, which is an email from ARC to an immigration official on 25 March 2011, states that Mr Zare was offered the position of Sheetmetal worker (Fabricator), and also that all tradesmen regardless of discipline are paid at the same rate.
- 22 On the evidence, there is no material distinction between the occupations of Welder (First class) and a Sheetmetal worker (Fabricator); significantly, both are at a tradesman level. However there is a significant difference between the occupation of tradesman and the occupation of trades assistant – the latter is not a tradesman occupation. Significantly, it was not the occupation nominated for Mr Zare by ARC.
- 23 In my view, that is sufficient to find that ARC's demotion of Mr Zare was contrary to the *Migration Regulations 1994* (Cth) reg 2.86(2)(a) because trades assistant was not the occupation nominated by ARC for Mr Zare under subsection 140GB(1) of the Migration Act nor was it an occupation approved by the Minister under subsection 140GB(2) of that Act.
- 24 What then is the consequence of this finding? Mr Fogliani submits that the demotion was illegal and therefore void. Mr Kutasi on behalf of the respondent, submits the Migration Act provides penalties for breaching that Act and it does not follow that the action taken by ARC is void.
- 25 The relevant general principles when the making or performance of a contract is expressly or impliedly prohibited by statute are helpfully summarised by Buss JA in *Barker v Midstyle Nominees Pty Ltd* [2014] WASCA 75 at [37] as follows:

A contract may be unenforceable for statutory illegality where:

- (a) the statute expressly prohibits, absolutely or conditionally, the making of the contract or the doing of an act essential to its formation (first category);

- (b) the statute impliedly prohibits the making of the contract (for example, where the contract is to perform an act the performance of which is prohibited by the statute) (second category); or
- (c) the statute does not expressly or impliedly prohibit the contract, but the courts treat the contract as unenforceable because it is associated with or furthers illegal purposes (third category).

See *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ); *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498 [23] (French CJ, Crennan & Kiefel JJ).

- 26 In this case, the facts of this matter fall within the second of the three categories of case listed above. On the evidence of ARC, there was a verbal agreement between ARC and Mr Zare at the meeting on 1 July 2011 which was impliedly prohibited by the *Migration Regulations 1994* (Cth) reg 2.86(2)(a).
- 27 It is not the function of this Commission in a claim of denied contractual benefit to declare it void. However, the Commission should uphold the policy of the law and not accept the agreement as validly varying the original contract of employment between ARC and Mr Zare to employ him as a Sheetmetal worker (Fabricator). The Commission is to decide the matters which come before it according to equity, good conscience and the substantial merits of the case, and it is inconsistent with that requirement to uphold ARC's defence to Mr Zare's claim by relying upon the agreement reached at that meeting.
- 28 There is in my view, a second reason why the agreement reached at the meeting on 1 July 2011 should not be upheld by the Commission. That reason is that I am satisfied that Mr Zare's apparent consent at that meeting to his demotion was not freely given. I accept his evidence that subsequent to the meeting he frequently asked for his rate of pay to be restored. Indeed Mr Zare says that the next time he spoke to Mr Griffiths in his office he asked for his salary back because of the work he was doing was exactly like the others, referring to the three or four sheetmetal workers there, including him getting drawings, making switchboards and sending them over to the paint shop. He says Mr Griffiths disagreed, however from 14 July 2011, which is 2 or so weeks after the meeting, his hourly rate was increased to \$22.00 per hour.
- 29 Mr Griffiths' evidence is that when Mr Zare spoke to him, he explained why his rate of pay had been dropped to \$20.00 per hour and that he had already received his first increment since that time because he had passed to the next level. Mr Griffiths recalled that Mr Zare had just completed another test but he had not passed. Mr Zare would raise this issue about every three to four months.
- 30 On the evidence, Mr Zare also raised his concerns several times with Mr Mahoney. Mr Mahoney's evidence is that Mr Zare did subsequently approach him when he thought he was 'up to speed' but in Mr Mahoney's view Mr Zare never achieved the quality or speed of work which justified his initial rate of pay.
- 31 Therefore I am not persuaded by Mr Kutasi's submission that Mr Zare's subsequent behaviour indicated that he did accept the demotion; the fact that he frequently asked for his rate of pay to be restored is demonstration that he did not willingly agree to the demotion. I consider that it is quite likely that Javad did say something to Mr Zare such as: 'Just be quiet because of your visa. If you make a complaint they might sack you and then you need to leave Australia' because that was in fact the reality. Mr Griffiths' evidence is to the same effect: ARC had two choices: either demote or dismiss Mr Zare. I have no doubt that Mr Zare felt he had no option open to him and was obliged to agree to the demotion although unwilling to do so.
- 32 On the evidence, ARC called Mr Zare to a meeting to tell him what already had been decided. Mr Zare was given no opportunity to think about it, or to seek external advice about it, or to come up with any alternative options for ARC's consideration which might have been more acceptable to him. The demotion had already been decided and was presented to him as fact and he was not given a proper opportunity to respond to the situation.
- 33 For those reasons, I do not accept the demotion to trades assistant with its corresponding reduction in rate of pay arising from the meeting of 1 July 2011 is a valid defence to Mr Zare's claim.
- 34 For similar reasons, the Employment Agreement does not assist ARC in its defence to Mr Zare's claim. If, as I find, the *Migration Regulations 1994* (Cth) reg 2.86(2)(a) required ARC to employ Mr Zare in the occupation in which it recruited him for employment, and that occupation is Sheetmetal worker (Fabricator) not trades assistant, then the Employment Agreement, being a demotion effected in writing, is not a valid defence to Mr Zare's claim.
- 35 I note too that Riordan C in Mr Zare's claim of unfair dismissal in the Fair Work Commission ([2015] FWC 8322, 17 December 2015) found at [50] on the evidence before him that Mr Zare had been forced to sign his 'new' contract of employment under duress. I have no doubt that Mr Zare felt he had no option open to him other than to sign although he was unwilling to do so. I accept that Mr Zare believed that ARC wished to take advantage of him because of his visa type, so he kept being patient.

#### Other Matters

- 36 In May 2014 Mr Griffiths had written 3 letters to Skilled Migration WA (ex B) putting its business case supporting the need for the nominated position of Welder/Fabricator and answering questions 'How the company has attempted to fill the position locally?' and 'How long has the position been vacant for prior to seeking an overseas employee?'. In these letters he stated:

'Mr Farhang Zare has been working for me for the past two years on his 457 Visa and we have been very satisfied with his work. To disregard his contribution to my company and seek to replace him with an unknown person would be commercial suicide for me...Therefore we request that this nomination be approved so as to allow us to permanently employ Mr Zare for at least the next two years.'

Mr Farhang Zare has been fulfilling this position while sponsored by us on a 457 Visa for the past two years and he has proved to be a valued member of the Team. We have offered the position on a permanent basis to Mr Zare as he has the right skills and qualifications and the right attitude and work ethic that is so lacking in Australian Employees...I seek you (sic) confirmation and approval of this Nomination for Welder/Fabricator.'

- 37 These letters were written at the same time that ARC had demoted Mr Zare from the position for which it had sponsored him under the 457 visa. Mr Zare's visa was issued on the basis that his occupation was Welder (First Class) (ex A3). He had been offered, and accepted, employment as a Sheetmetal worker (Fabricator). Mr Griffiths wrote that he has been very satisfied with his work and even that Mr Griffiths has offered the position on a permanent basis to Mr Zare as he has the right skills and qualifications and the right attitude and work ethic. It is in marked contrast to his evidence in these proceedings that he regarded Mr Zare as 'useless as a sheetmetal fabricator' because his 'skills were very, very limited'.
- 38 Mr Griffiths' evidence is that he signed these documents around the time that Mr Zare was applying for his permanent residency. These documents were going to the Department of Immigration to assist Mr Zare with his visa. He states that what he wrote in the documents is true, although a 'stretch on the truth'. In re-examination, Mr Griffiths said that the application for the permanent residency visa for Mr Zare occurred while Mr Zare was still trying to do the right thing, was still a pleasant person and he was trying to help him. He was under no obligation to assist Mr Zare but attempted to assist him because he had done so with several others. He wanted to turn Mr Zare into a good sheetmetal worker; if he had not done so, in April his visa would have expired and Mr Zare would have left.
- 39 It is to Mr Griffiths' credit that he attempted to assist Mr Zare for his permanent residency visa when he was under no obligation to do so. However to accept his evidence that Mr Zare was useless as a sheetmetal fabricator because his skills were very, very limited, that his work was not up to standard, or that he was too slow, as justification for demoting him and paying him less than the rate of pay to which he was entitled under his original contract of employment when he commenced at ARC, means that the statements in these letters about Mr Zare and his skills, qualifications, attitude and work ethic were not true.
- 40 At the time of those letters ARC had demoted Mr Zare and was not even employing him in the position to which the letters refer. Mr Griffiths' evidence that he did not have any issues with the quality of Mr Zare's work towards the end of his employment, and that the issue was with the speed that he was doing that work, is at odds with what he had written. I do not accept that they can be seen as merely a 'stretch on the truth'. These letters mean that I am reluctant to accept the evidence that Mr Zare's skills were so poor that it warranted his demotion.
- 41 Mr Zare's evidence is that his duties did not change at all during the life of his employment and I accept that evidence. Even if the speed of his work was slower than ARC wanted, this does not lead to the conclusion that he could be demoted to trades assistant. There is much to be said for the view of Riordan C at [62(g)] that speed is not a function or assessment of skill or competency. Mr Griffiths said that Mr Zare had been given numerous verbal warnings and on 30 March 2015 was warned formally in writing about the time it was taking him to do the work, and it may be that a disciplinary procedure is the appropriate means for management to address such an issue; unilateral demotion is not.
- 42 Given that Mr Zare's duties did not change, he should have received no less favourable terms and conditions of employment as the other employees, tradesmen, doing the same work were receiving. In this regard too the Migration Regulations 2.79(2) obliged ARC to ensure that the terms and conditions of Mr Zare's employment were no less favourable than the terms and conditions of employment that ARC provides, or would provide, to an Australian citizen or an Australian permanent resident to perform equivalent work in the workplace at the same location. I agree, with respect, with Riordan C at [48] that Mr Zare was working as a tradesman and ARC was obligated to treat Mr Zare in the same manner as other tradesmen and this did not occur.
- 43 It may well be that an employer such as ARC who sponsors a skilled employee under a 457 visa program, and who considers after the employee has commenced work that the employee does not have the level of skill expected, may have options under the Migrations Act and its Regulations to address the issue. What happened here is that ARC acted unilaterally to demote him and that it is not permitted to do.
- 44 Mr Kutasi submits that Mr Zare had attempted to profit from ARC's mistake by deliberately opting to say nothing and waiting until he had permanent residency. Considering the evidence as a whole, I do not accept that Mr Zare had a choice whether to stay or leave, and made a conscious decision to stay. His evidence is that he knew that if he found another employer he would be able to maintain his visa, but that it is difficult in practice to find alternate employment given that he was new to Australia and I accept it. I find he had little, or no, choice but to stay because if he lost his job he would lose his visa.
- 45 Mr Kutasi also submits that Mr Zare had contacted the union in April 2012 to check into the rules behind s 457 visas and from that time had known that ARC could not lawfully demote him. Therefore Mr Zare had sat silently in order to 'profit from ARC's mistake' and that he should not now be allowed to do so. I am not persuaded by the submission. The evidence does not show that his contact with the union informed him about the lawfulness of his demotion, it was about the issue of losing his job and having to leave Australia.
- 46 Moreover, the evidence that Mr Zare did repeatedly ask for his rate of pay to be restored shows that he did not sit silently in order to profit from a known mistake by ARC. His rate of pay did progressively increase but he still received less than the tradesman rate to which he was entitled under his contract of employment.

### Conclusion

- 47 For these reasons, I find Mr Zare has been denied by ARC a benefit to which he is entitled under his contract of employment and his claim is made out.
- 48 As a consequence of the FWC decision, Mr Zare discontinues the part of his claim which relates to the deduction of \$475.20 from his termination pay. A minute of an order now issues requiring ARC to pay Mr Zare \$21,466.92 being the amount set out in the document handed to the Commission by Mr Fogliani in the proceedings.
- 49 If a speaking to the minutes is required, the Commission should be advised by 4:00pm on Friday 29 January 2016 in writing containing the issues to be addressed. The Commission will decide any such issues on the papers.
-

2016 WAIRC 00072

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2016 WAIRC 00072  
**CORAM** : CHIEF COMMISSIONER A R BEECH  
**HEARD** : THURSDAY, 12 NOVEMBER 2015  
**DELIVERED** : TUESDAY, 9 FEBRUARY 2016  
**FILE NO.** : B 129 OF 2015  
**BETWEEN** : FARHANG ZARE  
                   Applicant  
                   AND  
                   ARC HOLDINGS (WA) PTY LTD  
                   Respondent

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**Result** : Order issued  
**Representation:** (By written correspondence)  
 Counsel:  
 Applicant : Mr C Fogliani of counsel  
 Respondent : Mr K Kutasi of counsel  
 Solicitors:  
 Applicant : WG McNally Jones Staff Lawyers  
 Respondent : Solve Legal Pty Ltd

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*Supplementary Reasons for Decision*

- 1 ARC Holdings (WA) Pty Ltd ("ARC") has requested that the sum to be paid to Mr Zare be made by six equal monthly instalments commencing from 1 February 2016. ARC states that the reason for the request is that it already is required by the Fair Work Commission ("FWC") decision to pay a large sum to Mr Zare and that sum together with the sum now to be paid, if it is to be paid immediately, in the current economic circumstances in WA would cause ARC financial hardship.
  - 2 Mr Zare does not agree to the request and wishes the order to issue in the same terms as the minute which requires the sum to be paid forthwith.
  - 3 The Commission only has the above request and reply before it. ARC did not provide any evidence in support of its request. In turn, Mr Zare did not provide any explanation why he refuses the request, nor what the effect on him would be if it is granted.
  - 4 On these very limited submissions, I approach ARC's request in this manner. I take notice of the order issued by the FWC (PR575190) on 17 December 2015 which required ARC to pay Mr Zare 20.5 weeks at the rate of \$30.08 per hour on a 38 hour week. I calculate that sum as \$23,432.32. The order to issue will be to require ARC to pay \$21,466.92 to Mr Zare. In December 2015 it was required to pay Mr Zare a similar sum. Together they total \$44,899.24.
  - 5 I am prepared to accept the general submission that there has been a significant downturn in the State's economy although I have no evidence of its effect on the demand for ARC's switchboards, or on ARC itself.
  - 6 Correspondingly, the sum to be paid to Mr Zare as a result of this order is the amount he was not paid over the course of his employment from July 2011. ARC has had the benefit of that money since that time and Mr Zare has not. Nor will he receive interest on the amounts he has been underpaid.
  - 7 In the usual case the order to issue would require the sum to be paid forthwith. Given the timing of ARC also having to comply with the FWC order, I consider it is appropriate for ARC to be given some additional time for payment of the total sum.
  - 8 ARC's request will mean that Mr Zare would have to wait for six months to receive the full payment of money to which he has been entitled for a considerable period. In the absence of any evidence from ARC, I am not persuaded that this represents a fair balance of the competing interests of ARC and Mr Zare.
  - 9 I consider fairness between them is achieved by requiring the payment to be made in two instalments. The first payment is to be made within 7 days from the date of the order and the second payment two months later.
  - 10 The order now issues.
-

2016 WAIRC 00071

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION FARHANG ZARE	<b>APPLICANT</b>
	-v- ARC HOLDINGS (WA) PTY LTD	<b>RESPONDENT</b>
<b>CORAM</b>	CHIEF COMMISSIONER A R BEECH	
<b>DATE</b>	TUESDAY, 9 FEBRUARY 2016	
<b>FILE NO/S</b>	B 129 OF 2015	
<b>CITATION NO.</b>	2016 WAIRC 00071	

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr C Fogliani of counsel
<b>Respondent</b>	Mr K Kutasi of counsel

*Order*

HAVING HEARD Mr C Fogliani of counsel on behalf of the applicant and Mr K Kutasi of counsel on behalf of the respondent, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –

1. THAT on or before 16 February 2016 ARC Holdings (WA) Pty Ltd pay Farhang Zare \$10,000.00 less tax; and
  2. THAT on or before 15 April 2016 ARC Holdings (WA) Pty Ltd pay Farhang Zare \$11,466.92 less tax,
- in each case being wages due to him for work performed pursuant to his contract of employment.

(Sgd.) A R BEECH,  
Chief Commissioner.

[L.S.]

### SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Belinda Rowland	Stuart Wright Pte Ltd	B 162/2015	Chief Commissioner A R Beech	Discontinued
Jade Cowle	Forrest Personnel Inc.	U 141/2015	Chief Commissioner A R Beech	Discontinued
Muriel Murat	Shire of Sandstone	U 151/2015	Chief Commissioner A R Beech	Discontinued
Naomi Brown	Dr Silas Prashant	U 111/2015	Chief Commissioner A R Beech	Discontinued
Robert Stevens	Birla Nifty Pty Ltd (ACN 19 074 145 636)	B 202/2015	Chief Commissioner A R Beech	Discontinued

### CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Disability Services Commission	Kenner C	PSAC 22/2015	23/11/2015	Dispute re entitlements	Discontinued

## PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00081

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DR MARK GRANITTO	<b>APPLICANT</b>
	-v-	
	RSC DENTAL PTY LTD T/AS KEYS DENTAL CENTRE	<b>RESPONDENT</b>
<b>CORAM</b>	ACTING SENIOR COMMISSIONER P E SCOTT	
<b>DATE</b>	FRIDAY, 12 FEBRUARY 2016	
<b>FILE NO.</b>	B 29 OF 2015	
<b>CITATION NO.</b>	2016 WAIRC 00081	

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<b>Result</b>	Direction issued
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*Direction*

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

WHEREAS the application was set down for a Directions hearing on 11 February 2016; and

WHEREAS the Commission proposed that Directions be issued for the preparation for the hearing of the matter and heard from the parties; and

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

1. THAT the matter be set down for hearing on 15, 16 and 17 March 2016 with 18 March 2016 being held in reserve.
2. THAT the applicant have leave to file and serve on the respondent any amended witness statement and attachments forthwith.
3. THAT the respondent file and serve on the applicant any further evidence in response by 1 March 2016.
4. THAT by no later than 1 March 2016 the respondent comply with Order 1 of the Commission's order ([2015] WAIRC 00881) dated 21 September 2015 to produce for inspection the letter of resignation referred to in paragraph 29a of the Notice of Answer filed on 9 March 2015 by 1 March 2016.
5. THAT should the respondent fail to comply with Direction 4, the respondent will not be able to rely on that document or any other evidence to support the assertion of a resignation by the applicant and any evidence to that effect will be struck out.

[L.S.]

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

2016 WAIRC 00046

### APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 20 OCTOBER 2015

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION NICHOLAS EDWARD PHILLIPS	<b>APPELLANT</b>
	-v-	
	MAIN ROADS WESTERN AUSTRALIA	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN MR G SUTHERLAND - BOARD MEMBER MR T CLARK - BOARD MEMBER	
<b>DATE</b>	MONDAY, 1 FEBRUARY 2016	
<b>FILE NO</b>	PSAB 6 OF 2015	
<b>CITATION NO.</b>	2016 WAIRC 00046	

**Result** Order issued  
**Representation**  
**Appellant** Mr N Phillips in person  
**Respondent** Mr D Anderson of counsel

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*Order*

HAVING HEARD Mr N Phillips on his own behalf and Mr D Anderson of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the name of the respondent in the appeal be amended to "Commissioner of Main Roads Western Australia".

[L.S.]

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

**2016 WAIRC 00044**

**APPEAL AGAINST THE DECISION TO DEMOTE POSITION GIVEN ON 24 NOVEMBER 2015**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES** COLIN HARGRAVE

**APPLICANT**

-v-

PUBLIC TRANSPORT AUTHORITY

**RESPONDENT**

**CORAM** PUBLIC SERVICE APPEAL BOARD  
 ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN  
 MR W DE PRAZER - BOARD MEMBER  
 MS B TRLIN - BOARD MEMBER

**DATE** FRIDAY, 29 JANUARY 2016

**FILE NO.** PSAB 9 OF 2015

**CITATION NO.** 2016 WAIRC 00044

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**Result** Direction issued  
**Representation**  
**Applicant** Mr G Upham as agent  
**Respondent** Mr R Farrell

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*Direction*

HAVING heard Mr G Upham on behalf of the appellant and Mr R Farrell on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the appeal be listed for a one day hearing, on a date to be advised.
2. THAT the parties engage in informal discovery.
3. THAT the appellant file and serve on the respondent any witness statements upon which it intends to rely, 14 days before the hearing of the appeal.
4. THAT the respondent file and serve on the appellant any witness statements upon which it intends to rely, 7 days before the hearing of the appeal.
5. THAT the parties file an agreed statement of facts two days before the hearing of the appeal.
6. THAT there be liberty to apply on short notice.

[L.S.]

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

2016 WAIRC 00005

**DISPUTE RE ALLEGED BREACH OF CONTRACT**  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SITTING AS  
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

HITCHCOCK TRANSPORT PTY LTD

**APPLICANT**

-v-

LIONEL SAMSON GROUP PTY LTD T/AS SADLIERS NEXUS LOGISTICS

**RESPONDENT****CORAM**

CHIEF COMMISSIONER A R BEECH

**DATE**

THURSDAY, 7 JANUARY 2016

**FILE NO/S**

RFT 31 OF 2015

**CITATION NO.**

2016 WAIRC 00005

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<b>Result</b>	Order issued extending time to file answer
<b>Representation</b>	(by written correspondence)
<b>Applicant</b>	Mr A Dzieciol, of counsel
<b>Respondent</b>	Ms E Badock

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*Order*

WHEREAS this referral was lodged in the Tribunal on 23 December 2015 pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* on 23 December 2015;

AND WHEREAS on 7 January 2016 the respondent requested an extension of time to mid-February 2016 in which to file its notice of answer due to relevant employees being on leave;

AND WHEREAS on 7 January 2016 the applicant objected to the length of this request and proposed the date of 1 February 2016;

AND WHEREAS the Chief Commissioner has taken into account the respondent's request and the applicant's objection;

AND WHEREAS the Chief Commissioner considers an extension to 1 February 2016 will allow sufficient time for relevant employees to return from leave;

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

The respondent file its notice of answer on or before 4:00pm Monday, 1 February 2016.

(Sgd.) A R BEECH,  
Chief Commissioner.

[L.S.]

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## RECLASSIFICATION APPEALS—

2016 WAIRC 00082

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
HELEN CHALSON

**PARTIES****APPLICANT**

-v-

DIRECTOR GENERAL OF HEALTH AS THE 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  
COMMISSIONER J L HARRISON

**DATE**

MONDAY, 15 FEBRUARY 2016

**FILE NO**

PSA 8 OF 2011

**CITATION NO.**

2016 WAIRC 00082

**Result** Discontinued  
**Representation**  
**Applicant** Ms K Heal (as agent)

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*Order*

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

On 10 February 2016 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 application be, and is hereby discontinued

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

[L.S.]

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**2016 WAIRC 00067**

<b>PARTIES</b>	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KERRY MICHELLE COWCHER	<b>APPLICANT</b>
	-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 METROPOLITAN HEALTH SERVICE	<b>RESPONDENT</b>
<b>CORAM</b>	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON	
<b>DATE</b>	TUESDAY, 9 FEBRUARY 2016	
<b>FILE NO</b>	PSA 2 OF 2011	
<b>CITATION NO.</b>	2016 WAIRC 00067	

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**Result** Discontinued  
**Representation**  
**Applicant** Ms K Heal (as agent)

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*Order*

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

On 29 January 2016 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 application be, and is hereby discontinued

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

[L.S.]

2016 WAIRC 00065

**PARTIES** WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
MISS CANDICE HOWELLS AND OTHERS

**APPLICANTS**

-v-

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

**RESPONDENT**

**CORAM** PUBLIC SERVICE ARBITRATOR  
COMMISSIONER J L HARRISON

**DATE** TUESDAY, 9 FEBRUARY 2016

**FILE NO** PSA 58 OF 2013, PSA 59 OF 2013, PSA 60 OF 2013, PSA 61 OF 2013, PSA 62 OF 2013, PSA 63 OF 2013, PSA 64 OF 2013, PSA 67 OF 2013, PSA 69 OF 2013, PSA 70 OF 2013, PSA 71 OF 2013, PSA 72 OF 2013, PSA 73 OF 2013, PSA 75 OF 2013, PSA 76 OF 2013, PSA 78 OF 2013, PSA 79 OF 2013, PSA 80 OF 2013, PSA 81 OF 2013, PSA 82 OF 2013, PSA 83 OF 2013, PSA 84 OF 2013, PSA 85 OF 2013, PSA 86 OF 2013, PSA 87 OF 2013

**CITATION NO.** 2016 WAIRC 00065

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**Result** Discontinued

**Representation**

**Applicants** Ms K Heal (as agent)

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*Order*

These are reclassification appeals made pursuant to the *Industrial Relations Act 1979*.

On 29 January 2016 the applicants filed a *Form 14 - Notice of withdrawal or discontinuance* in respect of the appeals.

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

THAT these applications be, and are hereby discontinued

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

[L.S.]

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## SCHOOL TEACHERS—Matters dealt with—

2016 WAIRC 00040

### REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

#### WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**CITATION** : 2016 WAIRC 00040

**CORAM** : ACTING SENIOR COMMISSIONER P E SCOTT

**HEARD** : THURSDAY, 22 OCTOBER 2015, FRIDAY, 23 OCTOBER 2015

**DELIVERED** : MONDAY, 25 JANUARY 2016

**FILE NO.** : APPL 122 OF 2015

**BETWEEN** : MS SHARON HISLOP  
Applicant  
AND  
DEPARTMENT OF EDUCATION  
Respondent

CatchWords	:	Industrial Law (WA) – Hearing de novo – School Teacher – Allegations of breaches of discipline and misconduct in administration of NAPLAN test – Standards and Integrity Directorate Investigation Report – Termination of employment – Procedural fairness – Investigation Report so flawed as to be unable to be relied on – Witness evidence unreliable and biased – Allegations not sustained – No finding of misconduct – Application upheld – Reinstatement
Legislation	:	<i>Public Sector Management Act 1994</i> (WA)
Result	:	Application upheld
<b>Representation:</b>		
Applicant	:	Ms N Barsby of counsel and with her Ms G Little
Respondent	:	Mr D Anderson of counsel

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*Reasons for Decision*

### Introduction

- 1 The applicant, Sharon Hislop, challenges the respondent's decision to dismiss her made pursuant to s 82A(3)(b) of the *Public Sector Management Act 1994* (WA) (PSM Act). She says that:
  - (a) the respondent relied on an investigation report which was not capable of establishing that the alleged misconduct actually occurred, or that it justified dismissal;
  - (b) she was denied procedural fairness by the respondent relying on an investigation that lacked the necessary level of comprehensiveness and which failed to fully and properly explore or analyse relevant matters; and
  - (c) the decision gave little or no regard to her lengthy and positive employment history or the significant impact that dismissal would have on her and her family.
- 2 Having considered all of the evidence, for the following reasons I conclude that:
  - (a) firstly, the investigation itself and the Investigation Report are so flawed as to be unable to be relied on;
  - (b) secondly, the only first hand evidence that contradicted Ms Hislop's evidence as to what happened in the test and in the staffroom, that of Ms Grundy, is so unreliable and biased as to be of little if any value at all.
- 3 In those circumstances, the decision to terminate must be overturned.

### Background

- 4 The applicant was employed by the respondent as a teacher at Wundowie Primary School. She was dismissed on 26 May 2015 following findings that she had committed breaches of discipline contrary to s 80(c) of the PSM Act in that she committed a number of acts of misconduct. Those acts are said to have occurred in the administration of the National Assessment Program – Literacy and Numeracy (NAPLAN) test for Language Conventions for a group of Year 3 students, and in making an inappropriate comment regarding one of those students. These incidents are said to have occurred on 13 May 2014.
- 5 The first allegation is that the applicant approached a student, V, during the Year 3 Language Conventions test and assisted V by indicating the correct answers to her.
- 6 The second allegation is that she also approached a number of Year 3 students during that test and assisted them by pointing to the correct answer bubble and explaining the words they did not understand.
- 7 The third allegation is that she arranged the layout of the classroom so that students' desks were in two rows, with students sitting on either side of each other and immediately across from each other. This layout is said to have allowed the students to read other students' test booklets.
- 8 The fourth allegation is that the applicant allowed all of the students approximately 20 minutes' extra time to complete their tests. She is alleged to have then instructed the Education Assistant, Ms Betty Grundy, to remain in the classroom with two students while they finished their tests.
- 9 The fifth allegation is that in an interview with the school Principal, Mr Hayden O'Mara, she admitted assisting the student, V, with her answers, and that immediately following this she had a conversation in the staff room in which she said words to the effect of, 'that little bitch dobbed me in so I had to admit it'. It is clear from the Investigation Report that the investigator viewed the comment as being made about the student, V.

### NAPLAN Tests

- 10 The NAPLAN is an annual national assessment of all students across Australia, in Years 3, 5, 7 and 9. The tests are Language Conventions (covering spelling, grammar and punctuation), Writing, Reading and Numeracy.
- 11 NAPLAN test results are said to provide 'a snapshot of a student's achievement in comparison to all students of the same year level across the country' (Exhibit 6, McKee [6]) and all progress of each student is able to be monitored. The results are also reported in such a way as to provide a national report 'by gender, Indigenous status, language background other than English status, parental occupation, parental education, and location (metropolitan, provincial, remote and very remote) at each year level and for each domain of the test' (Exhibit 6, McKee [8]).
- 12 The integrity of the testing and the results is said to be important at a number of levels, including for the individual student, the class and school level, and at state and national levels.

### The Test Handbook

- 13 School administrators and teachers across Australia who administer the tests are provided with a detailed handbook, the Test Administration Handbook for Teachers, so that the tests are administered in every school in a standardised way.
- 14 The 2014 Test Administration Handbook for Years 3 and 5 sets out a detailed description of how the tests were to be administered. It included a test schedule which provided that the Language Conventions test was to be undertaken on Tuesday morning, 13 May 2014.
- 15 The Writing test was scheduled for the same morning, following a break. The Reading and Numeracy tests were to follow, on Wednesday, 14 May 2014 and Thursday, 15 May 2014, respectively.
- 16 There were two parts to the Language Conventions test. The first part had a 15 minute introduction time 'for distributing test materials, giving instructions and completing practice questions' (SH-2, 1.1). The total test time including the introduction time was to be 55 minutes.
- 17 The Test Administration Handbook provides a script for the administrator, and to ensure consistency in the test administration across Australia, the script is to be strictly read. It says that 'Test administrators **MUST NOT** vary this procedure' (SH-2, 1.3). There are instructions for preparing the classroom by arranging desks 'to minimise opportunities for students to see another student's work' (SH-2, 2.1).
- 18 Under the heading **3.4 – Assisting students**, the Handbook provides:

It is expected that professional and ethical behaviour will be demonstrated regarding all aspects of the test administration. Any assistance given to a student that advantages them in any way will be considered cheating. Outlined below are the rules for assisting students in all tests as well as in individual tests.

#### 3.4.1 Protocols

- During **ALL** tests the administrator **MAY**:
  - ✓ read or clarify general instructions
  - ✓ remind students of the response types, e.g. shade a bubble
  - ✓ advise students to leave a question if they are unsure of the answer and move on to another question
  - ✓ advise students to return to any unanswered questions if they have time at the end
  - ✓ encourage students who have lost concentration to refocus.
- During the **Numeracy test only**, you **MAY**:
  - ✓ read the words within questions, but **must not read any numbers or symbols**.
- During **ALL** tests the administrator **MUST NOT**:
  - ✗ give examples or hints
  - ✗ explain, paraphrase or interpret questions or texts
  - ✗ explain the meaning of any symbols in questions or texts
  - ✗ indicate to students whether their answers are correct or incorrect
  - ✗ remind students about work completed in class
  - ✗ provide extra time (except where adjustments for disability have been granted).

#### 3.4.2 Language Conventions test

- During the Language Conventions test the administrator **MUST NOT**:
  - ✗ read or sound out any spelling words
  - ✗ write any spelling words on the board or elsewhere
  - ✗ read any of the test questions.

Exhibit 1, SH 2, 5

- 19 Under the heading of '5. Year 3 Test Administration Scripts', at 5.1.4, is the **Test administration script**. A script is then provided for the test administrator to read to the class as part of the introduction segment in the first 15 minutes of the test. Scripts are also provided for the other tests.
- 20 Interspersed within the scripts are instructions to administrators about how to do the practice test, going through the questions, allowing students to check their work and correct it, and in the test itself, it provides that the administrator is to supervise students closely to make sure they are on task, responding in the correct way and doing their own work.

### National Protocols

- 21 There is also a document titled 'National protocols for test administration' for the 2014 NAPLAN testing (Exhibit 3, document (1)). This 'provide[s] detailed information on all aspects of the administration of the tests. The Protocols manage security of the tests, the test environment and other relevant factors to ensure reliable, nationally comparable results are obtained. They specify security requirements and uniform processes and procedures to ensure students complete the tests under similar conditions' (page 3).
- 22 It also notes that:

In order to maintain the integrity of the tests, the testing process and ultimately test results, these protocols must be followed carefully. Breaches of the *National Protocols for Test Administration* and allegations of cheating or improper behaviour are taken very seriously, and substantiated cases of improper behaviour will be reported publicly in ACARA's annual test incident report. To assist [the Test Administration Authorities] and schools determine what are appropriate and inappropriate behaviours, a code of conduct is included, along with information on how breaches are dealt with.

23 The Protocols contain a Code of Conduct which sets out a range of appropriate and inappropriate behaviours on the part of a range of participants. At **[8.6] Administering the tests – appropriate behaviours**, it sets out:

8.6.1 Test administrators must ensure that professional and ethical behaviour of staff members is demonstrated regarding all aspects of test administration. Any assistance that answers a test question for a student or advantages them in any way will be considered cheating (see also Section 11).

8.6.2 'Cheating' refers to behaviour undertaken with the intent of conferring or obtaining unfair advantage in or from the assessment process.

8.6.3 In the case of a teacher, test administrator, or school, an advantage would generally be observed in the performance of the school or cohort, and cheating may include:

- viewing test materials before the morning of the test and using this knowledge to prepare students
- explaining, paraphrasing or interpreting questions
- giving verbal or physical hints to students about the accuracy of their responses
- reminding students about related work completed in class
- providing extra time for students to complete a test (this does not apply where a documented disability adjustment is in place, or where a student has experienced an interruption)
- informing individual students or groups of students undertaking the test in a catch-up session of test content
- changing student responses during or after the test
- knowingly allowing students to engage in behaviour amounting to cheating.

8.6.4 Student cheating is not, in itself, considered a breach of these Protocols, but may reflect a breach by test administrators. In the case of students, an advantage would generally be observed in their individual result. Acts of academic misconduct by students during the tests, such as cheating, are to be dealt with through schools' existing procedures. Cheating may include intentionally:

- taking unauthorised equipment or prohibited information into the test room (e.g. mobile phone, dictionary)
- communicating with any person other than an administrator during the test introduction time, planning time or during the test
- looking at another student's work
- working on the incorrect test in the 'flip' test book.

Where a student is found to have cheated, or is reasonably suspected of having done so, the TAA must be contacted as soon as possible.

8.6.5 During the tests, students should be seated so they are not able to read other students' work. If students take the tests in their classroom, it is expected that the test administrator will be present at all times. If students are seated with a larger group (e.g. in a hall), the student/test administrator ratio must be comparable to that of a regular classroom.

8.6.6 It is expected that test administrators will actively supervise students at all times, including walking around the room, to ensure that test conditions are maintained. When administering the tests in the 'flip' test books, test administrators must ensure that students are working on the correct test. The page borders in the test books have been shaded differently to assist this supervision.

8.6.7 Test administrators are responsible for ensuring that only permitted items are taken into the test area.

...

8.6.11 Reading aloud to students

The literacy demands of the test should not exclude a student from accessing the Numeracy tests; however, it is not intended that a test administrator lead the class through the Numeracy test, question by question, unless the literacy standard of the whole class is a barrier to access.

Test administrators **are** permitted to:

- ✓ read the Writing stimulus
- ✓ read Numeracy questions (not numbers or symbols) .
- ✓ read test instructions
- ✓ read practice questions.

Test administrators are **NOT** permitted to:

- ✘ read questions or stimulus material in the Reading or Language Conventions tests
- ✘ read numbers or symbols in the Numeracy tests
- ✘ interpret diagrams or rephrase questions
- ✘ paraphrase, interpret or give hints about questions or texts.

### 8.7 Instructions by test administrators

8.7.1 Test instructions must be delivered exactly as documented in the *Test Administration Handbook for Teachers*. Instructions outside those specified in the *Test Administration Handbook* should be minimal.

Typically these other instructions may be to:

- remind students of elapsed time
- maintain test conditions for all students
- remind students to check that they have completed all questions.

Under no circumstances is it appropriate to prompt students to record or change any response.

Exhibit 3, document 1

### The Language Conventions test

24 This test is made up of four practice questions and 51 questions, to be answered in a number of ways. Some are multiple choice questions where the student is required to shade in an oval or bubble shape adjacent to the correct answer, out of four choices. Other questions require the student to write a single word answer in a box adjacent to the question. The questions are in blocks relating to spelling, grammar and punctuation. The questions apparently become more difficult as the test progresses.

### Tuesday, 13 May 2014

- 25 Ms Hislop administered the NAPLAN Language Conventions test, which commenced around 9.15 am. She did so for a group of Year 3 students. She went through the introductory practice test and then administered the test itself.
- 26 Ms Grundy was present for the test. After the test, Ms Grundy went to see Ms Clare Hawke, another teacher, as the school Principal, Mr Hayden O'Mara, was thought to be away from the school at the time. Ms Grundy told Ms Hawke that she was concerned about what she had witnessed, that the applicant had helped some of the students with their answers. Ms Hawke said that it was necessary to speak to Mr O'Mara.
- 27 Mr O'Mara had arrived by the time Ms Grundy arrived at the main building and she told him of her concerns. These concerns were that:
- Ms Hislop significantly assisted a number of students to complete the test, in particular the student, V. She had done so by pointing to the correct bubble to be shaded; by holding up a number of fingers to indicate the number of the answer;
  - She had told five students to change their answers;
  - She had changed answers for two students;
  - The students were seated in two straight lines, close together.
- 28 Mr O'Mara then walked out of the office. As he did so, he encountered the student V who had just taken the test, and he spoke to her about how she went in the test. He says that V told him that Ms Hislop had helped her.
- 29 After recess, the Writing test was administered. Ms Hislop administered this test, with Ms Grundy present. Following this, Mr O'Mara asked V to come to his office and he asked her to complete part of the Language Conventions test again for him. He compared her results with the original test.
- 30 Mr O'Mara then spoke with Ms Hislop about the first test that morning, and he says that she acknowledged having assisted V.
- 31 Mr O'Mara then reported the matter to the Australian Curriculum and Standards Authority (ACARA) and also contacted Ms Marilyn McKee of the School Curriculum and Standards Authority (SCASA).
- 32 After having spoken with Mr O'Mara, Ms Hislop went to the staff room where she had a conversation with another teacher, Ms Egan, in which the comment contained in the fifth allegation is said to have been made. This comment was apparently overheard by Ms Grundy and Ms Hilary Joyce, the school's gardener/handy person.
- 33 The next day, Mr O'Mara provided a written report to Ms McKee, along with a brief statement from Ms Grundy. Ms Grundy's document listed the following issues as having arisen in the test on 'Tuesday the 13<sup>th</sup> June [sic]':
- Telling 3 students the answers
  - Telling 5 to change their answers
  - Changing answer for 2 students
  - All the students sat together so they could help each other.

Exhibit 7, Grundy, BG2

- 34 Ms McKee forwarded the email of Mr O'Mara's report and Ms Grundy's statement to the respondent's Standards and Integrity section.
- 35 Ms Hislop also administered the Reading and Numeracy tests for her class on the Wednesday and Thursday as scheduled.
- 36 The students re-sat the Language Conventions test a week after the first test.
- 37 On Wednesday, 18 June 2014, five weeks after the Language Conventions test, Mr O'Mara, Ms Grundy and seven of the students, V, S, D, H, A, Sh and C, were interviewed by investigators Ms A Plummer and Ms D Bell from Standards and Integrity. During the interviews, Ms Grundy and some of the students drew diagrams of the layout of the classroom for the test.
- 38 Approximately eight months after the test, on 12 February 2015, Ms Grundy was again interviewed, and Ms Hawke and Ms Joyce were interviewed by Ms A Plummer and Ms L Bacon.
- 39 Ms Hislop did not participate in an interview as part of the investigation, on the advice from her then-lawyers.
- 40 By letter dated 27 June 2014, Mr Geoff Davis, Manager Investigative Services, Standards and Integrity, wrote to Ms Hislop setting out the allegations as to her conduct regarding the Language Conventions test; that he was of the view that an investigation was required; he had appointed an investigator; the purpose of the investigation, and what actions may be taken in the event of the alternative findings that may result. He provided Ms Hislop with an opportunity to provide a written submission as to the allegations. Alternatively, if she wished, she could make a submission in person. The letter contained other incidental information.
- 41 By letter dated 6 August 2014, Ms Hislop's then-lawyers responded, denying each of the allegations and inviting Standards and Integrity to discontinue the matter. Attached was a letter from Ms Hislop dated 5 August 2014 in which she specifically denied the allegations and provided a very brief response.
- 42 On 4 March 2015, the investigators provided a briefing note (the First Briefing Note) to the Director General, together with a detailed Investigation Report. The Investigation Report summarised the interviews and analysed the information. It then set out findings open to be made.
- 43 By letter dated 12 March 2015, the Director General wrote to Ms Hislop, setting out the likely findings of the investigation, noting that it was open to her to find that Ms Hislop had committed breaches of discipline in accordance with the allegations; indicating that her preliminary view was to terminate Ms Hislop's employment, and providing Ms Hislop with an opportunity to make a submission about the proposed findings and the proposed termination of employment. Attached was a copy of the Investigation Report.
- 44 Ms Hislop's then-lawyers responded by letter dated 16 April 2015, dealing with the proposed termination. They also dealt with aspects of the evidence contained in the Investigation Report which supported Ms Hislop's version of events and were contrary to the proposed findings. Also attached was a letter from Ms Hislop in which she set out her version of events as to what occurred in the test and in the staff room.
- 45 On 12 May 2015, the investigators presented a final briefing note (the Second Briefing Note) to the Director General which noted Ms Hislop's lawyers' responses and an addendum addressing each of those responses. It also included a draft letter for the Director General to write to Ms Hislop notifying her that, in essence, the findings made against her were sustained, and that termination of her employment was the most appropriate action. This letter was signed by the Director General, apparently on 26 May 2015.

#### **The Evidence**

- 46 It is not my intention to recite all of the evidence but to set out some of the most significant aspects.
- 47 Ms Hislop gave evidence and she called evidence from Mr John Vassallo, a retired teacher.
- 48 The respondent's main witness was Ms Grundy. Other witnesses called by the respondent were Clare Hawke, Marilyn McKee, Hayden O'Mara and Eamon Francis Ryan, Executive Director, Professional Standards and Conduct Division of the Department of Education.
- 49 In addition to the oral evidence, transcripts of the interviews were received into evidence. The only person who was interviewed but whose transcript of interview was not submitted was Ms Egan. The Investigation Report contains a summary of each of the interviews, including Ms Egan's. Ms Egan was not called to give evidence.
- 50 As with those witnesses called by the respondent who had been interviewed, the summary of Ms Joyce's record of interview as set out in the Investigation Report effectively formed her witness statement. She was ill on the day of the hearing and did not appear for cross-examination. The applicant consented to the witness statement being received into evidence but says that in the circumstances, little weight should be given to her evidence.

#### **Ms Hislop's case**

- 51 Ms Hislop denies the allegations entirely. She particularly denies admitting to Mr O'Mara that she had assisted students, saying she felt pressured by him, wanted the interview to end, and her admission was merely sarcasm. Mr O'Mara acknowledges in his evidence that he 'pushed the point a little bit' in asking Ms Hislop about assisting students.
- 52 Ms Hislop says that prior to the Language Conventions test itself, at the beginning of the session, there was a practice test, which lasted approximately 15 minutes. The instruction sheet provided examples and a script telling the test administrator how to read out the question and then to sound out the word.
- 53 As to allegation one, she says that the student, V, was very upset, crying and saying that she could not do it. She says she went to V, gave her emotional support, put her arm around her and said, to the effect of, 'I believe you. You can do this' and tapped

- the page. She denies pointing to the correct answer. When V pointed to an answer bubble, seeking guidance, Ms Hislop says she would shake her head to indicate that she was not going to answer it for her.
- 54 In her letter to the Director General dated 5 August 2014, Ms Hislop said that she ‘sat several metres from the child, [V], and she turned to me and raised her eyebrows at me pointing to the answers, nodding to indicate is it this one? I too raised my eyebrows mimicking her actions, and she took that as a yes. I moved from my seat away from the situation.’
- 55 The student, V, was academically poor at spelling, although very articulate in speaking. She was receiving one-on-one assistance from an Education Assistant in a special assistance program.
- 56 Ms Hislop says that in the interview with Mr O’Mara, soon after the test, she answered Mr O’Mara’s question about assisting V with the test, meaning that she had encouraged her to open her book and give it her best go. She was surprised at how well V had done in the first test. She said to Mr O’Mara that her success was a result of lucky guesses. She says that this was her response because Mr O’Mara told her that when he asked V how she went, she said she got the answers correct, and when he asked her how she did it, V said ‘I did that by guessing’.
- 57 Mr O’Mara arranged for the class to re-sit the Language Conventions test. Ms McKee says that it was considered that although the students had already been exposed to the test items, the impact on scores of Year 3 students resitting the Language Conventions test would likely be minimal. If anything, the impact might be a little, but to the students’ advantage, in the second test.
- 58 Both tests, the original and the second test, were hand-marked by the Principal Consultant English (NAPLAN) at the SCASA office. There was little variation for some students, but several students’ scores were considerably lower in the second test than the first, and the pattern of correct and incorrect responses was quite different.
- 59 In the first test, administered by Ms Hislop, V scored 24 correct answers, but when she re-sat the test, she scored only six correct answers. Ms Hislop’s opinion was that V and she had a good relationship and that V felt comfortable with her in the classroom, giving her emotional support to begin.
- 60 Another student, S, scored 12 correct answers in the first test, and eight in the second. Again, Ms Hislop says that the better performance in the first test is likely to be because S is very shy, when she entered the classroom she was in tears, and Ms Hislop offered her emotional support and encouragement. Ms Hislop says that during the practice test, she advised S to erase an incorrect bubble she had shaded and directed her to shade the correct bubble.
- 61 Another student, D, scored 26 in the first test and 13 in the second test. Ms Hislop again says she only encouraged this student and gave emotional support.
- 62 Ms McKee gave a number of examples of explanations for variations between the results of the two tests, including that students might be guessing. However, she said one would not expect, where the re-testing is so soon after the original test, that there would be a lot of opportunity for new learning. She said it would be unexpected for there to be a run of correct answers which is not replicated in the second test.
- 63 In the multiple choice questions, with four choices, if the students were guessing, they would probably guess 25% correctly. She said it is unlikely that they would guess correctly in a long sequence.
- 64 It was put to Ms Hislop that she had read out questions and provided answers to another student, H. She says that this was in the practice test and she did this according to the script for the NAPLAN test. During the practice test, she walked around reading out the script, making sure the students marked the bubble or spelt the word correctly in the square provided. If they had not done that, she indicated what to do, pointing to the page and indicating to erase the answer and place it correctly.
- 65 When Mr O’Mara asked her about the results of some of the students, she agreed that she said that they could have copied V but she says that she was being sarcastic. She says this was in relation to the multiple choice questions and the print in the booklets is orange and would have been difficult to see from a distance. She regrets being sarcastic.
- 66 In her witness statement, Ms Hislop said that because many of the students were anxious about the NAPLAN testing, she decided to leave the classroom layout the same as usual, but made students sit with a spare desk between them, making sure they could not copy each other’s work. In cross-examination, it was suggested to her that she had arranged the desks in a way that allowed them to copy each other’s work, however she was given no opportunity to respond to this suggestion before Mr Anderson, counsel for the respondent, said ‘but we’ll move on’.
- 67 As to the allegation of allowing students extra time to do the test, Ms Hislop says that in respect of the Numeracy test, two days after the Language Conventions test, most of the students finished early and were becoming restless, so she collected the papers of all of those who were finished. She asked Ms Grundy to stay with a male student, who had not finished, and a female student, who was upset after doing the test. She took the remainder of the students outside. She stood in the doorway of the classroom so she could see both the students playing outside and those in the classroom. After about five minutes, they joined the students outside. In cross-examination, Ms Hislop said that the male student had actually finished his test, but had his jumper, shoes and socks off around the desk. He was to stay at his desk to dress before coming out.
- 68 She says she exercised her discretion to let the students out early because of their behaviour at that time.
- 69 As to the allegation of referring to the student as ‘that little bitch’, Ms Hislop says that the word she actually used was ‘witch’ and that this was because this was the student’s pet name used by her family, which referred to the way the student styled her hair at that time.
- 70 Betty Patricia Grundy was interviewed on 18 June 2014 at 9.15 am. It was the most lengthy and detailed of all of the interviews. I do not intend to recite all of that evidence in detail but have included some of it as it provides useful insight into her approach to the issues. However, I have considered all of that evidence and set out later my conclusions about it.

- 71 It is difficult to understand from the transcript of Ms Grundy's interviews with the investigators and the diagram of the layout of the classroom drawn by Ms Grundy, where the students actually sat. Ms Hislop's class is usually made up of a mix of Years 1, 2 and 3. On the day of the test, the classroom layout remained the same, with the desks in two rows facing each other and touching. The suggestion from her evidence is that the students were close to one another, 'basically looking at each – across to each other' (transcript of interview, page 7).
- 72 The room usually fits 23 desks, and there were 12 students sitting the test.
- 73 Ms Grundy was emphatic that there was not an empty desk between each student. She denied that there were two rows, saying the students were all sitting at one long desk, except for a student, Sa, who was at a separate desk. She clarified the 'one long desk' to mean two rows backing onto one another.
- 74 Ms Grundy says that students cheated by copying from each other because there were no spare desks between the students. She says that Sa would not have been able to cheat because he was sitting on his own.
- 75 She says that at the start of the test, Ms Hislop read out what she had to read out and told the students that if they had a question, they had to put their hand up and she would go to them, and Ms Hislop then kept walking around the room. She said 'right from the beginning and she did in the other test, too, just wandered'.
- 76 Ms Grundy says that Ms Hislop assisted about six students by pointing to the correct bubble, and V was the student she mainly assisted.
- 77 Ms Grundy said that pointing to the bubbles was not the only assistance Ms Hislop provided. Ms Hislop assisted V by shaking her head when V looked at her, while pointing to a particular bubble, and when V pointed to the right bubble Ms Hislop would shake her head 'yes'. She says that Ms Hislop stood with V helping her for 10 minutes. Other students were watching the answers.
- 78 Ms Grundy says that Ms Hislop assisted V for 'near enough to the whole test'. V is not a high achieving student.
- 79 Ms Grundy described that initially V had gone to Ms Hislop at the front of the class with her test sheet and there was a conversation between Ms Hislop and V which she did not hear. V then went and sat down. Ms Hislop then went over to V and was pointing and saying 'yes' or 'no'.
- 80 She says that she saw Ms Hislop reading out questions and pointing to the answer, to the bubble to be shaded. Because the students were sitting so close, she says that this meant that she was helping the lot if they were looking, but she clarified that Ms Hislop helped about six students.
- 81 Ms Grundy says Ms Hislop allowed the students roughly 20 minutes more than the allocated time to do the test, although it was not one of the complaints Ms Grundy made to Mr O'Mara when she raised her concerns immediately after the test. Ms Grundy subsequently raised another issue. She said that at the end of the test, two students were not finished, and Ms Hislop took the rest of the students outside and asked Ms Grundy to stay with the other two. Ms Grundy says that those two were a girl who had fallen behind and a boy who 'hadn't done anything anyway'. So those two students got another five minutes, after which she took their papers and told them to go out with the others. All of the test papers except those two had been collected and put on the desk before Ms Hislop and the other students went out. Ms Grundy put the other two students' papers on the desk and went out. The tests were not secured during this time. There was no one in the classroom. Ms Grundy says that this was about 10.00 am and that it was nearly recess.
- 82 When the test finished, Ms Grundy went to see Ms Hawke at the oval and told Ms Hawke of her concerns about what had happened. She asked if, in Mr O'Mara's absence, Ms Hawke was collecting the test sheets. Ms Hawke said 'no', and when Ms Hawke asked her why, Ms Grundy said that she was afraid that things might get altered. Ms Hawke told her the test sheets were not being collected from the classroom at that point because the students were to do another test using the backs of those sheets.
- 83 Ms Hawke said she would speak to Mr O'Mara. However, in the meantime, Ms Grundy came across Mr O'Mara herself. He asked her how she got on with the tests and she responded that 'it's the biggest farce I have ever seen'.
- 84 As Ms Grundy was talking to Mr O'Mara, V came down to the front office to get her morning tea. Ms Grundy says that she encouraged Mr O'Mara to speak to V and she could tell him what had happened.
- 85 Ms Grundy then described how she was in the staff room at morning tea and Ms Hislop and Ms Egan were standing at the window. She says that 'she turned around and she looked at me and she said, 'that little bitch just dobbed me in and I had to tell the truth'.' Ms Grundy did not say when asked who 'the little bitch' was, but she said 'because she knew she helped her and she knew I saw it. She knew I saw it'.
- 86 After morning tea, they returned to the classroom for the next test and the test papers from the earlier test were still on Ms Hislop's desk where they had been left during the break.
- 87 Ms Grundy gave evidence about a number of things she says she observed in Ms Hislop's conduct in tests following the Language Conventions test. In respect of the test she next assisted Ms Hislop with, whether it was that afternoon or the next day, Ms Grundy says that Ms Hislop 'hadn't learned her lesson', and was 'sneaky with it'. She said Ms Hislop would hover over the students, they would look up at her and she would put her finger down, and she did this two to three times.
- 88 Ms Grundy also says that in the test on the next day, Ms Hislop had collected the test papers. She saw her 'rub a bubble out, but I saw her not put that shade in there. It went to another shade'. I infer that she means that Ms Hislop erased one of the shaded bubble answers and shaded a different bubble.
- 89 Ms Grundy says that in respect of one student, C, Ms Hislop rubbed out all of his bubble answers and did them herself, and wrote on the bottom of the paper. She says that because Ms Hislop saw that Ms Grundy was watching, Ms Hislop said 'I've got to tell Hayden about this. I've got to tell Hayden what I'm doing here'.

- 90 Ms Grundy says that she asked Mr O'Mara if Ms Hislop had drawn his attention to changes on C's paper and he said 'yes'.
- 91 Ms Grundy says that for the test the following day, Ms Hislop gave her a copy of the test sheet. Ms Grundy was suspicious that Ms Hislop was trying to set her up, to read questions out to the students if they asked. She did not want to be involved, so she put the sheet on the desk.
- 92 Ms Grundy then wrote out a brief report for Mr O'Mara regarding the allegations about Ms Hislop's conduct in the Language Conventions test.
- 93 Ms Grundy also says that on the second day of testing, the student A had finished and gave Ms Hislop her paper. Ms Hislop handed it back to her and pointed to the paper. Ms Grundy thinks that A changed one answer.
- 94 Ms Grundy acknowledged a number of times in the interview that it was very hard to remember.
- 95 Ms Grundy says that at no stage prior to the testing did Ms Hislop explain Ms Grundy's role to her.
- 96 Ms Grundy says that on the second day, following some confusion about whether she was supposed to be assisting in Ms Hislop's classroom with the testing, she did assist. She says that a student (Sh) would say he could not do the test and Ms Hislop would help him a bit by reading out to him and pointing to the bubble. In the end, he just got up, got a ball, and went out.
- 97 Ms Grundy was interviewed again on 12 February 2015.
- 98 She said that in respect of the timing of the first test, she did not have a watch and 'I'm sort of guessing'. She thought they 'could have been a little bit – a few minutes early, a few minutes late, but I don't know. I just can't – I truthfully can't give you a proper time ... I didn't wear my watch' (transcript of second interview, page 3). She says that Ms Hislop got up to mark off the passage of each five minutes, and in Ms Grundy's mind it was longer than five minutes. She said that Ms Hislop said 'Oh, my God. I haven't marked it off ... Oh, I've got to go and mark that' (transcript of second interview, page 4). That was how she picked it up, 'but I thought that was nothing anyway'.
- 99 Ms Grundy said that she thought Ms Hislop 'might have given them an extra five minutes in the timings, but I'm not quite sure'.
- 100 As to the extra five minutes she stayed with the last two students, Ms Grundy said she was guessing the time.
- 101 Ms Grundy then said a couple of times that 10.30 am was the time for morning tea, but when one of the investigators said the information she had was that morning tea was 10.40 am, she agreed with that.
- 102 Ms Grundy says that after the last students left the classroom, she went to the oval and found Ms Hawke. Their conversation lasted about five minutes. She then went back to the staff room and met Mr O'Mara in the passage, and it appears that they walked to the staff room and the bell for recess went while they were in the staff room. Their conversation lasted five to 10 minutes.
- 103 In this second interview, Ms Grundy mentioned something about a tissue box. She said she came to the realisation that Ms Hislop was giving some kind of hint about the shape of the cut in the top of a tissue box where the tissues are pulled out.
- Ms Grundy's cross-examination**
- 104 Ms Grundy says that no one, including Ms Hislop, went through the NAPLAN Test Administrator's Handbook with her on the day concerned. She says that she read it at some other time in relation to a test she had sat in on before, but she could not recall if she had read the whole book. She had not been given any assistance as to what her role was on that day of the Language Conventions test.
- 105 Ms Grundy says that apart from getting up from her seat once to answer a question from one student, she remained seated.
- 106 Ms Grundy says there was two and a half metres between herself and V.
- 107 She also says that the test administrator was able to do one little test with the students, meaning one question, but she says that it could have been one or two. She later said she could not remember because it was two years ago.
- 108 After the one question that Ms Grundy says Ms Hislop was allowed to read out and explain, and the students completed it, she says Ms Hislop then read out the NAPLAN test.
- 109 When asked whether Ms Hislop had gone around during the practice test checking students' answers and checking if they had shaded the bubble correctly, Ms Grundy said that Ms Hislop could have done that but she was not sure – 'I can't remember that part of it'.
- 110 Ms Grundy says she could see the test papers of the students sitting close to her, approximately a metre away. Those further away she could not see. But, she says, she could see what was being done. She appeared to accept that while Ms Hislop was pointing at the test paper, it was possible that she was not pointing to an answer.
- 111 According to Ms Grundy, one student, H, was crying. V kept coming down to Ms Hislop and then she sat right at the end of the table – 'she moved down so she could get the answers'.
- 112 Ms Grundy said that V has learning difficulties and she had worked with her as an Education Assistant in May 2014, and that V does much better if she has an Education Assistant helping her.
- 113 In the Language Conventions test, Ms Grundy had said in her witness statement that Ms Hislop helped V more than the other students, for approximately 10 minutes, and that Ms Grundy thought Ms Hislop went through nearly the whole test with V. She affirmed her view that Ms Hislop went through the 51 questions with V in approximately 10 minutes, by flicking through the pages and nodding. She agreed that V would find work like the NAPLAN test challenging, would be slow to complete her work and she could be easily distracted.

- 114 As to the time taken for the test and whether additional time was given, Ms Grundy again conceded that she was guessing the time.
- 115 Ms Grundy was adamant that she saw Ms Hislop nodding and shaking her head to V as V went through each of the questions, and V was watching her and then shading the bubbles.
- 116 Ms Grundy also conceded that she could have been wrong in her assertion that in the second test, Ms Hislop would point to the answers, but acknowledged that the second test was not multiple choice or the identification of a correct answer, it was for the students to write a story. She said 'I could have got that one wrong'.
- 117 She also conceded that she was wrong in asserting that during the beginning of the test, Ms Hislop handed her a document which she assumed was the question and answer sheet, when in fact it was the NAPLAN Handbook. She had assumed that Ms Hislop was trying to set her up.

### **Consideration**

#### **Nature of proceedings**

- 118 The issue of whether the matter is heard de novo or is an appeal in the strict sense was briefly addressed by the parties.
- 119 This is a matter referred to the Commission under s 78(2) of the PSM Act. The nature of such proceedings has been considered in a number of decisions of the Commission at first instance, in *Geoffrey Johnston v Mr Ron Mance, Acting Director General, Department of Education* [2002] WAIRC 06155; (2002) 83 WAIG 1553 per Kenner C; and in *Peter John Ayling v Director General, Department of Education and Training* [2009] WAIRC 00413 per Smith C amongst others. Both of those decisions referred to set out extensively the law in respect of hearing de novo as opposed to an appeal in the strict sense.
- 120 In this particular matter, Ms Hislop challenges the process by reference to denial of procedural fairness, and also the substance of the allegations against her. Both parties conducted the matter as if it were a hearing de novo by bringing first hand evidence, in addition to an examination of the investigation which was the basis of the respondent's decision.
- 121 Therefore, I am of the view that as this matter has been argued as a hearing de novo, it is appropriate to be dealt with in that way. In doing so, no mischief is done in respect of any of the authorities referred to which have set out the appropriate approach.

#### **Ms Joyce's evidence**

- 122 Ms Joyce's evidence was about the conversation in the staff room when Ms Hislop is alleged to have made the comment contained in allegation five. Given that Ms Joyce was not available for cross-examination and that the precise words used by Ms Hislop form the essential part of the allegation, I intend to give very little, if any, weight to her witness statement.

#### **The failure to call Ms Egan**

- 123 Ms Egan was the person to whom Ms Hislop is said to have spoken when she is alleged to have made the derogatory comment regarding the student, V. It is said to have been overheard by Ms Grundy and Ms Joyce.
- 124 As the respondent has alleged that the basis of the decision to terminate was Ms Hislop's misconduct, the respondent bears the evidential onus, as set out in *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224. I also note the decision of the Full Bench in *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 Services Board v Denise Drake-Brockman* [2012] WAIRC 0015; (2012) 92 WAIG 203 at [66] per Smith AP and Beech CC.
- 125 Therefore, as the respondent has failed to call evidence from Ms Egan, and it is for the respondent to call that evidence, and Ms Joyce's evidence was not able to be cross-examined, I am left with the conflict between Ms Hislop's and Ms Grundy's versions of what Ms Hislop said in the staff room.

#### **The test requirements**

- 126 In considering the allegations about Ms Hislop's conduct, it is essential to know and understand the conditions under which the Language Conventions test was required to be conducted.
- 127 According to the Test Administration Handbook and the Protocols, those things which an administrator may do are:
1. During the introduction time, give instructions and complete practice questions. There were four practice questions in the Language Conventions test.  
  
In completing the practice questions, the administrator goes through each question, the shading of a bubble is demonstrated, allows the students a chance to answer on the test paper, gives the answer, allows the students to check their work and correct it, and answers any questions.  
  
It is entirely conceivable that in assisting the students to check their work and correct it, that the teacher would walk around the room looking at what the students had done in their practice questions.
  2. During the test, read or clarify general instructions; remind students of the response types, eg shade a bubble; advise students to leave a question if they are unsure of the answer and move on to another question; advise students to return to any unanswered questions if they have time at the end; encourage students who have lost concentration to refocus.
- 128 Some of these instructions suggest that in doing these things, the administrator is dealing with individual students rather than dealing with the whole group exclusively. This may involve the administrator walking around the room and, for example, where a student appears to be distracted, encouraging that student to refocus by pointing at their paper or in some way directing them.

## The investigation

### (i) *The practice test*

- 129 The investigators interviewed a number of eight-year-old students and Ms Grundy, amongst others. They did so five weeks after the Language Conventions test, and during this time the students had sat a further three tests and re-sat the Language Conventions test.
- 130 It would appear that the investigators undertaking the interviews were either unaware of, or if they were aware, placed no significance on the fact that in the Language Conventions test, there was an introductory part which lasted for around 15 minutes and contained four practice questions.
- 131 The investigators had already interviewed Ms Grundy for the first time at 9.15 am; the student V at 10.15 am; S at 10.40 am, D at 11.10 am and H at 11.30 am, before the student A, interviewed at 12 noon, identified that Ms Hislop did some things in the 'practice questions'. The next student interviewed, Sh, at 12.20 pm, also referred to the 'practice test'.
- 132 S, who was interviewed at 10.40 am, gave answers which, read with knowledge of there having been practice questions, indicate that Ms Hislop helped them initially and they could correct their answers, but could not help them at another point.
- 133 Given that there were four practice questions, it is highly likely that V's reference to Ms Hislop doing four questions is reference to the practice questions.
- 134 The student C, interviewed immediately after Sh at 12.40 pm did not mention the practice questions and the investigators did not pick up on that point with this last student.
- 135 In their interviews, apart from Sh, A and S, none of the other students nor Ms Grundy distinguished between what occurred in the introductory part of the test and the test itself, even if they could have recalled it or distinguished it from the other tests which were sat following the original Language Conventions test, nor did the interviewers raise the issue with them.

### (ii) *Assistance by Ms Hislop and Ms Grundy*

- 136 It is also clear that some of the students in their interviews suggested that Ms Hislop and Ms Grundy were helping them. None of the suggestions by students that Ms Grundy had assisted were pursued by the investigators; they asked only about Ms Hislop.

### (iii) *Questions about other tests*

- 137 The Test Administration Handbook refers to the four different tests: Language Conventions, Writing, Reading and Numeracy. The allegations being investigated related only to the Language Conventions test, yet the investigators asked the students about the reading test, the 'maths' test and the writing test. None of those tests were the subject of allegations against Ms Hislop. They also appear to have confused the Language Conventions test with the reading and writing tests, and also referred to a spelling test.
- 138 The transcript of the interviews strongly suggests that five weeks after sitting the tests, it was difficult and confusing for the students to remember each test and distinguish between them.
- 139 It was quite clear at the commencement of V's interview that she was confused about which test was being referred to. She described Ms Schumachers and Ms Hawke as being present for what she described as the 'spelling' test. She had to be corrected and was redirected to what the interviewers referred to as the 'spelling' test. She said that when the testing finished, they had to sit on their mats. She also said that Ms Curry was in the room for the second test that day.
- 140 Sh was confused about what happened in the various tests and mixed them up. Many of her answers were about the 'maths' test. It was clear from the transcript of H's interview that she had trouble recalling and distinguishing between the various tests. D was asked to give a description of the seating arrangements for the 'reading' test, not for the Language Conventions test. She also gave information about shading bubbles in the 'maths' test. A also talked about the 'maths' test. The interviewer also attempted to clarify with V whether there was a practice test for the Writing test.
- 141 S could not recall that there was a second test on the first day. Many of her answers were about the 'maths' test.
- 142 It is far from clear why the investigators asked students about tests that were not the subject of any allegation against Ms Hislop, and the students were confused and unable to clearly distinguish between what happened in each test.

### (iv) *The diagrams*

- 143 The diagram drawn by D was the only one which had any context. It showed two rows of desks, facing each other, another small rectangle at the end of the row but separate from it, another long rectangle which may be a table, and another smaller rectangle. The two rows of desks show three students only, but they are sitting with a desk in between each of them. However, the interview transcript indicates that D was asked to draw the layout of the classroom for the Reading test. This was separate from the Language Conventions test.
- 144 H's diagram is simply four blocks together with a letter in each. It does not show in any way how the room was set up and is of no assistance.
- 145 Sh's diagram shows two rows of desks and two separate desks, however, it identifies only where one other student and Sh were sitting. It does not show whether the students had spare desks between them or not.
- 146 The same applies to the diagram drawn by A.
- 147 That drawn by S shows two separate rows of desks but marks one spot only with an 'X'.
- 148 V simply put a square in the middle of the page with 'me' under it, and two circles to the side.
- 149 Ms Grundy's diagram is confused and unclear. Even looking at it whilst reading her interview makes it difficult to comprehend.

150 Therefore, the only diagram which provides any assistance is that drawn by D, and it supports Ms Hislop's evidence that she arranged the desks so that there was a spare desk between and in front of each student, but it is for the Reading test, not the Language Conventions test, the subject of the allegations.

### **The First Briefing Note**

151 The First Briefing Note was prepared by the investigator to the Director General (EFR1). It was attached to the Investigation Report.

152 On the basis of the First Briefing Note and the Investigation Report, the Director General appears to have decided on Ms Hislop's conduct. While I accept that, as Mr Ryan says, the Briefing Note is a summary, it should be accurate. However, it contained a number of errors and omissions including:

- Paragraph seven deals with Ms Hislop allegedly indicating in her written responses that 'she raised her eyebrows while [V] was pointing to an answer and nodded to indicate the correct answer'. This suggests that Ms Hislop nodded to indicate the correct answer. However, in Ms Hislop's written response, she said that she was several metres away from V and that V 'turned to me and raised her eyebrows at me, pointing to the answer, nodding to indicate 'is this the one?'. I too raised my eyebrows, mimicking her action, and she took that as a yes'. In cross-examination, Mr Ryan acknowledged the distinction between the suggestion that Ms Hislop had nodded to indicate the correct answer and what Ms Hislop says is that V nodded to indicate 'is this the correct one?'
- It did not make some of the finer distinctions contained in the evidence. It recorded that Ms Grundy said she did not look at her watch or clock to confirm the time, but did not record that she actually said that she was guessing.
- At paragraph 10 it says that amongst others, Sh described how Ms Hislop assisted him during the NAPLAN test. Yet this student's interview, as recorded at pages 19 – 20 of the Investigation Report, makes clear that while Ms Hislop told them how to answer the questions, she did not tell them what the answers were. This student also made clear that she told him that she could not show him, he would have to work it out for himself, and that the help she gave other students was to show them how to answer the question – how to do the question. This is a very important distinction which is not drawn within the Investigation Report.
- The table setting out the results of the first and second Language Conventions tests is a grossly over-simplified reflection of the actual results. I deal with those results and how they are problematic later.

### **The Investigation Report**

153 In summarising Mr O'Mara's recollection of his conversation with V, and in examining the transcript of part of his conversation with V, I note that the Investigation Report neglects to record that V's first response to Mr O'Mara was to say that she guessed the answers to some of the questions. Mr O'Mara said that he asked V how she did in the test and she said it was easy. He asked her how did she do that, to which she answered 'it was easy, Ms Hislop helped me'. He says he examined her test paper and she got most of the answers to questions 27 to 51 correct, and later that she 'basically answered all of those questions correctly'. This is quoted in the summary of Mr O'Mara's interview in the Investigation Report. However, in the analysis at page 41, the Investigation Report says Mr O'Mara said V 'answered all those questions accurately' (p 3.6). It is not correct. Her first test paper shows she got questions 40, 43, 46, 47, 48 and 50 wrong.

154 The recording of Mr O'Mara's conversation with V starts after that conversation began. He said in the interview that he got V's original test out and asked her 'were you assisted? How did you get these all right?' to which she is said to have answered 'I just did them and I guessed them'. Her reference to guessing is not reflected in the analysis contained under allegation one at page 42 of the Investigation Report.

155 While her answers included that in respect of 'how did you get them all right?' to which V said 'Mrs Hislop done it', when asked 'Done what?' she said 'That. Well, I done this one'. She was asked 'did you do this by yourself?' to which she said 'No'. She was asked 'Who did this with you?' and she said, 'Mrs Hislop'. It is not at all clear from this exchange what help Ms Hislop gave her.

156 In relation to a number of questions, V said she did them by herself, and on others she said Mrs Hislop helped her. It is entirely plausible that if Mrs Hislop encouraged her to focus, to attend to the task, that she helped her. It is also likely that, as Ms Hislop says, V may have interpreted Ms Hislop's mimicking her gestures when V questioned her, as being an indication that she, V, was getting the answer correct, when this was not Ms Hislop's intention. In other questions, she guessed, and had a one in four chance of getting it correct.

157 It is not clear cut from simply reading the transcript, in isolation, what actually occurred between V and Ms Hislop in the test.

158 The Investigation Report asserts that the investigator examined the Test Administration Handbook. The Test Administration Handbook refers explicitly to the practice questions (1.1). As with the Briefing Note, the Investigation Report does not identify that there were practice questions, nor that the behaviour alleged by Ms Grundy was permissible during the practice questions. Had the distinction been recognised, the investigators ought to have asked questions which might have assisted the students to distinguish between what occurred during the practice questions and the actual test.

159 The investigators did not explore the possibility of Ms Grundy being biased against Ms Hislop, yet they reported in the Investigation Report that there was no evidence to suggest that Ms Grundy had made a malicious or vexatious complaint regarding the students being given extra time. I will deal later with Ms Grundy's evidence, but I have found that there was evidence of prejudice and suspicion by Ms Grundy towards Ms Hislop.

### Variance between the tests

- 160 Of the top performing students within the two Language Conventions tests, Sh scored 27 in the first test and 19 in the second test; D scored 26 in the first test and 13 in the second test; R scored 33 in the first test and 37 in the second test; A scored 25 in the first test and 26 in the second test; C scored 21 in the first test and 20 in the second test. V is the standout distinction of having 24 in the first test and six in the second test. S scored 12 in the first test and eight in the second test. B scored eight in the first test and nine in the second test. H and C scored the same in both the first and second tests.
- 161 The statistical analysis of the variance between the results in the first and second tests, contained on pages 45-46 in the Investigation Report, appears very shallow. This was not addressed in any depth in the submissions or the evidence. I examined the first and second Language Conventions test papers for four students and sought to use them to confirm the variance figures contained in the schedules in the Investigation Report.
- 162 Attached to the Investigation Report is a series of schedules which set out for each of the students each of the questions in the Language Conventions test. The schedules contains four columns, the first being the question number and answer; the second being whether the answer for Test one was correct, incorrect or not answered; the third being whether the answer for Test two was correct, incorrect or not answered; and the fourth headed 'Variance' records a variance only where the student got the answer correct in one of the tests and incorrect in the other. It does not record a variance where the answers in both tests were wrong but not the same. Nor does it record a variance where one test has no answer and an incorrect answer in the other test, yet it records a variance where there is no answer in one test and a correct answer in the other.
- 163 The schedule attached to the Investigation Report dealing with V's results is inaccurate in a number of respects. For example, in test two, it says that she was incorrect in her answers to questions 5, 6, 7 and 8 when in fact she did not answer those questions at all. Although I appreciate that V's results between the first and second tests vary widely, there are four errors in that schedule. In such an important issue this raises further concerns about the process.
- 164 I have also examined the first and second tests for Sh and I note that although there were a number of questions that he was recorded as having answered incorrectly in both the first and second tests, the answers he gave in both tests were different, for example in questions 31, 32 and 40, each of them were incorrect but the first and second test answers are different. These were not recorded as variances within the Variance column. The two results suggest a level of guessing which acts against a simplistic conclusion that his first test was better than the second because he was helped in an impermissible way.
- 165 For D, there were a number of answers that were incorrect in both tests, but they were incorrect in different ways. These were not recorded as variances. If they were, the variances would have been 26 not 15. It also records that D gave no answer in the first test to question 20, yet he actually wrote a word.
- 166 The student H, in the first test, is recorded as having made no answer to a number of questions, yet there is an answer, even though it is one letter. In eight of the questions which H got wrong, the answers in the two tests were different, yet these were not recorded as variances.
- 167 If the purpose of the analysis was to show that students got more answers right in the first test than the second, it is correct. But beyond that, its value is questionable.
- 168 Further, there were a number of possible reasons for some students answering more questions, and more questions correctly, in the first test. These include that some of them, including V, were being given emotional support and encouragement to persevere by Ms Hislop. However, this is not the allegation against her. Nor is it impermissible assistance.
- 169 The variances are not of themselves significant in terms of whether Ms Hislop assisted the students. What it means though is that, as Ms McKee noted, some of the answers could have been guesses, that in the multiple choice questions each student had a 25% chance of getting the correct answer, and a 75% chance of getting an incorrect answer. Sometimes a question is answered by the same student incorrectly but in different ways in the two tests.
- 170 This analysis still leaves hanging the question of the first allegation and that V, being a relatively poor student in respect of spelling and language, did significantly better in the test administered by Ms Hislop. Given the conflict in the evidence, it is very hard to come to a conclusion that this resulted purely from Ms Hislop giving V impermissible assistance. It may be that her answers were guesses, it may be that some of them were correct because Ms Hislop encouraged her, gave her emotional support, and her presence in standing near her assisted her to focus.
- 171 This is supported both by Ms Grundy's evidence and in the General Comment written in V's Interim Report for Term 1, 2014, that:

[V] is finding it difficult with the academic demands required to work at a satisfactory level. She finds it a lot easier to work with an assistant giving her good results ... she is easily distracted in class ...

Exhibit 3, document 11

### Ms Grundy's evidence

- 172 Ms Grundy was the only person present in the room with Ms Hislop, other than the eight-year-old students. Her complaints were the basis of the allegations. Where Ms Grundy's evidence is not supported by other evidence, I reject her evidence. I do so for a number of reasons.
- 173 Firstly, it is very clear from both Ms Hislop's and Ms Grundy's evidence, that Ms Grundy was suspicious of and antagonistic towards Ms Hislop due to their previous dealings regarding an incident affecting another teacher.
- 174 Ms Grundy also gave evidence that she thought Ms Hislop was trying to set her up when Ms Hislop gave her a copy of the Test Administration Handbook to read, so Ms Grundy did not read it. Apart from the issue of her attitude towards Ms Hislop, it also meant that she was unfamiliar with the testing requirements and those actions which were permissible and those which were not.

- 175 Ms Grundy made a number of concessions in cross-examination which either severely undermine or completely negate her evidence regarding some of the allegations. For example, she accepted that where she had alleged that Ms Hislop pointed to a correct bubble answer, she could have been pointing at the test paper, not pointing to a particular answer (ts 39).
- 176 She initially said there was only one practice question, then one or two, but later said she could not remember – it was two years ago.
- 177 She described Ms Hislop helping V through ‘near enough to the whole test’, but said that it was for approximately 10 minutes. The test went for 40 minutes.
- 178 Ms Grundy also agreed that, in respect of her allegation that the students were all given more time to do the test, she did not have a watch and was merely guessing. She had in fact acknowledged this during the second interview with the investigators.
- 179 Ms Grundy also conceded that she could be wrong in her assertion that in the second test, Ms Hislop would point to answers, because the second test was a writing test, and there were no multiple choice questions. She said ‘I could have got that wrong’.
- 180 Ms Grundy also conceded that she could have misinterpreted Ms Hislop’s action in checking A’s paper and giving it back to her to correct an answer.
- 181 Also, Ms Grundy named a student, C, as the one on whose numeracy test paper Ms Hislop re-shaded some bubbles, and made a note to explain this. Yet when it became clear that what Ms Hislop had done was not the inappropriate conduct Ms Grundy had suggested, Ms Grundy then claimed that she had not identified C in her witness statement when she had done so.
- 182 Ms Grundy also accepted that she had told Mr O’Mara that the Numeracy test was done correctly, but in her witness statement alleges that Ms Hislop rubbed things out. In any event, she acknowledged that she could not see what Ms Hislop had rubbed out.
- 183 Ms Grundy also alleged that additional time was given to the two students who she had to stay with and that this was in the first test, the Language Conventions test. However, much of the other evidence suggests that this was in the Numeracy test. Further, it was not one of the allegations Ms Grundy made when she wrote out her list of issues that she gave to Mr O’Mara on the day after the first test. The Numeracy test was not until Thursday, 15 May 2014, two days after the Language Conventions test. Ms Grundy also conceded that all of her complaints were about the Language Conventions test.
- 184 Ms Grundy was also wrong about the test papers for the Language Conventions test being left unsecured in the classroom. It is likely that the papers remained in the room, as they were required for the Writing test which was to be held immediately after recess, that the room was locked during recess, and that Ms Hislop unlocked the room when they returned after recess. Ms Grundy did not realise that this was appropriate. It was one of a number of wrong conclusions she leapt to in her suspicion of Ms Hislop.
- 185 Ms Grundy also acknowledged that when she alleged to Mr O’Mara that Ms Hislop had cheated in the test by referring to the tissue box, she was making an assumption about something she did not understand. In cross-examination, she acknowledged that she might have got it wrong about the tissue box.
- 186 Ms Grundy seems to think that Ms Hislop and Ms Egan were having a conversation in the staff room at morning tea, however, other evidence would suggest that this did not occur until lunch time because Mr O’Mara did not meet with Ms Hislop until after recess at the earliest.
- 187 In all of the circumstances, I conclude that Ms Grundy was not familiar with the testing arrangements; did not recognise the distinction between what occurred properly in the practice test as opposed to what occurred in the test itself; misinterpreted, I believe deliberately, Ms Hislop’s actions, particularly towards V; made assumptions which were not correct; and did not recognise those permissible interventions of encouraging students to focus and answer the questions even in the actual test. I find that her allegations were not made in good faith.

### Conclusion

- 188 Given the multiplicity of problems with the interviews, the First Briefing Note and the Investigation Report, I conclude without hesitation that the Investigation Report is not a reasonable basis upon which the respondent could have made the findings that were made in respect of each of the allegations.
- 189 Apart from that, where the respondent’s case relies largely on the evidence of Ms Grundy as to what occurred, it cannot succeed in demonstrating that the misconduct occurred.
- 190 In respect of the first allegation, there is no evidence to support Ms Grundy’s allegation that Ms Hislop approached V and assisted her by indicating the correct answers to her. Even if the analysis of the test results were able to indicate something amiss, there are sufficient questions about the analysis to undermine its value. I note that the Protocols says that ‘in the case of students, an advantage would generally be observed in their individual result’ (exhibit 3, document 1, 8.6.4). More is needed to demonstrate misconduct.
- 191 The same applies to allegation two. In the case of both the first two allegations, the evidence does not allow a conclusion as to whether the assistance given was appropriate as it was given during the practice questions or was inappropriate because it was given in the test. Further, some of the conduct described was appropriate even during the test itself, such as ‘reading or clarifying’.
- 192 The third allegation cannot be sustained as there is credible evidence from a number of students (D and S) and Ms Hislop, that there were vacant seats between each of the students. There is also confusion in the evidence about which tests the students’ diagrams depict, and most of them are of no assistance. The number of students who usually occupied the room appears to be those in Years 1, 2 and 3, yet only the Year 3 students were present for the test. So there would have been many vacant desks. Further, the allegation is that the layout of the classroom allowed them to read other students’ test booklets, yet there is no credible evidence that this was so.

- 193 The fourth allegation contains two elements. The first is that the students were allowed extra time. This is reliant on highly questionable evidence from Ms Grundy and from students who were confused about the tests. Ms Grundy first described the test as finishing about 10.00 am. Yet she said the students were allowed approximately 20 minutes extra. Ultimately, she conceded that she guessed.
- 194 Ms Hawke's evidence is of little assistance because it was first the subject of an interview many months after the tests and she described Ms Grundy as coming to the oval between 10 minutes and half an hour before recess, that is, between 10.10 am and 10.30 am. Therefore, the extrapolations contained in the Investigation Report are no more than guesses.
- 195 The second element is about instructing Ms Grundy to remain behind with two students. Firstly, this appears to have happened in the Maths test not the Language Conventions test as alleged. Secondly, there is evidence that the rest of the class finished early and it is unclear whether the students who remained were actually completing their tests, or whether one was getting dressed and the other was simply upset.
- 196 As to the fifth allegation, four people gave their version of what Ms Hislop said in the staff room to Ms Egan. Ms Egan was not called to give evidence and therefore her interview cannot be corroborated or challenged. Ms Joyce's evidence is of little weight. That leaves Ms Hislop's and Ms Grundy's versions. I have found Ms Grundy's evidence unreliable and that she did not make the allegations in good faith.
- 197 There are a number of possibilities in regard to what Ms Hislop said. The first is that she said what Ms Grundy alleges. The second possibility is that she was actually referring to Ms Grundy when she made the comment that she is alleged to have made. The third is that she referred to the student, V, as 'that little witch'. Each of these is quite plausible, however, only one of them meets the allegation. Given my findings about Ms Grundy's evidence, I am unable to find that Ms Hislop said the words attributed to her in the allegation.
- 198 In all of the circumstances I conclude that, as the allegations are not sustained, there can be no finding of misconduct. The application is to be upheld.
- 199 I am inclined to think that the appropriate remedy is that Ms Hislop be reinstated to her former position on conditions at least as favourable as the conditions on which she was employed immediately before the dismissal, that her employment be deemed to be continuous, and that the respondent pay to her the remuneration lost because of the dismissal.
- 200 However, if the parties wish to be heard on that issue, they should advise my Associate within seven days.

2016 WAIRC 00053

**REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

**PARTIES**

MS SHARON HISLOP

**APPLICANT**

-v-

DEPARTMENT OF EDUCATION

**RESPONDENT****CORAM**

ACTING SENIOR COMMISSIONER P E SCOTT

**DATE**

FRIDAY, 5 FEBRUARY 2016

**FILE NO/S**

APPL 122 OF 2015

**CITATION NO.**

2016 WAIRC 00053

**Result**

Application upheld

*Order*

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

1. THAT the respondent reinstate Ms Sharon Hislop to her former position on conditions at least as favourable as the conditions on which she was employed immediately before the dismissal.
2. THAT her employment be deemed to be continuous.
3. THAT the respondent pay to her the remuneration lost because of the dismissal.
4. THAT the respondent comply with Orders 1 to 3 within 14 days from the date of this Order.
5. THAT the parties have liberty to apply in relation to costs.

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

[L.S.]

## ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2015 WAIRC 01117

### DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

FARMAC FAMILY TRUST

APPLICANT

-v-

MARGARET RIVER TRANSPORT T/A S &amp; D STOKES TRANSPORT

RESPONDENT

**CORAM**

COMMISSIONER S J KENNER

**DATE**

TUESDAY, 22 DECEMBER 2015

**FILE NO/S**

RFT 24 OF 2015

**CITATION NO.**

2015 WAIRC 01117

**Result**

Application discontinued

**Representation****Applicant**

Ms A Lowenhoff

**Respondent**

Ms A Hegarty

*Order*

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 00525

### DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

KEVIN HEARN

APPLICANT

-v-

T &amp; G ELDER TRANSPORT

RESPONDENT

**CORAM**

COMMISSIONER S J KENNER

**DATE**

TUESDAY, 21 JULY 2015

**FILE NO/S**

RFT 11 OF 2015

**CITATION NO.**

2015 WAIRC 00525

**Result**

Order issued

**Representation****Applicant**

Mr A Dzieciol of counsel

**Respondent**

No appearance required

*Order*

WHEREAS on 9 July 2015 the applicant filed a notice of referral to the Road Freight Transport Industry Tribunal;

AND WHEREAS on 9 July 2015 the applicant applied to the Tribunal for an order abridging the time for the filing of a notice of answer and counter proposal in respect of the herein application pursuant to Regulation 99D(4) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Tribunal has considered the application for an abridgement of time for filing a notice of answer and counter proposal ex parte in Chambers;

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

THAT the respondent do file a notice of answer and counter proposal in answer to the herein application within 5 days of service of the notice of referral on the respondent.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

**2016 WAIRC 00051**

**DISPUTE RE OUTSTANDING PAYMENTS**

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

KEVIN HEARN

**APPLICANT**

-v-

T & G ELDER TRANSPORT

**RESPONDENT**

**CORAM**

COMMISSIONER S J KENNER

**DATE**

THURSDAY, 4 FEBRUARY 2016

**FILE NO/S**

RFT 11 OF 2015

**CITATION NO.**

2016 WAIRC 00051

**Result**

Application discontinued

**Representation**

**Applicant**

Mr A Dzieciol of counsel

**Respondent**

Ms T Elder

*Order*

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms T Elder on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the application be and is hereby discontinued.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 00526

**DISPUTE RE ALLEGED BREACH OF CONTRACT**  
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION  
SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,  
WESTERN AUSTRALIAN BRANCH

**APPLICANT**

-v-

TOLL TRANSPORT PTY LTD T/A TOLL EXPRESS

**RESPONDENT****CORAM** COMMISSIONER S J KENNER**DATE** TUESDAY, 21 JULY 2015**FILE NO/S** RFT 13 OF 2015**CITATION NO.** 2015 WAIRC 00526**Result** Order issued**Representation****Applicant** Mr G Ferguson**Respondent** No appearance required*Order*

WHEREAS on 20 July 2015 the applicant filed a notice of referral to the Road Freight Transport Industry Tribunal;

AND WHEREAS on 20 July 2015 the applicant applied to the Tribunal for an order abridging the time for the filing of a notice of answer and counter proposal in respect of the herein application pursuant to Regulation 99D(4) of the Industrial Relations Commission Regulations, 2005;

AND WHEREAS the Tribunal has considered the application for an abridgement of time for filing a notice of answer and counter proposal ex parte in Chambers;

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

THAT the respondent do file a notice of answer and counter proposal in answer to the herein application within 7 days of service of the notice of referral on the respondent.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

2015 WAIRC 00854

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

**PARTIES**

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,  
WESTERN AUSTRALIAN BRANCH

**APPLICANT**

-v-

TOLL TRANSPORT PTY LTD T/A TOLL EXPRESS

**RESPONDENT****CORAM** COMMISSIONER S J KENNER**DATE** THURSDAY, 3 SEPTEMBER 2015**FILE NO/S** RFT 13 OF 2015**CITATION NO.** 2015 WAIRC 00854

<b>Result</b>	Order issued
<b>Representation</b>	
<b>Applicant</b>	Mr A Dzieciol of counsel and with him Mr T Dawson
<b>Respondent</b>	Ms C McCutcheon and with her Mr A Liakishev

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*Order*

WHEREAS on 20 July 2015, the applicant filed a notice of referral in the Road Freight Transport Industry Tribunal under s 40 of the Owner Drivers (Contracts and Disputes) Act 2007;

AND WHEREAS the dispute notified to the Tribunal by the applicant concerned the proposed termination of owner-driver contracts between the respondent and Mr P Morgan trading as P G & S D Morgan, Mr B Campbell trading as B & E Campbell and Mr L Campbell trading as Campbell, Lucas John, effective 11 August 2015;

AND WHEREAS the Tribunal convened a compulsory conference under s 44 of the OD Act on 13 August 2015. At the compulsory conference, the Tribunal was informed by the applicant that the respondent was alleged to have acted in an unconscionable manner by requiring the owner-drivers to upgrade vehicles to 8 tonne Tautliner with 12 pallet spaces from 29 June 2015. The Tribunal was informed that some of the owner-drivers concerned had provided services to the respondent for many years and the conditions imposed on them to upgrade the vehicle, including acquiring finance, purchasing a new vehicle and operating the vehicle, would require some commitment from the respondent as to a minimum period of ongoing service and terms and conditions of appointment;

AND WHEREAS the applicant informed the Tribunal that having regard to all of the circumstances the respondent's proposed course of conduct under the existing owner-driver contract was unconscionable for the purposes of s 30 of the OD Act;

AND WHEREAS the respondent informed the Tribunal that it undertakes a continuous process of renewing its fleet of vehicles. As a consequence of a merger between the respondent and another transport company, the respondent requested the owner-drivers to upgrade their vehicles in order to meet the respondent's operational requirements. Failing that, the respondent indicated that other alternatives could be offered to the owner-drivers including ad hoc casual engagements; contractor opportunities in related companies to the respondent; or direct employment by the respondent as drivers;

AND WHEREAS as a consequence of discussions between the parties at the compulsory conference and suggestions by the Tribunal, the parties were requested to confer within 14 days from 17 August 2015 in relation to the matters in dispute including appropriate rates of pay and other terms and conditions for the owner-driver contracts;

AND WHEREAS on 1 September 2015, the Tribunal was informed that the parties had met to further discuss the issues in dispute and as requested by the Tribunal the respondent had provided further documents and information to the applicant on a without prejudice basis. By letter of 27 August 2015, the respondent wrote to the owner-drivers setting out a proposal for the continued provision of services by the owner-drivers, in particular the provision of particulars as to alternative vehicles to be purchased by 1 September 2015 and a timetable for agreement on other matters by 4 September 2015, with a prospective commencement of services no later than 19 October 2015;

AND WHEREAS the Tribunal was further informed by the applicant, that despite the letter of 27 August 2015, given the 1 September 2015 date has not been met, the respondent, by letter of 2 September 2015, now proposes to terminate the owner-driver contracts effective on 8 September 2015.

AND WHEREAS on 3 September 2015, at the request of the applicant, the Tribunal urgently relisted the compulsory conference. At the conference, the Tribunal was informed that negotiations between the parties led to an expectation that the respondent would provide a 'continuance letter' in relation to prospective use by the respondent of the owner-drivers' services, to assist in obtaining finance to purchase the required vehicles. This was disputed by the respondent as not being a condition of any agreement reached;

AND WHEREAS the applicant maintains that the respondent, in now moving to terminate the owner-driver contracts, despite the matter being before the Tribunal, is in all the circumstances unconscionable;

AND WHEREAS the Tribunal informed the parties that in relation to the present dispute that the commercial considerations of both the owner-drivers and the respondent as hirer under the OD Act need to be considered. Furthermore, that the respondent has the right to configure its fleet in accordance with its commercial requirements as long as it does not do so in circumstances which could be regarded as unconscionable for the purposes of the OD Act ;

AND WHEREAS the Tribunal further informed the parties that particularly in view of the discussions between them as directed by the Tribunal, and the respondent's letter of 27 August 2015, foreshadowing the terms of ongoing services from 19 October 2015 that the Tribunal is not persuaded that further conciliation may not be availing. Therefore for the purposes of the Tribunal assisting the parties to reach agreement on the issues presently in dispute the Tribunal intended to make orders under s 44(3) of the OD Act ;

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

- (1) THAT the proposed termination by the respondent of the owner-driver contracts between the respondent and P Morgan, B Campbell and L Campbell be and are hereby suspended.
- (2) THAT the respondent provide to the owner-drivers referred to in par 1 a letter as to their period of service, earnings to date for the current financial year and the likelihood of any expected future work as contemplated by the respondent's letter of 27 August 2015 by close of business 7 September 2015.
- (3) THAT the owner-drivers referred to in par 1 provide to the respondent the particulars set out in par 1 of the respondent's letter of 27 August 2015 by 28 September 2015.

- (4) THAT should the owner-drivers referred to in par 1 fail to comply with par 3 above this order will be revoked by the Tribunal.
- (5) THAT the Tribunal will re-list the compulsory conference on a date to be fixed.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2015 WAIRC 00916

**DISPUTE RE ALLEGED BREACH OF CONTRACT**

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,  
WESTERN AUSTRALIAN BRANCH**APPLICANT**

-v-

TOLL TRANSPORT PTY LTD T/A TOLL EXPRESS

**RESPONDENT****CORAM**

COMMISSIONER S J KENNER

**DATE**

FRIDAY, 2 OCTOBER 2015

**FILE NO/S**

RFT 13 OF 2015

**CITATION NO.**

2015 WAIRC 00916

**Result**

Order issued

**Representation****Applicant**

Mr A Dzieciol of counsel and with him Mr T Dawson

**Respondent**

Ms C McCutcheon and with her Mr A Liakishev

*Order*

WHEREAS the Tribunal by order of 3 September 2015, suspended the proposed notices of termination of owner-driver contracts between the respondent and three owner-drivers, the subject of the present dispute. The Tribunal further ordered both the respondent and the owner-drivers to take steps as set out in pars 2 and 3 of the order, the Tribunal having reached the view that such orders may assist in the resolution of the present dispute through further conciliation under s 44 of the Owner-Drivers (Contracts and Disputes) Act 2007;

WHEREAS it was a further term of the Tribunal's order of 3 September 2015 that should the owner-drivers fail to comply with par 3, then the order would be revoked by the Tribunal;

AND WHEREAS on 2 October 2015 the Tribunal relisted the compulsory conference, following receipt of correspondence passing between the parties in relation to compliance with the order of 3 September 2015. The respondent contended that the owner-drivers had failed to comply with par 3 of the order. At the conference the Tribunal was informed by the applicant that whilst the respondent, by letter of 7 September 2015, provided the information required by par 2 of the order, the owner-drivers' bank had requested further information from the respondent, in order for it to make a decision regarding financing for the purchase of new trucks. The specific request made, is set out in an email from the applicant to the respondent of 11 September 2015. In short, it was that the respondent provides further information as to the likely future duration of any new contract with the owner-drivers and additionally, the likely number of working hours and future earnings under any such contract. The applicant submitted that he respondent should provide the additional information as requested;

AND WHEREAS by email of 14 September 2015 the respondent advised that it was not in a position to accommodate the request made for further information. This was on the basis that the respondent would not be offering a fixed term contract and nor could it make any representation as to the likely duration of any new contract. Similarly, the respondent, in relation to future earnings, was not able to provide any additional information, to that set out in its letter of 7 September 2015;

AND WHEREAS in email correspondence provided to the Tribunal between an owner-driver and BankWest, dated 29 September 2015, the bank required confirmation that the owner-drivers' income under any new contract with the respondent would either remain the same or increase. It is apparent to the Tribunal from correspondence from the respondent to the applicant and from observations made by the respondent in the compulsory conference, that such written undertakings are unable to be made;

AND WHEREAS despite the best endeavours of the owner-drivers to comply with the Tribunal's order of 3 September 2015, the applicant now seeks its extension to provide further time for the owner-drivers to obtain finance for the purchase of new trucks;

AND WHEREAS the respondent, in opposing any extension of the order reiterated that the respondent's initial request for expressions of commitment from the owner-drivers to continue the provision of services with new vehicle types was first made on 25 May 2015. It notes that two affected owner-drivers commenced providing the services with a new vehicle on 10 June and 19 August 2015 respectively. The respondent submitted that despite extensions of time being granted by the respondent, the present proceedings being commenced before the Tribunal on 20 July 2015, and including the order made by the Tribunal on 3 September 2015, the owner-drivers have still not been able to satisfy the respondent of their ability to undertake services with the required new vehicle configuration. The respondent further contended that the delay in implementing the reconfiguration of its vehicle fleet is having a significant practical impact on its operations. This is particularly so, the respondent contended, given the approaching Christmas work period. Furthermore, the respondent informed the Tribunal that the anticipated dates of commencement of services, even if the owner-drivers were successful in obtaining finance, being approximately mid-November 2015, approximately mid-December 2015, and approximately mid-January 2016, are not certain and are outside of the respondent's requirements;

AND WHEREAS the Tribunal informed the parties that the conference would be adjourned in order for the Tribunal to consider the submissions of the parties in relation to the applicant's request that the order be extended;

AND WHEREAS the Tribunal notes that the order of 3 September 2015 under s 44(3) of the OD Act was made in an endeavour to assist in the resolution of the present dispute before the Tribunal by further conciliation. The Tribunal may only make such orders, if it is satisfied that an order is expedient for the purposes of resolving the issues in dispute by conciliation;

AND WHEREAS having examined the correspondence provided by the parties; having considered their further submissions; having regard for the requirements of the owner-drivers' bank and the position adopted by the respondent to the provision of further information as requested; and the legitimate business needs of the respondent to implement its fleet reconfiguration in a timely way, the Tribunal cannot be satisfied, based on what is now before it, that further conciliation will be availing in resolving the issues in dispute. Therefore, the Tribunal also cannot be satisfied that further orders made under s 44(3), or an extension of the current order, would be expedient for the purposes of further conciliation. Accordingly, despite giving the parties every reasonable opportunity of renewing their commercial arrangements, the Tribunal will revoke the order of 3 September 2015;

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

THAT the order of 3 September 2015 be and is hereby revoked.

[L.S.]

(Sgd.) S J KENNER,  
Commissioner.

2016 WAIRC 00045

**DISPUTE RE ALLEGED BREACH OF CONTRACT**

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

**PARTIES**

TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS,  
WESTERN AUSTRALIAN BRANCH

**APPLICANT**

-v-

TOLL TRANSPORT PTY LTD T/A TOLL EXPRESS

**RESPONDENT**

**CORAM**

COMMISSIONER S J KENNER

**DATE**

MONDAY, 1 FEBRUARY 2016

**FILE NO/S**

RFT 13 OF 2015

**CITATION NO.**

2016 WAIRC 00045

**Result**

Discontinued by Leave

**Representation**

**Applicant**

Mr A Dzieciol

**Respondent**

Ms C McCutcheon

*Order*

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

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,  
Commissioner.

[L.S.]

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### ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

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

Parties		Commissioner	Application Number	Dates	Matter	Result
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Star Track Express Pty Ltd and Star Track Retail Pty Ltd	Kenner C	RFT 35/2014	10/04/2015	Referral of dispute	Discontinued

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